Fact Finding and Criminal Adjudication

Darryl K. Brown

Introduction

Criminal adjudication systems vary dramatically in the means they employ to find facts accurately. Hold aside international comparisons; our own adjudication practice has gone through momentous evolutionary shifts. Pre-trial discovery rights were non-existent through the early twentieth century; they are now universal and, in some states, quite broad. In early English trials, defendants were forbidden to have counsel. The Sixth Amendment was a reaction to this practice, although for its first 150 years, the American right to counsel largely meant that defendants were allowed to hire attorneys rather than that the state was required to provide counsel. English prosecutors were not always required to present key witnesses for cross-examination (they could substitute hearsay), a practice that prompted our Confrontation Clause. Prosecution was routinely conducted by private victims rather than public officials, and without lawyers on either side, even in serious cases. American prosecutors early on were marginal players, often court appointed, and lacked on monopoly on initiating criminal actions. Although the Self-Incrimination Clause reversed the English practice under which defendants could be compelled to speak, for several decades American courts forbade defendants from testifying under oath. For the same period, large classes of witnesses were disqualified from testifying: categorical judgments about competency based on status (racial, marital, or status as a party to the litigation) were deemed better vehicles for assuring accurate fact-finding than allowing all witnesses’ veracity to be assessed by juries and judges. Procedures once deemed unwaivable, such as juries, are now routinely circumvented. Plea bargaining was once unknown, though an arguable equivalent—trials lasting a few minutes—was once common.

Adjudication systems also vary in how they balance their commitment to accurate fact finding with other, competing commitments. American criminal adjudication has a strong commitment to constraining government power. That goal explains features such as the use of juries rather than government officials (judges) as fact-finders and use of

1 See Powell v. Alabama, 287 U.S. 45 (1932); see also Betts v. Brady, 315 U.S. 455 (1942).
3 See Abraham Goldstein, Prosecution: A History of the Public Prosecutor, in Sanford Kadish, Encyclopedia of Crime and Justice (1983). It’s not clear early federal prosecutors were under presidential control. See Stephen L. Carter, The Independent Counsel Mess, 102 Harv. L. Rev. 105, 126-27 (1988) (noting the first 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 8-1187 (1937)).
4 Fisher at __.
5 Langbein at 16, 18-19.
adversarial process rather than European-style inquisitorial processes. Criminal adjudication shares with our civil process a commitment to conflict resolution, which is not always consistent with a commitment to truth finding.6 If the government’s interest in adjudication is to settle conflicts between competing parties—and if the disposition affects only the parties—it makes sense to allow the parties to separately develop partisan factual accounts with the government taking little responsibility for the thoroughness or accuracy of either.7 Parties’ factual accounts will sometimes lack critical information, but in a system that privileges conflict resolution as much as truth-finding, inaccuracy is less troublesome. The party that suffers from flawed fact finding bears much of the fault for its occurrence, and the state’s independent accuracy is not enough to stop an inaccurate, but procedurally fair, resolution.8

Adversarial process assumes that competing accounts usually lead to truth-finding, because adjudication will uncover weaknesses in a party’s account. Constitutional and statutory rules govern adjudication in considerable detail, but they govern investigation relatively little, especially with respect to ensuring that investigation is thorough and reliable. (Most of our law of criminal investigation regulates the intrusiveness of government action on privacy and liberty; few rules directly ensure that investigations interview all witnesses, gather all physical evidence or employ available forensic analysis.)9 In adversarial adjudication, investigation—meaning not just police activity but all efforts, by both sides, to generate an accurate factual account of relevant events—is governed only indirectly by the partisan incentives of the parties and related players (such as police), and by the incentives arising from highly regulated trial adjudication. Accuracy depends on thorough, reliable fact gathering. But we lightly govern investigation—leave it privatized, in the control of parties—because we rigorously structure adjudication. Strong regulation of adjudication permits weak investigation,10 because—as the Supreme Court repeatedly implies in its criminal procedure decisions—adjudication checks investigation.11

6 In a well known article, 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 So. Cal. L. Rev. 181 (2004) (arguing that accuracy is not the overriding goal of procedural fairness and arguing for the importance of party participation).

7 Here I use “the government” in a sense that excludes the prosecution and police, who take on the partisan, adversarial roles of parties. See discussion infra notes ___.


9 For example, Brady v. Maryland requires prosecutors to disclose exculpatory evidence to defendants, but it does not require the state to seek exculpatory evidence. Youngblood and Trombetta require the government to preserve material evidence, but they do not require it to obtain that evidence in the first place.

10 Weak in two senses: weakly (or lightly) regulated, and weak in its reliability to produce accurate factual accounts without the support of adjudication practice.

11 Especially in right-to-counsel cases, the Court has repeatedly stressed the importance of defendants making “prosecution's case to survive the crucible of meaningful adversarial testing.” See, e.g., United States v. Chronic, 466 U.S. 648, 656 (1984); Moran v. Burbine, 475 U.S. 412, 430 (1986) (quoting same
Much has occurred, however, to upset both the model of strong adjudication that regulates investigation and our comfort with a commitment to accurate fact finding that is heavily compromised by competing goals on conflict resolution and limited government power. First, the strong version of adjudication—the jury trial—is rarely used anymore.\(^\text{12}\) Most criminal dispositions occur in summary fashion through plea bargains,\(^\text{13}\) and plea bargaining dramatically changes the supervision of investigation. Gone is the structure of power separated among executive actors, defendants, judges and juries\(^\text{14}\) interacting within elaborate procedural rules.\(^\text{15}\) We now rely mostly on the defendants’ self-interest as the structural check on government over-reaching and as the guarantor of accurate fact-finding.\(^\text{16}\)

Most contemporary adjudication fits Judge Lynch’s account of an “administrative system of criminal justice”\(^\text{17}\) carried out in the prosecutor’s office rather than the courtroom:

[T]he prosecutor … is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty … [as well as] what sentence the defendant should be given in exchange for his plea.\(^\text{18}\)

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\(^{12}\) See Bureau of Justice Statistics, State Court Sentencing of Convicted Felons 2000 (June 2003 NCJ 198822) (Tables 4.1 & 4.2 estimating that 3% of felony convictions in state courts resulted from jury trials and 95% by plea bargaining in 2000); Bureau of Justice Statistics, Federal Criminal Case Processing 2001 at 1 & table 5 (Jan. 2003 NCJ 197104) (95% of federal felony convictions in 2001 occurred through plea bargaining).

\(^{13}\) In the early nineteenth century, as dockets and caseloads increased, prosecutors (with the cooperation of judges and defense counsel) responded by evolving the practice of plea bargaining, rather than innovating (or returning to) other forms of quick disposition. That practice arose in the form it did partly through historical quirks: strict sentencing schedules enabled nineteenth century prosecutors to relieve caseload pressures by offering charge-bargain deals with clarity on sentencing outcomes. See George Fisher, Plea Bargaining’s Triumph. Additional responses could have included increased funding from legislatures to make the gap in caseloads and resources less pressing or, more broadly, to consider other strategies for addressing social problems than criminal prosecution. [cite me, Harcourt].

\(^{14}\) The background, of course, is the legislature, which defines substantive criminal law and many (non-constitutional) components of procedure and evidence rules.

\(^{15}\) Some argue the jury’s shadow remains an influence on settlement practice. See Jeffrey Abramson, We, The Jury (1994); Bargaining in the Shadow of Trial; DOJ charging polices reference jury nullification as a rationale for declination. Nonetheless, the jury is now a marginal feature of criminal practice. In its place came the much more privatized, lightly regulated model of plea practice.

\(^{16}\) 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 King, Priceless Process, 47 UCLA L. Rev. 113 (1999).


In this regime, weak regulation of investigation becomes weaker. Incentives that structured investigation change from those generated by formal trials to the quite different ones of party negotiation and settlement. The state’s evidence gathering practice has always incurred little scrutiny before trial; in the plea bargaining world it is even more lightly scrutinized.

The second development that undermines our traditional confidence in adversarial adjudication is constraint of defense counsel. Beginning in the 1930s with Powell and in earnest with Gideon in 1963, criminal adjudication evolved a model for improving fact finding that relied on defense lawyers to make adversarial adjudication work. Right-to-counsel (and later, effective-assistance) cases repeatedly described defense lawyers as improving the accuracy of adjudication. But defense counsel commitment isn’t to accuracy; it is to the client, and those two interests often conflict. Legislatures came to recognize this, and they eventually under-funded defenders as a consequence. This political limit on defense is an enduring feature of criminal adjudication; under-funded defense counsel is not a feature that will change except at the margins. That means adjudication’s experiment with achieving accuracy through defense advocacy must be superseded with a different model. I will argue we already see early signs of a system that depends less on adversarial process and, implicitly, more on practices that look familiar to administrative settings.

Further, this shift is not a bad thing. I want to argue that criminal adjudication can improve its commitment to factual accuracy despite this limitation, and even in part because of this limitation. The structural, accuracy-enhancing function of defense attorneys—scrutinizing the reliability of state evidence and presenting evidence the state ignored—can be supplemented with other mechanisms, many of which are more politically sustainable. Some recent reforms in criminal justice move in this direction; once we recognize that our model of adjudication is shifting in this way, more reforms are possible.

A final development is pushing this transition not only to moderate the role of defense counsel in favor of other accuracy-enhancing practices, but to reconfigure the balance in adjudication between conflict resolution and truth finding to give more priority to the latter. New means of detecting wrongful convictions—DNA evidence but also a range of other forensic science and social-science developments—have had a widespread effect of undermining confidence the accuracy of criminal adjudication. They have revealed the reality of an adjudication system designed more for conflict resolution than...
fact finding. These new tools of accuracy, I want to suggest, have two effects. The first is well-known: demonstrable wrongful convictions—of which we now have many dozens, mostly in capital and other serious-felony cases—provide a compelling basis for discrete criminal justice reforms that will reduce wrongful convictions, such as access to DNA evidence and improved eyewitness identification procedures.

The second is less obvious. Adjudication works as conflict resolution only when the truth remains in a black box—that is, when we never know for sure if the resolution was accurate, so that we can assume it was. Adjudication scholars and many trial lawyers, but not the general public, recognize that adversarial adjudication privileges conflict resolution at some unknown cost to accuracy. Wrongful convictions weaken public confidence that resolutions are accurate, and it weakens confidence in the choice of our adjudication structures. I want to suggest that we can understand some of the discrete reforms arising from the wrongful conviction movement, and the somewhat reduced role for defense attorneys, as parts of a common shift toward an adjudication system that moderates its adversarial features and is beginning to rely more on—and should rely much more on—alternative mechanisms to improve fact-finding.

With this account, I aim largely to bypass one body of contemporary criminal procedure scholarship and build on another. Much of the scholarly focus is on, in one form or another, plea bargaining. Opponents of plea bargaining—long the dominant and still an important scholarly view—urge a return to more trials. Recently, more scholars have accepted the pervasiveness of plea bargaining and suggested ways to improve its operation. Another body of scholarship focuses on the role of counsel and demonstrates widespread agreement that the critical deficiency in reliable adjudication is under-funded indigent defense.

I see both pleas and constrained defense counsel as fundamental features of American criminal justice for the foreseeable future. The structural forces that drive bargaining are firmly fixed. Even if they weren’t, replacing pleas with trials won’t fix deficiencies revealed by wrongful conviction cases, many of which occurred after full jury trials, because trials do too little to improve accurate fact generation despite their dependence on it. Proposals to improve plea bargaining process likewise do little to give parties more access to reliable evidence. Further, criminal justice will continue to operate in a “post-Gideon” mode in which defense counsel’s roles are moderated by resource constraints. Both the rise of bargaining and the constraint of defense counsel have had bad effects for accurate fact finding. Our evidence-generating and fact-finding structures depend on adversarial trial adjudication, and we have reduced both adversariness and trials. But these developments don’t have to be bad for fact finding, and nascent reforms—plus options for reform—may well make this so.

My goal in this article is to describe this emerging transformation and sketch a path for reform of criminal adjudication that employs the familiar tools of institutional design and process to improve substantive outcomes. We can compensate for the illusory

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24 Alschuler; Schulhofer; Langbein.
25 Scott & Stuntz; Miller & Wright; Bibas; Oren Bar-Gill & Oren Gazal, Plea Bargains Only for the Guilty (available on ssrn.com).
26 Bright; Richard Klein. Much of the policy and legislative debate takes this focus as well. States periodically study their indigent defense systems, find the deficient, and often make some improvements. Virginia; Georgia; Texas; Indiana.
27 See George Fisher, Plea Bargaining’s Triumph.
strength of adjudication by turning more attention to regulation of investigation processes. If we restructure the executive’s dominant role in evidence generation and strengthen the roles of other executive- and judicial-branch players in fact development, we can serve both the accuracy and power-checking goals of criminal justice and make up for weaknesses of trial and plea adjudication. This argument identifies a range of possibilities for supplementing executive investigation dominance that are consistent with American practice; in the process, it highlights domestic practices that are closer cousins to European models of judicial fact development than we usually acknowledge. If we recognize defense advocacy as serving a structural function—checks on executive action—then we can look for ways to serve that function other than defense investigation and advocacy. Those moves allow us to both fulfill this structural function in more politically sustainable ways than funding defense and to also heighten the prospects for accurate fact finding.

Part I then develops the argument that neither trials nor plea negotiations are sufficiently effective, in their common, real-world forms, to either improve investigation or detect its deficiencies. Part II then describes an approach to separated powers and institutional design focused on investigation practices, and then sketches several possibilities we might implement reforms that improve fact-generation practices while also limiting executive power in the manner formal trial adjudication aspires to. Part III concludes with a structural description of current practices, emerging reforms and additional possibilities that heighten adjudication’s commitment to accuracy while moderating defense counsel’s role. These changes represent not only a rise in truth-finding over conflict-resolution goals, but a shift away from adjudication as the dominant accuracy-producing phase of litigation and toward investigation as the critical stage that makes trials and pleas more reliable.

I. Adjudication’s Weaknesses

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—confessions, eyewitness accounts, and other forms of forensic science. Erroneous eyewitness testimony, for example, is the most common basis for mistaken convictions; it occurs in a majority of documented wrongful convictions. But DNA analysis is only the most prominent event to undermine criminal judgment reliability. At the same time, other means of forensic analysis—serological, hair, fingerprint, bitemark 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.

Non-scientific sources have faced new criticisms as well. Documented cases of false confessions suggest accounts of defendant statements are not foolproof. Social scientists in the last two decades carried out a broad and compelling collection of well designed studies that undermine common-sense (and judicial) confidence in eyewitness identifications. We know, for example, there is little connection between an eyewitness’s accuracy and her high personal confidence that identification is accurate. And we have numerous, strong studies of how formal identification processes can be suggestive and lead to erroneous identifications, which has led to development of well-grounded protocols for administering identification procedures such as suspect line ups and photo arrays. This social science research backed by case studies, compelling as it is, would probably not have had the impact on criminal procedure it is now starting to have without confirmation through DNA analysis.

On top of all this is the surprising number of crime lab scandals in the last decade. A wide range state and federal crime labs—in Houston, Montana, Oklahoma, West Virginia, Florida, the FBI and several other jurisdictions—have turned out large bodies of analyses that were either intentionally fraudulent or so poor executed (and in violation of standard practice protocols) as to be unreliable. Those scandals are especially disturbing because they undermine confidence that science provides special reliability.


31 [cites]


33 See Mnookin, supra note __ 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”).
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 chain of custody.\textsuperscript{34}

Together, these developments tell us DNA exonerations are the tip of an unmeasurable iceberg. DNA analysis is decisive in only a small minority of cases, but the forms of evidence that it has proven are frequently unreliable—other forensic analysis, eyewitnesses, informant testimony—are extremely widespread.\textsuperscript{35} (Note that total felony convictions per year approach one million, so an accuracy rate of even 99.5 percent means nearly 5,000 wrongful felony convictions annually.)\textsuperscript{36} 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 moratoriums on implementation of the death penalty due to accuracy concerns,\textsuperscript{37} and calls for moratoriums are come from the ABA and a large number of local governments are bar associations.\textsuperscript{38} A broader range of states...

\textsuperscript{34} See Roma Khanna, Man Convicted of Rape on Faulty DNA Evidence Set Free, Houston Chronicle, Oct. 8, 2004 (noting conviction based on flawed analysis by Houston crime lab).


\textsuperscript{36} In one attempt to estimate the extent of wrongful convictions, Ronald Huff and colleagues have employed a variety of methods—including a survey judges and prosecutors, and studies of judges’ disagreements with jury guilty verdicts—to conservatively estimate 99.5 percent accuracy rate in felony adjudication. See C. Ronald Huff et al., Convicted But Innocent: Wrongful Conviction and Public Policy 53-62 (1996). For the 992,856 felony convictions in 2000, that would mean 4,965 wrongful felony convictions. Figures for felony convictions in 2000 are from U.S. Dept. of Justice, Sourcebook for Criminal Justice Statistics 2002, tables 5.18 at 417 & 5.44 at 477 (reporting convictions in federal and state courts). Huff used data from a decade earlier to reach a comparable estimate. See C. Ronald Huff et al., supra, at 62.


\textsuperscript{38} See ABA, Death Penalty Moratorium Implementation Project, http://www.abanet.org/moratorium/reportsandlaw.html; see also
including North Carolina and Connecticut have created actual innocence commissions to review adjudication procedures and convictions in addition to pursuing other reforms.  

Less noted in public and scholarly reaction is the risk of inaccuracy to 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 leading or minor one. Sentencing depends on the same sorts of close and subtle fact assessments. Criminal convictions depend upon normative judgments, and normative judgments depend upon facts. Additionally, even some innocence cases 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 if we can achieve the accuracy determination earlier in the process.

The vulnerability of traditional evidence evaluated through traditional legal process raises a question beyond whether the error rate in criminal adjudication is inevitable. The broad-based reaction signals an issue of normative legitimacy, and that issue goes in large part to whether prevailing adjudication practices have struck the right balance between competing interests in truth determination, conflict resolution and constraint of government power. That balance must be struck differently when factual error can’t be concealed behind procedural finality.

In what follows, I survey many of the central features of criminal practice to develop the argument that both trial and plea contexts are weaker means than we have long believed to check flawed investigation practices and ensure 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. In its current forms, adjudication is fails sufficiently to superintend evidence gathering and maximize accurate dispositions.

B. Structure and limits of prosecutors’ and investigators’ roles.

Consider first prosecutors’ institutional roles, 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


39 On North Carolina’s panel, organized by the state supreme court chief justice with legislative support, see http://www.aoc.state.nc.us/www/ids/News%20&%20Updates/Eyewitness%20ID.pdf. See also Benjamin Weiser, A Quest Finds a Fatal Death Penalty Flaw: Mistakes, N.Y. Times, Jan. 2, 2005, at 18 (describing federal judge Jed S. Rakoff’s scrutiny of capital punishment’s constitutionality in light of factual errors).

40 Defendants’ role in a offense (and dominance over or domination by others) affects punishment levels, a circumstances surrounding a murder, as well as the details of an offender’s background, can make the difference in a life sentence or the death penalty. See U.S. Sent. Guidelines [cite].

“competitive enterprise of ferreting out crime.” Courts recognize that advocacy role makes them, for example, untrustworthy arbiters on such issues as sufficiency of warrants.\textsuperscript{42} 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 broadly\textsuperscript{43}—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.

Police and prosecutors have partisan institutional identities, yet it is nonetheless not clear they have unmitigated motives to \textit{maximize} the quality and scope of investigation files in every case. Dan Richman has described the complex incentives on federal investigative agents, which include direct accountability to agency chiefs rather than prosecutors, the need to impress legislative funders, concern with deflecting blame from the agency to prosecutors or others for cases that do not result in conviction (especially in politically charged contexts such as terrorism investigations). 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.\textsuperscript{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 \textit{minimally sufficient} basis to invade citizen privacy and liberty; judges don’t seriously evaluate the quality of evidence for accuracy, or the investigation for its thoroughness.

In adversarial roles, prosecutors and police make important decisions about evidence generation, such as whether to seek further evidence, forgo evidence sources, and use coercive tools to generate evidence on based on assumptions about true facts. Take as one example the use of cooperating witnesses. Prosecutors use a variety of tools to 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 testimonial incentives raise obvious risks of inaccuracy in testimony. Prosecutors employ these tools for securing testimony on assumptions, based on \textit{other} sources, that the testimony 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 defendant’s jail-cell confession?

\textsuperscript{43} Shadwick v. City of Tampa (1972) (approving municipal magistrates appointed by and removable by the executive as appropriate officials for probable cause determinations because they are detached from prosecutors).
\textsuperscript{44} Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L.Rev. 749 (2003).
Wrong guesses on such questions explain many erroneous judgments. The appropriateness of employing carrots or sticks to secure testimony may require a considerable amount of good-faith hunches about background truth and witness credibility. Those decisions are vulnerable to role bias and partisan perspective, and we depend on trial adjudication (or plea negotiation) to counter them, without any mechanism earlier in the pretrial process to serve as a comparable check.

To be sure, prosecutors are not incapable 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. Charge screening is a quasi-judicial practice, yet prosecutors do it routinely and, in some jurisdictions—judging from the rates they decline to pursue cases...

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45 Take two recent examples of exonerations (without DNA analysis) from wrongful convictions that arose from these sorts of issues. Thomas Goldstein served twenty-four years in prison after a conviction was based solely on two witnesses. One was an eyewitness who identified Goldstein through suggestive eyewitness procedures conducted by police and who was discouraged by police from clarifying in subsequent testimony her doubts about earlier testimony identifying Goldstein. The other witness was a pre-trial jail-cellmate of Goldstein’s who testified that Goldstein confessed; police and prosecutors withheld evidence that the jail mate testified in exchange for lenient disposition of his own case. Goldstein v. Harris, 82 Fed. Appx. 592 (9th Cir. 2003) (unpublished opinion); see also Taylor v. Maddox, 366 F.3d 992, 1014 n.17 (9th Cir. 2004) (describing Goldstein case). The official misconduct might explain why trial adjudication did not raise doubts about these sources; so does the defense attorney’s failure to interview the sole eyewitness before trial. But even more zealous, and better informed defense counsel won’t catch stop all such errors. In June 2003, federal prosecutors won convictions of Karim Koubriti and Abdel-Ilah Elmardoudi, despite very capable defense representation, for providing material support to terrorists and another terrorism-related charge. In September 2004, after completing an internal review (ordered by the trial judge) of its own prosecutors’ and FBI agents’ handling of the case, the Justice Department asked the trial court to dismiss the convictions. In a long report, the Justice Department documented that its officials knew the case was weak from the start and relied an informant of dubious credibility as well as a questionable interpretation of a document possessed by the defendants; it conceded its officials withheld material discovery from the defense and “created a record filled with misleading inferences.” See Danny Hakim & Eric Lichtblau, After Convictions, the Undoing of a U.S. Terror Prosecution, N.Y. Times, Oct. 7, 2004 (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.


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, cf. 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”).
the police present—quite rigorously and effectively. Screening is more likely rigorous when prosecutors are detached from investigation. When prosecutors are invested in 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, with early presuppositions and choices affecting subsequent inferences and decisions about evidence credibility and meaning as well as what other leads to pursue.

This problem is one instance of the widespread challenge of making decisions under uncertainty that affects a range of endeavors. The study of 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”—affects scientific investigation as well and police and prosecutor fact-development decisions. “Signal detection theory” describes a related problem of required decisions when indicators are faint, ambiguous or confusing, a difficulty widely studied in the context of medical decision-making such as radiologists’ interpretation of CT scans. 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.”

Prosecutors and police must make evidence judgments on ambiguous or uncertain

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47 For accounts of state prosecution offices rigorous screening practices and high declination rates, see Miller & Wright, supra [Stan. L. Rev.] (describing the New Orleans District Attorneys’ office); Jacoby, supra note __, at 223 (describing the New Orleans District Attorneys’ office); id. at 237 (describing Jackson County, Missouri, prosecutor office); but see id. at 259 (describing minimal screening before preliminary hearings in Boulder, Colo. Office); id. at 117 (general criteria for screening); see also National District Attorneys Association, National Prosecution Standards 42.1-42.9 (2d Ed. 1991, amended 1997) (recommending screening criteria). For a local prosecutor’s official screening policy, see http://www.attorneygeneral.org/crncrhr.html (Tennessee prosecutor adopting National Prosecution Standards). For varying declination rates by federal prosecutors, see Richman, supra note __ [Colum. L. Rev.] (describing federal practice).

48 See Kola Abimbola, Questions and Answers: The Logic of Preliminary Fact Investigation, 29 J. L. & Society 533, 533-34 (2002) (“presuppositions 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 on presuppositions of the questions posed”); id. at 536-37 (“all agents have to engage in the interpretation, construction and evaluation of fact in decision-making”); id. at 544 (describing a case study of an investigation 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 Moore, Trial by Schema, 37 UCLA L. Rev. 273 (1989) (relying on cognitive science literature to describe fact decision making at trial). On path dependence generally, see Lucian A. Bebchuk & Mark J. Roe, A Theory of Path Dependence in American Corporate Ownership and Governance, 52 Stan. L. Rev. 127 (1999) (describing distinct forms of path dependence).


51 Saks & Risinger, supra, at 1053.
indicators, and little before trial regulates their decision thresholds on matters such as witness credibility. 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 leaves defendants to either challenge the evidence at trial or pursue their own investigation for evidence the state forgoes.

C. Defense Attorneys.

The primary check against these sorts are errors in prosecution’s 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 lawyer-prosecutors against lay defendants. As the Court noted, skilled defense counsel can be a formative contributor to accurate fact finding. Defendants conduct separate investigations and uncover evidence the government overlooks. (Though they do so with notably fewer legal tools—no search, subpoena or deposition power before trial, nor means to generate incentives for testimony such as offers of immunity. Only in limited cases can they get funds for expert assistance.) 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 evidence, though unreliable, 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.

52 There can be substantial and useful checks within law enforcement offices, through such mechanisms as review by supervisors. See discussion infra __; see also Gerard Lynch, __.

53 This problem explains misconduct as well as legitimate evidence-development decisions. For example, despite a generous open-file policy that gave defendants more discovery than required, prosecutors in Commonwealth v. Strickler withheld Brady material that would have made possible significant impeachment of a key prosecution witness, whose initial statements to police about seeing defendant before the murder contrasted dramatically with her trial testimony. See Strickler v. Greene, 527 U.S. 263 (1999). But the evidence against Strickler was strong despite that impeachment (which is why his Brady claim ultimately failed; the Court found the prosecutor’s violation caused no prejudice). One can imagine a prosecutor dismissing the evidence in his own mind and then placing it outside the file, or even affirmatively choosing to conceal on it, on the view that it does not accord with what he “knows” to be the witness’s true testimony and the true version of events. Police may have engaged in the same rationale to withhold the evidence from prosecutors. For a discussion of this problem, see infra __. To be sure, Brady doctrine instructs prosecutors and police against exactly this sort of judgment. But the strong prejudice component of Brady also signals to prosecutors that, when other evidence against defendants is strong, withholding such material (or merely failing to find and disclose it, since Brady covers inadvertent violations and makes prosecutors responsible for disclosing information in police files) is unlikely to result in a Brady violation justifying reversal. See Scott Sundby, __.

54 It is hard to imagine now, but wasn’t 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 have an inherent information advantage over the state, while innocent ones can 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 Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (defining a due process right for indigent defendants to expert assistance for issues that are “significant factors” in a criminal trial).
Witnesses insist on personal confidence in their memories and jurors may not easily persuaded to doubt a confident witness even when unreliable procedures are explained. 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-theory errors, inadequately calibrated equipment, negligence or fraud.

Moreover, we limit the ability of defense counsel 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. The Court as recently as three years ago extended the right to counsel, but it barely regulates the quality of that counsel right. Legislatures do so quite effectively, however, by limiting funding for appointed counsel so that defenders have little time and few resources for most cases. The Court facilitates this legislative judgment through ineffective assistance doctrine, which broadly protects lawyers’ discretion. That doctrine leaves wide leeway for poor but fairly routine lawyering judgments, such as failing to interview or subpoena key witnesses, and it explicitly protects only the subset of prejudicial outcomes that arise from errors that fail an objective standard of reasonableness. As a result, it does not capture the subset of modest errors that turn out to have momentous consequences. Failure to track down additional witnesses, for instance, rarely fails the Strickland performance prong, though that decision can be outcome-changing.

Accounts of poor defense practice, especially for indigents, are widespread and routine across a wide array of jurisdictions. This state of affairs represents a fairly firm

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57 Some are quite subtle. IDs 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; line-ups are less reliable if all members match the description of the defendant rather than the perpetrator.


60 See, e.g., State v. LaForest, 665 A.2d 1083 (1995) (failure to interview state witnesses is not ineffective assistance).

legislative judgment against the Court’s decision in the *Powell-Gideon* line of cases to establish defense counsel, and lawyer-dominated adversarial process, as the dominant guarantor of accurate fact finding. Constraint of defense counsel reduces the defense attorney’s structural role of checking the executive’s factual accounts of crimes. That role is important, because defendants and their counsel replace the jury in that structural role when bargaining substitutes for trial. Weak defense facilitates case resolution; under-funded defenders like quick pleas. But the price of this arrangement has become more noticeable: it contributes to criminal adjudication’s current problems with accurate fact finding. Yet in part because defense counsel sometimes hinder accuracy as well as help it, the solution will have to be—and is beginning to be—something other than reversing that political judgment and more fully funding defense counsel.

**D. Effects of Resource Constraints.**

Adversarial adjudication that puts evidence generation solely in the hands of parties suffers from a wealth effect. 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. But that is not the only, and perhaps not the worst, form of the wealth effect. Both sides can face resources constraints; prosecutors rarely enjoy consistently adequate funding either.

Sometimes prosecutors must dismiss cases or offer generous plea bargains to save scant resources; that helps defendants. But tight law enforcement budgets don’t necessarily work in defendants’ favor. Routinely, when police and prosecutors are committed to pursuing charges, resource constraints prompt them to shortchange investigation in other ways: interviewing some but not all witnesses, using quicker eyewitness identification procedures rather than more burdensome but reliable ones, employing unofficial informers (often with criminal records) rather than undercover law officers when the latter could substitute for the former. Further, a range of evidence-gathering practices reflect compromises with cost constraints. Investigators may not get 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 bars 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); *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).

For one example, see Kenneth Mann, *Defending White Collar Crime: A Portrait of Attorneys at Work* (1985) (describing defense strategies of information control).


64 See id.

65 For an argument that prosecution is 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 J. Jacoby, supra note __, at 238; see also Stuntz, supra note __, at 8-11 (discussing prosecution funding in recent decades in comparison with defense funding).
necessary training; prosecutors may skip forensic analysis; police may avoid the trouble and expense of taping undercover officers and informants or suspect interrogations.

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, poor facilities maintenance and accreditation, and inadequate staff training. 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 “line up” 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 of 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. Crime lab technicians usually assume high base rates—meaning high odds of a test yielding incriminating results—because samples they test are not randomly provided; the samples mostly come from police who suspect the sample is incriminating. Using multiple samples reduces errors prompted by base rate assumptions. (Consider the challenge of presenting this issue through defense confrontation at trial.) But it raises costs, and many crime labs already have backlogs. The same is true with other procedures needed to ensure “blind” testing, such as protocols that keep technicians from knowing which samples are submitted by police. And all this holds aside errors from analysis grounded in poor science or methodology.

Some 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. That is a problem that exists, to lesser but significant degree, with adult witnesses as well, and poor training or interview protocols might lead to error-producing practices such as telling one witness what another has said, a strategy that can affect the current witness’s account. In all these ways, the prosecution, prompted in part by resource constraints, can acquire a less-than-fully-accurate account of events despite good faith by all state actors. In these ways the risk of inaccuracy in the state’s case—the dominant investigation—increases. Some cases are dismissed because of evidentiary weaknesses. But others proceed, with those good-faith but partisan-based inferences about factual

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66 See Bureau of Justice Statistics, Fact Sheet: 50 Largest Crime Labs 2002 (NCJ 205988 Sept. 2004) (summarizing census of publicly funded labs and noting the 50 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 a year earlier; noting staff shortages as an explanation).

67 See Saks & Risinger, supra note __.

68 Michael D. Shear, Warner Proposes Crime Lab Upgrades, Wash. Post, Dec. 15, 2004 (noting Virginia’s crime lab has a backlog of 13,000 drug cases); see also See Justice For All Act § 202(b) (Oct. 30, 2004), Pub. L. 108-405 (providing federal funding to help state crime labs process backlogs of DNA evidence).

69 This problem is an especially difficult one, because it can be legitimate and necessary tactic to tell witness A of witness B’s account, in order to stop witness A’s stonewalling or (in the case such witnesses as child sex abuse victims) silence arising from shame, fear or embarrassment. But such strategies have to be employed carefully to avoid coaching or coercing witnesses into saying what investigators have signaled they want to hear.
truth effectively substituting for components of a factual record that could be improved with more rigorous (and sometimes more expensive) evidence gathering practice.\(^{70}\)

Under-funded defense counsel cannot always correct, or even make apparent to fact-finders, those risks by means of their own investigation or impeachment of state evidence. Sometimes they cannot identify those risks themselves. Defendants might not locate witnesses the state missed. Pointing out to juries that witness endured suggestive interviews or identification practices, or that labs used a given testing protocol or an unverified analytical theory—even if underfunded discover these risks—might not convince fact-finders to discount such testimony appropriately.

**E. Trial procedure rules**

Procedural rules are one of adjudication’s primary safeguard against the full range of errors in evidence generation. Yet trials are a fairly poor means of fact determination when the information inputs into the trial—investigation’s results—are weak in particular ways. Confrontation is a weak tool against confident eyewitnesses who went through suggestive identification processes, or lab technicians whose processes increased the risk of baserate errors. Confrontation at most raises doubts about such evidence, when what we really want is the more reliable form of that evidence—witnesses whose reliability is high from careful identification practice, lab results produced by rigorous protocols and sound analysis. Familiar trial tools often can only raise doubts about evidence; we cannot in every case produce another eyewitness, or a better lab test, to give us a more reliable source.\(^{71}\)

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 we worry most about, wrongful convictions. But proof rules are insufficient, because weaknesses in evidence do not always appear as weak evidence. The absence of impeachment evidence might leave an unreliable witness seeming trustworthy. Undetected baserate errors, equipment calibration errors, or flawed interpretation can make lab results appear stronger. Suggestive identification practices can make witnesses more confident and harder to impeach.\(^{72}\) Failure to find the second witness to a crime can leave the first witness’s account uncontradicted. In these ways, weak evidence can

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\(^{70}\) It is worth clarifying that not all cases can yield strong evidentiary files that erase ambiguity about historical truth. Some events can’t be reliably recreated or determined despite the best efforts. But the point is that many more can than currently are.

\(^{71}\) 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, Houston L. Rev. (forthcoming 2005).

Wrongful acquittals occur as well, and not only from the default rule created by the standard of proof but from the sorts process deficiencies we are about to survey in trial processes.

\(^{72}\) A large body of research suggests that eyewitnesses selecting suspects from live or photographic line-ups have error rates in the range of thirty to forty percent. 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 thirty-four to thirty-six percent); 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 rate of more than 20% in live line-ups).
appear strong, and a high standard of proof is a poor substitute for accurate fact-generation.  

F. Legitimacy, conflict resolution and error-obscuring processes.

Finally, trial adjudication intentionally conceals some uncertainties in factual accounts in service of conflict resolution and systemic legitimacy.  George Fisher has described one version of this as the criminal jury’s “error-erasing function.” Multiple witnesses sometimes provide conflicting accounts. Through the mid-nineteenth century, the means to minimize these conflicts—to settle which witnesses would be taken as reliable—had been simply to bar many witnesses from the courtroom. Large classes of witnesses were barred—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. It solved this problem by “permitting the jury to resolve credibility conflicts in the black box of the jury room” and thereby to “present 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.”  

Fisher’s historical account makes clear, though, that the jury took on this task because other events forced broader witness-competency rules; in the wake of those reforms, courts needed a way to address the increased frequency of conflicting testimony. It was not because the jury is especially competent and reliable at detecting false testimony through such means such as observing demeanor. Rather, the jury’s virtue is that it hides the inevitable uncertainty—and thus periodic error—of such decisions.

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73 On top of that, there are good reasons to think prevailing practices for explaining proof standards lead jurors misunderstand the rules and apply them less rigorously. Larry Solan has added a linguistic analysis to his review of a range of empirical studies that found widespread differences in how juries understand and employ “beyond a reasonable doubt,” depending on which instruction explaining that standard that they receive. Some common instructions lead jurors to apply the standard less in a way that demands less assurance than a “clear and convincing evidence” civil standard. This is so for a variety of reasons including the wording of reasonable-doubt instructions, some versions of which jurors interpret as functionally equivalent to a lower, civil standard of proof. Similarly, some jurors wrongly understand common burden-of-proof procedures to require the defendant to put forth evidence rebutting that state’s case. See Lawrence M. Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt, 78 Tex. L. Rev. 105 (1999). See also Steve Sheppard, The Metamorphoses of Reasonable Doubt, 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); see also Scott Turow, Ultimate Punishment 36 (2003) (arguing there is a “propensity of juries to turn the burden of proof against defendants accused of monstrous crimes” because “[j]urors are unwilling to take a chance of releasing a monster into our midst, and thus will not always require proof beyond a reasonable doubt”); 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 Studies __ (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 defendants will be more so. Those perceptions affect not only defendants’ decisions to plea but the parties’ relative bargaining positions during plea negotiations.


75 Id. At 579.
A dozen years before Fisher, Charles Nesson made a compatible argument on how a range of evidence rules and trial procedures serve to generate publicly acceptable verdicts rather than outcomes with the highest probability of according with the actual events; jury trials, in other words, conceal the varying probabilities that the system’s fact-determination outcome is the correct one. Doctrines that greatly restrict factual re-examination in appellate and collateral review, for example, serve the twin purposes of conserving resources by limiting relitigation and of 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. The errors adjudication can’t resolve, it conceals. And it is this obscuring of the periodic disconnect between resolution and truth that DNA analysis and other developments have undermined.

Both accounts describe features of an adjudication system that sacrifices accuracy—or at least hides inaccuracy—for conflict resolution. Mirjan Damaska has described more broadly distinctions among national adjudication regimes, which vary notably in 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. “Where 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’etre.”

Further:

A legal process aimed at maximizing the goal of dispute resolution … cannot simultaneously aspire to maximize accurate fact-finding. [T]his process does not seek precision of factual findings independent of dispute resolution, even within the narrow compass of issues as defined by 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…. On 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.” That may be why we rarely see partisan and adversarial presentations of evidence used in other settings in which fact-finding accuracy is clearly important. Systems that use partisan fact gatherers have priorities beyond truth finding; they aim to settle disputes.

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77 M. Damaska, supra note __, at 102.
78 Id. at 123.
79 Id. at 145.
80 In a broad range of government fact-finding panels we use 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 http://www.9-11commission.gov/ (describing the National Commission on Terrorists Attacks Upon the United States and listing its members; the chair is former Republican governor and the vice-chair a former Democratic congressman). For a description of the Columbia Accident Investigation Board, see http://www.caib.us/board_members/default.html; for a description of the Presidential Commission on the Space Shuttle Challenger Accident, see http://science.ksc.nasa.gov/shuttle/missions/51-l/docs/rogers-
This model fits uneasily in criminal, as opposed to civil, practice. Criminal law is public law. Citizens are not settling a private dispute; the government is taking coercive action against a citizen. Yet we nonetheless employ 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. Another is the perceived need to limit state power; we distrust government-run fact-finding in this context even if it promised greater accuracy. A third is that we have been able to get by with it, because criminal cases rarely have broad consequences for non-parties, and because we’ve been able to conceal inaccuracies—and thereby maintain legitimacy—in adjudication’s black box. DNA analysis and other means to second-guess criminal judgments have now undermined that “error-erasing” concealment.

G. Plea bargaining

Plea bargaining fully accords with adjudication practice focused on conflict resolution rather than fact finding. Bargaining requires waiver of trial procedures designed to promote accuracy, such as a neutral fact finder and confrontation of evidence. It allows the parties to shape procedure while the judge (and the state more generally) passively concedes any interest in accuracy. The critical non-waivable feature of plea practice—that the judge find a factual basis for the plea—in reality 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 prosecutors’ 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. What replaces jury trials as fact finder and check on the executive branch is not judicial scrutiny of evidence but defendants’ voluntary consent.

In deciding whether to plea bargain, defendants have considerations other than the accuracy of the prosecutors’ account of facts. Most obviously, they assess risk of consequences if they don’t bargain. Bargaining occurs because prosecutors can create “trial penalties”—greatly increased charges and punishment after a trial conviction.
Defendants may be in pretrial detention; especially in less serious cases, pleas can be a means to end confinement. For serious cases, prosecutors can threaten long sentences and other interests defendants care about: property forfeiture, charges against family members or friends, and sometimes civil or regulatory sanctions. These competing considerations can outweigh accuracy in defendants’ consent decisions.

Plea agreements could occur in the wake of rigorous pretrial adversarial scrutiny of evidence. But the deference to party autonomy that defines conflict-resolution systems means parties control most procedures before pleas as well. Specifically, parties can waive judicial review of charges (through grand juries or preliminary hearings) and all discovery practice. 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, much like funding constraints on defense attorneys do. Limited time and resources mean defendants can’t track down witnesses the state ignored, 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 see the state has gotten its information right. But it’s a considerable problem for innocent or over-charged defendants, who must weigh the advantages of plea leniency against the risks of trial (1987); see also David Bereton & Johnathan Casper, Does It Pay to Plead Guilty? Differential Sentencing and Functioning of Criminal Courts, 16 L. & Society Rev. 45 (1981-82) (estimating trial penalties).

For a proposal to limit plea discounts and thereby decrease wrongful convictions in plea bargains, see Oren Bar-Gill & Oren Gazal, Plea Bargains Only for the Guilty (2004 manuscript available on ssrn.com).

87 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 2004), available at http://www.pbs.org/wgbh/pages/frontline/shows/plea/ (recounting the case of Erma Faye Stewart, who describes her decision to plead guilty 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).

88 The latter occur not just in white-collar contexts. Loss of public housing or benefits, immigration consequences, and child custody rights can affected by criminal dispositions.


91 For a compelling example of this problem, see Frontline: The Plea (PBS 2004), available at http://www.pbs.org/wgbh/pages/frontline/shows/plea/. 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 suspected Gampero might not be his son’s killer. The father hired a private investigator, who found many witnesses the police ignored (and Gampero’s defense lawyer also did not find) and who raised substantial doubts about Gampero’s guilt, convincing the victim’s father of Gampero’s innocence.
penalties and other consequences if they forgo pleas, decline to waive procedural rights, and engage in fuller adversarial practice. Creating that risk is a feature of a system that is structured more for case resolution than truth finding. Innocent defendants, after all, can quite rationally plead guilty. 92 Defendants who are risk averse, or who plausibly distrust adjudication’s capacity to vindicate false charges, can sensibly accede to inaccurate pleas in order to avoid the risk of graver consequences, 93 much as civil defendants sometimes claim to settle meritless civil actions because settlement costs are less than the costs and risks of litigation.

II. Toward Reform Through Structured Investigation

The structure of trial adjudication divides power among the executive-branch prosecutors, the two “houses” of the judiciary 94—judge and jury—and the defense. But the prevailing forms of trial and party negotiations, built on party-run investigation, hardly exhaust the options for maximizing the accuracy of fact finding. The tools of institutional design—especially separating powers among distinct entities and constructing professional roles to respond to particular incentives—are widely adaptable, as we find in a range of public and private settings. Constitutional separation of powers doctrine seeks, through federal government design, 95 to limit the odds of bad government action and improve odds for normatively desirable action. 96 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. Comparably, corporate governance distributes power among officers, board members and shareholders and employs procedural devices such as public reporting via standard accounting practices. 97

We have undercut two critical components of that adjudicative design, juries and defense attorneys, but even with them we now recognize the vulnerabilities of accurate fact generation. Yet we have 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

92 See Scott & Stuntz, supra note __ (describing information problems, risk aversion and other barriers to plea bargaining and proposing reforms to facilitate bargaining); see also Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979, 1983-84 (1992) (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”).
95 See id.
96 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, 70 So. Cal. L. Rev. 381, 398-404 (1997) (discussing and criticizing various proposals for “compensating adjustments” in separation of powers scholarship, including Abner S. Greene, Checks and Balances in an Era of Presidential Lawmaking, 61 U. Chi. L. Rev. 123 (1994) and Randy E. Barnett, Reconceiving the Ninth Amendment, 74 Cornell L. Rev. 1, 26 (1988)).
97 The Sarbanes-Oxley Act added fraud-prevention mechanisms on this model with new reporting duties for attorneys, accountants and CEOs and new requirements for outside board members.
these options into three categories. The first identifies means to separate powers and to design institutional roles solely 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 involvement in fact generation and assessment in pretrial practice, but it builds on options on existing examples of the judicial branch acting uncontroversially outside its core (and weak) adjudicative role.

In doing so, I describe three kinds of emerging reform in criminal justice—eyewitness identification protocols, broad discovery, and crime lab improvements—that are in varying degrees of development and promise. Each represents existing efforts to take factual accuracy more seriously in criminal justice and to make that improvement in the pretrial stages, so that early fact development becomes more reliable and we rely less on trials and negotiations as critical screens. To these ideas I sketch additional, compatible 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 With 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. For case resolution, this practice permits the sorts of compromise dispositions with certainty of outcome that both parties often prefer. But for fact determination, this system works only as well as the informational inputs parties have available to them. We can improve this entrenched practice of administrative criminal justice not by looking to traditional due process notions that take us back to trial-based structures, such as neutral magistrates, but instead by looking for means divide and restructure roles within the executive branch.

Power can be diffused among public actors within the same branch of government. Crime investigation can borrow from this idea—or more accurately, build on the versions that already exist in investigation practice—to divide authority among executive actors. We have models of institutionally separate entities with some competing or supervisory objectives. Inspectors general are one model. IGs 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. They do not duplicate tasks of a Departmental office such as investigation; they assess the efficacy with which

98 As Judge Lynch has argued, this is not necessarily grounds to wholly condemn this “an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor’s office.” Gerard E. Lynch, Screening v. Plea Bargaining: Exactly What are We Trading Off?, 55 Stan. L. Rev. 1399, 1404 (2003).
99 Id. at 1405-06.
100 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).
public officials fulfill their duties and monitor corruption or incompetence. Another partial analogy is Justice 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 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 distinctions, they also demonstrate the possibility of agency independence among officials whom one might suspect have every reason to cooperate on common goals. 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 as well as useful cooperation.

These models suggest some promise for greater institutional separation of detectives and other investigators from local police departments—perhaps with an agency head distinct from the police chief, and career avenues distinct from police training and employment. 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 thereby more 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 teams, separate from police departments, that may serve some of this function.

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101 The federal Justice Department’s IG recently served this function effectively by investigating work of an incompetent scientist in the FBI’s crime lab. Associated Press, FBI DNA Lab Probe Widens, April 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.

102 Investigative officials work in a range federal departments and agencies. Core criminal enforcement agents, such as the FBI and Drug Enforcement Agency, are in the Justice Department, but immigration agents, customs agents and the Secret Service in the Homeland Security Department, while agencies such as the Securities and Exchange Commission and the Environmental Protection Agency have investigators who develop cases for federal prosecutors. See Daniel C. Richman, Prosecutor and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 756-61 (2003) (discussing diversity among investigative agencies, including dispersion among federal departments, challenges to prosecutorial supervision and coordination of investigative agents).

103 Cf. Armacost, supra note __ 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).

104 Richman, supra note __, at 825-26; Bureau of Justice Statistics, U.S. Dep’t of Justice, 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 D.A.s’ offices might encourage less thorough work by police departments—who know D.A. offices can fill in gaps—but even so that distinction among investigation teams means fresh perspectives are brought to fact evaluation.
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—despite residing separate agencies with distinct bosses and political accountability mechanisms—sometimes do. But institutional distinction does increase the prospect of more distinct professional roles, incentives, customs and assumptions.\(^{105}\) The prospects increase for a skeptical investigator who identifies 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 management\(^ {106}\) in addition to institutional design. Despite the real prospect of a formal agency division meaning little in fact, it opens the prospect for the development of a distinct institutional role and culture that increases the odds diffusing power and limiting negligence, misconduct or simply actions based on myopic assessments of evidence.

In addition to agency design, office procedures can check improve official action in ways that reduce errors in fact generation. In particular, protocols for eyewitness identification are slowly emerging that should substantially reduce error from eyewitness evidence, the most frequently noted contributor to wrongful convictions. (And recall that poor ID procedures can both destroy the original evidentiary source—a memory unaffected by post-crime suggestion—and is not easily discredited with confrontation.\(^{107}\) The data on the effects of identification procedures are now so well established, and the protocols for reliable identifications so widely agreed upon,\(^ {108}\) that calls for mandatory use of optimal procedures by police appears in every study of wrongful convictions or criminal justice reform.\(^ {109}\) Those procedures include requirements that line-ups be

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\(^{105}\) See Richman, supra note __ [Colum. L. Rev.], 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 his distinct institution and professional culture, interaction presents less a risk of capture than an opportunity for both productive collaboration and mutual monitoring”).

\(^{106}\) 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. L. Admin. 1 (2004); Joan E. Jacoby, The American Prosecutor: A Search for Identity 199 (1980) (noting site visits to prosecution offices “detect a distinct influence of individual policy decisions on office performance”); id. at 231 (discussing a case study of the New Orleans District Attorney office, which is “strictly controlled by executive level policy makers” and such control accounts for “successful implementation of policy”); id. at 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 __, at 507-16.

\(^{107}\) See National Institute of Justice: Post-Conviction DNA Testing: Recommendations for Handling Requests 55-57 (Sept. 1999, NCJ 177626) (noting eyewitnesses often continue to believe their erroneous identification even after DNA evidence has excluded the suspect they identified); PBS Frontline: What Jennifer Saw (1998) (describing conviction of rapist based on eyewitness testimony of the victim who was later exonerated by DNA evidence; DNA evidence also identified the actual perpetrator).


photographed and photo spreads preserved for defense examination; eyewitnesses must sign a form clarifying that the suspect might not be in the line-up or photo-spread, the witness is not obligated to make an identification, and the person administering the line-up does not know which person, if any, is the suspect; suspects should not appear substantially different from “fillers” based on the original description of the perpetrator; officials dealing with witnesses should in fact not know which person is the suspect.\footnote{See Edwin Colfax, Illinois Death Penalty Reform Legislation (describing protocols in Illinois), available at http://www.law.northwestern.edu/depts/clinic/wrongful/documents/Omnibusbillanalysis.htm; Eyewitness Evidence, supra note __.}

Jurisdictions have begun to voluntarily adopting them. Police departments in New Jersey, North Carolina, Minneapolis, Boston, Santa Clara, California, and Northhampton, Massachusetts, among others, have implemented these procedures.\footnote{See Barry C. Scheck, Mistaken Eyewitness Identification: Three Roads to Reform, The Champion 4 (Dec. 2004). For a description of identification reforms in Illinois, see http://www.law.northwestern.edu/depts/clinic/wrongful/documents/Omnibusbillanalysis.htm (describing legislative funding pilot project on research and implementation of procedures in local police departments); David S. Bernstein, Reasonable Bias, Boston Phoenix, Jan. 7-15, 2005 (describing Boston police reform of eyewitness identification procedures).}

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 good-faith officers from facilitating creation of erroneous or unreliable evidence. And they achieve this within the police department without adversarial or outside supervision. Protocols work by in part dividing power among officers in the same office—one officer knows the suspect’s identity, but another who doesn’t administers the identification process (a sort of micro-level separation of power). These kinds of internal police practices both functionally replace and often improve upon the structural check of adversarial scrutiny. It does not \textit{displace} defense confrontation, but it relieves it from being the primary means to assess and improve eyewitness reliability.\footnote{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.}

2. Crime Labs. State crime labs are also candidates for institutional as well as 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; they are located with police departments and their daily agendas are driven by law enforcement’s need for forensic services. This kind of institutional affiliation, in addition to under-funding, surely helps account for the dramatic failures of labs in recent years. Yet with labs, even more than local investigators, we can easily envision ways to make labs bureaucratically separate from law enforcement. One option is simply shifting administrative control of labs from law
enforcement to another state department,\(^\text{113}\) to create a further safeguard by dividing the government’s prosecution practice among distinct agencies. Virginia’s lab is structured this way, and it is highly regarded (though under-funded).\(^\text{114}\)

On top of that organizational change, lab analysis reliability can be improved with greater funding and more rigorous accreditation, which would assure proper staff training, equipment maintenance, and better adherence to optimal analytical practices (such as those that reduce baserate errors, discussed earlier) including blind-sample analysis.\(^\text{115}\) Movement toward both of 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 and ties that funding to more rigorous lab accreditation, external audits and adherence to federal quality assurance standards.\(^\text{116}\) Again, we see a structure other than adversarial counsel that scrutinizes evidence creation by the executive branch, and again it holds greater promise than defense confrontation for improving factual accuracy. External auditors serve an IG-like function of independent review, much as defense teams try to do, usually ineffectively. 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 we get relatively little of this kind of adversarial practice because legislatures constrain counsel with under-funding. But in their place we are beginning to get—or could get—a regime that both holds greater promise for improving factual accuracy and of garnering more sustained legislative favor in funding battles than defense counsel ever will. The Justice for All Act hardly cures all labs’ funding problems, but it suggests legislators’ greater receptivity to requests from labs, who promise factual accuracy, over defense attorneys who promise zealous opposition to law enforcement.

3. Prosecution offices. Separation of prosecutors into distinct offices and assignments establishes them as checks both on police and on other prosecutors. Separating investigators from prosecutors helps make the latter a check on the former. Prosecutors evaluate police evidence-gathering and decide which charges (if any) the

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\(^{113}\) Defendants as well as prosecutors could have the ability to submit samples to crime labs. Some labs allow this now, and it is unlikely to radically increase lab workloads. Defendants don’t have much evidence to test that the state doesn’t already submit for testing. The bulk of crime lab work involves drug identification, which prosecutors always need tested; the issue there is reliability rather than defendant access.

\(^{114}\) On under-funding, see Michael D. Shear, Warner Proposes Crime Lab Upgrades: Hiring Would Cut DNA Test Backlog, Washington Post, Dec. 15, 2004, at B01; Amy Jeter, Crime Lab Backlog Delays Drug Cases, Virginian-Pilot, Oct. 5, 2004 (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 of one high-profile in a capital wrongful conviction, see Maurice Possley, Steve Mills & Flynn McRoberts, Scandal Touches Even Elite Labs, Chi. Tribune, Oct. 21, 2004 (describing Virginia lab analyses in case of Earl Washington).

\(^{115}\) For a description of lab analysis practices and their importance in reducing error, see Saks & Risinger, supra note ___ [2003 Mich St. L. Rev. 1051]. 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 ___ (quoting a former prosecutor who critically describes the society as “more of a fraternal organization than an authoritative scientific body”).

\(^{116}\) See Justice For All Act § 202(b) (Oct. 30, 2004), Pub. L. 108-405. Virginia’s lab may soon get a substantial funding increase as well. See Shear, supra note __, at B01.
evidence supports. This screening is sometimes rigorous; some prosecution offices have high declination rates (rates of declining to bring charges on cases presented by investigators). Some prosecutors’ offices structure their staffs and procedures to rigorously screen police evidence files. The New Orleans District Attorneys’ office is unusual in committing significant numbers of experienced prosecutors to its charging division. The goal is to limit plea bargaining, but it also keeps weak fact files from becoming poorly grounded charges that adversarial process must detect later. In this way, executive actors modestly reduce the need for defense attorneys (and trial prosecutors) to scrutinize investigations for accuracy. That is not insignificant. In the high volume of mid-level crimes that state courts process quickly, rigorous screening prevents the error of weak (and perhaps erroneous) cases being resolved through pleas rather than dismissals; it also allows limited defense resources to be shifted from that screening task to stronger or more serious ones.

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, some prosecutors, with the advantage of more experience or less personal investment in the case, to check front-line attorneys. There are weaknesses to these models. Most state prosecution offices are small, making separation of staff into distinct divisions or roles infeasible. Supervising prosecutors facing time constraints may conduct cursory reviews that defer to trial attorneys who know case facts better. Elected prosecutors, who dominate state practice, face familiar problems as agents whose principals, the public, monitor imperfectly. Prosecutors face the most scrutiny of serious, high-profile crimes. The

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119 Anecdotal evidence suggests this possibility is real, and when the come to public attention they add to the legitimacy problem of a case-resolution-oriented system that gets accuracy wrong. PBS Frontline broadcast a documentary on several guilty pleas of defendants who had strong cases for innocence. One defendant, Erma Stewart, pled guilty to a felony drug charge. The case against her was based solely on a police informant who provided the basis for several drug cases. 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 (PBS 2004), available at http://www.pbs.org/wgbh/pages/frontline/shows/plea/ (recounting Stewart’s case and describing considerations that led her to plead guilty to charges she denied, including pretrial detention, the illness of her young children, and little help from her appointed attorney).
120 See U.S. Attorneys Manual. English practice includes an interesting variation: solicitors with the Crown Prosecution Service prepare criminal cases but then transfer them for trial over to barristers, who are institutionally distinct, formally private trial lawyers not affiliated with the C.P.S. See W. Pizzi, supra, ___.
121 See Bureau of Justice Statistics Bulletin, Prosecutors in State Courts 2001 (NCJ 193441 May 2002) (noting median size of state prosecutor offices is nine attorneys).
122 [Dan Richman & prosecutor interview data:] federal supervisory prosecutors, due to time constraints, often must review files in a limited way that depends on the trial attorney’s evidentiary descriptions, much as judges depend on parties’ factual accounts (rather than assessing evidentiary files or hearing witnesses) in confirming the factual basis for plea bargains. This means of supervision works better for judging the appropriateness of charges for given conduct than evaluating the details of evidentiary items’ reliability or disclosure of border-line Brady obligations.
123 See Joan Jacoby, The American Prosecutor: A Search For Identity 292 (1980) (describing popular responsiveness of elected prosecutors and effects on office policy). This is true of specific lower level
public easily monitors basic outcomes (charging or declination, conviction or acquittal), but pays less attention to factors contributing to those outcomes (such as weak forensic analysis or uncredible key witnesses). In those contexts prosecutors may moderate their scrutiny of police or trial attorneys’ work—or just knowingly proceed on weaker cases—in order to avoid blame.\(^\text{124}\) And in a small but important subset of federal practice, where prosecutors run investigations rather than evaluate agents’ work, professional judgment of fact-evaluation decisions is harder to maintain.\(^\text{125}\) 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 that evidence they helped generate.\(^\text{126}\) Nonetheless, expansion of models such as New Orleans’ and federal prosecutors’ screening practices can, at least in important segments of prosecution practice, take some weight off of adversarial adjudication for detecting weakly grounded charges.

**B. Improving Evidence Reliability with Pre-Trial Adversary Process.**

1. Discovery and Open Investigation Files. Discovery rules require only that parties disclose what evidence they possess, not that they affirmatively seek other evidence. But discovery is a primary mechanism to make the factual record more comprehensive and reliable, 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. And the more information a party has, the more easily they can find missing information; one witness may identify other potential ones neither side has yet contacted. Adversary 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 has been concluded too quickly.\(^\text{127}\) To make

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\(^{124}\) Scholars of wrongful-conviction causes identify public attention to high-profile crimes as a circumstance correlates with wrongful convictions. C. Ronald Huff, Wrongful Conviction: Causes and Public Policy Issues, 18 Crim. Just. 15, 17 (Spring 2003) (discussing “community pressure for conviction”). The Goldstein case—in which prosecutors employed a jailhouse snitch and suppressed evidence both of his testimonial incentives and the suggestive procedures used to secure testimony of the sole eyewitness—seems a case in point. See Goldstein v. Harris, 82 Fed. Appx. 592 (9th Cir. 2003) (unpublished opinion); see also Taylor v. Maddox, 366 F.3d 992, 1014 n.17 (9th Cir. 2004) (describing Goldstein case).

\(^{125}\) See Richman, supra note ___ [Colum. L. Rev.] 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 nation’s responses to this concern).

\(^{126}\) For descriptions of cases that are examples of this problem, see See Goldstein v. Harris, 82 Fed. Appx. 592 (9th Cir. 2003) (unpublished opinion); Taylor v. Maddox, 366 F.3d 992, 1014 n.17 (9th Cir. 2004) (describing Goldstein case); see Danny Hakim & Eric Lichtblau, After Convictions, the Undoing of a U.S. Terror Prosecution, N.Y. Times, Oct. 7, 2004 (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.

\(^{127}\) For a case study of this problem, see Frontline: The Plea (PBS 2004), available at [http://www.pbs.org/wgbh/pages/frontline/shows/plea/]. 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 suspected Gampero might not be his son’s killer. The father hired a private investigator, who found many witnesses the police ignored (and Gampero’s defense lawyer
investigations more reliable without adjudication, we want to increase the portion of evidence in parties’ files that has been subjected to competing scrutiny, though not necessarily examination at trial. Even informal interviews of opponents’ witnesses—very few jurisdictions allow the routine depositions common in civil practice—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 arise from information disclosure—risks to undercover agents and informants, to ongoing investigations, and to witnesses. Broad discovery might increase risks of witness-intimidation, and in some contexts (especially federal practice) compromise ongoing investigations based on confidential government information such as informant identities; it could also facilitate defendant perjury. To serve these competing goals, federal discovery rules, and those of some states modeled on them, remain quite restrictive. Under restrictive rules, parties are not required to disclose before trial the names of witnesses they will call to testify, much less identify those who have may have relevant information but will not be subpoenaed for trial. Nor must they disclose witnesses’ prior statements until after the witness as testified on direct examination at trial, which means there is no requirement to disclose such statements at all in most cases.

Note the effect of restrictive discovery on adjudication: it mandates 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, and it means that adjudication—trials or plea negotiations—play a larger role in sorting evidence and assuring accuracy. Not until trial are witnesses put under oath or (unless parties voluntarily agree otherwise) available even informally to opposing parties; tools to assess their credibility—prior statements, criminal records, cooperation agreements—likewise may not be available until trial.

also did not find) and who raised substantial doubts about Gampero’s guilt, convincing the victim’s father of Gampero’s innocence.

Limits are also justified on a fairness argument: 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.


Due process doctrine does not clearly require that mandatory disclosure of exculpatory evidence occur before trial. See Corrina 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). However, fewer than ten states do not supersede that rule with a requirement that prosecutors disclose exculpatory evidence at various points before trial.
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 in state courts. As a result, most states have moved away from the restrictive model of federal discovery in significant ways. In doing so, these broader discovery rules help improve the accuracy of factual accounts in the investigation and pretrial stages, so that the backstop of adjudication is less critical.

The trend in state discovery practice is clearly toward broad, reciprocal discovery regimes. 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.

In contrast to federal constitutional and statutory requirements, more than forty states require that exculpatory evidence (variously defined, but often including impeachment evidence of government witnesses) be disclosed to defendants at some point before trial. 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 (took effect Oct. 1, 2004). North Carolina most recently switched to broad discovery and did so as a response to high-profile scandals of prosecutors’ withholding evidence that lead to seeming wrongful convictions in capital cases. For news reports preceeding North Carolina’s 2004 expansion of its discovery rules that describe cases prosecutors withholding evidence and death row convicts having convictions overturned as a result, see, e.g., Andrea Weigl, Lawyers Debate Openness; Prosecutors Say Each Side Should See Files, News & Observer, March 15, 2004, at B1; Brad Bannon, Justice For All Means Opening Files, News & Observer, April 20, 2004, at A11; Editorial, Open Says North Carolina, News & Observer, Aug. 10, 2004, at A10.

Further, as a practical matter, parties often exchange much information they are not required to share in order to facilitate settlement, see, e.g., J. Jacoby, supra note __, at 242 & 264 (describing voluntary open-file discovery by local prosecutor), though this voluntary practice has a substantial constraint. While many prosecutors adopt voluntary open-file, those disclosures are least likely when they matter most: when the government’s evidence is weak or ambiguous. Full disclosure makes sense when evidence is overwhelming; it convinces defendants to plea. Disclosure of weaknesses provides defendants a basis for driving harder bargains or insisting on trial. 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 there are serious problems with a system that counts on informal, voluntary disclosure to solve most of its discovery problems. For one thing, 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, those 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.

See Ala. R. Crim. P. 16.1(a) (within fourteen days of defendant’s request); Alaska R. Crim. P. 16 (upon defendant’s motion); Ariz. R. Crim. P. 15.1(a) (within ten days from arraignment); Ark. R. Crim. P. 17.1 (upon timely request); Cal. R. Glenn Super. Ct. 12.7 (within 14 days from information); Colo. R. Crim. P. 16(b)(1) (within 20 days of first appearance); Conn. Gen. Stat. Ann. § 54-86a(a) (West 1994) (upon defendant’s motion); Del. R. Com. Pl. Ct. R. Crim. P. 16(a)(1)(A) (upon defendant’s request); Fla. R. Crim. P. 3.220(b)(1) (within 15 days of serving notice of discovery); Haw. R. Penal P. 16(e)(1) (within 10 days from arraignment); Idaho Ct. R. 16(a) (as soon as practicable); Ill. S. Ct. R. 412(a) (as soon as practical after defendant’s motion); Ind. Marion Super. Ct. Crim. R. 7(1)(a) (20 days from initial hearing); Iowa Code Ann. § 813.2, Rule 13 (West 1999) (pretrial request by defendant); Ky. R. Jefferson Cir. Ct. 603(A) (within 10 days before pretrial conference); La. Code Crim. Proc. Ann. art. 718 (West 1981) (pretrial); Me. R. Crim. P. 16 (within 10 days from arraignment on certain offenses); Md. R. Crim. Causes 4-263(b) (defendant’s request); Mass. R. Crim. P. 14(a)(1) (pretrial motion); Mich. Ct. R. 6.201(F) (within seven days of defendant’s request); Minn. R. Crim. P. 9.01 (at defendant’s request before omnibus hearing); Mo. R. Crim. P. 25.03(B) (written request by defendant); Mont. Code Ann. § 46-15-322(1) (1998) (defendant’s request); Neb. Rev. Stat. § 29-1912 (1995) (same); Nev. Rev. Stat. § 174.235(1) (1997) (same); N.H. Super. Ct. R. 98 (within 30 days from a not-guilty plea); N.M. R. Dist. Ct. R. Crim. P. 5-501(A) (within
half 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 witness-safety concerns are outweighed by the truth-facilitating (and perhaps settlement-facilitating) function of broader discovery. A few states, such as New Jersey, effectively mandate open investigation files and require prosecutors to disclose all “persons the prosecutor knows to have relevant evidence or information” even if they will not be state witnesses. ¹³⁴ A few others, such as Florida, have broken with criminal practice tradition and allow witness depositions in criminal cases. ¹³⁵ All of these practices suggest that the traditional concerns of witness safety and investigative confidentiality to do not justify narrow discovery regimes in contemporary state practice.¹³⁶

Consider this broad-discovery trend in light of funding-limited role of defense counsel as government adversary. Minimal discovery works best when defendants have strong counsel who can replicate state investigation and independently uncover the state’s case. A traditional rationale for broad discovery is that it facilitates traditional adversarial practice. But turning that rationale almost on its head is more persuasive: broad

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¹³⁴ See N.J Court R. 3:13-3(c)(6). Note this kind of disclosure rule could have an adverse incentive effect on state investigation. If police know all people they speak to will be disclosed to the defense, they may be selectively incomplete in their investigation, seeking only witnesses they suspect have incriminating evidence, or stopping after they have some incriminating witnesses to avoid the risk of discovery conflicting ones. The problem of incomplete state investigations is a real one; 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 (PBS 2004), available at http://www.pbs.org/wgbh/pages/frontline/shows/plea/. (documentary describing case of Charles Gampero, who pled guilty to a homicide he denied committing. After his plea, the victim’s father hired a private investigator who found many witnesses the police (and Gampero’s lawyer) ignored who raised substantial doubts about Gampero’s guilt, convincing the victim’s father of Gampero’s innocence).


¹³⁶ State criminal dockets differ substantially from the traditional federal 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. As a result, there are fewer ongoing investigations that discovery could compromise, fewer defendants who are likely to intimidate or kill witnesses, and fewer pretrial witness statements (such as those made to investigative grand juries) that are problematic to disclose.
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 state disclosures, and they need not spend as much time tracking down witnesses and evidence from scratch. Broad discovery plus constrained defense services target pretrial adversarial practice on the task of scrutinizing the reliability of the state’s evidence sources. In contrast, restricted discovery and restricted defense counsel provide 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 employed in some northern European countries.\(^{137}\) 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,\(^{138}\) European investigative files are disclosed fully to prosecutors, defense counsel and judges.\(^{139}\) Where narrow discovery rules in adversarial systems make factual accounts reliable by redundant investigations,\(^{140}\) this European model puts more emphasis on multiple scrutiny of a single file.

American jurisdictions that combine broad discovery with limited defense funding move our adversarial regime somewhat toward this model, and that provides considerably more promise of reliability than the combination of narrow discovery rules and under-funded defense. We could trust bargaining, after shared scrutiny of the investigative file, is more often based on accurate factual accounts rather than producing settlements in light of inaccurate ones that are driven by other party concerns. Broad discovery is not a full substitute for under-funded defense; attorneys may be so constrained 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-\textit{Gideon} system of limited defense advocacy.

2. \textit{The problem of waivable discovery rights.} If, to serve accuracy, expansive

\(^{137}\) For a description of this practice in Norway, Germany and the Netherlands, see William T. Pizzi, \textit{Trials Without Truth} 112-13 (1999).


\(^{139}\) See W. Pizzi, supra note __, at 113. Defense counsel can even request police to supplement the file by, for instance, interviewing additional witnesses. Id. at __. This approach is apparently supported by a professional culture among investigative agents to produce a thorough file without a partisan commitment. Id. at 112.

\(^{140}\) See M. Damaska, supra note __, at 223-24.
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 caseloads, ensure convictions, protect victims from stressful interviews and minimize adversarial resistance; defense attorneys also have heavy caseloads and want to minimize time investments when compensation is minimal; and defendants face a variety of incentives to grant waivers and speed disposition, some of which prosecutors help create: mainly pretrial detention and steep plea discounts in exchange for waivers, and occasionally risks like forfeiture or prosecutions of family. Waiver privileges party autonomy, and parties may be willing to resolve cases on inaccurate factual accounts. Defendants in low level cases plead guilty to end detention (especially if they have little faith in their attorney to prevail at trial). Risk-averse defendants in serious cases accept bargains in fear of much worse trial outcomes.

A broad commitment to party autonomy is deeply embedded in American practice. Rarely do courts limit parties’ ability to waive procedural safeguards. That tradition rests on a conflict resolution over accuracy. Yet, if I am right that the legitimacy of criminal justice newly depends on a heightened commitment to accuracy (and that commitment motivates a variety of reforms), then waiver is problematic. Waiver allows parties to shape procedure in their own interests, and those interests are not always the

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142 In public defender systems, heavy caseloads are frequent problems. See, e.g., State v. Peart, 621 So. 2d 780 (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 (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 __, at 10-11 (noting “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”).
143 See, e.g., Bordenkircher v. Hayes, 434 U.S. 357 (1978) (defendant who declined a plea offer to a five-year sentence on forged-check charge was convicted at trial and mandatory life sentence under habitual offender statute). For documentary in which defendants recount accepting pleas to crimes they claim they did not commit, in large part due to risk aversion of high penalties after trial, see PBS Frontline: The Plea (2004).
144 Defendants may accede to inaccurate dispositions to serve the other interests just noted. Presumably, prosecutors rarely pursue knowingly false charges; the risk with them is rather that their partisan role makes them untrustworthy assessors of evidentiary files and uninterested in adversarial or outside scrutiny that second-guesses their conclusions about facts.
145 For a rare example of a limited restriction on discovery waiver, see State v. Draper, 784 P.2d 259, 263-64 (Ariz. 1989) (under due process clause, allowing defendant to agree to prosecutor’s demand that he not interview the victim only in limited circumstances when other safeguards are present, such as defendant’s sufficient access to other state evidence).

same as the public commitment to truth finding. Taking that commitment seriously suggests the need for mandatory, nonwaivable procedural components that are critical to maximizing the odds of accurate outcomes.\footnote{Cf. M. Damaska, supra note __ 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).} 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.\footnote{For the two most recent examples, see Illinoid Death Penalty Reform Act; N.C. discovery statute.} But so far none limit waiver and make 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 signal of how far criminal justice will shift toward a truth-finding commitment over a conflict-resolving one. Mandatory disclosure rules would still allow much private ordering through plea negotiations. But they would force information on parties that might improve party-driven dispositions and would strengthen the investigation stage that informs plea or trial adjudication.\footnote{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 __.}\footnote{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) (judge can approve defendant discovery waiver when safeguards are present, such as defendant’s sufficient access to other state evidence).}  

3. Judicial overrides of disclosure rules. One way to refine a rule of mandatory disclosure could be to assign judges a more rigorous role in scrutinizing party-requested waivers.\footnote{See id. Cf. United States v. Ruiz, 536 U.S. 622 (2002) (holding waiver of constitutional discovery rights in plea agreements is constitutional but noting prosecution vowed to disclose exculpatory evidence despite waiver).} 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 are poor cases for waiver. On the other hand, when waiver is only partial, a judge may find defendants have access to a sufficient amount of the file to ensure adversarial review.\footnote{This is the context of Ruiz, 536 U.S. 622 (2002), which is an example of federal “fast track” prosecution policy, a key component of which is waiver of discovery and motions practice.} Other features of the case might be give judges rough guidance. Consider two contexts in which wide discovery waiver are routinely sought: federal criminal immigration prosecutions in the Southwest\footnote{The dramatic caseload rise in Arizona and Southern California was largely due to increased enforcement rather than an increase in violations. The Justice Department and INS made the fight against illegal border crossings a priority, adding several hundred new agents to implement new enforcement initiatives against border crimes. Agents in Tucson alone doubled the number of arrests to 40,000 in January 1996 from half that in the previous January. See Laura Storto, Getting Behind the Numbers: A Report on Four Districts} and some state-court domestic violence cases.

Federal prosecutors in the Southwest developed “fast track” plea policies, which included discovery waivers, to address a huge increase in illegal-entry cases in the 1990s.\footnote{See id. Cf. United States v. Ruiz, 536 U.S. 622 (2002) (holding waiver of constitutional discovery rights in plea agreements is constitutional but noting prosecution vowed to disclose exculpatory evidence despite waiver).} Federal investigations of illegal entry tend to yield straightforward factual
records; legal residency is an easily resolved factual issue. Further, these fast-track policies arose because federal prosecution resources were overwhelmed. That gives defendants—managed as a group by public defenders—leverage against prosecutors because they gain some capacity to create big delays. That adversarial power makes it less likely defendants are excessively weak negotiators. That power and the low risk of inaccurate investigation files, make this class of cases better-than-average candidates for discovery waiver and reduced adversarial development of the factual record.

Fast-track prosecutions for domestic violence cases are different. In a typical program, first offenders, typically free on bond, meet with prosecutors without defense counsel and plead guilty to misdemeanors for a sentence of probation and treatment. The nature of domestic violence cases provides less assurance that law enforcement investigative accounts alone are complete and accurate without defense input. Violent disputes without uninvolved witnesses can be hard to sort out, and political pressure for strong enforcement policies encourages charging in ambiguous cases. (One concern is that police charge both participants when one may have been a self-defending victim.)

Adjudication without discovery or defense counsel provides little scrutiny of the investigation and these kinds of cases are probably less safe cases for discovery waivers. But unless reasonable counsel assistance accompanies discovery, disclosure won’t help much. 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 discovery (and counsel) waivers only when they compensate for adversarial process with judicial inquiry.


These indicia of reliability occur in a context in which low risk of irreparable harm even if the innocent are persuaded by fast-track offers to plead guilty. Under fast-track policies, defendants typically plea to offenses with maximum sentence of thirty months; median sentences are 21 to 24 months. Storto, supra, at 18. That term is not much different from the likely detention periods if defendants were forced through a longer pretrial process and trial. (Get fed stats on pretrial detention averages). Defendants also typically gain the certainty of knowing the sentence cap. See Storto, supra, at 25 (noting most agreements include sentence caps under F.R.Cr.P. 11(c)(1)(C)). This is a substantial discount from maximum sentences of 10 to 20 years available to entrants with prior illegal-entry or other criminal records, see Storto, supra, at 20-21 (describing penalties available under 18 U.S.C. sec. 1325, 1326). Thus defendants face the incentive of a steep plea discount, which counsels against waiver unless other indicia of reliability are strong.

For an example of such a program in Colorado’s Sixth Judicial District, see Brenda K. Uekert, Process Evaluation of the Southwest Colorado Domestic Violence Project (July 1999) (Institute for Law and Justice evaluation that describes the Colorado program). See also id. at 8 (noting similar projects in other Colorado jurisdictions).

Id. at 8-12.

In Colorado, police are required to provide a “primary aggressor analysis” and frequently arrest multiple parties in one dispute. Fast-track practice makes it easier for prosecutors, who may feel incentives to achieve high conviction rates, to convict all participants. Id. at 12.

On the other hand, misdemeanor cases without prospect of incarceration are a category to which we give less procedural protection and tolerate more inaccuracy. Jury trial and defense counsel are not constitutionally required in such cases, see Alabama v. Shelton, 535 U.S. 654 (2002), which reflects a constitutional policy to accept higher rates of inaccuracy in low-stakes cases so that states can distribute resources to cases where more substantial liberty infringements are at stake.
4. Federal criminal dockets and restrictive discovery. Return now to the setting in which broad discovery is less feasible because competing concerns about witness safety and investigative confidentiality are much greater—federal courts, which see many more prosecutions of complex, multi-party crimes than make up typical state dockets. To address these concerns arising from large-scale, ongoing investigations involving especially dangerous defendants, federal rules restrict discovery in order to hide witness identities from defendants before trial. But that also weakens the reliability of the fact generation process; it does because adjudication is supposed to supplement the investigation and detect its weaknesses. But if adjudication is weak, we need a stronger investigation stage, and we cannot achieve that the same way many state systems do, by broadening discovery and deposition rights. Two options present themselves. The first is to disaggregate the cases that need the security of restrictive discovery from those that don’t (that is, those that look more like routine state cases). The next is find ways other than expansive disclosure to build reliability checks into investigation practice.

a. Disaggregating cases under narrow discovery rules. 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, which prosecutors often give when they conclude witness safety and ongoing investigations are not threatened (and when it speeds settlement because defendants will recognize the strength of the government’s case). But prosecutors are tempted to make disclosure judgments not only on witness-safety grounds but on strategic ones as well; they are least likely to expand discovery not only when investigations are threatened but when the government’s case is weak, regardless of witness-safety concerns.

One option for reform is to keep the rule but change the decision-maker. Narrow discovery rules could contain a provision by which defendants request broader discovery and judges, rather than prosecutors, decide whether witness-safety and investigative-confidentiality justify restrictive discovery. Federal courts lack such a rule, but some district judges have devised a limited substitute; they occasionally order early disclosure of some evidence by relying on Brady v. Maryland, which requires disclosure of exculpatory evidence. The judicial decision requires information that is mostly in the

159 This became less true as federal criminal law expanded and many federal dockets came to look more much more like traditional state dockets, especially with large numbers of routine drug crimes. After 9/11, federal dockets may be shifting back somewhat to traditional federal criminal law concerns.
160 See supra note __ [citing Douglass, Fordham L. Rev.]; J. Jacoby, supra note __, 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).
161 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 otherwise rules 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.”).
162 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, despite Jencks Act rule that prosecutors need not disclose them under after witness’s trial testimony); compare United States v. Algie, 667 F.2d 569 (6th Cir. 1982) (reversing district court order that ordered early prosecution
prosecutor’s possession, and some would have to be presented to judges ex parte. Some prosecutors believe judges cannot fully appreciate risks to witness safety; prosecutors have a personal stake in dangers to which they expose their witnesses that judges (especially if they lack prosecution or even criminal-docket experience) might not. 163

The latter 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. With the expansion of federal criminal law, many federal cases look a lot like state cases;164 there is surely a large set in which there is no real ambiguity about on-going investigations 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.165 And they can take account that witness-safety risks can be addressed as well with pretrial detention166 and restrictions commonly used in domestic violence contexts such as restraining orders barring defendant-victim contact or moving victims to protective shelters.

b. Alternative evidence-access practices under narrow discovery. For cases in which narrow discovery is justified, further possibilities exist to balance witness-safety and confidentiality concerns with heightened interests in pretrial assessment of evidence reliability. Discovery and pretrial detention policies could present defendants in such cases with a new set of choices. Judges could offer full (or fuller), early access to the
investigation file not only on the condition not that defendants remain in detention until disposition, but that they have no contact with visitors (and perhaps even other inmates) other than their attorneys. Further, a judicial officer—a marshal, law clerk or probation officer—could monitor attorney-client communications. Such precautions could allow broader disclosure and thereby strengthen the evidentiary record through adversarial scrutiny while guarding against risks to evidence sources.

c. Judicial intervention in fact development. Despite these kinds of reforms, 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 that process in the pretrial stage. But, especially if states continue to move away from narrow discovery, those restrictions affect only a small portion of American criminal practice. Moreover, there is another option for improving fact-finding in the investigative stage: giving the judiciary a larger role. That role need not mimic European investigative magistrates’ capabilities. It can build on American judges’ existing traditions of involvement in fact development with limited, specific expansions of judicial fact investigation and review. This expansion provides a third means (beyond structures internal to the executive branch and adversarial process) to strengthen factual records before adjudication. And it can avoid many of the witness-safety and enforcement-confidentiality concerns that justify narrow discovery.

C. Improving Evidence Reliability with Judicial Involvement

1. Existing judicial practices of evidence generation and review. American judges have distinct limitations to their role in adjudication. They have no routine investigation power independent of the parties and, unless parties consent otherwise, juries rather than judges find facts. These limits on judges’ roles reflect one manifestation of a perceived need to limit government power—judicial power. Yet these limits are odd for a couple of reasons, more so now than at the time of their creation. First, we have seen a growth in executive power in criminal law and a diminishment in mechanisms to constrain it. Yet these limits are odd for a couple of reasons, more so now than at the time of their creation. First, we have seen a growth in executive power in criminal law and a diminishment in mechanisms to constrain it. We have constrained one form of government power while expanding another, and it is not self-evident that executive power is less worrisome than

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167 Cf. DOJ policy on monitoring attorney-defendant communications.
168 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 bar disciplinary action for violations, and perhaps something analogous to a security-clearance pre-screening 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).
169 Arguable exceptions appear in specialized contexts, as when judges empanel their own experts in mass tort litigation or appoint special masters in large-scale public law litigation. See infra notes ___ and accompanying text. See Chayes, supra note ___, at 1300-02.
170 See generally A. Goldstein, supra [The Passive Judiciary]. More recently, with the advent of sentencing guidelines in the last quarter-century, many jurisdictions have constrained judges’ sentencing authority as well, the one area in which they traditionally had broad authority. See generally, Kate Stith & Jose Cabranes, Fear of Judging (1998) (describing loss of judicial sentencing power under federal guidelines).
judicial, especially with the jury’s decline.\textsuperscript{171} Limits on judicial power constrain a means to counter-balance 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 a comfort with some forms of heavy judicial involvement in fact production and evaluation. Contemporary judicial practice has innovated models for judicial involvement in pre-adjudication fact development, and these provide clues to an expanded judicial role in creating the factual record and checking executive action.

There is a much-noted trend in the last thirty years or more for judges in civil litigation to take a much more active role in pretrial discovery and negotiation than was traditional for common law judges.\textsuperscript{172} At least in the subset of federal civil practice dealing with large class actions against public institutions (prisons, mental hospitals, school systems) or corporations, judges have developed, in Judith Resnik’s well-known description, a “managerial” judicial role.\textsuperscript{173} The noteworthy innovations of managerial judging include detailed, fact-intensive, substantive judicial involvement in pretrial litigation. There was for a time much debate around the appropriateness of judges being so actively involved in discovery and pretrial settlement negotiations. 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 fit the common law model of disinterested judges during the trial and post-trial phases. 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—the appropriateness of supervising discovery and settlement efforts at the cost of judging gaining detailed, pretrial knowledge of facts—has filtered more broadly into civil practice. 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.

Civil judges also have taken advantage of judges’ limited ability to generate evidence as well as manage the parties’ development of it. Civil judges have long had the capacity to appoint special masters for complex tasks analogous to investigation and fact assessment was well as remedy design and administration.\textsuperscript{174} Moreover, evidence rules allow both civil and criminal judges not only to examine witnesses\textsuperscript{175} but to call their

\textsuperscript{171} In early American criminal practice, the prosecutor was a marginal, relatively weak player, see Jacoby, supra note __, at 273-76, as he was in English criminal practice, which had a stronger tradition to private prosecution. As a result, constraining judicial power in criminal practice meant constraining the main mechanism of government power. But executive power has since greatly expanded in criminal practice, while judicial power has not.

\textsuperscript{172} See Chayes, supra note __, at 1284 (describing “the emerging model of ‘public law litigation’” and the “judge [as a dominant figure] in it, in contrast to the “traditional adversary relationship” of party control).  

\textsuperscript{173} Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374 (1982); see also Chayes, supra note __, at 1297-98.

\textsuperscript{174} See Amanda Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 Cornell L. Rev. (forthcoming 2005; available at ssrn.com/abstract=630613) (discussing judicial traditions of special master investigators); Chayes, supra note __, at 1300-01.

\textsuperscript{175} See, e.g., Fed. R. Evid. 614(b).
own witnesses and supplement the parties’ evidence. Especially in civil contexts of mass tort litigation, judges have used this power aggressively to empanel experts whose views are effectively dispositive for large classes of cases. The real bright-line limit on American judging bars merely fact investigation outside the presence of the parties. American judges may have pretrial knowledge of facts, supplement those facts, take part in settlement negotiations, and otherwise intrude on party control of evidence.

Despite these practices on the civil side, criminal judges have in many respects receded to a peripheral role. Some reasons for that are rule-based limitations. In contrast to civil judges’ active involvement in fact development and encouragement of settlement negotiation, criminal judges are forbidden in many jurisdictions from taking part in the parties’ plea negotiations. In the context of federal sentencing, the Sentencing Guidelines clearly—and largely intentionally—restrict judicial authority and shift power to prosecutors. Further, criminal judges minimize their own involvement in aspects of plea bargaining even where they have formal power to do more. Adopting the judge’s traditional passive role to fact finding, judges routinely fulfill their obligations to find a factual basis for guilty pleas by relying on parties’ fact summaries rather than judges hearing witnesses and other evidence.

Yet despite these restraints, American criminal courts have a less-noticed counter-tradition; they retain long-standing capacities to conduct or initiate specialized fact-finding. In limited contexts, judicial agents regularly conduct investigations. Probation officers in most jurisdictions are agents of the judicial branch. They have long done factual investigations (requiring witness interviews and document research) on defendants’ backgrounds, circumstances surrounding crimes, and post-crime conduct.

176 See Fed. R. Evid. 706, 614(a); [and state counterparts].
178 It is grounds for disqualification that a judge would conduct fact investigation on her own, without the parties (that is, to act something like a European investigative magistrate). See, e.g., Tom Jackson, Prosecutors Want Judge Off Sniper Case, Citing Improper Probe, Wash. Post, Sept. 9, 2004 (describing objections to a trial judge who allegedly interviewed witnesses on his own). Contrast Mirjan Damaska, The Faces of Justice and State Authority ___ (1986) (describing panels of European judges in which one is assigned to gather evidence they the panel evaluates).
179 See, e.g., Fed. R. Crim. Pro. 11(c); Colo. Rev. Stat. Ann. § 16-7-302 (1) (“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) (“...we 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 suggested 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.”); Supreme Court of Virginia. Rule 3A:8(c)(1) (“In any such discussions under this Rule, the court shall not participate.”); Rev. Code Wash. Ann. § 9.94A.421 (“The court shall not participate in any discussions under this section.”)
180 The implications of Blakeley on federal sentencing are unsettled at this point, and thus so is its implication for the judicial role. Invalidating the guidelines could increase judicial power if they are replaced with traditional judicial discretion in sentencing. But Blakeley’s plain meaning is about transferring judicial fact-finding power to juries, which could translate in practice to party negotiation over such fact determination, leaving judges with little more sentencing authority in a post-Guidelines world.
181 Fed. R. Crim. Pro. 11.
which judges use for sentencing. Such judicial investigations routinely provide information that neither party would disclose.

Grand juries also are a reminder—though now a symbolic rather than active one—of judicial fact-investigation capacity. While grand juries have long since become de facto tools of prosecutors, 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, independent of police or prosecutors, to conduct investigations into crimes, especially (as in some cases of public corruption) where police and prosecutors may be unreliable due to conflicts of interest. And federal courts have the constitutional authority to appoint prosecutors independent of executive-branch control.

Finally, in addition to generating facts, criminal judges can have some capacity to evaluate them—and influence parties’ evaluation—pretrial. In contrast to federal practice, there is a modest trend among states to allow judicial involvement in plea negotiations; some jurisdictions are comfortable with judges influencing plea terms and conveying evidence assessments to defendants. Moreover, criminal judges can learn

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183 Apparently only one state continues to authorize courts of inquiry. See Tex. Code Crim. Proc. Ann. art. 52.01-52.09 (Courts of inquiry conducted by district judges); see also Jim D. Bowmer et al., Peace Officers and Texas’ New Code of Criminal Procedure, 17 Baylor L. Rev. 268, 299 (1965) (describing briefly the possible unconstitutionality of the prior “courts of inquiry” statute and the resulting redraft in 1965); Ralph Blumenthal, Rarely Used Courts Investigate El Paso Police and District Attorney, NY Times, June 4, 2004, at A16. For a recent historical example, see State v. Moynahan, 325 A.2d 199 (Conn. 1973). Moynihan describes Conn. Statute § 54-47, since repealed, that provided for a judicially initiated “investigative 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” but “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. at 204.


185 For examples of jurisdictions permitting judicial involvement in plea negotiations, see, e.g., Ariz. R. Crim. Proc.17.4(a) (“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.”); Calif. Code § 1192.7(b); State v. Warner, 762 So. 2d 507, 513-14 (Fla. S. Ct. 2000) (court may participate in plea bargaining to a limited extent upon the request of a party); Hawaii Rules of Penal Procedure. Rule 11(e) (“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, 953-4 (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.”), but for a vivid account of judicial practice in New York, see Frontline: The Plea (PBS) available at http://www.pbs.org/wgbh/pages/frontline/shows/plea/. For a less heavy-handed example of judicial involvement, this one under Arizona’s rule, see ABC News, “State v. Pelofske” (broadcast aired June 2002; available on videotape).
much 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; that requires learning enough facts to prejudge a case worthy of incarceration. In serious cases, judges need substantial pretrial fact information to determine whether defendants, under *Ake v. Oklahoma*, are entitled to funds for expert assistance on “significant” issues in the case; 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.

At least in 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 the public role in substantive supervision of criminal adjudication to the more partisan public actor in the process, executive branch 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-a-vis the parties forecloses options for separated-powers-style strategies of adjudication reform. At the same time, existing practices of expansive judicial involvement provide bases for expanding the judicial role in criminal investigation in ways that accord with established traditions.

2. Judicial review of investigative files. With that kind of history and contemporary judicial involvement, consider one low-cost means for bringing judges into 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 get sufficiently full accounts of evidence in plea hearing to conclude a plea is well-grounded in fact; it would be a modest conceptual shift (though a larger practical burden) to require the parties to present that factual basis in a written file, before the hearing. Especially in those jurisdictions in which judges take an active role plea negotiations, there is strong justification for the judge having a well developed evidence file much earlier, at the start of those negotiations.

Greater judicial pretrial access to evidence could serve several purposes. For one, the rationales that justify restrictive discovery practices between prosecutors and defendants do not hold 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, sometimes having judicial clerks review those files). The rule might define mandatory components of the file, such as *Brady* material, the criminal record of witnesses, and

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186 See Argersiner, Scott, Shelton.
187 470 U.S. 68, 83 (1985) (defining a due process right for indigent defendants to expert assistance for issues that are “significant factors” in a criminal trial).
188 Fed. R. Crim. Pro. 11.
189 On judges’ temptation and need to use clerks for substantive work, see Kozinski, supra note __.
190 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 Death Penalty Reform Act, Ill. Pub. Act. 93-0605 (Nov. 19, 2003), available at
statements on whether investigators are aware of witnesses and evidence sources that were not pursued. This practice would strengthen rationales for prosecutors continuing to obtain discovery waivers from defendants; judges would review a fuller set of information on each case. This gives judges a meaningful capacity to assess the appropriateness of bargains, including terms such as discovery waivers.\footnote{191} It allows judges to act on their assigned role of assuring an accurate factual basis in each given disposition. And it does so in a way that compensates for defendants’ compromised ability to fulfill that role due to limited defense counsel resources, pre-trial detention, and the incentives of bargains backed by trial penalties. The rule forces information disclosure to another player who can check executive-branch judgment, but without raising the concerns, such as witness intimidation or public revelation of law enforcement strategy, that underlie restrictions on discovery to defendants.\footnote{192}

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

Courts could do so generally, as a means to assure 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 conviction, such as high-profile terrorism cases, death penalty cases, and other notorious cases such as child abuse prosecutions; public and political pressure creates special risks of compromising law enforcement judgment on evidence strength.\footnote{193} Or judges could depose only witnesses who are critical to the government’s case and fall into defined

\footnote{191} In cases in which the bargain does not dictate the sentence, it gives judges some additional information for exercising sentencing discretion. Though note what kind of information this is likely to be. Parties still disclose and argue evidence on sentencing factors, and judges still often have pre-sentence reports prepared by their probation officers. Investigative file review allows judges to adjust sentences on the same strength-of-evidence basis that underlies many pleas.

\footnote{192} See \textit{Ruiz} (citing disruption and confidentiality of law enforcement strategy as a rationale for limiting discovery to defendants).

\footnote{193} Scholars of wrongful convictions identify public attention as a factor that correlates with wrongful convictions. See Huff, supra note \_\_ at 17 (discussing “community pressure for conviction”). This seems clearly to have been the case in the recent, erroneous, Koubriti federal prosecution. See Danny Hakim & Eric Lichtblau, \textit{After Convictions, the Undoing of a U.S. Terror Prosecution}, N.Y. Times, Oct. 7, 2004 (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. See supra note \_\_ for a brief description of the case. Public attention was also a likely cause for the \textit{Brady} violation of evidence concealed by the state in Strickler v. Greene, 527 U.S. 263 (1999), which as a routine, high-profile murder in a small town (Harrisonburg, Virginia).
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 and the state’s written disclosure of testimonial incentives and the informant’s background. 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 cases, and it may be waived by defendants; the hearing is not required before plea bargains. But the requirement singles out a particularly untrustworthy source of evidence for an additional hurdle of admissibility: judges must rule on witness reliability before juries do.

In a broader version of such a rule—one that applied to larger class of witnesses or to all felony cases—judges could employ judicial agents on the existing models of special masters or probation officers to conduct interviews, and those agents could supplement with the kind of background investigation on the witness that the judiciary routinely does now on defendants in pre-sentence investigations—identifying factors such as criminal records and pending charges. (For jailhouse snitches, they might also interview police officers and prosecutors handling the informant’s case, a procedure that might expose informant deals occasionally concealed by the state—and thereby create more incentives against concealment.)

If parties don’t participate in the hearing, judicial depositions could be disclosed to both parties shortly before trial, to improve adversarial practice. Alternately, 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 provide merely a cursory finding of reliability or a report only of factors indicating unreliability, such as informant deals.

While judges don’t have the same partisan incentives as defendants do in conducting such depositions, they don’t need it; their task is not the same. Judges in this mode are not seeking new evidence but confirming the reliability of evidence parties present. They do, however, have a significant investment in the integrity of evidence employed in the ir courts. In this sense, such depositions depart little from American judges’ traditional roles; they now have the ability to question party witnesses in pretrial and trial settings; interviewing an informant’s arresting officer or prosecutor are analogous both to judges calling their own witnesses and to probation officers’ witness interviews for presentence reports.

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195 Probation investigations uncovering an informant’s testimonial incentives or indicia of eyewitness unreliability are forms of additional evidence, but they are evidence the state is required to disclose, so judicial investigations are merely a backstop against state disclosure violations.

196 See, e.g., FR.E. 614.
The important point is not that investigation review has been partially transferred to a “neutral” judicial officer rather than a “partisan” prosecutor or police investigator. The point is rather 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. That moderates somewhat the executive’s dominance on fact development. It also modestly reduces our dependence on defense counsel, at trial or in pleas, to scrutinize state evidence reliability. Defense advocacy, we know, is a structural check that is especially hard to maintain politically, because it associates this public, government-checking function with private criminal suspects’ self-interest. But here again we see a way to shift some of this function to another actor, so that we can serve that function through a means likely to be more politically sustainable. And it does so without limiting defendants’ ability to manage their own defense, and without creating risks posed by some defendants to the integrity of the evidentiary record.

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 judicial role that is a product of institutional incentives on judges. American judges have no tradition of regularly taking responsibility for the accuracy of evidence in the liability stage; in routine cases, they are used to leaving the facts to the parties. The motivation for intense involvement in pretrial fact development, evidence evaluation and settlement discussion mostly has been efficiency—docket management—rather than accuracy. Even bold moves such as court-created expert witness panels or assertive engagement in 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 a judicial responsibility for accuracy in addition to the engrained commitment to docket efficiency likely requires more than creating more mechanisms for judges to do so. It requires a shift in long-standing judicial culture for bearing little responsibility for factual accuracy, and that probably depends on restructuring 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

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

198 See Chayes, supra note __, at 1286 (in “the traditional conception of adjudication … the trial judge … was passive” with “limited involvement” in fact finding); A. Goldstein, supra note __; M. Damaska, supra note __, at 168 (describing the “essentially passive” role of judges in “conflict resolution” justice systems); id. at 205-06 (in systems with features like American courts, 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 needs prodding by the parties”).

199 But see Chayes, supra note __, at 1287-98 (noting that, as public law litigation began to have wide impact beyond the parties, judges sought ways to improve the reliability of fact finding).
way official monitoring of trial judges’ docket management creates part of the incentive for speedier disposition, or monitoring of sentencing patterns affects sentencing decisions. But dockets and sentencing are easier to measure and monitor than factual accuracy; no plausible tracking system would discover more than very occasional cases of factual inaccuracies. We can monitor rates or consistency of prophylactic practices, like judicial depositions, but not results. It is unclear whether judicial roles and incentives, at least without non-waivable procedures, can shift substantially toward taking responsibility for accuracy as well as efficiency so that judges can help make up for deficits in the shifting institutional practices of adversarial adjudication.

III. Conclusion: Structural Options for Accuracy

Legal systems evolve, and the history of criminal adjudication demonstrates tremendous malleability. We don’t have a Platonic ideal of, or even widespread agreement on, a fully developed model for an adjudication process that maximizes accurate fact-finding while properly guarding against government abuse of power. Viewing the various components functionally, we see that different institutions and arrangements have served the same purpose at different times. With the rise of plea bargaining, we substituted defendant’s self-interest for the jury as the main structural check on the executive. The popular election of prosecutors, rather than judicial supervision or an appointment system with independence from the executive (both former practices), changed the practice of many prosecutorial tasks, especially quasi-judicial ones like charge screening and charge dismissal. The rise and partial fall of defense attorneys reflect evolution in means to check prosecutors and improve truth finding.

We can recognize some notable deficiencies in our current system. The multiple incentives on prosecutors are one source; the effective political limits of depending on defense counsel as a structural check on government action is another. Yet variations in existing adjudication practice (let alone imaginable variations) reveal 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—probably more than—defense-attorney scrutiny. Thus improving crime labs’ reliability can replace part of the function of diminished defense counsel, and it does so in a way likely to garner more sustained political support. Crime labs don’t get blank checks from legislatures, but tying funding to rigorous outside accreditation is easier than, say, ensuring defense counsel are diligent.

Expanded and mandatory evidence disclosure restructures costs in politically sustainable ways as well. Disclosure is costly for prosecutors, but it is usually cheaper than defense teams digging up the same evidence independently (which is not always possible). And it distributes the cost of defense possession-of-evidence from defense teams to prosecutors. Prosecutors routinely face funding challenges, but rarely are they

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 King & Rosevelt 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).
worse challenges than defense attorneys’.

Expansive disclosure allows defenders, constrained by funding, to allocate limited time from evidence gathering 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, but that approach may be able to 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 access to evidence files, and judicial depositions, would impose costs on courts. But again those practices provide a way to shift some of the structural burden of evidence scrutiny from defense attorneys to the moderately more politically appealing entity of the courts. Defendants and judges have different motives for evidence scrutiny, and judges’ motives may be insufficient. They may want to move cases rather than ensure accuracy. But defendants’ motives are mixed too; the guilty and innocent both want to discredit state evidence—the guilty have little interest in accuracy. Neither has perfect motives, and that probably counsels for input of both. But if recurrent legislative disfavor of defense funding is partly a policy judgment about defense motives, then a larger role for judges taking over some of this structural role of checking executive action is a plausible, 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 broaden a commitment to reliable fact finding are a shift in adjudication’s orientation in two ways. They represent a strategy of strengthening investigation because we distrust adjudication to detect fact errors, an inversion of the traditional model in which strong adjudication tools check partisan fact gathering. Additionally, our adversarial model has long balanced fact-finding against other interests, particularly conflict resolution and efficiency. Compromises are inevitable; cases must end, and they must end within 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 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. The early cases establishing right to counsel—Powell

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201 See Stuntz, supra note ___ [107 Yale] at 8-9 (documenting police and prosecutors’ greater success at legislative funding than defense attorneys).

202 Cf. Alex Kosinski, The Appearance of Propriety, Legal Affairs (Jan.-Feb. 2005) (describing ethical challenges for judges arising from increased caseloads, including the temptation of give many cases cursory consideration).

203 Though the guilty have a real and legitimate interest in accuracy if errors lead to excessive charges and punishment.

205 In a line of cases defining the limitations of habeas corpus, 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 that otherwise might be barred by procedural rules. In McCleskey v. Zant, the Court noted that the filing of successive habeas petitions should be permitted when necessary to avert a "fundamental miscarriage of justice." 499 U.S. 467, 495 (1991). That requirement can be satisfied by presenting "new facts [that] raise[ ] sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial." Schlup v. Delo, 513 U.S. 298, 317 (1995). In Herrera v. Collins, the Court said its habeas jurisprudence does not
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 cases\(^{206}\) are accuracy-bolstering strategies. Proposals for capital murder verdicts under an unprecedented standard of “beyond all doubt”\(^{207}\) fit this trend as well. But our tradition contains more and better tools for extending an expanded commitment to truth finding.

The animating ideas of adjudication are 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 it is clear that the strategy of pursuing accuracy through adversarial processes—through, in particular, well-equipped defense counsel, the model that arose in the middle decades of the twentieth century\(^{208}\)—has reached a political limit. Broadly speaking, legislatures are interested in accurate criminal adjudication, but they don’t view zealous defense attorneys as the best way to achieve that goal. That means adversarial process won’t be the reliable means for assuring the accuracy of fact gathering that the traditional model implies. Defendants’ partisan challenge to the state must become—and is becoming—a less dominant tool for serving a renewed popular commitment to accuracy. Other actors and institutions, with different mixes of motives and weaknesses, are starting to take on—and can take on—more of that task. And those accuracy-enhancing practices are occurring more often throughout the continuum of criminal process.


\[^{208}\] The dates reference Powell (1932) through Gideon (1963) and post-Gideon cases.