BURDENS OF PROOF IN CRIMINAL PROCEDURE

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ABSTRACT

The Supreme Court's haphazard approach to allocating burdens of proof in criminal procedure has created a system in which constitutional rights can be rendered meaningless simply because defendants are required to prove things they cannot possibly know. Even though allocations of the burden of proof often drive litigation outcomes, the Court has failed to establish clear burden allocation structures for cases arising under the Fourth, Fifth, Sixth, and Fourteenth Amendments, leaving lower courts split about how to allocate the burdens. When the Supreme Court does allocate burdens, it often does so without explanation or consideration of key factors. Recent Supreme Court decisions have exacerbated the problem by subtly shifting burdens of proof to defendants without acknowledgment or justification, creating practical challenges for defendants who lack access to the information necessary to meet those burdens.

This Article provides a framework for analyzing burden allocation in criminal procedure under both federal and state law. It unpacks three categories—efficiency interests, fairness issues, and policy concerns, describing the factors within each category and discussing how each factor has informed and should inform the allocation of criminal procedure burdens. It argues that courts and legislators often overemphasize efficiency interests and policy concerns about system preservation at the expense of fairness and constitutional values. The Article then proposes solutions including strategic burden-splitting and burden-shifting regimes and a greater emphasis on fairness factors and rights-specific interests when allocating burdens of proof in criminal procedure.

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INTRODUCTION

One of the most important practical considerations shaping litigation outcomes is the allocation of the burdens of proof. In the domain of criminal procedure, that allocation is a mess. The United States Supreme Court has given no guidance on how to allocate burdens with respect to several

criminal procedure rights, leaving lower court splits that significantly affect the scope of constitutional protections. Even when the Court does assign a burden of proof, it often does so in ways that contradict basic considerations that should guide burden allocation. It is past time to reform and systematize this area of law with a coherent theory of where the burdens should lie.

The Supreme Court's Fourth Amendment jurisprudence demonstrates the scope of this problem. The Court has never clearly established which party bears the burden of proving that a search was unreasonable. Some jurisdictions place the burden of proof on the defendant to establish the unreasonableness of warrantless government searches.[1] That burden allocation can be dispositive because it requires the defense to prove the lack of probable cause in the abstract without information about why the government thought its tactics were permissible.[2] Other courts place the burden of demonstrating reasonableness on the prosecution or split the burden, which makes Fourth Amendment claims more viable in those jurisdictions.[3]

Even when the Supreme Court clearly allocates the burden of proof on a criminal procedure issue, it often does so by fiat without any explanation or practical guidance. In *Bumper v. North Carolina*,[4] for example, the Court announced, "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."[5] The Court did not explain why it was allocating the burden to the prosecution. When a court assigns a burden without giving any rationale, it is less likely to assign the burden in a thoughtful way than when it goes through the process of considering reasons.

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1. *See, e.g.*, People v. Cunningham, 314 P.3d 1289, 1291 (Colo. 2013) ("[W]e have made no distinction between warrantless and warrant cases in holding that the defendant, as the moving party, bears the burden of going forward to show a violation of his or her Fourth Amendment rights."); State v. Shults, 136 P.3d 507, 511 (Mont. 2006) (citation omitted) ("A criminal defendant who seeks to suppress evidence has the burden of proving that the search was illegal.").

2. *See* Kevin W. Saunders, *The Mythic Difficulty in Proving a Negative*, 15 SETON HALL L. REV. 276, 280–82 (1985) (explaining that it is much more difficult for a party to prove a universal statement like "there always . . ." or "there never . . ." than it is to prove an existential statement such as "there exists an . . .") (quoted language is author's formulation).

3. *See, e.g.*, United States v. Williams, 722 F. Supp. 3d 979, 987 (D.N.D. 2024) ("In the case of a warrantless search, the government bears the burden of establishing an exception to the warrant requirement."); State v. Irwin, 252 A.3d 471, 478 (Del. 2021) ("The State has the burden to prove by a preponderance of the evidence that the search or seizure conducted without a warrant was justified."); *see also* 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, & ORIN S. KERR, CRIM. PROC. § 10.3(b) (4th ed. 2024) [hereinafter LAFAVE, ET AL.] (discussing the split between jurisdictions and collecting cases).

4. Bumper v. North Carolina, 391 U.S. 543 (1968).

5. *Id.* at 548.

And in the absence of any explanation, the assignment of burdens provides lower courts with little guidance about how to handle situations other than the one specifically addressed.

The frequent lack of explanation for why burdens are allocated as they are is particularly troubling because the allocation of burdens can be complex—and indeed, the best allocation frequently requires attention to that complexity. What lawyers often call "the burden of proof" is actually four separate things.[6] First is the burden of raising a contention.[7] Second is the burden of producing some evidence to support the contention, typically known as the burden of production.[8] Third is the burden of convincing the court on the merits with respect to the contention, typically known as the burden of persuasion.[9] And fourth is the quantum of evidence required to satisfy the burden of persuasion, typically known as the standard of proof.[10]

In the simplest scenario, the same party would bear all of the burdens, and the standard of proof would just be more-probable-than-not. But many cases call for more complicated arrangements in which the burdens are divided between the parties and the standard of proof is higher or lower than the default civil standard. For example, in *Batson v. Kentucky*[11]—the leading case on constitutional challenges to the use of peremptory strikes in jury selection—the Supreme Court disentangled the component parts of the burden of proof.[12] First, it assigned a burden of production to the defense to make out a prima facie case of racial discrimination with respect to the prosecutor's use of peremptory strikes.[13] Then, it shifted the burden of

6. *See* Beth A. Colgan, *The Burdens of the Excessive Fines Clause*, 63 WM. & MARY L. REV. 407, 413 (2021) (breaking the "burden of proof" into these four component parts).

7. *See id.* One could argue about whether this is actually a burden of "proof," since it does not require proof of anything. It is comparable to the burden of pleading in civil litigation. *See generally* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271 (1969) (discussing the burden of pleading in the civil context).

8. *See* ROBERT P. MOSTELLER, ET AL., MCCORMICK ON EVIDENCE § 336, at 763–64 (8th ed. 2020) [hereinafter MCCORMICK ON EVIDENCE] (explaining the burden of production).

9. *See id.* (explaining the burden of persuasion). Wigmore famously called this "the risk of nonpersuasion." 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2485, at 283 (Chadbourn rev. 1981); *see also* Ronald J. Allen, *Burdens of Proof, Uncertainty and Ambiguity in Modern Legal Discourse*, 17 HARV. J.L. & PUB. POL'Y 627, 633 (1994) ("[T]he burden of persuasion merely provides the decision rule under uncertainty.").

10. *See* Lawrence B. Solum, *You Prove It! Why Should I?*, 17 HARV. J.L. & PUB. POL'Y 691, 693 (1994) ("[T]he standard of proof tells the jury what to do if it believes that the evidence leaves it somewhere between certainty and ignorance.").

11. Batson v. Kentucky, 476 U.S. 79 (1986).

12. *Id.* at 96–98; *see also* Purkett v. Elm, 514 U.S. 765, 767–68 (1995) (describing the *Batson* burden structure).

13. *Batson*, 476 U.S. at 96–97.

production to the prosecution to offer a race-neutral explanation for its strikes.[14] Finally, it gave the defendant the burden of persuasion to prove purposeful discrimination.[15] *Batson* is a rare example of the Court allocating burdens clearly. In other cases, the justices have divided over how to allocate the burdens of proof, leaving lower courts confused.[16]

In its more recent criminal procedure cases, the Supreme Court has sown additional confusion by adopting presumptions that subtly shift what were once clearly established prosecutorial burdens of proof to the defense without acknowledging the significance of the change. A presumption is "a standardized practice, under which certain facts [or propositions] are held to call for uniform treatment with respect to their effect as proof of other facts [or propositions]."[17] Decision-makers use presumptions to shift burdens of production or persuasion or to make it easier for a party to satisfy its burden.[18] In the Fourth Amendment context, when the Court first adopted a good faith exception to the application of the exclusionary rule, it assigned the burden of proving that the police acted in good faith to the government.[19] But in recent years, the Court has started presuming that police are good faith actors and has suggested that defendants must show that the police acted intentionally or recklessly, or that their behavior was part of a systematic problem to overcome the presumption of good faith.[20] This effectively shifts

14. *Id.* at 97–98.

15. *Id.* at 98.

16. In *Florida v. Riley*, 488 U.S. 445 (1989), for example, the Justices disagreed in dicta on which party had the burden of establishing that a search had taken place under the Fourth Amendment with five Justices arguing that the burden should be on the defendant to show that the use of helicopters at 400 feet was so rare that there was a reasonable expectation of privacy and four others saying that the burden should be on the prosecution to say that helicopter flight at that altitude was not rare. *Compare id.* at 455 (O'Connor, J., concurring) (defendant should have burden), *with id.* at 465–66 (Brennan, J., concurring) (prosecution should have burden), *and id.* at 467–68 (Blackmun, J., dissenting) (prosecution should have burden). *See also* LAFAVE, ET AL., *supra* note 3, § 10.3(b) (noting that lower courts are now split on this issue and collecting cases).

17. MCCORMICK ON EVIDENCE, *supra* note 8, § 342, at 724.

18. *See id.* §§ 342–44, at 724–59 (discussing different kinds of presumptions); *see also infra* Part I.A.4.

19. *See* United States v. Leon, 468 U.S. 897, 924 (1984) (noting that "the prosecution should ordinarily be able to establish objective good faith without substantial expenditure of judicial time").

20. *See, e.g.*, Herring v. United States, 555 U.S. 135, 146 (2009) (presuming that police are acting in good faith when they rely on erroneous warrants in police databases unless the police "have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests" or, "[i]n a case where systemic errors were demonstrated" in the police database system). The presumption that police errors are isolated mistakes has also caused a shift in the allocation of the burden of proof regarding when police discovery of evidence is sufficiently attenuated from illegal action to preclude suppression. In *Brown v. Illinois*, 422 U.S. 590 (1975), the Court held that the government bears the burden of proving that police discovery of evidence is attenuated

the burden of persuasion to the defendant to disprove good faith.[21]

Similarly, in the Fifth Amendment context, *Miranda v. Arizona*[22] imposed a "heavy burden" on the government to establish that a criminal defendant's *Miranda* waiver was made knowingly, intelligently, and voluntarily.[23] But, in *Berghuis v. Thompkins*,[24] the Court held that "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent."[25] *Thompkins* diluted the government's burden substantially, creating a presumption that a waiver is adequate if the subject understands the words of the warning and is not coerced. In those situations, which cover the vast majority of all cases in which *Miranda* warnings are read, *Thompkins* effectively shifts the burden of persuasion to the defendant to disprove waiver.

Importantly, in all of these decisions, the Court never acknowledges that it is shifting the burden of persuasion to the defense, and it never considers whether defendants have access to the necessary information to satisfy these newly imposed burdens.[26] Not surprisingly, the Court's

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from an illegal stop or search. *Id.* at 604. Because the flagrancy of the police misconduct is an important factor in the attenuation analysis, this meant that the government bore the burden of proving that the police misconduct was not flagrant. *Id.* But, in *Utah v. Strieff*, 579 U.S. 232 (2016), the Court noted that it would presume that an illegal stop resulted from an "isolated instance of negligence that occurred in connection with a bona fide investigation" unless there was evidence that the unlawful stop was part of "systemic or recurrent police misconduct." *Id.* at 242. This seems to shift the burden to the defense to prove flagrancy through evidence of repeated violations.

21. Professor Moreno explains this shift as follows:

> After *Herring*, a defendant must first prove by a preponderance of the evidence that a search was illegal. Once this burden has been met, the defendant must further prove, using direct or circumstantial evidence: (1) that the arresting officers acted deliberately, recklessly, or with gross negligence; or, (2) that the illegality was the result of recurring or systemic police negligence.

Joëlle Anne Moreno, *Rights, Remedies, and the Quantum and Burden of Proof*, 3 VA. J. CRIM. L. 89, 98–99 (2015). *See also* Wayne R. LaFave, *The Smell of* Herring: *A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 786–87 (2009) (arguing that the burden of proof should be on the prosecution but acknowledging that it is an open question after *Herring*); Orin Kerr, *Opinion Analysis: The Exclusionary Rule is Weakened But it Still Lives*, SCOTUSBLOG (June 21, 2016, 9:35 PM), https://www.scotusblog.com/2016/06/opinion-analysis-the-exclusionary-rule-is-weakened-but-it-still-lives [https://perma.cc/47Q3-THB5] ("In theory, the burden of proving attenuation is on the government," but after *Strieff*, it appears that, "in practice, . . . a defense attorney needs to build up a record to show purpose and flagrancy").

22. Miranda v. Arizona, 384 U.S. 436 (1966).

23. *Id.* at 475.

24. Berghuis v. Thompkins, 560 U.S. 370 (2010).

25. *Id.* at 384.

26. *See, e.g.*, Florida v. Harris, 568 U.S. 237, 247 (2013) (presuming that certified police dogs are reliable and shifting the burden of persuasion to the defendant to disprove a dog's reliability without ever

unacknowledged burden-shifting in a number of cases and its general lack of guidance as to how courts should allocate burdens in criminal procedure cases have led to an untheorized patchwork in the lower courts, with different courts taking conflicting approaches to allocating burdens of proof under the Due Process Clause,[27] the privilege against self-incrimination,[28] the Double Jeopardy Clause,[29] the Public Trial Clause,[30] the Right to Counsel Clause,[31]

addressing that is making a change to the burden of proof or discussing how a criminal defendant will obtain the information relevant to mount such a challenge).

27. *Compare* Robinson v. State, 875 S.W.2d 837, 840 (Ark. 1994) (noting that it is the defendant's burden to show that a pretrial identification procedure was flawed), *and In re* Doe, 114 P.3d 945, 956 (Haw. Ct. App. 2005) (same), *with* People v. Young, 176 N.W.2d 420, 425 (Mich. Ct. App. 1970) ("[F]or identifications made at a confrontation out of the presence of defendant's attorney, the burden is on the prosecution to show fairness."), Commonwealth v. Moore, 633 A.2d 1119, 1125 (Pa. 1993) ("[T]he Commonwealth bears the burden of establishing that any identification testimony to be offered at trial is free from taint of initial illegality."), State v. Wilson, 508 N.W.2d 44, 52 (Wis. Ct. App. 1993) (holding that the defendant has the initial burden of showing that the identification procedure was impermissibly suggestive but then the burden shifts to the prosecution to show that the resulting identification was reliable), *and* People v. Moore, 640 N.E.2d 1256, 1260 (Ill. App. Ct. 1994) (same).

28. *Compare* State v. Grant, 939 A.2d 93, 100 (Me. 2008) ("[T]he State bears the burden of proving, by a preponderance of the evidence, that a suspect was not in custody at the time he or she made incriminating statements."), People v. Singh, 323 Cal. Rptr. 3d 45, 59 (Ct. App. 2024) (holding that the state bears this burden), *and* State v. Birmingham, 132 S.W.3d 318, 323 (Mo. Ct. App. 2004) (same), *with* State v. James, 225 P.3d 1169, 1172 (Idaho 2010) ("[T]he burden of showing custody rests on the defendant seeking to exclude evidence based on a failure to administer *Miranda* warnings."), *and* State v. Kirby, 908 A.2d 506, 528 (Conn. 2006) (same).

29. *See* United States v. Leal, 921 F.3d 951, 959 n.6 (10th Cir. 2019) (recognizing a split about whether the defendant bears the burden of establishing a double jeopardy violation or whether the defendant only has to advance a non-frivolous double jeopardy claim and then the burden shifts to the government to show by a preponderance that the two charges are separate for double jeopardy purposes); Note, *The Burden of Proof in Double Jeopardy Claims*, 82 MICH. L. REV. 365, 365–66 (1983) (discussing lower court splits).

30. *Compare, e.g.*, State v. Barkmeyer, 949 A.2d 984, 1002 (R.I. 2008) (placing the burden on the defendant to show that someone was excluded from the courtroom as the result of a courtroom closure), Commonwealth v. Williams, 401 N.E.2d 376, 378 (Mass. 1980) (same), State v. Brown, 815 N.W.2d 609, 616 (Minn. 2012) (same), *and* State v. Venable, 986 A.2d 743, 749 (N.J. Super. Ct. App. Div. 2010) (same), *with* State v. Brightman, 122 P.3d 150, 155 (Wash. 2005) (refusing to impose such a burden on the defendant and noting that "the burden is on the State to overcome the strong presumption that the courtroom was closed" after a judge's order to close the courtroom), Peterson v. Williams, 85 F.3d 39, 44 (2d Cir. 1996) (same), United States, *ex rel.* Bennett v. Rundle, 419 F.2d 599, 608 (3d Cir. 1969) (en banc) (same), *and* Lilly v. State, 365 S.W.3d 321, 331 (Tex. Crim. App. 2012) (same).

31. *See, e.g.*, United States v. Hohn, 123 F.4th 1084, 1112–19 (10th Cir. 2024) (describing a circuit split on which party should have the burden of proof to show prejudice after an intentional government intrusion into the attorney-client relationship).

the Impartial Jury Trial Clause,[32] and the Fourth Amendment.[33] And when lower courts allocate criminal procedure burdens, they often repeat the Supreme Court's practice of failing to explain which component parts of a burden of proof they are allocating to each party and why.[34]

Courts are not the only actors to blame for this confusion. Legislatures have also created sub-constitutional criminal procedure rights without clear burden structures.[35] Consider, for example, the recent wave of state legislation prohibiting police officers from lying to children during interrogations.[36] Some statutes presume that any resulting confession will be inadmissible and allocate the burden of proof to the state to overcome that presumption, though different jurisdictions impose different standards of proof.[37] But other statutes say nothing about how the burden of proof should be allocated to prove a violation.[38]

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32. *Compare* United States v. Lawson, 677 F.3d 629, 644–46 (4th Cir. 2012) (holding that the burden is on the government to prove that a juror's unauthorized use of Wikipedia during trial was not prejudicial), *with* United States v. Gillespie, 61 F.3d 457, 460 (6th Cir. 1995) ("[I]f members of the jury in fact used the dictionary definition [to reach their verdict], the defendant must prove that he was prejudiced thereby; prejudice is not presumed."). *See also* Andrew S. Rumschlag, Note, *Iceberg Ahead: Why Courts Should Presume Bias in Cases of Extraneous Juror Contacts*, 72 CASE W. RES. L. REV. 463, 481–87 (2021) (collecting cases and describing lower courts splits).

33. *Compare* United States v. Maxwell, 778 F.3d 719, 732 (8th Cir. 2015) (holding that the defendant has the burden of establishing standing to object to a government intrusion), *with* State v. Person, 298 N.E.2d 922, 924 (Ohio Mun. 1973) (holding that the prosecution has that burden).

34. *See, e.g.*, Colgan, *supra* note 6, at 410–11 (discussing the burden of proof under the Eighth Amendment of establishing the financial effect of a fine for purposes of the excessiveness inquiry and noting that "the lower courts presume the burden is on the defendant either without meaningful analysis or citation to authority, or by reference to the placement of the burdens on the person challenging a non-financial punishment as cruel and unusual . . . .").

35. *Cf.* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1306 (2018) (describing the importance of sub-constitutional laws and rules in regulating actors' conduct in the criminal legal system).

36. *See, e.g.*, CAL. WELF. & INST. CODE § 625.7 (West 2025) (prohibiting an officer from using manipulative tactics against a juvenile); 2023 Conn. Pub. Acts 23–27 (Reg. Sess.) (same); UTAH CODE ANN. § 80-6-206 (West 2025) (same); DEL. CODE. ANN. tit. 11 § 2022 (Supp. 2022) (same); COLO. REV. STAT. ANN. § 19-2.5-203 (West 2023) (holding evidence obtained by use of untruthful information to be inadmissible); 705 ILL. COMP. STAT. ANN. 405/5-401.6 (West 2022) (same); IND. CODE § 31-30.5-1-6 (2023) (same); NEV. REV. STAT. ANN. § 62C.014 (West 2024) (same); OR. REV. STAT. § 133.403 (2021) (same).

37. *See, e.g.*, Eve Brensike Primus, *The State[s] of Confession Law in a Post*-Miranda *World*, 115 J. CRIM. L. & CRIMINOLOGY, 79, 129–31 (2025) (collecting statutes and discussing how some states presume exclusion of the resulting confession unless the state can show the statement was voluntary by a preponderance of the evidence while others require a showing of voluntariness by clear and convincing evidence and still others require a showing of both voluntariness and reliability before the presumption can be overcome).

38. *See id.* (describing how some state statutes fail to discuss burden allocation).

Advocates and scholars also share the blame. In criminal procedure litigation, lawyers frequently fail to raise or discuss burden of proof issues even when the doctrine is unclear.[39] And although scholars have written a fair amount about the kinds of factors that should inform burden allocation in the law more generally,[40] there has been less discussion of how these factors relate to one another in the criminal procedure context. Crucially, there is little discussion about how to allocate criminal procedure burdens when the numerous factors conflict—as they often do in real cases. Much of the analysis of burdens of proof in the criminal context has focused on the beyond-a-reasonable-doubt standard of proof[41] or the allocation of burdens of proof on substantive elements of criminal offenses[42] with far less emphasis on the "smaller," but enormously consequential burdens associated with constitutional rules of criminal procedure.[43] This Article aims to fill the void by providing guiding principles for advocates, courts, and legislators to use when determining how to allocate those burdens.

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39. *See, e.g.*, Ashby v. State, No. CR-21-216, 2021 WL 5099117, at *10 (Ark. Ct. App. Nov. 3, 2021) (Virden, J., concurring) (failing to brief burden of proof issue on good faith exception in a post-*Herring* database error case prompted a concurring judge to complain about implicit burden shifting to the defense); Katerina Kokkas, *Fourth Amendment Standing and the General Rule of Waiver*, 2018 U. CHI. LEGAL F. 309, 330 (noting the government repeatedly fails to argue that the defendant bears the burden of establishing Fourth Amendment standing in federal cases).

40. *See, e.g.*, MCCORMICK ON EVIDENCE, *supra* note 8, § 337, at 701 (discussing the need to balance five different factors when allocating burdens: "(1) the natural tendency to place the burdens on the party desiring change, (2) special policy considerations such as those disfavoring certain defenses, (3) convenience, (4) fairness, and (5) the judicial estimate of the probabilities"); 6 WAYNE R. LAFAVE, SEARCH & SEIZURE § 11.2(b) (6th ed. 2024) (listing more than a dozen competing concerns that animate judicial burden allocation in Fourth Amendment cases); Allen, *supra* note 9, at 627 n.2 (collecting articles on burdens of proof and presumptions in the law); Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651, 651 (1997) (arguing that burdens should be assigned in ways that "minimize the total social costs associated with dispute resolution—which encompass both the costs of processing disputes and the costs of erroneous outcomes"); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 763 (2012) ("Ideally, we would like to maximize deterrence and minimize chilling.").

41. *See, e.g.*, Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1127 (2015) (discussing and challenging the Blackstone principle that animates the beyond a reasonable doubt standard of proof); Alexander Volokh, *Guilty Men*, 146 U. PA. L. REV. 173, 198 (1997) (discussing the Blackstone principle); Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 508 (1975) (discussing the history behind the adoption of the beyond a reasonable doubt standard and arguing that it actually decreased the burden of proof in criminal cases).

42. *See, e.g.*, Ronald J. Allen, *Rationality and Accuracy in the Criminal Process: A Discordant Note on the Harmonizing of the Justices' Views on Burdens of Persuasion in Criminal Cases*, 74 CRIM. L. & CRIMINOLOGY 1147, 1147 (1983) (collecting sources and noting that the debate about allocating the burden of proof on the substantive elements of crimes "has generated a literature sufficiently vast so that complete citation is precluded simply for lack of space").

43. *But see* Colgan, *supra* note 6, at 450–59 (discussing how burdens of proof should be allocated on excessive fine claims).

Part I describes the factors that courts and legislatures typically rely on when allocating burdens. It begins by teasing out three overarching considerations that are relevant to allocating burdens of proof more generally: efficiency concerns, fairness issues, and policy interests specific to the right or system at issue. It then identifies the relevant factors in each category that inform how to allocate burdens in the criminal procedure context. Efficiency concerns include four factors: the moving-party principle, the information principle, the probabilities principle, and the presumption of regularity. Fairness issues address two concerns: how feasible it is for a party to carry a burden and when a party should be equitably estopped from complaining about carrying a burden of proof. And contextual policy interests in the criminal procedure domain consist of both the constitutional values specific to the right at issue and system-preservation interests that address the viability of the system writ large. For each factor, Part I provides examples of how that factor has informed the allocation of burdens in constitutional criminal procedure cases. Part I is descriptive, providing a vocabulary for talking about the factors that have informed burden allocation in criminal procedure.

Part II is normative. It argues that many courts and legislators have failed to engage seriously with the factors animating burden allocations, creating problems in the practice of criminal procedure litigation. Sometimes decision-makers rely on factors—like the presumption of regularity or the policy interest in system preservation—without recognizing that those principles misdescribe the real world of criminal procedure and may be in tension with the values underlying the constitutional rights at stake. At the same time, decision-makers often undervalue fairness and rights-specific interests, causing serious harm to the liberty of the people who are prosecuted—liberty that is the central concern of the Constitution's criminal procedure provisions.

Part III addresses what decision-makers should do when the factors relevant to the allocation of burdens conflict with one another. Sometimes the best way for advocates, courts, and legislatures to address competing concerns about the assignment of burdens of proof involves dividing the burden of production from the burden of persuasion, putting the onus on one party at a preliminary stage, and then shifting it to the other party on the ultimate question. Burden-splitting and burden-shifting regimes enable decision-makers to properly consider fairness and rights-specific interests while still addressing efficiency and system-preservation concerns. Finally, Part III explains when fairness concerns and rights-specific interests trump the other factors and dictate that a burden of proof constitutionally must fall on the government or that a heightened burden may not constitutionally be

placed on the defendant. The Article concludes with a call for advocates, courts, legislatures, and scholars to take burden allocation factors seriously and to think carefully about how to disentangle different burdens of proof to accommodate conflict among the factors when allocating criminal procedure burdens.

I. THE FACTORS RELEVANT TO BURDEN ALLOCATION IN CRIMINAL PROCEDURE CASES

Courts and legislatures typically think about three overarching considerations when allocating burdens of proof in criminal procedure cases: efficiency concerns, questions about fairness, and policy interests specific to the right or system at issue.[44] The sections below unpack these three considerations to create a taxonomy of the important factors within each category and explain how courts have relied on these factors in criminal procedure cases.

It is important to note that these considerations may apply differently when allocating the different kinds of burdens. At the initial stages of litigation—when allocating the burdens of raising a contention and producing evidence—decision-makers focus on which party is challenging the status quo, which party has access to the relevant information, how easy or difficult it is to find and produce that information, and who should lose as a matter of fairness and policy if no evidence is presented.[45] At the burden of persuasion stage, however, the focus is more explicitly on error costs and how efficiency, fairness, and policy interests inform which party should bear those costs given the probability of error and how high that party's burden of persuasion should be.[46] These different foci may lead decision-makers to

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44. *See* Fleming James, Jr., *Burden of Proof*, 47 VA. L. REV. 51, 65 (1961) (describing these considerations as "convenience, fairness, and policy").

45. *See* Colgan, *supra* note 6, at 461–62 ("When attending to the production of relevant evidence, the Supreme Court has looked to both who has 'superior access' to the evidence and how burdens may be used to incentivize the parties to produce such evidence."); Allen, *supra* note 9, at 632–33, 639 (describing the burden of production as necessary "to establish that a good enough reason exists to expend judicial resources on litigating any particular case and for a mechanism structuring the orderly presentation of information so that such a decision can be reached" and noting that "allocation of burdens of production probably will affect outcomes as much as, perhaps more than, allocations of burdens of persuasion").

46. *See* Richard S. Bell, *Decision Theory and Due Process: A Critique of the Supreme Court's Lawmaking for Burdens of Proof*, 78 J. CRIM. L. & CRIMINOLOGY 557, 557 (1987) ("[T]he burden of proof should apportion the risks of error in a way that favors the more important interests at stake in the trial."); *see also* Hay, *supra* note 40, at 652 (describing as relevant to burden allocation "a given party's costs of presenting evidence to support her position, the probability that this party's position is correct, that party's costs of presenting evidence, the amount at stake for the party, and the social cost of an

weigh considerations of efficiency, fairness, and policy slightly differently at the different stages, but all three considerations apply throughout the process.[47]

It is also important to note that the timing of a claim—when it is typically raised in the adjudicatory process—may affect how decision-makers weigh the different factors relating to efficiency, fairness, and policy interests. When allocating burdens of proof for claims that are typically raised for the first time on appeal and in post-conviction processes, decision-makers worry more about upending finality interests, showing proper deference to factual decisions made in the trial court, and the costs of re-adjudication.[48] While efficiency, fairness, and policy interests are relevant to the burden allocation analysis at all stages, they may look slightly different depending on when a claim is raised.

A. Efficiency Concerns

Criminal courts routinely face huge backlogs,[49] so decision-makers do not want to set burdens of proof in ways that unnecessarily waste time and other resources. Because of the need to process cases efficiently, courts emphasize four important factors when allocating burdens: the moving party principle, the information principle, the probabilities principle, and the presumption of regularity.

1. *Moving Party Principle.* The moving party principle would assign the burdens of proof to the party seeking to change the status quo.[50] Proponents of this principle argue that it saves time and resources by not

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erroneous decision against the party"); Solum, *supra* note 10, at 701 (noting that "when we deal with ignorance, our decision about where to place the burden of proof must be made on some ground other than maximizing the likelihood that the decision will be accurate" and might depend more on how "to create incentives that will reduce future uncertainty" or "to prevent unfairness").

47. *But see* Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 327–28 (1980) (arguing that burdens of production are a function of burdens of persuasion, because the burden of production is only satisfied "if a rational factfinder could conclude on the basis of the evidence adduced that there is a sufficiently high probability that the relevant issue will be proved").

48. *Cf.* Chapman v. California, 386 U.S. 18, 22 (1967) (adopting a harmless error standard for constitutional claims on direct appeal to avoid unnecessarily setting aside convictions and requiring needless and wasteful retrials "for small errors or defects that have little, if any, likelihood of having changed the result of the trial").

49. *See, e.g.*, Kat Albrecht, Maria Hawilo, Thomas F. Geraghty & Meredith Martin Rountree, *Justice Delayed: The Complex System of Delays in Criminal Court*, 53 LOY. U. CHI. L.J. 747, 758–61 (2022) (describing research on case-processing delays).

50. *See* Hay, *supra* note 40, at 655–56 (discussing how burdens are often allocated to the moving party to "prevent[] needless disruptions of the status quo").

setting the machinery of the system into motion unless it is warranted.[51] For example, part of the reason why the prosecution has the burden of proving a criminal defendant's guilt is to discourage it from bringing criminal charges when it lacks compelling evidence of guilt; this saves resources by limiting prosecutions to those cases most likely to result in convictions.[52] But if a convicted defendant wishes to challenge his conviction by alleging that his trial counsel was constitutionally ineffective, he becomes the party seeking to change the status quo. Giving him the burdens of proof will save resources by reducing the incidence of meritless challenges.[53]

Of course, the moving party principle is simplistic, and it is often not dispositive: sometimes the overall weight of efficiency concerns, properly understood, argues for placing some or all of the burdens on the non-moving party instead.[54] Still, the moving party principle has a prima facie logic. It will often dictate which party has the burden of raising a contention. The party seeking to change the status quo will, in most cases, have the burden of raising the claim.

2. *Information Principle.* One reason why the interest in efficiency does not always mean that the moving party should bear all the burdens of proof is that the moving party sometimes lacks access to information that is necessary for adjudicating an issue. If bringing relevant information before the court is much more costly for one party than the other, then it is more efficient to place the burden of proof—or at least the burden of production—on the party with easier access to that information.[55] This is what I call the information principle, and it sometimes overrides the moving party principle. For example, even though the criminal defendant is typically the moving

51. *See id.* at 652, 655–56 (noting that proponents of the moving party principle contend that it "conserves legal resources by ensuring that the law's 'cumbersome and expensive machinery' is not put in motion unless it is shown to be warranted").

52. *See In re* Winship, 397 U.S. 358, 363–64 (1970) (describing how the government's high burden of proof in criminal cases reduces the "margin of error" by incentivizing the government to bring charges only when it has real evidence of guilt (quoting Speiser v. Randall, 357 U.S. 513, 525–26 (1958))).

53. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 689–90 (1984) (imposing burdens on the defendant to establish trial attorney ineffectiveness and noting that "[t]he availability of intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges" that would "dampen the ardor and impair the independence of defense counsel").

54. In the criminal procedure context, it is often not clear who the moving party is. *See* LAFAVE, *supra* note 40, § 11.2(b) ("[I]n the exclusionary rule context it is not obvious whether it is the state or the defendant who is upsetting the status quo.").

55. *See* Colgan, *supra* note 6, at 461–62 (noting that "the Supreme Court has looked to both who has 'superior access' to the evidence and how burdens may be used to incentivize the parties to provide such evidence"); James, *supra* note 44, at 60, 66 ("Access to evidence is often the basis for creating a presumption.").

party asking to exclude a confession, the Supreme Court has placed the burden on the prosecution to demonstrate that a criminal defendant waived their *Miranda* rights and agreed to speak with police.[56] That allocation serves efficiency interests in addition to addressing other policy goals. After all, in the typical case where the defendant waived protection, the government can demonstrate that waiver cheaply and quickly: it has ready access to the relevant *Miranda* waiver documentation or video evidence of the waiver in a way that the defendant does not. Requiring the government to produce that evidence saves time and other resources.

The information principle is also relevant in situations where there are many alternative grounds for justifying a challenged action.[57] Consider, for example, the long roster of exceptions to the Fourth Amendment's warrant requirement. It would be inefficient to place the burden of disproving the existence of every exception to the warrant requirement on a criminal defendant challenging the legality of a warrantless search. After all, the police know which exceptions to the warrant requirement might be relevant in any given case, because they are the ones who know why they did not seek a warrant. Thus, it saves time and other resources to place the burden on the police to articulate and prove the application of the relevant exceptions.[58] For this reason, most courts allocate the burdens of proof to the prosecution to justify warrantless searches and seizures.[59]

3. *Probabilities Principle.* The third efficiency consideration is what I call the "probabilities principle." It holds that the party arguing that an unusual event has occurred should bear the burden of proving that the unusual thing happened.[60] Suppose, for example, that what is at issue in a case is whether, in a business context, services were given for pay or for free. Because it is unusual in such a context to give away services for free, the

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56. *E.g.*, Miranda v. Arizona, 384 U.S. 436, 475 (1966).

57. *See* LAFAVE, *supra* note 40, § 11.2(b) ("[O]ne efficiency/inefficiency parameter is the distinction between one party proving a limited ground versus the other party disproving many grounds.").

58. Saunders, *supra* note 2, at 280–82 (explaining that it is much more difficult for a party to prove a universal statement like "there always . . . "or "there never . . ." than it is to prove an existential statement such as "there exists an . . .") (quoted language is author's formulation); *see also* MCCORMICK ON EVIDENCE, *supra* note 8, § 337, at 699 (noting that, when the exceptions are numerous, "fairness usually requires that the adversary give notice of the particular exception upon which it relies and therefore that it bear the burden of pleading").

59. *See* LAFAVE, ET AL., *supra* note 3, § 10.3(b) (collecting cases).

60. *See* MCCORMICK ON EVIDENCE, *supra* note 8, § 337, at 698 ("The risk of failure of proof may be placed upon the party who contends that the more unusual event has occurred."); James, *supra* note 44, at 60–61 ("It is a matter of convenience to assume that things occurred as they usually do and to make the party who asserts the uncommon occurrence prove that it did happen as he claims.").

person claiming that the services were a gift bears the burden of proving that the services were gifted.[61] Placing the burden on the party arguing for the less common occurrence means that the issue will be subject to contestation less frequently, thus saving time and resources. In the criminal procedure context, the probabilities principle may explain, in part, why courts have placed the burden of proving consent to search on the government.[62] According to at least some courts, people typically feel compelled or pressured to say yes when police ask them for consent.[63] This means that the more usual occurrence is that people do not feel free to withhold consent and consent, when given, is not voluntary. If that is the more typical situation, it would make sense under the probabilities principle to place the burden on the government to prove that consent was voluntarily given.

4. *Presumption of Regularity.* One especially important form of the probabilities principle is called the presumption of regularity. Recall that a presumption is "a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts."[64] When a fact is presumed true, the presumption effectively shifts the burden of proving otherwise to the party opposing the presumed fact.[65] Under the presumption of regularity, "[o]fficial actions by public officers . . . are presumed to have been regularly and legally performed."[66] Thus, the party who argues that a public official acted illegally or improperly bears the burden of rebutting that presumption and proving the public official acted

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61. *See* MCCORMICK ON EVIDENCE, *supra* note 8, § 337, at 698–99, 699 n.13 (explaining that, in a business context, the likelihood of gratuitous transactions is unlikely so it makes sense to place the burden of proving that something was a gift on the person claiming it was a gift (citing *In re* Smith's Est., 213 P.2d 284 (Okla. 1949))).

62. *See* Bumper v. North Carolina, 391 U.S. 543, 548 & n.12 (1968) (establishing that the government has the burden of proving that consent was voluntarily given).

63. The D.C. Circuit, for example, explained this phenomenon as follows:

> Non-resistance to the orders or suggestions of the police is not infrequent [and] true consent, free of fear or pressure, is not so readily to be found. In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human experience,' and explainable only on the basis of 'physical or moral compulsion.'

Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951) (internal citations omitted); *see also Bumper*, 391 U.S. at 548 n.12 (citing *Judd* with approval when noting that the government has the burden of proving that consent was voluntarily given).

64. MCCORMICK ON EVIDENCE, *supra* note 8, § 342, at 708.

65. This assumes that the presumption is a rebuttable one, which the presumption of regularity is. If a decision-maker adopts an irrebuttable or conclusive presumption, it operates like a decision rule that precludes the other party from attempting to disprove the fact in question. *See id.* § 342, at 726 ("In the case of what is commonly called a conclusive or irrebuttable presumption, when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all.").

66. *Id.* § 343, at 732.

illegally or irregularly. The underlying intuition of the presumption of regularity is that, most of the time, public officials do what they are supposed to do. On that understanding, it is more efficient to require proof of irregular or illegal conduct than to require, in every case, that public officials affirmatively prove that they did what they usually do.

In the criminal procedure context, courts frequently rely on the presumption of regularity when allocating burdens. Assuming that invidiously selective prosecutions and retaliatory prosecutions are unusual, the presumption of regularity is the basis for allocating stringent burdens of proof to defendants in the context of selective prosecution claims[67] and allegations of retaliatory inducements to prosecute.[68] Similarly, the Supreme Court presumes that prosecutors are aware of and routinely comply with their obligation under *Brady v. Maryland*[69] to disclose material, exculpatory evidence to the defense in advance of trial.[70] Indeed, the Court presumes that prosecutors are aware of their *Brady* obligations even if there is no in-house training in the prosecutor's office on that obligation.[71] For this reason, the Court places the burden of proving that a prosecutor violated their *Brady* obligations on the criminal defendant.[72]

With respect to defense counsel, the Court "presum[es] that counsel will fulfill the role in the adversary process that the [Sixth] Amendment envisions."[73] As a result, when a defendant claims that his trial attorney was constitutionally ineffective, the Court instructs lower courts to "indulge a strong presumption that counsel's conduct falls within the wide range of

67. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) ("'[T]he presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'" (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15 (1926))).

68. *See* Hartman v. Moore, 547 U.S. 250, 263–65 (2006) (imposing a burden on the defendant to demonstrate a retaliatory motive on the part of an official urging prosecution as well as an absence of probable cause supporting the prosecutor's decision to go forward in order to pierce the presumption of regularity).

69. Brady v. Maryland, 373 U.S. 83 (1963).

70. *See id.* at 87 (establishing the prosecutorial duty to disclose material, exculpatory evidence); Connick v. Thompson, 563 U.S. 51, 67 (2011) (presuming that prosecutors are aware of and comply with their *Brady* obligations absent evidence of a pattern of noncompliance).

71. *See Connick*, 563 U.S. at 67 ("A district attorney is entitled to rely on prosecutors' professional training [in law school] and ethical obligations in the absence of [a] specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent [] constitutional violations.").

72. *See* Strickler v. Greene, 527 U.S. 263, 289 (1999) (explaining that the defendant must demonstrate that "'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense").

73. Strickland v. Washington, 466 U.S. 668, 688 (1984).

reasonable professional assistance."[74] The Court requires "the defendant [to] overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[75]

The presumption of regularity also informs the decision of most state and federal courts to place the burden of proof on defendants alleging Fourth Amendment violations when the police act pursuant to warrants.[76] After all, when there is a warrant, a neutral and detached magistrate has made an independent determination on the issue of probable cause. The magistrate, whose role is to check the police assessment of probable cause, is entitled to the presumption of legality. Reviewing courts will defer to the magistrate's determinations absent a defense showing of a reason to doubt their legitimacy.[77]

B. Fairness Issues

The fairness concerns that animate burden allocation in the criminal procedure context come in two forms. The first asks whether it is feasible for a party to carry the burden on an issue given their access to the relevant information or whether assigning the burden to that party will mean that the adjudication systematically goes against that party on that issue, even if that party should prevail on the merits. This first concern substantially reproduces the information principle but for different reasons: putting the burden on the party with access to the relevant information is not just efficient, it is also required by fairness. The second fairness concern asks whether a party's own misconduct estops it from complaining about having to carry the burden of proof.

1. *Feasibility.* The information principle discussed above is not just an efficiency consideration. It also addresses fairness concerns. If the resolution of an issue depends on certain information, and if only one of the parties has access to that information, placing the entire burden of proof on the other party is not merely inefficient, but also likely unfair.[78] For example, if one party objects to hearsay testimony offered by an opposing witness, and the proponent of the testimony claims that the statement falls within a hearsay exception, the proponent of the testimony should bear the burden of demonstrating the applicability of the hearsay exception. It would be unfair

74. *Id.* at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

75. *Id.*

76. *See* LAFAVE, *supra* note 40, § 11.2(b), at 50–52 nn.38–39 (collecting cases).

77. *See id.* § 11.2(b).

78. *See* MCCORMICK ON EVIDENCE, *supra* note 8, § 343, at 734.

to require the opponent of the testimony to have to disprove the existence of more than thirty exceptions to the hearsay rule. After all, the proponent has the relevant contextual information for the testimony and knows which hearsay exceptions might apply; information that the opponent may not have.[79] For this reason—as well as reasons of efficiency, courts hold that the proponent of challenged hearsay testimony has the burden of justifying its admission under an exception.[80]

The fairness concerns animating the information principle exist along a continuum. There is information that is readily accessible to both parties, information that neither party can know or access, and information that one party has superior access to, though how much easier it is for that party to obtain the information may vary. The fairness concerns addressed by the information principle should not guide how burdens are allocated when the relevant information is readily accessible to both parties because neither party is unfairly advantaged or disadvantaged by any allocation. In that situation, other efficiency, fairness, and policy interests will determine the burden allocation.

At the other end of the spectrum, as Justice Brennan once recognized, "the assignment of the burden of proof on an issue where evidence . . . cannot be obtained is outcome determinative. The assignment of the burden is merely a way of announcing a predetermined conclusion."[81] The party with the burden of proof will always lose—not because they should lose on the merits but because they cannot prove their case even if meritorious. In the criminal procedure context, requiring defendants to meet impossible evidentiary burdens before courts are willing to consider whether their constitutional rights have been violated effectively renders those rights illusory and raises significant fairness concerns. Burdens should not be allocated in ways that make it infeasible for criminal defendants to ever prevail.

Similarly, when one party has superior access to information, the fairness concerns of the information principle have an important role to play in burden allocation. When it is simply not possible—or incredibly difficult—for one party to secure relevant information, and that information is accessible to the other party, it would be unfair to place the entire burden

79. Once again, this is an example of the universal-existential distinction. *See* Saunders, *supra* note 2 and accompanying text.

80. *See, e.g.*, United States v. Day, 789 F.2d 1217, 1221 (6th Cir. 1986) ("The proponent of a hearsay statement bears the burden of proving each element of a given hearsay exception or exclusion.").

81. United States v. Leon, 468 U.S. 897, 943 (1984) (Brennan, J., dissenting) (quoting Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 332–33 (1973)).

of proof on the party without access to the relevant information. In such circumstances, it makes sense to place at least the production burden on the party with ready access to the relevant information. Where both parties could, in principle, bring the relevant information before the court, but it would be much more difficult for one party to do so than for the other, the fairness considerations animating the information principle still apply, but in a less absolute way. The more easily a party can furnish the information relevant to a claim, the fairer it is under the information principle to place the burden of proof—or at least part of the burden of proof—on that party.[82]

These concepts of feasibility and fairness informed the Supreme Court's decision in *Batson v. Kentucky* to adopt a burden-shifting regime for claims that a prosecutor was unconstitutionally using peremptory challenges to strike Black jurors from the venire.[83] Before *Batson*, some lower courts required defendants alleging racially motivated strikes to prove that the prosecutors had repeatedly struck Black jurors over a series of cases.[84] In *Batson*, the Court recognized that "this interpretation . . . has placed on defendants a crippling burden of proof."[85] To meet their burden, defendants would need to know the race of defendants and struck venirepersons in many cases other than their own, as well as the racial composition of the venires in each of those cases. Noting that "the burden would be insurmountable" in the many jurisdictions that do not keep data about those facts, the Court rejected that approach.[86] Because it was unfair to impose such a burden on defendants, the *Batson* Court instead adopted a burden-shifting regime under which defendants can rely on data from the instant case to make a prima facie showing of purposeful discrimination by the prosecutor.[87] If the defendant is

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82. Of course, efficiency, policy, and other fairness-related concerns not grounded in the information principle's attention to feasibility may ultimately dictate that a burden should be placed on the party with less access to information. But that is more about how to weigh the different factors when they conflict. *See infra* Part III.

83. *See* Batson v. Kentucky, 476 U.S. 79, 97–98 (1986) (describing the new burden structure).

84. These courts believed such a showing was required by *Swain v. Alabama*, 380 U.S. 202 (1965), which rejected an Equal Protection challenge based solely on data about the prosecutor's use of peremptory challenges in the case at hand, instead requiring the defense to demonstrate a consistent and systematic use of strikes by the prosecutor to prevent Black jurors from being empaneled. *Id.* at 221–26.

85. *Batson*, 476 U.S. at 92.

86. *Id.* at 92 n.17.

87. The *Baston* Court explained:

> Circumstantial evidence of invidious intent may include proof of disproportionate impact [and] a black defendant alleging that members of his race have been impermissibly excluded from the venire may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.

See id. at 93–94.

successful, the burden of production then shifts to the prosecution to come forward with a race-neutral explanation for challenging Black jurors, and the trial court then determines whether the explanation offered is credible or whether there is purposeful discrimination.[88]

Feasibility and fairness have also informed how lower courts have allocated burdens of proof in contexts not yet addressed by the Supreme Court. Selective police enforcement claims provide one example. In *United States v. Armstrong*,[89] which addressed the analogous matter of selective prosecutions, the Court held that a criminal defendant who alleges that he is being selectively prosecuted because of his race in violation of the Equal Protection Clause cannot obtain discovery on that claim unless he shows that the prosecution has failed to prosecute similarly situated defendants of a different race.[90] As a decision of the Supreme Court, *Armstrong* binds lower courts on the issue of selective prosecution—at least when they are interpreting the federal Constitution. But for reasons of feasibility and fairness, some lower courts have declined to apply *Armstrong*'s model in the analogous domain of selective enforcement by police.[91] To distinguish the two contexts, the Ninth Circuit Court of Appeals wrote that, in selective prosecution cases, "statistical evidence of differential treatment is ostensibly available," because defendants, in theory, could compare arrest records to prosecution records to show differential treatment of individuals of other races.[92] But selective enforcement is different, because "[a]sking a defendant . . . to prove who *could* have been targeted by an informant, but was *not*, or who the ATF *could* have investigated, but did *not*, is asking him to prove a negative; there is simply no statistical record for a defendant to point to."[93]

88. *See id.* at 97–98 ("Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors . . . . The trial court then will have the duty to determine if the defendant has established purposeful discrimination.").

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

90. *See id.* at 458 (requiring the person claiming selective prosecution to "show that the Government declined to prosecute similarly situated suspects of other races"); *see also* United States v. Bass, 536 U.S. 862, 863–64 (2002) (rejecting a selective prosecution challenge to implementation of the death penalty despite nationwide data about discriminatory practices because of defendant's failure to present evidence about similarly situated defendants).

91. *See, e.g.*, United States v. Sellers, 906 F.3d 848, 852–53 (9th Cir. 2018) (noting that "[s]elective prosecution is not selective enforcement" because, in the selective enforcement context, "no evidence of similarly situated individuals who were not targeted exists"); United States v. Washington, 869 F.3d 193, 219–20 (3d Cir. 2017) (departing from the *Armstrong* and *Bass* framework for selective enforcement claims); United States v. Davis, 793 F.3d 712, 719–21 (7th Cir. 2015) (en banc) (same). *But see, e.g.*, United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006) (applying *Armstrong* in the selective enforcement context); United States v. Mason, 774 F.3d 824, 829–30 (4th Cir. 2014) (same).

92. *Sellers*, 906 F.3d at 853.

93. *Id.*

Giving the defendant in a selective enforcement claim the burden of demonstrating the failure to enforce the law against similarly situated individuals of a different race would make the claim "impossible to prove."[94] Because it is not feasible to require defendants to obtain that information, the Third, Seventh, and Ninth Circuits have rejected application of the *Armstrong* burden to the selective enforcement context.[95] Instead, district courts in these circuits have discretion to allow discovery on selective enforcement claims based on the defendant's allegations.[96] These courts relaxed the defense's burden of production to ensure that defendants' equal protection rights are honored and that they have a fair shot at obtaining discovery for potentially viable selective enforcement claims when that information is uniquely in the hands of the government.

2. *Equitable Estoppel.* Concerns of fairness also sometimes direct the allocation of burdens of proof based on equitable estoppel. Typically, equitable estoppel concerns arise when parties seek to excuse their own misbehavior. For example, if a court finds a warrant invalid, and the prosecution argues that evidence discovered pursuant to the execution of that warrant should still be admissible because the police relied on the deficient warrant in good faith, the burden is typically on the prosecution to prove the applicability of the good-faith exception.[97] This makes sense. After all, asking the defendant to disprove the applicability of the good-faith exception would allow the state's unlawful conduct to impose burdens on the defense, rather than on the party that engaged in misconduct. For similar reasons, if the prosecution argues that evidence gathered in violation of a constitutional right is admissible because its procurement was sufficiently attenuated from

94. *Id.* at 854. *See also Washington*, 869 F.3d at 216 (noting that, because "there are likely to be no records of similarly situated individuals who were not arrested or investigated," placing the burden on the defendant to show a lack of enforcement with respect to similarly situated suspects of another race "would transform the functional impossibility of *Armstrong*[] into a complete impossibility").

95. *See supra* note 91.

96. *See Sellers*, 906 F.3d at 855 (noting that the district court should "determine in the first instance whether the defendant . . . was entitled to any additional discovery."); *Washington*, 869 F.3d at 197 ("[A] district court may exercise its discretion to grant limited discovery, or otherwise to conduct *in camera* analysis of government data before deciding whether limited discovery is warranted."); *Davis*, 793 F.3d at 723 (asking district courts to start with limited inquiries and then enlarge the discovery probe if evidence discovered in the initial phase justifies a wider inquiry).

97. *See* LAFAVE, *supra* note 40, § 11.2(b), at 52 n.40 (collecting cases with this burden structure); *see also* United States v. Leon, 468 U.S. 897, 924 (1984) (noting that "the prosecution should ordinarily be able to establish objective good faith without substantial expenditure of judicial time"). *But see* Herring v. United States, 555 U.S. 135, 146 (2009) (adopting a presumption of good faith when police rely on database entries unless "the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries" or in a case "where systemic errors were demonstrated").

the constitutional violation, it has the burden of demonstrating sufficient attenuation.[98]

Or consider a case in which the government obtains an indictment but negligently—or intentionally—waits years before notifying the defendant of the charges and bringing him to trial. If the delay is long enough, when the defendant raises a speedy trial objection, the court will presume the delay was prejudicial and shift the burden to the government to prove otherwise.[99] In *Doggett v. United States*,[100] the Supreme Court explained that fairness considerations of both feasibility and equitable estoppel justify the burden shift. First, it is infeasible for the defendant to demonstrate actual prejudice years later given "the possibility that the accused's defense will be impaired by dimming memories and loss of exculpatory evidence."[101] Additionally, because the government is at fault for the problematic delay, it is only fair for the government to bear the burden of proving that the delay was harmless to the defendant.[102]

C. Contextual Policy Interests

In addition to considering issues of efficiency and fairness, decision-makers use burdens of proof as tools to promote context-specific interests that undergird the system or rights at stake. Sometimes there is a reason to favor one contention over another, and the placement of the burden can be

98. *See* Brown v. Illinois, 422 U.S. 590, 604 (1975) ("[T]he burden of showing admissibility rests, of course, on the prosecution."); United States v. Wade, 388 U.S. 218, 239–40 (1967) (requiring the government to demonstrate by clear and convincing evidence that an in-court identification has an independent source and is not the tainted fruit of an improperly obtained out-of-court identification procedure); Nix v. Williams, 467 U.S. 431, 438 (1984) (holding that the government has the burden of showing that evidence that was illegally obtained would have been inevitably discovered in order to trigger application of the inevitable discovery exception to the exclusionary rule); Nardone v. United States, 308 U.S. 338, 341 (1939) (noting that the government has the burden of establishing applicability of the independent source doctrine—that illegally obtained evidence has an independent, legal source). *But see* Utah v. Strieff, 579 U.S. 232, 242 (2016) (presuming that an illegal stop resulted from an "isolated instance of negligence in connection with a bona fide investigation" and was therefore not flagrant misconduct under attenuation doctrine unless evidence is presented to show that the unlawful stop was part of "systemic or recurrent police misconduct").

99. *See* Doggett v. United States, 505 U.S. 647, 655–56, 658 (1992) (establishing a "presumption of prejudice" when there is extreme delay).

100. *Id.*

101. *Id.* at 654 (cleaned up); *see also* United States v. Battis, 589 F.3d 673, 683 (3d Cir. 2009) ("[P]rejudice will be presumed when there is a forty-five-month delay . . . even when it could be argued that only thirty-five months . . . is attributable to the Government. After such a long delay, witnesses become harder to locate and their memories inevitably fade.").

102. *See Doggett*, 505 U.S. at 658 n.4 (noting that the government "has not, and probably could not have, affirmatively proved that the delay left [Doggett's] ability to defend himself unimpaired").

used to handicap the disfavored contention.[103] For example, in property law, there is a presumption that ownership accompanies possession.[104] The person who wants to claim otherwise has a heavy burden of proof. That allocation of the burden serves property law's general interest in stability.[105]

In the criminal procedure context, contextual policy interests that affect burden allocation typically fall into two buckets. First, there are rights-specific interests that serve the values of the underlying constitutional right at issue. Second, there are interests arising from society's need for a functional criminal system.

1. *Rights-Specific Interests.* Consider first what I am calling rights-specific interests. These are interests that are central to the animating principles of the criminal procedure right at issue. For example, when interpreting the Fourth Amendment, the Supreme Court has often articulated the importance of the government obtaining a warrant, when feasible, before conducting a search or seizure.[106] The warrant process deters cavalier police searches by requiring the police to think in advance about whether they have probable cause;[107] it prevents hindsight bias from affecting judicial decision-making about the legitimacy of a search or seizure;[108] and it prevents the police from justifying successful searches *ex post* by lying about their *ex ante* reasons for believing a search was appropriate.[109] Most courts have allocated Fourth Amendment burdens of proof to further this constitutional preference for warrants, giving the government the burden of justifying warrantless searches, but giving the defendant the burden when challenging a search supported by a warrant.[110] These rules for allocating the burdens of proof

103. *See* MCCORMICK ON EVIDENCE, *supra* note 8, § 337, at 697.

104. *Id.* § 343, at 730 & n.5 (collecting sources).

105. *See id.* (noting that "the presumption of ownership from possession . . . tends to favor the prior possessor and to make for the stability of estates").

106. *See, e.g.*, United States v. Leon, 468 U.S. 897, 914 (1984) ("[W]e have expressed a strong preference for warrants . . . ."); United States v. Ventresca, 389 U.S. 102, 105–06 (1965) (discussing the preference for warrants).

107. *See* Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1614 (2012) ("[A] real warrant requirement will force some police officials to stop and think, and to articulate their reasons for intruding into someone's liberty, thereby avoiding unreasonable intrusions in the first place.").

108. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 884 (1991) (noting that one argument in favor of the warrant requirement is that "trial judges deciding suppression motions *cannot* avoid biased after-the-fact probable cause judgments").

109. *See id.* ("[T]he lack of a credible opponent (the defendant has, after all, been found with incriminating evidence) invites the police to subvert the governing legal standard by testifying falsely at suppression hearings.").

110. *See* LAFAVE, *supra* note 40, § 11.2(b), at 50–52 nn.38–39 (collecting cases).

nudge government actors toward behavior that respects the constitutional values embodied in the Fourth Amendment.

Courts also allocate burdens of proof to further the deterrence purposes of the exclusionary rule.[111] The Supreme Court has held that a Fourth Amendment violation happens at the time of an illegal search or seizure and that the later exclusion of ill-gotten evidence is necessary to send a message to the offending police officers, thus deterring future violations.[112] To further this deterrence interest, once a court finds a Fourth Amendment violation, it typically places the burden on the government to explain why that violation should not result in suppression of the resulting evidence.[113] Similarly, in the confession law context, the government bears the burden of proving that a confession was voluntarily given[114] because it is a situation in which the government seeks "to introduce inculpatory evidence obtained by virtue of a waiver of . . . a defendant's constitutional rights."[115] Giving the burden of proof to the government is a way of protecting the exercise of those rights and deterring lawless police behavior.[116]

2. *System-Preservation Interests.* Sometimes policy goals serve the ends of the system writ large rather than the goals of a specific criminal procedure right. These are what I call "system-preservation interests." For example, the presumption of regularity expresses confidence in the judgment of public officials and disincentivizes challenges to their actions. That helps the system to operate by reducing the friction that public officials experience in the execution of their duties.

The criminal legal system cannot function unless people are willing to serve in roles like police officer, prosecutor, and defense attorney, and the Supreme Court has expressed concern that piercing the presumption of

111. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 656 (1961) (noting that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it'" (quoting Elkins v. United States, 364 U.S. 206, 217 (1960))).

112. *See Mapp*, 367 U.S. at 648, 656.

113. LAFAVE, *supra* note 40, § 11.2(b) (collecting cases).

114. *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 489 (1972) ("[T]he prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.").

115. Medina v. California, 505 U.S. 437, 452 (1992); *see also id.* at 456 (O'Connor, J., concurring) (explaining that placing the burden on the government in these situations "accords with its investigatory responsibilities," because the government must ensure a confession is voluntarily given before it obtains that confession and must ensure that an owner consents if it wants to warrantlessly search a private area).

116. *See id.* at 452 (majority opinion) (noting that "where the government sought to introduce inculpatory evidence obtained by virtue of a waiver of, or in violation of, a defendant's constitutional rights . . . allocating the burden of proof to the government furthers the objective of 'deterring lawless conduct by police and prosecution'").

regularity might chill individuals' willingness to serve in such roles.[117] For example, when articulating the presumption that criminal defense attorneys at trial behave strategically, the Court speculated that individuals' "willingness to serve could be adversely affected" without such a presumption and that the absence of the presumption would "discourage the acceptance of assigned cases."[118] Similarly, when giving prosecutors the benefit of the presumption of regularity in selective prosecution cases, the Court noted that a contrary approach "threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry."[119]

Additionally, courts often consider whether a particular burden allocation would open the floodgates of litigation, overwhelming the courts with cases and rendering the system unable to function. This concern is heightened for post-trial claims like ineffective assistance of trial counsel or prosecutorial misconduct, which are typically raised by defendants who have already been convicted and who have incentives to raise any and all challenges that might result in their release from custody. When the Supreme Court created the presumption that criminal defense attorneys at trial behave strategically, it noted that, without such a presumption, "[t]he availability of intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges," flooding the docket and clogging the system.[120] And in *McCleskey v. Kemp*,[121] the Court cited system-preservation interests when it rejected Warren McCleskey's claim that statistical analyses demonstrated that racial bias impermissibly infected and tainted capital sentencing proceedings in violation of the Eighth Amendment.[122] "McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system,"[123] the Court explained. The Court was concerned that if evidence

117. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 690 (1984) ("Intensive scrutiny of counsel [could] discourage the acceptance of assigned cases . . . ."); United States v. Armstrong, 517 U.S. 456, 465 (1996) ("Examining the basis of a prosecution . . . threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry . . . ." (quoting Wayte v. United States, 470 U.S. 598, 607 (1985))).

118. *Strickland*, 466 U.S. at 690.

119. *Armstrong*, 517 U.S. at 465. In the selective prosecution context, the Court also discusses separation of powers concerns about the judiciary encroaching on the discretion of the executive. *Id.* That policy concern is also a system-preservation concern.

120. *Strickland*, 466 U.S. at 690.

121. McCleskey v. Kemp, 481 U.S. 279 (1987).

122. *Id.* at 314–15.

123. *Id.*

like McCleskey's sufficed to satisfy a burden of proof, then a flood of similar claims would simply shut down the system.[124]

Sometimes, system-preservation interests focus on allocating burdens in ways that ensure the system is perceived as legitimate. For example, when the Court adopted its burden-shifting regime in *Batson v. Kentucky* for claims that a prosecutor was unconstitutionally using peremptory challenges to strike Black jurors from the venire, in addition to discussing principles of fairness, it also emphasized that "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."[125] The Court thought the *Batson* burden-shifting regime would be an important contributor to the perceived legitimacy of the system.

II. FIXING HOW COURTS CURRENTLY ANALYZE BURDEN ALLOCATION FACTORS

Understanding the different factors that inform burden allocation in constitutional criminal procedure is one thing; appropriately considering these factors when allocating burdens is something entirely different. In practice, many courts and legislatures fail to analyze considerations of efficiency, fairness, and contextual policy sufficiently when allocating burdens in criminal procedure.[126] This lack of engagement has led to the problematic overemphasis of certain principles—like the presumption of regularity—at the expense of meaningful engagement with other important considerations—like fairness concerns.[127] It has also contributed to the development of blind spots in the doctrine where the law on the books does not mirror what we know about how the system operates in practice—a disjunction that undermines the legitimacy of the criminal legal system.[128]

This Part explains why the current emphasis on the presumption of regularity is both improper and factually unsupportable in several contexts. It then addresses the failure of many decision-makers to engage with fairness issues related to both feasibility and equitable estoppel. Finally, it discusses how courts and legislators should more carefully consider rights-specific interests when allocating burdens and argues that doing so could restore some legitimacy that the system has lost—a system-preservation interest.

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124. *See id.* at 318; *see also id.* at 339 (Brennan, J., dissenting) (describing this as "a fear of too much justice").

125. Batson v. Kentucky, 476 U.S. 79, 98–99 (1986).

126. *See infra* Parts II.A–C.

127. *Id.*

128. *Id.*

Each subsection explains how the current approaches are often lacking and provides examples of how some jurisdictions have done better, providing models for advocates and decision-makers to use when analyzing burden-allocation factors.

A. The Problems with the Presumption of Regularity

The presumption of regularity does a lot of work in criminal procedure doctrine—both to promote efficiency under the probabilities principle and as a system-preservation tool.[129] The Supreme Court has relied on the presumption of regularity in Fourth, Sixth, and Fourteenth Amendment cases.[130] But the presumption's application to criminal procedure is problematic for several reasons. First, the presumption that public officials comply with the law as a regular matter is not factually accurate for entire categories of official action taken by indigent defense attorneys and prosecutors.[131] Second, the Court's application of a presumption of regularity to law enforcement officers is in tension with its recognition that police have incentives to push their conduct up to and perhaps even past constitutional lines.[132] For that reason, the presumption should disappear more quickly and easily for police than for other system actors. And third, because system actors already enjoy significant protections, the system-preservation interests in favor of the presumption are overblown.[133]

1. *Inaccurate Assessments of Probabilities.* To justify the presumption of regularity under the probabilities principle, it must be true as a descriptive matter that public officials act lawfully most of the time. After all, it is the likelihood that they are behaving lawfully that justifies putting the burden on the party that claims otherwise. The presumption is only more efficient if it is true in the run-of-the-mill case that the public official acts lawfully. Unfortunately, there are contexts in which the assumption of regular and lawful behavior is simply not accurate.

Take, for instance, the presumption under *Strickland v. Washington*[134] that criminal defense attorneys act strategically and fulfill their constitutional obligations to their clients.[135] That presumption plays a significant role in the Court's reticence to find that trial attorneys perform deficiently and provide

129. *See supra* Part I.A.4.
130. *Id.*
131. *See infra* Part II.A.1.
132. *See infra* Part II.A.2.
133. *See infra* Part II.A.3.
134. Strickland v. Washington, 466 U.S. 668 (1984).
135. *See id.* at 689.

ineffective assistance to their clients under the Sixth Amendment right to counsel.[136] Unfortunately, the data on the ground show that this presumption of regularity is factually inaccurate. The vast majority of criminal defendants receive appointed counsel because they are too poor to afford counsel,[137] and there is a longstanding national crisis in the provision of indigent defense counsel.[138] In every state, government-appointed criminal defense counsel are drastically underfunded and overwhelmed.[139] Studies repeatedly show that indigent defense attorneys are often thrown into court without adequate training and supervision and forced to carry caseloads that are impossible for

136. *See id.* ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'").

137. *See* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 5 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/374V-U5KH] (noting that, between 1992 and 1996, about eighty percent of criminal defendants in the United States' most populous counties were indigent); *see also* Thomas H. Cohen, *Who is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. JUST. POL'Y REV. 29, 35 (2014) ("In 2004 and 2006, about 80% of defendants charged with a felony in the nation's 75 most populous counties reported having public defenders or assigned counsel . . . .").

138. *See, e.g.*, Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2152–54 (2013) (describing how the right to effective assistance of counsel is routinely violated around the country in criminal cases); Eve Brensike Primus, *Defense Counsel and Public Defense*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 123–24 (Erik Luna ed., 2017) (collecting studies and statistics about "a public-defense crisis characterized by funding problems").

139. *See, e.g.*, John Gross, *Reframing the Indigent Defense Crisis*, HARV. L. REV. BLOG (Mar. 18, 2023), https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis [https://perma.cc/N9TF-GJN7] (documenting how the indigent defense crisis has "persisted for decades" and how indigent defendants' rights to counsel are routinely violated throughout the country, in part because of stagnant funding); A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 16–19 (2004), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [https://perma.cc/E3ZL-G6TG] (documenting patterns of overwhelmed public defense systems across the country); NAT'L ASS'N OF CRIM. DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 21, 30–35 (2009), https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf [https://perma.cc/NC7V-Q5Z6] (describing pressure on misdemeanor defense system); NAT'L LEGAL AID & DEF. ASS'N, EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN: A RACE TO THE BOTTOM 1, 5, 15 (2008); NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 49–101 (2009), https://www.opensocietyfoundations.org/uploads/52165620-3308-4802-9a58-ce8b4c00a31d/justice_20090511.pdf [https://perma.cc/UTF9-Q34L] (describing the problems in indigent defense delivery systems around the country, including a lack of sufficient funding, high caseloads, a lack of independence, and inadequate training and supervision); BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 5–10 (2019) (describing the crisis of underfunding in indigent defense).

any attorney to manage effectively.[140] Stories abound of indigent defendants who meet their attorneys for the first time in court and who are then pressured to plead guilty before their attorneys are able to investigate and research their cases.[141] The problem is not isolated. It exists everywhere, and it has been documented for decades.[142] Smart and dedicated indigent defenders around the country do their best in the face of these headwinds, but, in the majority of cases, they do not have the time that they need to provide the kind of representation the Sixth Amendment requires.[143] It is hard to square that reality with the *Strickland* presumption that indigent defenders act strategically and fulfill their constitutional responsibilities. They do not even have enough time to meet with all of their clients before trial, let alone to investigate and conduct adequate legal research for all of their cases.[144] They are structurally ineffective through no fault of their own, and the assumption that they regularly comply with the Sixth Amendment is problematic.[145] In fact, it is more likely than not that, in any given case, the lawyer representing an indigent defendant does *not* have adequate time and resources to perform their job lawfully. Therefore, if the probabilities principle governed, the burden of proof would be on the government to defend counsel's behavior once a defendant alleges ineffective assistance of counsel.[146] At the very least, the burden of persuasion should shift to the prosecutor to show that trial counsel's performance was not deficient once the defendant satisfies an

140. The Sixth Amendment Center issues reports about the states of indigent defense systems around the country that are available at SIXTH AMENDMENT CENTER, https://6ac.org/what-we-do/evaluations (last visited June 12, 2025) [https://perma.cc/QD67-YRWW]. *See also* Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 214–40 (2023) (collecting data).

141. *E.g.*, Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1771–73, 1776 (2016) (describing these problems).

142. *See supra* notes 138–39.

143. *See generally* Primus, *supra* note 141 (describing the time constraints).

144. *See, e.g.*, Brent R. Appel, *State and Federal Constitutional Right to Counsel in an Age of Case Specific and Systemic Inadequacies*, 93 UMKC L. REV. 523, 577 (2025) (explaining that public defenders' caseloads are often so high that they are "unable to meet with clients on a regular basis" and they are unable to research and prepare their cases); Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 14 OHIO ST. J. CRIM. L. 403, 403 (2017) ("Attorneys saddled with hundreds or thousands of cases per year must jettison core legal tasks—client communication, investigation, legal research—in violation of constitutional and ethical duties."); Lisa C. Wood, Daniel T. Goyette, & Geoffrey T. Burkhart, *Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads*, 42 LITIG. 20, 23–24 (2016) (describing how excessive workloads can often lead to practices where defense attorneys meet their clients for the first time on their court date and then help them plead guilty that same day).

145. *See* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581, 1586 (2020) [hereinafter Primus, *Disaggregating Ineffective Assistance*] (describing the problem of structural ineffectiveness).

146. *See supra* notes 138–45.

initial, reduced production burden and shows that the defense attorney did something wrong or failed to do something that should have been done.[147]

Of course, it is possible that the real reason for the *Strickland* presumption that defense attorneys act strategically is a system-preservation concern about opening the floodgates to too many ineffectiveness claims.[148] But, if that is the concern, it should be addressed as a system-preservation concern and balanced against the other factors when allocating the burden of proof.[149] It should not be improperly placed under the presumption of regularity to justify allocating the entire burden of proof to the defendant.

State courts should recognize that the presumption of regularity that *Strickland* assumed is not empirically tenable. States could then develop

147. Looking closely at ineffective-assistance-of-trial-counsel cases, there are ways to interpret Supreme Court precedent as implicitly recognizing and endorsing such a shift. For example, at least in the capital context, the Supreme Court seems willing to assume that there was deficient performance when an attorney fails to investigate—implicitly shifting the burden of proof to the government to explain why that performance was not deficient. *See* Primus, *Disaggregating Ineffective Assistance*, *supra* note 145, at 1635–36 (collecting cases). More generally, the Court is willing to presume deficient performance when defense counsel (a) labors under an actual conflict of interest; (b) infringes on client autonomy by failing to do something that is necessary to assist the defendant in making decisions that are reserved for the defendant or affirmatively misleads the defendant with respect to those decisions; and (c) acts in a way that shows a clearly erroneous understanding of the law. *Id.* at 1630–34 (collecting cases). One could easily imagine lower courts expanding on the kinds of cases that fall within these categories.

For example, under ethics rules, defense attorneys with excessive caseloads are laboring under actual conflicts of interest that would justify a presumption of deficient performance. *See generally* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 06-441, at 1 (2006) (discussing the "ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation"); *see also* MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (A.B.A. 2016) (noting that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest" and noting that such a conflict exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client"); Stephen F. Hanlon, *Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients*, 51 IND. L. REV. 59, 60 (2018) (noting that handling excessive caseloads is "flatly unethical, and it is specifically forbidden by the Rules of Professional Conduct"). Additionally, the Supreme Court has recently held that determining "the objective of the defense," is one of the decisions that is reserved for the defendant to make. McCoy v. Louisiana, 584 U.S. 414, 422 (2018). Trial counsel may have a duty to do adequate legal research to inform the client about the elements of the offense and available defenses so the defendant can make a rational choice about those objectives, and the failure to do that research may infringe on the client's autonomous choice in ways that should lead to a presumption of deficient performance. *See* Primus, *Disaggregating Ineffective Assistance*, *supra* note 145, at 1639 (suggesting that courts need to address what counsel must do to assist clients in determining the objective of their defense and determine "what kinds of deficient performance will trigger a rebuttable presumption of deficient performance").

148. After all, *Strickland* has some language to that effect as well. Strickland v. Washington, 466 U.S. 668, 690 (1984) (expressing worry about how "[t]he availability of intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges").

149. *See infra* Part III.A for a discussion of how to balance this system-preservation interest against the other burden allocation factors when assessing *Strickland* claims.

doctrine under state or federal constitutional law that diverges from *Strickland*'s presumption. In 2016, the U.S. Supreme Court made statements that would support rejecting the presumption of regularity as applied to indigent defense counsel. In *Luis v. United States*,[150] the Court held that the pretrial restraint of a defendant's legitimate, untainted assets—which the defendant needed to retain counsel of choice—violated the Sixth Amendment.[151] The Court emphasized that pretrial restraint, if permissible, could render defendants indigent, which would require them to rely on public defenders.[152] A plurality of the Court found that reliance problematic because public defenders are so "overworked and underpaid" that forcing these defendants to rely on public defenders would create a "substantial risk" of "render[ing] less effective the basic right the Sixth Amendment seeks to protect."[153] The plurality clearly suggested that defendants represented by public defenders are more likely to receive inadequate representation. That suggestion is in tension with *Strickland*'s presumption that defenders routinely act in accordance with their constitutional obligations.[154] Similarly, many state and federal courts deciding civil lawsuits have recognized systemic problems in indigent defense delivery.[155]

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150. Luis v. United States, 578 U.S. 5 (2016).

151. *See id.* at 8–9.

152. *Id.* at 21.

153. *Id.* at 21–22.

154. *See Strickland*, 466 U.S. at 689 (presuming defense counsel is competent).

155. *See, e.g.*, Betschart v. Oregon, 103 F.4th 607, 612 (9th Cir. 2024) ("[D]ue to an 'ongoing public defense crisis' of its own creation, Oregon does not provide indigent criminal defendants their fundamental right to counsel despite *Gideon*'s clear command."); Kuren v. Luzerne Cnty., 146 A.3d 715, 743 (Pa. 2016) (recognizing a cognizable cause of action for a class of indigent Pennsylvania defendants who sought relief for "widespread, systematic and constructive denial[s] of counsel" related to "deficiencies in funding and resources"); Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) ("[I]ndigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution [due to] deliberate choices regarding the funding, contracting, and monitoring of the public defense system . . . ."); Hurrell-Harring v. State, 930 N.E.2d 217, 222, 224–25 (N.Y. 2010) (pointing out that "[t]he allegations here . . . raise serious questions as to whether any [representational] relationship may be really said to have existed between many of the plaintiffs and their putative attorneys," and further asking whether this "may be understood to raise the distinct possibility that merely nominal attorney-client pairings occur in the subject counties with a fair degree of regularity, allegedly because of inadequate funding and staffing of indigent defense providers"); Duncan v. State, 774 N.W.2d 89, 136–37 (Mich. Ct. App. 2009), *vacated mem. on other grounds*, 780 N.W.2d 843 (Mich. 2010) ("[T]here are extensive allegations concerning detrimental and harmful effects on these criminal defendants, as they pass through the systems, caused by ineffective attorneys, which, in turn, is allegedly the result of the states and the Governors failure to protect the constitutional rights of indigent defendants."); Luckey v. Harris, 860 F.2d 1012, 1018 (11th Cir. 1988) (discussing allegations that attorneys are denied investigative and expert resources and pressured to hurry their cases to trial or to enter guilty pleas). *See also* Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 94–98 (2018) (collecting and discussing indigent defense civil lawsuits).

It might be factually more accurate for courts to employ a presumption of irregularity when allocating burdens regarding indigent defense counsel's performance. In any given case, the limited resources and excessive caseloads indigent defenders face mean they are unlikely to provide constitutionally effective representation no matter how well-intentioned and capable they are.[156] At the very least, advocates and lower courts should rely on hard data and judicial acknowledgements of the indigent defense crisis to argue and hold that circumstances have changed since *Strickland*, such that the presumption of regularity with respect to indigent defenders is not a plausible description of reality.

The presumption of regularity is also inaccurate with respect to at least some prosecutorial behavior. For example, multiple studies have revealed that prosecutors—like all individuals—have implicit racial biases that infect their work.[157] Data reveal that prosecutors regularly bring more and higher charges against Black defendants than against their white counterparts for comparable conduct.[158] This data contradicts the presumption that

156. Some may balk at the claim that defenders' limited resources and excessive caseloads lead to constitutional violations with enough frequency to justify a presumption of irregularity given that most defendants opt to plead guilty, and guilty pleas take far less attorney time than trial preparation. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) (noting that ninety-seven percent of federal convictions and ninety-four percent of state convictions come from guilty pleas). But plea negotiation is a critical phase in the criminal process where competent counsel is constitutionally required. *See id.* ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires . . . at critical stages."); *see also* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."). If counsel does not have adequate time to investigate and research the facts and law, they cannot provide clients with effective advice at that critical stage. *See* Lafler v. Cooper, 566 U.S. 156, 163 (2012) (providing a remedy for ineffective assistance of counsel when a defense attorney gave improper legal advice to a client at the plea negotiation stage).

157. *E.g.*, L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 881–85 (2017) (collecting sources).

158. *See, e.g.*, GRADY BRIDGES & J.J. PRESCOTT, PROSECUTOR TRANSPARENCY PROJECT: RACIAL DISPARITIES STUDY 82 (2023), https://ssrn.com/abstract=4680695 [https://perma.cc/LZ4G-55EK] (finding statistically significant racial disparities in charging decisions); Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014) (noting that, after controlling for arrest offense, criminal history, and federal district, there is "an unexplained black-white sentence disparity of approximately 9 percent" and noting that more than half of those disparities can be explained by stark racial disparities in prosecutorial charging decisions with respect to charges that carry mandatory minimum sentences); Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1190–91 (2018) (describing racial disparities in plea bargaining and noting that "[w]hite defendants are twenty-five percent more likely than black defendants to have their most serious initial charge dropped or reduced to a less severe charge" which translates to more white defendants receiving misdemeanor plea offers or offers that do not carry possible

prosecutors typically do not selectively prosecute individuals based on race. In fact, the data suggest that prosecutors regularly make decisions based on legally impermissible racial criteria.[159] Accordingly, the Court should revisit the presumption of regularity that was central to its decision in *United States v. Armstrong*. In *Armstrong*, the Court allocated an onerous burden of proof to the defendant with respect to claims of selective prosecution, noting that "'[t]he presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.'"[160] Data now provides "clear evidence to the contrary" at the aggregate level, such that courts should dispense with the presumption.[161]

In some jurisdictions, it might make sense to dispense with the presumption of regularity for other claims involving prosecutorial behavior. Consider, for example, the problem of repeated *Brady* violations in Louisiana.[162] Under *Brady v. Maryland*, prosecutors have a duty to look at police and prosecutorial files, discover potentially exculpatory material, and turn any potentially exculpatory material over to the defense before trial.[163] But in Louisiana, there is a documented pattern of prosecutors ignoring their *Brady* obligations.[164] At some point, repeated violations become so egregious that it is no longer reasonable to assume that prosecutors regularly comply with their *Brady* obligations.

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incarceration as compared to Black defendants); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 78 (2013) (noting "that prosecutors file mandatory minimums twice as often against black men as against comparable white men"). *But see* Hannah Shaffer, *Prosecutors, Race, and the Criminal Pipeline*, 90 U. CHI. L. REV. 1889, 1892 (2023) (arguing that prosecutors in North Carolina have used their discretion to punish white defendants more).

159. *See supra* note 158.

160. United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15 (1926)).

161. *Id.*; *see also supra* note 158. In *Armstrong* itself, the Court recognized that "[p]resumptions at war with presumably reliable statistics have no proper place in the analysis of [an] issue." *Armstrong*, 517 U.S. at 469–70.

162. *See* Ivan Moreno, *Louisiana Has a* Brady *Crisis. Can the Supreme Court Fix It?*, LAW360 (Jan. 3, 2023, 15:50 ET), https://www.law360.com/articles/1561189 [https://perma.cc/E26E-ASY3]; *see also* Connick v. Thompson, 563 U.S. 51, 80 (2011) (Ginsburg, J., dissenting) ("[M]isperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish.").

163. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963)*; see also* United States v. Agurs, 427 U.S. 97, 111 (1976) (noting that prosecutors have a duty to disclose material, exculpatory evidence even when it is not requested by the defense); Kyles v. Whitley, 514 U.S. 419, 421 (1995) (extending the prosecutorial obligation to disclose exculpatory information in police files).

164. *See* Moreno, *supra* note 162 (comparing markedly higher *Brady* violations in Louisiana to other jurisdictions).

The presumption of regularity should cease to apply as a factor in burden allocation when the data show the presumption is factually unwarranted. After all, the presumption of regularity is primarily an efficiency-driven principle grounded in the idea that system actors will save time and resources by assuming a proposition is true because it is true most of the time. So, if it is not true most of the time, there is no reason for the presumption.

I would argue for an earlier tipping point—for example, when the proposition is not true in a substantial proportion of cases or when it has been disproven in a significant number of cases—though reasonable minds may differ on precisely where to locate the tipping point. When the tipping point is reached, however, it makes sense to dispense with the presumption of regularity in the burden allocation analysis and place more burdens on the prosecution to show that they have fulfilled their constitutional obligations.[165]

Given developments in data collection, courts and legislatures today have better information about how actors in the system behave than the courts and legislatures of previous generations who established presumptions about what behavior is regular.[166] Those earlier presumptions were based mostly on anecdote, guesswork, and some amount of idealized thinking. If data today show that those presumptions do not reflect reality, decision-makers should take note and adjust their presumptions accordingly.[167] This may mean adjusting or shifting burdens of proof to consider realities on the ground. This need not be done case by case, but it should be done claim by claim.

2. *Improper Assumptions about Law Enforcement Officers.* There is a tension between the Supreme Court's application of a presumption of regularity to law enforcement actions and its acknowledgment that law enforcement officers will often be tempted to go too far when "engaged in

165. And, of course, if the data on the ground changes and, for example, Louisiana reforms its practices such that prosecutorial compliance with *Brady* improves, it would be possible for the presumption of regularity to return as a burden allocation factor in the future.

166. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2053 (2016) (recognizing that criminal courts have become "great warehouses of criminal justice data"); Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 549–58 (2016) (discussing the increases in data collection and generation in the criminal system).

167. *Cf.* Shelby County v. Holder, 570 U.S. 529, 538 (2013) (discussing how Sections 4 and 5 of the Voting Rights Act imposed legitimate, but temporary, additional obligations on certain jurisdictions that had a history of suppressing minority voters); *see also infra* Part II.A.3 (addressing system-preservation concerns).

the often competitive enterprise of ferreting out crime."[168] The Court has made it clear that judges should not blindly defer to officers' conclusory assumptions that their actions were lawful,[169] noting that the Fourth Amendment is designed to check the government's tendency toward overreach and prevent arbitrary, discriminatory, and harassing searches.[170] This understanding of police incentives and behavior means that any presumption of regularity should apply weakly, if at all, to law enforcement officers. But too many courts—including the Supreme Court—apply a strong presumption of regularity to law enforcement actions, even when there is clear evidence that police behaved inappropriately.

For example, when police improperly arrest someone based on a recalled warrant that was not properly removed from a police computer system, *Herring v. United States*[171] tells courts to presume that the police error is isolated and merely negligent unless evidence is presented to suggest otherwise.[172] A defendant who seeks to overcome the good faith exception to the exclusionary rule after *Herring* effectively bears the burden of proving either a heightened improper police *mens rea* or that the police error was part of a systemic police database problem.[173]

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

169. *See, e.g.*, Nathanson v. United States, 290 U.S. 41, 47 (1933) ("Mere affirmance of belief or suspicion is not enough."); Aguilar v. Texas, 378 U.S. 108, 114–15 (1964) (noting that reasonable suspicion and probable cause analyses should not be based on conclusions drawn "by a police officer 'engaged in the often competitive enterprise of ferreting out crime'" (quoting Giordenello v. United States, 357 U.S. 480, 486 (1958))).

170. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 417 (1974) ("A paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures.").

171. Herring v. United States, 555 U.S. 135 (2009).

172. *See id.* at 137, 146–47 (noting that evidence discovered as a result of the arrest is admissible under the good faith exception as long as the database error "was the result of isolated negligence attenuated from the arrest" and noting that suppression would be appropriate only "[i]f the police *have been shown to be* reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests" or "[i]n a case where systemic errors *were demonstrated*" in the police database system and "no such showings were made here" (emphasis added)).

173. *Id.*; *see also* Moreno, *supra* note 21, at 98–99:

> After *Herring*, a defendant must first prove by a preponderance of the evidence that a search was illegal. Once this burden has been met, the defendant must further prove, using direct or circumstantial evidence: (1) that the arresting officers acted deliberately, recklessly, or with gross negligence; or, (2) that the illegality was the result of recurring or systematic police negligence.

Similarly, after *Utah v. Strieff*,[174] when police illegally stop someone and then discover that the person they stopped has an outstanding arrest warrant, the court may presume that the illegal stop was "an isolated instance of negligence that occurred in connection with a bona fide investigation."[175] To overcome that presumption, the defendant must point to some "indication that this unlawful stop was part of [] systematic or recurrent police misconduct."[176] *Strieff*'s presumption that police mistakes are typically isolated and merely negligent matters, because courts are more likely to deem the discovery of incriminating evidence attenuated from an illegal search or seizure when the illegal police action is not flagrant.[177] The *Strieff* presumption encourages courts to avoid the exclusionary rule by finding sufficient attenuation to permit the admission of illegally obtained evidence.

Even when a police officer includes false information in an application for a search warrant, the Court adopts "a presumption of validity with respect to the affidavit [the police officer filed] supporting the search warrant."[178] To overcome this presumption, and before the Court considers whether to suppress the resulting evidence, the defendant bears a heavy burden of proving that the officer who included the false information acted recklessly or intentionally.[179] There is no reason to presume that police act lawfully even when everyone agrees that they acted unlawfully—such as by illegally stopping or arresting someone, or including false information in a warrant application. Once there is evidence of a police mistake, the government should bear the burden of proving that it did not violate the Fourth Amendment, not the other way around.[180]

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174. Utah v. Strieff, 579 U.S. 232 (2016).

175. *Id.* at 243.

176. *Id.*

177. *See* Brown v. Illinois, 422 U.S. 590, 604 (1975) (noting that the "flagrancy of the official misconduct" is particularly relevant in the attenuation analysis). If an illegal stop is not "flagrant," it is easier for the subsequently discovered outstanding arrest warrant to break the causal chain between the illegal stop and the evidence the police found as a result of the arrest. *See Strieff*, 579 U.S at 243 (citing the presumption and noting that "it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct").

178. Franks v. Delaware, 438 U.S. 154, 171 (1978).

179. *See id.* (noting that the defendant's "attack must be more than conclusory" and must include "allegations of deliberate falsehood or of reckless disregard for the truth" that are "accompanied by an offer of proof" that "point[s] out specifically the portion of the warrant affidavit that is claimed to be false" along with a "statement of supporting reasons" in "[a]ffidavits or sworn or otherwise reliable statements" from witnesses). Even if the court determines that the police included deliberate falsehoods in the application, it may still refuse to suppress the resulting evidence "when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause." *Id.* at 171–72.

180. *See supra* Part I.B.2 (discussing equitable estoppel fairness concerns).

Fortunately, some of these presumptions are based on inferences from the Court's dicta, so they are not required by any holdings. That gives lower courts room to reallocate the burdens more equitably. Some jurisdictions are already doing that. For example, several courts have held that when police improperly arrest someone based on a police database error, the prosecution has the burden of demonstrating that the police error was an isolated instance of negligence.[181] These courts have rejected the dicta in *Herring* suggesting that the defendant would have to come forward with evidence of a systemic problem or evidence that the police acted intentionally or recklessly.[182] Instead, they recognize that "[a]n error that subjects a citizen to an unconstitutional search based on [outdated and incorrect information] suggests reckless recordkeeping that may not be excused by the good faith doctrine[, and t]he prosecution had a duty to explain it."[183]

There is also evidence of lower courts rejecting the application of the presumption of regularity to police behavior in other contexts that the Court has yet to address. For example, based on data demonstrating that police regularly engage in racial profiling when choosing whom to stop, detain, and search,[184] some courts reject the application of a presumption of regularity to

181. *See, e.g.*, People v. Pearl, 92 Cal. Rptr. 3d 85, 94–95 (Cal. Ct. App. 2009) (noting that the prosecution has the burden of proving the applicability of the good faith exception, "including the burden of proving an error in recordkeeping that led to the unlawful search was not the fault of any part of the law enforcement team"); State v. McElrath, 569 S.W.3d 565, 580 (Tenn. 2019) (noting that it is the State's burden to prove "that the evidence seized pursuant to the defendant's warrantless arrests should be exempted from exclusion by the good-faith doctrine"); State v. J.R.D., 311 So. 3d 84, 89 (Fla. Dist. Ct. App. 2019) (emphasizing that the State "failed to carry its burden of proof" to establish that the exclusionary rule should not apply under *Herring*); People v. Tidwell, No. B256885, 2015 WL 3612269, at *9 (Cal. Ct. App. June 10, 2015) ("The prosecution failed to demonstrate the reason for the database error, and thus failed to meet its burden to demonstrate that an objectively reasonable basis—otherwise referred to as the good faith exception—excused the presumptively invalid search . . . .").

182. *See supra* note 181.

183. *Tidwell*, 2015 WL 3612269, at *9.

184. *See, e.g.*, RACIAL & IDENTITY PROFILING ADVISORY BD., ANNUAL REPORT 6, 9 (2024), https://oag.ca.gov/system/files/media/ripa-board-report-2024.pdf [https://perma.cc/TH4P-XRLQ] (analyzing data from more than 4.5 million stops by 535 California law enforcement agencies and finding that "Black individuals were stopped 131.5 percent more frequently than expected, given their relative proportion of the California population" and individuals perceived as Black or Native American have higher rates of detention); U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 19–21 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [https://perma.cc/22RL-KKAE] (finding pervasive racial bias in policing); ACLU OF D.C., BIAS AT THE CORE? ENDURING RACIAL DISPARITIES IN D.C. METROPOLITAN POLICE DEPARTMENT STOP-AND-FRISK PRACTICES 1–2 (2023), https://www.acludc.org/sites/default/files/aclu-dc_2024_stop-and-frisk_report.pdf [https://perma.cc/D9UD-AK7S] (same); JEFFREY FAGAN, ANTHONY A. BRAGA, ROD K. BRUNSON & APRIL PATTAVINA, AN ANALYSIS OF RACE AND ETHNICITY PATTERNS IN BOSTON POLICE DEPARTMENT FIELD INTERROGATION, OBSERVATION, FRISK, AND/OR SEARCH REPORTS 20 (2015), https://s3.amazona

selective police enforcement claims.[185] These jurisdictions reduce the burden of production that defendants have when raising selective enforcement claims, and some of them allocate the burden of persuasion to the government, requiring it to provide race-neutral explanations for the officers' behavior and rebut the inference of impermissible police discrimination.[186]

Police openly admit that they will cut constitutional corners for the greater good,[187] and the Supreme Court acknowledges that police cannot always be trusted to do the right thing.[188] For these reasons, it makes sense for courts to distinguish them from other state actors and be more wary of giving them a strong presumption of regularity. Once a criminal defendant produces evidence suggesting that an officer has done something wrong, the presumption of regularity should disappear and play no role in determining how to assign a burden of proof on the underlying claim.[189] Instead, other factors in the burden allocation analysis should determine how the ultimate burden is assigned when the claim is one alleging law enforcement misconduct.

Some courts have essentially adopted the above position and refuse to apply a presumption of regularity to law enforcement conduct.[190] They

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ws.com/s3.documentcloud.org/documents/2158964/full-boston-police-analysis-on-race-and-ethnicity.pdf [https://perma.cc/XNY6-NEJS] (same).

185. *See supra* note 91 and *infra* notes 320, 328.

186. *Id.* More jurisdictions should rely on national and local data demonstrating selective enforcement problems to pierce the presumption of regularity and structure burdens in ways that permit courts to address this constitutional problem.

187. *See* David H. Bayley, *Law Enforcement and the Rule of Law: Is There a Tradeoff?*, 2 CRIMINOLOGY & PUB. POL'Y 133, 133 (2002) ("[T]he police in every society believe that they must occasionally cut legal corners in order to provide effective protection to [the] public.").

188. *See* Johnson v. United States, 333 U.S. 10, 14 (1948) (noting that police are involved in the "often competitive enterprise of ferreting out crime").

189. In this respect, the presumption of regularity as applied to police should be understood as a Thayer bursting-bubble presumption that disappears as soon as the defendant presents any evidence to contradict it rather than a Morgan burden-shifting presumption that continues to give law enforcement the benefit of the doubt and requires the defendant to bear the burden of persuading the court on the facts of each case that the assumption that the police acted regularly and lawfully is incorrect. *Compare* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 336 (1898) (suggesting that a presumption should disappear as soon as any contrary evidence is presented), *and* WIGMORE, *supra* note 9, § 2491 (same), *with* Edmund M. Morgan & John MacArthur Maguire, *Looking Backward and Forward at Evidence*, 50 HARV. L. REV. 909, 913 (1937) (rejecting the bursting-bubble theory of presumptions), *and* Edmund M. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 77–83 (1933) (same).

190. *See, e.g.*, United States v. Sellers, 906 F.3d 848, 853 (9th Cir. 2018) (refusing to presume that officers "are constitutionally enforcing the laws"); United States v. Washington, 869 F.3d 193, 219 (3d Cir. 2017) ("[T]he special solicitude shown to prosecutorial discretion . . . does not inevitably flow to the

recognize the incentives described above and know that officers' behavior is "regularly questioned at trial" and their credibility is often challenged and tested.[191] So when a criminal defendant alleges that a police officer acted improperly, these courts refuse to give the police the benefit of the presumption and instead consider how to allocate the burden of proof based on the other factors, without a thumb on the scale in favor of the government.

3. *Overemphasis on System-Preservation Interests.* At times, the Court has suggested that a presumption of correctness for government actors is necessary to encourage people to seek out and stay in government jobs.[192] Without this presumption, the thinking goes, people will be deterred from becoming public defenders, prosecutors, or police officers.[193] To be sure, anything that disfavors those system actors in litigation—or in any other forum—will, at the margin, reduce the attractiveness of the job. But the Court's concern that a sufficient supply of system actors depends on the operation of the presumption of regularity in its current form seems overblown. Prosecutors are completely immune from liability for their actions,[194] and police have qualified immunity.[195] Moreover, professional discipline for prosecutors and police is virtually nonexistent.[196] For these

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actions of law enforcement . . . ."); United States v. Davis, 793 F.3d 712, 720 (7th Cir. 2015) (en banc) ("Agents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior.").

191. *See Sellers*, 906 F.3d at 853 (explaining that the presumption helps to insulate prosecutors and law enforcement); *Washington*, 869 F.3d at 216, 219 (noting that the presumption of regularity that applies to prosecutors "does not inevitably flow to the actions of law enforcement"); *Davis*, 793 F.3d at 720 (noting that police agents "regularly testify in criminal cases, and their credibility may be relentlessly attacked by defense counsel").

192. *See supra* notes 118–19.

193. *See id.*

194. *E.g.*, Imbler v. Pachtman, 424 U.S. 409, 410 (1976).

195. *E.g.*, Anderson v. Creighton, 483 U.S. 635, 638–39 (1987); Malley v. Briggs, 4757 U.S. 335, 341 (1986); *see generally* JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE xvii (2023) (describing the development and scope of qualified immunity). In addition, police are often indemnified even if a litigant were to overcome the qualified immunity barrier. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 885 (2014) (conducting a nationwide study and finding that "police officers are virtually always indemnified").

196. *See, e.g.*, David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J.F. 203, 203 (2011) (surveying all fifty states and concluding that "professional responsibility measures as they are currently composed do a poor job of policing prosecutorial misconduct"); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 975–77 (2009) (collecting studies to show that "bar authorities have proven to be ineffectual" in addressing prosecutorial misconduct); Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals*

actors, the only thing at stake is the loss of evidence through suppression under the exclusionary rule or the granting of a new trial—and that only occurs in cases where the government cannot meet the burden of explaining why the system actors acted as they did.[197] Those hardly seem like problems that will chill people from pursuing these jobs. Prosecutors and police do not like losing evidence and are likely to pay attention and attempt to learn from their mistakes when suppression happens, but there is no evidence that suppression of evidence tends to drive them out of the profession.[198] Mistrials and appellate court reversals have also been a mainstay of the criminal legal system for years, but they have not caused a meaningful reduction in the supply of prosecutors or police officers.[199]

Nor will public defenders be chilled by the prospect of being declared structurally ineffective. First, many defenders are mission-driven and are actually quite willing to be declared constitutionally ineffective if the result is a new trial for a client.[200] And professional discipline for poor performance

for Reform, 105 J. CRIM. L. & CRIMINOLOGY 881, 884–90 (2015) (concluding that there is "an almost complete lack of discipline of errant prosecutors"); Max Schanzenbach, *Policing the Police: Personnel Management and Police Misconduct*, 75 VAND. L. REV. 1523, 1525–26 (2022) ("Internal discipline procedures designed to enforce police department policies rarely result in significant sanctions . . . ."); Christopher J. Harris & Robert E. Worden, *The Effect of Sanctions on Police Misconduct*, 60 CRIME & DELINQ. 1258, 1259 (2014) (highlighting examples of "police organizations that have failed to maintain officer discipline . . . ranging from failures to properly investigate complaints, to failures to actually sanction officers found guilty of misconduct").

197. *Cf.* Medina v. California, 505 U.S. 437, 449 (1992) (noting that "the allocation of the burden of proof . . . will affect . . . determinations only in a narrow class of cases where the evidence is in equipoise").

198. *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 580, 582 (2008) (noting that "a tiny fraction—about 2 percent" of criminal cases are thrown out each year based on Fourth Amendment violations and collecting empirical research to show that "the exclusionary rule is largely powerless in cases the police do not expect to take before a judge [and that] category constitutes the majority of the cases in which the police operate"); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 82 (1992) (surveying police and court personnel and finding that suppression "effectively educates officers in the law of search and seizure" and is not "too complicated for police officers to do their jobs effectively").

199. *See Criminal Justice Expenditures: Police, Corrections, and Courts*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/criminal-justice-police-corrections-courts-expenditures [https://perma.cc/Z5E8-KM83] (noting that funding for and hiring of police has not decreased over time); Udi Ofer, *Defunding Prosecutors and Reinvesting in Communities: The Case for Reducing the Power and Budgets of Prosecutors to Help End Mass Incarceration*, 2 HASTINGS J. CRIME & PUNISHMENT 31, 32 (2021) (explaining how prosecutor offices have grown in size over time).

200. *Cf.* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1272–74 (1993) (discussing how public defenders are mission driven); *see also* J. Amy Dillard, *Foreword*, 44 U. BALT. L. REV. 367, 369 (2015) ("Falling on the sword for a client who might get relief from an ineffective assistance of counsel claim is nearly a blood-oath among public defenders.").

in indigent defense is practically non-existent.[201] The entire reason for dispensing with the presumption of regularity in the context of indigent defense is that no attorney—no matter how good they are—is able to be effective with caseloads as large as those indigent defenders are expected to handle. As a result, the declaration that an overburdened attorney is ineffective is neither personal nor stigmatizing and is unlikely to drive lawyers from the profession. On the contrary, defenders forced to carry outrageous caseloads are quite willing to acknowledge that they cannot adequately handle the volume—and to hope that widespread judicial findings that representation is ineffective due to high caseloads will push state legislatures to address the chronic underfunding of indigent defense.[202] Far from driving people out of the profession, measures taken to address their crushing caseloads would likely help to keep individuals in the profession longer.

One could argue that the presumption of regularity also serves a symbolic, normative system-preservation value in that it demonstrates confidence in public officials, making them feel trusted and valued, while also protecting them from harassment and distraction. Such arguments are made about qualified immunity doctrine.[203] But burden allocation is a relatively weak and diluted vehicle for sending symbolic, aspirational messages to public officials. And unlike qualified immunity, burden allocation does not result in dismissals of cases or shield public officials from further scrutiny. In criminal cases, defendants will continue to challenge public officials' behavior even when a presumption of regularity affects the burden allocation. Burden allocations that do not accurately reflect reality will not insulate public officials from challenge; they will just make the constitutional analyses under those challenges less accurate.

Additionally, any interest the system has in shielding public officials from harassment or distraction through burden allocation must be balanced against the need to hold public officials accountable when they violate individuals' constitutional rights. Because burden allocation does little to shield public officials from scrutiny—as opposed to liability—its value for that purpose is likely outweighed by the need for criminal defendants to be able to vindicate their constitutional rights. A presumption of regularity

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201. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORN. L. REV. 679, 695 (2007) (noting that findings of ineffectiveness rarely result in any disciplinary action).

202. *See supra* note 155.

203. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 8 (2017) (noting that qualified immunity is shaped by policy considerations that include a desire "to shield officials from harassment, distraction, and liability").

grounded in aspirational values that ignores the facts on the ground risks unjustly imprisoning innocent people. That is dangerous in an adversarial system whose legitimacy depends on reaching reliable outcomes.

Finally, it is possible that the presumption of regularity also addresses a system-preservation concern about closing the courthouse doors to frivolous and unnecessary litigation. The Court has previously expressed a concern about allowing too much litigation—particularly with respect to appellate and postconviction claims arising under cases like *Strickland*.[204] But the legitimacy of this system-preservation concern requires that the courthouse doors only be closed to frivolous or unnecessary claims. After all, the system has an interest in providing a remedy for meritorious constitutional claims, both to provide relief to defendants whose rights have been violated and to catalyze appropriate government action to prevent future violations. And there are ways to aggregate claims through class actions and issue preclusion to address systemic constitutional violations while simultaneously reducing the number of cases.[205] To adopt a presumption that makes it harder for criminal defendants to raise and win constitutional challenges when there is robust data documenting systemic constitutional violations undermines the system-preservation interest in ensuring legitimacy. Courts can also prevent unnecessary retrials without relying on factually untenable presumptions of regularity by using other appellate and post-conviction doctrines—like harmless error and deferential standards of appellate and post-conviction review—that already serve that purpose.[206]

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204. *E.g.*, Strickland v. Washington, 466 U.S. 668, 690 (1984) (expressing fear that "[t]he availability of intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges").

205. *See, e.g.*, Betschart v. Oregon, 103 F.4th 607, 612–13, 628 (9th Cir. 2024) (providing relief in a habeas class action to all criminal defendants facing systemic violations of the right to counsel in Oregon).

206. *See, e.g.*, Chapman v. California, 386 U.S. 18, 22 (1967) (adopting a harmless error standard for constitutional claims on direct appeal to avoid unnecessarily setting aside convictions and requiring needless and wasteful retrials "for small errors or defects that have little, if any, likelihood of having changed the result of the trial"); Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (holding that federal habeas relief will not be granted unless the error in question had a "substantial and injurious effect or influence in determining the jury's verdict" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))); Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 678–79 (2015) (describing the "several deferential standards" of review on appeal that "usually favor[] the state," including clear error, abuse of discretion, clearly erroneous standards); 28 U.S.C. § 2254(d) (1996) (requiring federal courts to show deference to state court decisions when addressing habeas corpus petitions filed by state prisoners attempting to obtain post-conviction relief).

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Courts and other decision-makers should attend to circumstances on the ground rather than blindly assuming that all public officials are entitled to the presumption of regularity. Based on data about how the system actually operates, there should not be a presumption of regularity with respect to indigent defenders' performance or with respect to determinations of selective prosecution or selective enforcement. And the presumption of regularity as applied to law enforcement officers should disappear when a defendant presents evidence of police misbehavior. Finally, some jurisdictions may need to adjust burdens of proof on other claims—like *Brady*—based on the actual practice in their jurisdictions and their determinations about whether government actors should be stripped of the presumption based on data about how actors behave. Generic or aspirational system-preservation interests should not stand in the way of dispensing with factually unsupportable presumptions of regularity.

B. The Need for More Attention to Fairness Issues

Advocates and decision-makers should also be more attentive to fairness concerns related to both feasibility and equitable estoppel.

1. *Feasibility*. Courts and legislatures should consider the relevant discovery rules and statutes as well as facts on the ground when determining whether a party has access to the information relevant to a claim instead of focusing on the abstract possibility that a party might be able to find the information. In the context of criminal prosecutions, discovery rules often provide defendants with little information and frequently connect the timing of any required disclosures to the trial date.[207] With the vast majority of criminal cases being resolved through plea bargaining, these timing requirements often mean defendants do not have realistic access to discovery.[208] Meanwhile, state and federal statutes limit criminal defendants' ability to access information from private companies that increasingly store

207. *See, e.g.*, Russell M. Gold, *Power Over Procedure*, 57 WAKE FOREST L. REV. 51, 78–79 (2022) (discussing how little discovery criminal defendants get under the rules and statutes and noting that, "the government is required to disclose only very limited categories of information and often need not even meet those obligations because the timing is tied to a trial that may never come"); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1091 (2014) ("The typical discovery statute only permits a criminal defendant to view fragments of the State's evidence against him . . . .").

208. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) (noting that ninety-seven percent of federal convictions and ninety-four percent of state convictions come from guilty pleas); *see also* Gold, *supra* note 207, at 78–79 (discussing the problematic timing of discovery obligations).

large volumes of relevant, digital evidence.[209] Notably, these statutes often have exceptions that give police and prosecutors access to the information, creating an information asymmetry.[210]

When thinking about how to allocate burdens of proof, courts should ask if defendants typically have realistic access to the information they would need to support a federal constitutional claim or if that information is uniquely available to the government. If the latter, the court should consider adopting a burden-shifting regime that forces the government to produce the necessary information after the defendant makes an initial, reduced showing of a possible constitutional problem.

The U.S. Supreme Court and several lower courts have failed to give sufficient consideration to these feasibility issues. They have explicitly or implicitly placed burdens on criminal defendants to establish that prosecutors have failed to pursue prosecutions against similarly-situated defendants of another race,[211] that police maintain their databases in reckless ways,[212] that police systematically stop people without reasonable suspicion,[213] that police officers acted intentionally or recklessly when including false information in warrant applications,[214] and that drug-sniffing police dogs are not reliably able to detect contraband.[215] In all of these cases, the information necessary to sustain the defense burden is typically in the

209. *See, e.g.*, Rebecca Wexler, *Privacy Asymmetries: Access to Data in Criminal Defense Investigations*, 68 UCLA L. REV. 212, 215 (2021) (describing how "multiple privacy statutes . . . bar defense counsel from subpoenaing private entities for entire categories of information" that is otherwise available to prosecutors and law enforcement).

210. *See id.* ("The statutes often contain express exceptions that permit police and prosecutors to access protected information but contain textual silence regarding access by criminal defense investigators[,]" which "[c]ourts have repeatedly interpreted . . . to categorically prohibit defense subpoenas.").

211. *E.g.*, United States v. Armstrong, 517 U.S. 456, 465 (1996) ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted.").

212. *E.g.*, Herring v. United States, 555 U.S. 135, 146 (2009) (noting that exclusion of illegally obtained evidence would be warranted "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests").

213. *See* Utah v. Strieff, 579 U.S. 232, 242 (2016) (noting that a defendant's inability to provide any "indication[s] that this unlawful stop was part of any systemic or recurrent police misconduct" supported concluding that the police exercised reasonable suspicion).

214. *E.g.*, Franks v. Delaware, 438 U.S. 154, 171–72 (1978) (requiring the defendant to produce specific evidence demonstrating that the officer included deliberate falsehoods or recklessly disregarded the truth in a warrant application).

215. *See* Florida v. Harris, 568 U.S. 237, 246–47 (2013) (noting that if the dog has been certified by a "bona fide organization" or "completed a training program that evaluated his proficiency in locating drugs[,]" then the court can presume the dog's alert "provides probable cause to search" absent contrary evidence from the defendant).

hands of the government and difficult for indigent defense attorneys to obtain—especially given the limited resources at those attorneys' disposal.

Consider again the onerous burden the Supreme Court placed on criminal defendants who raise selective prosecution claims in *United States v. Armstrong*.[216] There, the Court required them to produce evidence that similarly situated individuals of a different race were not prosecuted before the defendants could even get discovery.[217] In theory, *Armstrong* is right that defendants could make prima facie showings of selective prosecution by looking at arrest data, comparing it to later prosecution records, and locating similarly situated individuals who were not ultimately prosecuted.[218] But in practice, that data is not available to criminal defendants.[219] As the Third Circuit Court of Appeals recognized, "[t]he lived experience . . . has resembled less a challenge and more a rout, as practical and logistical hurdles abound—especially to prov[e] a negative."[220] There has not been a single successful selective prosecution claim in a federal case since *Armstrong* was decided.[221] Given the empirical data showing that racial bias is common in prosecutorial decision-making, the complete absence of successful selective prosecution claims in federal courts necessarily means that the process for

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216. *See Armstrong*, 517 U.S. at 465–66 ("In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'" (internal citation omitted)).

217. *Id.*

218. *See id.* at 470.

219. *See* United States v. Washington, 869 F.3d 193, 215, 219 (3d Cir. 2017) (noting that "practical and logistical hurdles abound" in requiring defendants to produce such data); Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 828–29, 846–47 (2003) (discussing, among other things, the problems with the "similarly situated" discovery standard, including the possibility that the "data . . . may simply not exist" or is in "the exclusive control of the government"); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 640 (1998) ("The *Armstrong* holding and the implications of its reasoning create a barrier to discovery that, for the great majority of criminal cases, is insuperable."); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1139 (2000) ("The bar for selective enforcement and prosecution claims has been set at a nearly unreachable height for the vast majority of criminal defendants, an example of an abstract right with no practical remedy.").

220. *See Washington*, 869 F.3d at 215, 219 (noting that the presumption of regularity that applies to prosecutors "does not inevitably flow to the actions of law enforcement"). *See also* United States v. Sellers, 906 F.3d 848, 853 (9th Cir. 2018); United States v. Davis, 793 F.3d 712, 720 (7th Cir. 2015) (en banc) (noting that police agents "regularly testify in criminal cases" and their "credibility may be relentless attacked by defense counsel").

221. *See* Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 1002 (2021) (noting that "there has not been a single successful selective prosecution" case in federal court since *Armstrong*); *Washington*, 869 F.3d at 215 ("The government itself concedes that 'neither the Supreme Court nor this Court has ever found sufficient evidence to permit discovery of a prosecutor's decision-making policies and practices.'" (internal citation omitted)).

litigating such claims fails to capture the real incidence of selective prosecution.[222] For this reason, some states have rejected the stringent *Armstrong* standard as a matter of state law and are more willing to give defendants discovery on selective prosecution claims.[223] Other states—and the U.S. Supreme Court—should do the same.

Some lower courts have relied on feasibility concerns to reject the *Herring* Court's presumption that police database errors are good-faith mistakes unless the defense shows that the database error was intentional, reckless, or part of a systemic problem.[224] In those jurisdictions "the burden of proof is allocated to the party with superior knowledge concerning the facts" and, in *Herring* cases, that means the prosecution should be forced to demonstrate that the police error was isolated and negligent.[225] After all, "law enforcement had full custody and control of the database in question, and also had access to the witnesses who could have explained the procedures," so it is only fair to place the burden on the government to show that the error was isolated.[226]

In the context of drug-sniffing dogs, *Florida v. Harris*[227] held that an alert by a drug-sniffing dog who performed satisfactorily in a certification or training program is presumed to provide probable cause for the police to search "subject to any conflicting evidence offered" by the defendant.[228] By shifting the burden of proof to the defendant to contest the adequacy of the training program or to indict the dog's track record or the dog handler's methods, the Court required the defendant to affirmatively disprove the validity of a warrantless search—a position at odds with the burden allocation adopted by a majority of jurisdictions in warrantless search

222. *See supra* notes 155–56.

223. *E.g.*, Young v. Superior Ct., 294 Cal. Rptr. 3d 513, 526 (Cal. Ct. App. 2022) (explaining that the California Racial Justice Act created a standard for obtaining discovery that is "significantly lower than the rigorous standard announced in *Armstrong*").

224. *Compare supra* note 181 (holding when police improperly arrest someone based on a police database error, the prosecution has the burden of demonstrating that the police error was an isolated instance of negligence), *with* Herring v. United States, 555 U.S. 135, 144–46 (2009) (presuming that database mistakes are negligent and isolated unless "police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests").

225. People v. Tidwell, No. B256885, 2015 WL 3612269, at *8 (Cal. Ct. App. June 10, 2015). *See also* People v. Pearl, 92 Cal. Rptr. 3d 85, 94–95 (Cal. Ct. App. 2009) (giving the prosecution the burden); State v. McElrath, 569 S.W.3d 565, 579 (Tenn. 2019) (same); State v. J.R.D., 311 So. 3d 84, 87 (Fla. Dist. Ct. App. 2019) (same).

226. *Tidwell*, 2015 WL 3612269, at *8. *See also* United States v. Leon, 468 U.S. 897, 924 (1984) (noting that "the prosecution should ordinarily be able to establish objective good faith without a substantial expenditure of judicial time").

227. Florida v. Harris, 568 U.S. 237 (2013).

228. *Id.* at 247.

cases.[229] This burden allocation is particularly troubling because the relevant information about the dog's history, the dog's handler, and the relevant training program are solely in the government's possession.

Importantly, the Court never held that the government must give the defendant access to the information needed to mount a reliability challenge—that is, information about the performance of the dog in question. Some lower courts have denied defendants' requests for such information, making it nearly impossible for defendants to challenge the reliability of the dogs.[230] But some lower courts have pushed back on fairness grounds, holding that the government must provide information about the dogs' field performance and the nature of the dogs' training when the defense asks for it—effectively imposing a burden of production on the government.[231] To these courts, the defendant's ability to rebut the *Harris* presumption "would be stripped of its value if the defendant were not entitled to discover the evidence on which he would base such a challenge."[232] If the defendant is to have the burden of rebutting reliability, it is only fair to give the defense access to the information that would be necessary to permit such a refutation.

States have different discovery rules, data collection practices, and attitudes towards data transparency.[233] When analyzing state constitutional provisions, state courts should consider how available the relevant data is to the defendants in their state as part of the feasibility assessment. That might lead to different burden allocations under different state constitutional provisions. When the prosecution has greater access to the information relevant to a claim, that party's greater access argues in favor of requiring it to bear at least the burden of producing the relevant information. After all,

229. *See* LAFAVE ET AL., *supra* note 3, § 10.3(b) ("[M]ost states follow the rule utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution."); Chimel v. California, 395 U.S. 752, 762 (1969) (explaining in dicta that "the general requirement that a search warrant be obtained is not lightly to be dispensed with, and the burden is on those seeking (an) exemption (from the requirement) to show the need for it" (internal citations omitted) (citation modified)).

230. *See, e.g.*, United States v. Salgado, 761 F.3d 861, 866–67 (8th Cir. 2014) (identifying narrow scenarios where a defendant may seek discovery regarding the reliability of dog performance or training); United States v. Jones, No. 19-cr-00201, 2020 WL 3128905, at *3 (D. Me. June 12, 2020) (same).

231. *See, e.g.*, United States v. Foreste, 780 F.3d 518, 528–29 (2d Cir. 2015) (holding that "[t]he state should produce its evidence of the dog's reliability"); Harris v. State, 802 S.E.2d 708, 712 (Ga. Ct. App. 2017) (holding that "the defendant should be permitted to utilize subpoena power to obtain relevant materials" in regards to a dog's alert).

232. *Foreste*, 780 F.3d at 529.

233. *See* Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719, 1755–59 (2016) (discussing how some states require court systems to give defendants access to jury records to enable them to gauge the viability of raising fair cross section challenges to the venire while others do not).

error costs in the criminal system are extremely high. A person who loses their liberty—and possibly their life, depending on the nature of the charged criminal offense—suffers a much more significant loss than one who loses a civil judgment and has to pay money damages. When decision-makers set burdens of proof in ways that require parties who have more limited access to information to find ways to produce it, it wastes precious system resources while also increasing the probability of an erroneous determination if the court eventually must make a determination without a full understanding of the relevant facts.

In addition to informing allocations of the burden of production, feasibility analyses should inform how courts allocate the burden of persuasion and how they set the quantum of proof. Even after a defendant has access to the relevant information, courts still must be careful not to allocate burdens of persuasion and impose standards of proof that effectively prevent all criminal defendants—including those whose rights may have been violated—from being able to show a constitutional violation. After *Harris* adopted a presumption of reliability for certified drug-sniffing dogs and allocated the burden of persuasion to the defense to overcome that presumption, some lower courts continue to insist that drug-sniffing dogs are reliable, even in the face of damning evidence of the dogs' unreliability.[234] For example, one court found a certified drug-sniffing dog reliable even though drugs were found only 43% of the time after the dog alerted in the field.[235] Another court relied on the *Harris* presumption to find a dog reliable despite evidence that the dog was trained through a rewards system that tended to encourage alerts and even though the dog's "overall accuracy rate in the field [wa]s not much better than a coin flip."[236] In these cases, courts often point to the dog's certification program as evidence of the dog's reliability, but they typically reject any attempts to challenge the adequacy

234. *See, e.g.*, United States v. Bentley, 795 F.3d 630, 635–36 (7th Cir. 2015) (applying *Harris* presumption of reliability to a dog who "alerts 93% of the time he is called to do an open-air sniff of a vehicle" even though his "overall accuracy rate in the field . . . is not much better than a coin flip" and even though he was trained to alert through a reward system that incentivized alerts); United States v. Green, 740 F.3d 275, 283–84 (4th Cir. 2014) (relying on *Harris* to affirm a sniff even when only 43% of the cases where the dog alerted actually resulted in drugs or direct evidence that drugs had recently been in the vehicle).

235. United States v. Green, 740 F.3d 275, 283–84 (4th Cir. 2014).

236. United States v. Bentley, 795 F.3d 630, 635–36 (7th Cir. 2015). The *Bentley* Court relied in part on the fact that the dog in question had passed certification and rejected defense counsel's attempt to challenge the adequacy of the certification program. *Id.* at 637.

of those certification programs.[237] If the dog's poor training and field performance are insufficient to overcome the *Harris* presumption of reliability, and defense counsel cannot question the adequacy of the certification program that triggered application of the presumption, then the presumption becomes essentially unrebuttable.[238] The burden is set so high as to make it practically infeasible for a criminal defendant to ever meet it. In those jurisdictions, individuals' constitutional rights to be free from unreasonable searches and seizures are likely being violated by erroneous dog alerts, because courts have interpreted the *Harris* burden structure as erecting an impossible barrier for defendants.

Some lower courts do a better job of attending to feasibility concerns and do not put such an impossible burden on the defense. Instead, they require the prosecution to present real evidence that a drug-sniffing dog has been properly trained and certified before holding that the prosecution is entitled to the *Harris* presumption of reliability.[239]

2. *Equitable Estoppel*. In addition to addressing feasibility concerns, decision-makers should pay more attention to equitable estoppel principles and ask if there is wrongdoing that merits placing the burden on the government. The Supreme Court has already held that when the government violates an individual's constitutional rights and wants to argue that the evidence it discovered from that violation was so attenuated from the illegality that it should be admissible, the burdens of proof rest on the government to establish attenuation, an independent source, or inevitable discovery through lawful means.[240]

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237. *See, e.g.*, *id.* at 636–37 (noting that such challenges "cannot get off the ground[, because] there are no national standards by which we can judge the training"). In a world with no national standards under which a defendant can legitimately challenge application of the presumption, there is no feasible way for the defense to rebut the presumption. Maneka Sinha, *The Automated Fourth Amendment*, 73 EMORY L.J. 589, 625 (2024) (explaining the lack of uniform standards and the difficulty defendants will face in attempting to challenge a dog's reliability).

238. *See Bentley*, 795 F.3d at 636–37 (describing one drug-sniffing dog's poor training and bad field performance and noting that it was still not enough to overcome the presumption).

239. *See, e.g.*, State v. Farmer, 311 P.3d 888, 900 (Or. 2013) (carefully scrutinizing a drug-sniffing dog's training and field performance); United States v. Diaz, No. 16-cr-00055, 2018 WL 1697386, at *14–15 (D.S.C. Apr. 6, 2018) (same); United States v. Acosta, No. 18-cr-2050, 2019 WL 454247, at *12–13 (N.D. Iowa Feb. 4, 2019) (same). Mere evidence of certification is not sufficient in these courts; instead, the prosecution must present "information about the training that the dog and handler underwent, and the standards they had to meet to achieve certification." *See, e.g.*, State v. Helzer, 252 P.3d 288, 291 (Or. 2011).

240. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 438 (1984) (holding that the government bears the burden of demonstrating that police would inevitably have discovered evidence that was illegally obtained); Brown v. Illinois, 422 U.S. 590, 604 (1975) (allocating to the government the burden of establishing attenuation); Nardone v. United States, 308 U.S. 338, 341 (1939) (same).

The logic of these decisions should also mean that the government has the burden of establishing that it acted in good faith reliance on a warrant, statute, or judicial holding if it wants to rely on the good faith exception to the Fourth Amendment. But cases like *Herring* and *Strieff* seem to presume good faith and place burdens on the defendant to show that the police error was systemic rather than isolated.[241] In addition to improperly affording police an undeserved presumption of regularity and posing feasibility issues because the defense is unlikely to have access to the relevant information about how prevalent police errors are, there are also equitable reasons to question this allocation of the burden. After all, if the government has engaged in wrongdoing and violated someone's Fourth Amendment rights, allocating the burden of persuasion to the government to get itself out of trouble is one small way to begin to right the equitable wrong and encourage the government to do better. If the government wants to use the illegally obtained evidence, it should bear the burden of establishing isolated, negligent error.[242]

Similar equitable arguments suggest adjusting the allocation of burdens in other criminal procedure contexts as well. Consider, for example, the federal burden structures under *Brady*[243] and *Strickland*.[244] Both cases require defendants to bear all of the burdens of proof.[245] Under *Brady*, the defendant must demonstrate both that the prosecutor failed to disclose exculpatory evidence before trial and that the evidence was material, meaning that there is a reasonability probability that, had the information been disclosed, the result of the proceeding would have been different.[246] Under *Strickland*, the defendant must demonstrate both that defense counsel performed deficiently given the prevailing professional norms and that there

241. *See* Herring v. United States, 555 U.S. 135, 144–45 (2009) (holding that "police conduct must be sufficiently deliberate that exclusion can meaningfully deter"); Utah v. Strieff, 579 U.S. 232, 242 (2016) (noting that the absence of any "indication that this unlawful stop was part of any systemic or recurrent police misconduct" supported "that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house").

242. People v. Tidwell, No. B256885, 2015 WL 3612269, at *9 (Cal. Ct. App. June 10, 2015) ("An error that subjects a citizen to an unconstitutional search based on information more than two years old suggests reckless recordkeeping that may not be excused by the good faith doctrine. The prosecution has a duty to explain it.").

243. Brady v. Maryland, 373 U.S. 83 (1963).

244. Strickland v. Washington, 466 U.S. 668 (1984).

245. *Id.* at 689–90, 693–94; *see also* Strickler v. Greene, 527 U.S. 263, 289 (1999) (noting that the defendant bears all of the burdens to establish a *Brady* violation).

246. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 434 (1995) (requiring the defendant to show a reasonable probability of a different outcome); United States v. Bagley, 473 U.S. 667, 682 (1985) (same).

was prejudice, meaning that there is a reasonable probability that, had counsel performed reasonably, the outcome would have been different.[247]

Of course, it makes sense to place an initial burden of production on the defendant under both *Brady* and *Strickland*. After all, these claims are typically raised after conviction when the defendant attempts to change the status quo and upend a conviction.[248] If the defendant had no burden of production, the law would invite a flood of potentially frivolous claims that would require the government to defend every conviction, no matter how good defense counsel and the trial prosecutors were. But once the defense has shown that the prosecutor failed to disclose important exculpatory evidence before trial, or once the defendant has made a prima facie showing of deficient attorney performance, equity might suggest shifting the burden to the government to show why the error was not significant enough to merit relief. At the very least, the defendant should be given a minimal burden of production on prejudice with the government then shouldering the burden of persuasion to disprove prejudicial effect. After all, if the prosecution failed to disclose important exculpatory evidence, the government is in the wrong and should not be allowed to complain about having to explain itself. Requiring the government to justify its behavior—or at least explain why its failure should not have consequences—also gives the government an incentive to avoid error in the first place.[249] And in the *Brady* context, the need to avoid errors is necessary to ensure that innocent people are not wrongly convicted.

Similarly, once the defendant shows that appointed defense counsel erred in important ways, the state, which is responsible for the performance of that attorney, has wronged the defendant. Equitably, the state should not now be able to complain about having to show why a criminal defendant is not entitled to a remedy despite receiving deficient counsel. The Court has repeatedly described the *Gideon v. Wainwright*[250] right to appointed counsel as a "watershed" right that is fundamental to the accuracy of the adversarial

247. *Strickland*, 466 U.S. at 689–90, 693–94.

248. *See* Parke v. Raley, 506 U.S. 20, 31 (1992) ("[E]ven when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant.").

249. The government is likely to be more careful and avoid even negligent mistakes if it must justify its actions later or face consequences. *Cf.* Utah v. Strieff, 579 U.S. 232, 249 (2016) (Sotomayor, J., dissenting) ("Even officers prone to negligence can learn from courts that exclude illegally obtained evidence . . . . Indeed, they are perhaps the most in need of the education . . . ."); Herring v. United States, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting) ("Negligent recordkeeping errors by law enforcement . . . are susceptible to deterrence by the exclusionary rule . . . .").

250. Gideon v. Wainwright, 372 U.S. 335 (1963).

system.[251] Defendants need constitutionally adequate counsel because it is through counsel that they assert their other rights. Placing a burden on the government to explain why a defense attorney's deficient performance does not merit a new trial ensures accurate verdicts and incentivizes the government to invest more in the quality of indigent defense representation.

Some states have recognized that equitable considerations argue in favor of a different burden structure—at least with respect to *Brady* violations. For example, the New Hampshire Supreme Court explained that "[e]ssential fairness . . . underlies the duty to disclose"[252] and faulted the State for failing to provide relevant exculpatory and impeachment material. Having determined that the State was in the wrong for failing to disclose the information, the state high court concluded that the federal materiality standard imposed "too severe a burden on defendants."[253] As the court put it, "the prosecutor decides which information must be disclosed[, so] . . . the prosecutor must be responsible for defending that decision."[254] The state adopted a burden-shifting regime under which the defense bears the initial burden of proving that the State failed to disclose exculpatory or impeachment information, but once it does that, "the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict."[255]

New York does not shift the burden of proof to the State, but it does rely on similar fairness concerns to reduce the defendant's burden on the materiality prong. Noting that the *Brady* obligation is premised on concerns about ensuring "'elemental fairness' to the defendant" and that "the prosecutor's office discharge[s] its ethical and professional obligations," the New York Court of Appeals explained that the materiality analysis should vary depending on how much the prosecutor's behavior "violated basic concepts of fair play."[256] When a defendant makes the prosecutor aware through a specific discovery request that the defense thinks certain

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251. *See* Edwards v. Vannoy, 593 U.S. 255, 267 (2021) (describing the *Gideon* right to counsel as a "watershed" right); Jones v. Mississippi, 593 U.S. 98, 124 (2021) (same); Lackawanna Cnty. Dist. Att'y v. Coss, 532 U.S. 394, 404 (2001) ("[T]he special status of *Gideon* claims . . . is well established in our case law."); United States v. Cronic, 466 U.S. 648, 654 (1984) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956))).

252. State v. Laurie, 653 A.2d 549, 552 (N.H. 1995).

253. *Id.*

254. *Id.*

255. *Id.*

256. People v. Vilardi, 555 N.E.2d 915, 919 (N.Y. 1990) (quoting People v. Fein, 219 N.E.2d 274, 279 (N.Y. 1966)).

exculpatory information is material to its defense, the prosecutor's failure to provide the information is "more serious" in its "potential to undermine the fairness of the trial."[257] For that reason, the New York court modified the standard of proof a defendant has to meet, holding as a matter of state constitutional law that the defendant's burden is only to demonstrate "a 'reasonable *possibility*' that the failure to disclose the exculpatory [evidence] contributed to the verdict."[258] In so doing, it deviated from the higher federal burden requiring the defendant to show a reasonable *probability* of a different outcome.

A handful of states have made similar moves to reduce the standard of proof the defendant must meet to prove prejudice in the context of ineffective-assistance-of-trial-counsel claims.[259] Once the defendant demonstrates that trial counsel provided deficient performance, Alaska requires the defendant to show that "there is a reasonable *possibility* that the attorney's deficient performance affected the outcome of the case,"[260] rather than a reasonable probability. Hawaii does not require the defendant to show actual prejudice—just "a possible impairment, rather than a probable impairment, of a potentially meritorious defense."[261] In New York, the prejudice component "focuses on the 'fairness of the process as a whole rather than its particular impact on the outcome of the case'"[262] and asks whether "the evidence, the law, and the circumstances of a particular case,

257. *Id.* at 920.

258. *Id.* (emphasis added).

259. *See, e.g.*, State v. Yuen, 555 P.3d 121, 125 (Haw. 2024) (requiring the defendant to show only "a possible impairment, rather than a probable impairment, of a potentially meritorious defense" as a result of counsel's deficient performance); People v. Sposito, 180 N.E.3d 1053, 1054 (N.Y. 2022) (emphasizing that New York considers "whether 'the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation'" (quoting People v. Oliveras, 993 N.E.2d 1241, 1245 (N.Y. 2013))); Ahvakana v. State, 475 P.3d 1118, 1122 & n.7, 1125 (Alaska Ct. App. 2020) (requiring the defendant to show "a reasonable possibility that the attorney's deficient performance affected the outcome").

260. *See Ahvakana*, 475 P.3d at 1122 & n.7, 1125 (emphasis added) (noting that Alaska's constitutional standard is lower than the federal "reasonable probability" standard). *See also* Garay v. State, 53 P.3d 626, 628 (Alaska Ct. App. 2002) ("[T]he issue is whether there is a reasonable possibility that this information would have *affected* [defendant's] decision . . . ."); Risher v. State, 523 P.2d 421, 424–25 (Alaska 1974) ("If the first burden has been met, all that is required additionally is to create a reasonable doubt that the incompetence contributed to the outcome.").

261. *Yuen*, 555 P.3d at 125. *See also* State v. Smith, 712 P.2d 496, 500 n.7 (Haw. 1986) (noting that Hawaii's Constitution is more protective of defendants than the *Strickland* standard); State v. Antone, 615 P.2d 101, 104–05 (Haw. 1980) ("The standard for proving ineffective assistance of counsel . . . requires that the appellant establish the substantial impairment or withdrawal of a potential defense.").

262. People v. Caban, 833 N.E.2d 213, 222 (N.Y. 2005) (quoting People v. Benevento, 697 N.E.2d 584, 588 (N.Y. 1998)).

viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation."[263]

Before *Strickland v. Washington*, several prominent judges and other experts argued in favor of a burden-shifting regime that would require the government to demonstrate the absence of prejudice once the defendant established deficient attorney performance.[264] The Supreme Court rejected that approach in *Strickland*, and no state has adopted it as a matter of state constitutional law. Data about the national crisis in indigent defense should cause states to revisit the question and ask whether a burden-shifting regime might better satisfy equitable concerns.

C. Why Rights-Specific Interests and Incentives Should Matter More

When considering how to allocate burdens of proof, courts and legislatures should also consider how a burden structure incentivizes system actors to do things that align with the underlying goals of the criminal procedure right at issue.[265] Some courts already do this. For example, as discussed earlier, most courts set Fourth Amendment burdens to incentivize government actors to seek warrants.[266] But courts could do more.

We live in an age of increasing data collection and digitization. The allocation of burdens of production can shape what data system actors collect and how they maintain it. Take, for example, cases like *Herring*, which involve police failures to maintain accurate warrant databases.[267] Requiring the government to demonstrate that such errors are isolated rather than systemic encourages attentive maintenance of these databases. Or consider

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263. *Sposito*, 180 N.E.3d at 1054 (quoting People v. Oliveras, 993 N.E.2d 1241, 1245 (N.Y. 2013)). *See also* People v. Hayward, 253 N.E.3d 618, 622 (N.Y. 2024) (Rivera, J., concurring) (noting that the New York standard is more protective than the federal rule); Commonwealth v. White, 565 N.E.2d 1185, 1189–90 (Mass. 1991) (noting that Massachusetts asks if counsel's conduct "has likely deprived the defendant of an otherwise available, substantial ground of defen[s]e") (quoting Commonwealth v. Saferin, 315 N.E.2d 878, 883 (Mass. 1974)).

264. *See, e.g.*, David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 30 (1973) ("A defendant should be relieved of the burden of showing prejudice. Once he has proven ineffectiveness, the government should have the burden of showing no resulting prejudice."); *Risher*, 523 P.2d at 427 (Rabinowitz, C.J., concurring) ("In my opinion, Judge Bazelon offers a cogent argument for relieving the defendant of the burden of showing prejudice once ineffectiveness has been proven."); Springer v. State, 666 P.2d 431, 437 n.4 (Alaska Ct. App. 1983) (collecting opinions by other jurists who are in agreement).

265. *See* Cooper v. Oklahoma, 517 U.S. 348, 355 n.6 (1996) (noting that burdens can be used to incentivize a party to provide relevant information so that the decision-makers can make a reliable determination).

266. *See* LAFAVE, ET AL., *supra* note 3, § 10.3(b); LAFAVE, *supra* note 40, § 11.2(b), at 50–52 nn.38–39 (collecting cases).

267. Herring v. United States, 555 U.S. 135, 146 (2009).

Harris—the case involving drug-sniffing dogs.[268] If the prosecutor had the burden of demonstrating that the drug-sniffing dog was probably accurate—rather than just assuming that to be true based on certification and placing the burden on the defendant to disprove it—police departments would have an incentive to re-certify drug-sniffing dogs regularly and ensure that they stay "up to snuff."[269]

More generally, if the government knows that it will routinely be expected to provide information about its recordkeeping, databases, stop and arrest practices, the proficiency of its drug-sniffing dogs, and so on, it will be incentivized to maintain those records well. That, in turn, will likely increase the quality of work performed by prosecutors and police agents. As a result, allocating a production burden to the government will address feasibility and fairness concerns while simultaneously serving the interests underlying defendants' criminal procedure rights and improving the efficiency of law enforcement by reducing the incidence of mistaken arrests and prosecutions.

Some states recognize those incentives and have modified the burdens they place on defendants accordingly. For example, when New York diluted the burden of proof that defendants bear with respect to the materiality prong of proving a *Brady* violation, the court relied not only on the fairness concerns described above, but also noted that "a backward-looking, outcome-oriented standard of review that gives dispositive weight to the strength of the People's case clearly provides diminished incentive for the prosecutor, in first responding to discovery requests, thoroughly to review files for exculpatory material, or to err on the side of disclosure where exculpatory value is debatable."[270] That court thought it important to structure the burdens to provide prosecutors with an incentive to do a more thorough review and to disclose more exculpatory information.

For similar reasons, it makes sense to shift the burden of proof on the question of prejudice for Sixth Amendment *Strickland* violations, such that the government would have to show that deficient performance probably did not affect the outcome of a case. In addition to the fairness reasons discussed above, the system should incentivize states to provide indigent defendants with effective representation. If there is deficient performance, defendants are not getting their constitutionally required representation, and overturning state convictions sends the offending state a message to improve. Hiding

268. Florida v. Harris, 568 U.S. 237 (2013).

269. *Id.* at 248.

270. People v. Vilardi, 555 N.E.2d 915, 920 (N.Y. 1990).

routine deficient performance behind onerous prejudice burdens only promotes continuation of the same subpar representation system.

Some may understandably object that using the law to incentivize care, thoroughness, and accuracy is great when there are no process costs to consider, but all of these government burdens generate countervailing increased costs. It is true that more government burdens mean more costs for the government to bear. But those costs are becoming and will continue to become less onerous as technological innovations make data collection easier.

And in any event, changes to burden allocations are relatively modest reforms. When defendants are given onerous burdens of proof that make it virtually impossible for them to vindicate their constitutional rights, there are real consequences for the system-preservation interest in ensuring the legitimacy of the system. Public opinion polls regularly reveal little respect for the outcomes of the criminal legal system.[271] It is not surprising that the public has little faith in the system's outcomes when police do not have to maintain records to show that their systems and processes are accurate, prosecutors are able to hide exculpatory evidence without consequence, and defense attorneys routinely do not have the time and resources to provide effective defense representation. Fixing systemic mistakes means finding ways to stop sweeping them under the rug, and changing burden allocations is one of the more modest reforms available. It is a leverage point that offers the potential for significant improvement to the system at a relatively modest cost. For some of the reasons discussed in this Article, some experts advocate the elimination of both the materiality prong under *Brady* and the prejudice inquiry under *Strickland*.[272] Shifting the burden structure on these claims is

271. *See, e.g.*, Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP: NEWS (Nov. 16, 2023), https://news.gallup.com/poll/544439/americans-critical-criminal-justice-system.aspx [https://perma.cc/8A57-VHSR] (finding that 49% of those surveyed reported believing that criminal suspects are treated somewhat unfairly or very unfairly); Lydia Saad, *Historically Low Faith in U.S. Institutions Continues*, GALLUP: NEWS (July 6, 2023), https://news.gallup.com/poll/508169/historically-low-faith-institutions-continues.aspx [https://perma.cc/H8MY-APZU] (noting that only 17% of Americans reported having a "[g]reat deal" or "[q]uite a lot" of confidence in the criminal justice system).

272. *See, e.g.*, Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 281 (2020) (advocating removal of the prejudice inquiries from both tests and replacing it with a contextual harmless error review); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 518 (2009) (advocating to replace *Brady*'s materiality requirement with traditional harmless error review); Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 41–49 (2009) (same for *Strickland*'s prejudice requirement); Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 421–26 (2011) (describing how some judges systematically avoid the materiality requirement in practice); Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 936–

a compromise that recognizes some of the incentive problems in the current system while imposing fewer costs than reinventing the doctrine would.

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As a first step, it is important for advocates and decision-makers to assess each of the factors that inform burden allocation accurately. This means considering the facts on the ground, the equities involved, and the incentives that the system creates. But as the previous paragraph recognizes, there will often be tension between taking those considerations seriously and continuing to account for efficiency and system-preservation concerns. The next Part considers how to balance the different factors when they conflict.

III. BALANCING THE FACTORS: HOW TO ALLOCATE BURDENS WHEN THE FACTORS CONFLICT AND WHEN BURDENS ARE CONSTITUTIONALLY REQUIRED

Sometimes the stars align and efficiency, fairness, and contextual policy interests—properly considered—all point toward the allocation of a burden of proof to one party. For example, if the police violate an individual's Fourth Amendment rights and want to claim that they would have inevitably discovered the illegally-obtained evidence in the course of a lawful investigation such that it should still be admissible, it is pretty obvious that the government should bear the burdens of proof.[273] Under the information principle, the government is the party with access to the relevant information about its investigation and whether the investigation would inevitably have led it to discover the evidence. Inevitable discovery is the more unusual event when there is a Fourth Amendment violation, so it is more efficient under the probabilities principle to put the burden of proof on the government to argue for that more unusual occurrence. Equitable estoppel principles suggest that it is only fair to give the government the burden of proof since the government engaged in wrongdoing in the first place. It would be difficult, if not impossible, in many circumstances for the defendant to know about the inner workings of the police investigation, making it infeasible to place the burden on the defendant to disprove inevitable discovery. And

37 (2012) (advocating for elimination of the *Brady* pretrial materiality determination); *The Supreme Court 2005 Term–Leading Cases*, United States v. Gonzalez-Lopez, 120 HARV. L. REV. 203, 210–11 (2006) (advocating for removal of the prejudice prong from *Strickland*); Richard L. Gabriel, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel*, 134 U. PA. L. REV. 1259, 1284–85 (1986) (arguing that courts should presume prejudice once defense counsel's performance is shown to be objectively unreasonable).

273. *See* Nix v. Williams, 467 U.S. 431, 438 (1984) (holding that the government has the burden of showing that evidence that was illegally obtained would have been inevitably discovered in order to trigger application of the inevitable discovery exception to the exclusionary rule).

Fourth Amendment law has a stated interest in deterring illegal police behavior, which exists here, so it makes sense to place the burden on the government to promote the constitutional deterrence values at stake.

But in many situations, efficiency, fairness, and contextual policy interests diverge, and the question is how to balance the competing factors. Part III.A explains how disentangling the components of a burden of proof and adopting burden-splitting or burden-shifting regimes offers a promising way to accommodate conflicting factors, because such regimes can take into account efficiency and system-preservation concerns while still prioritizing fairness and rights-specific interests.

Of course, there are limits in the criminal procedure context to how much freedom jurisdictions have when balancing competing factors. Fairness concerns and rights-specific interests may constitutionally require the government to bear some burdens and may prohibit defendants in other contexts from being forced to bear heightened burdens. Part III.B explains that the Due Process Clauses may require decision-makers to prioritize fairness concerns while rights-specific policies may dictate burden allocation with respect to certain criminal procedure rights. Even when constitutional values are at stake, however, there are still opportunities to rely on burden-shifting or burden-splitting regimes to accommodate competing concerns. Part III.B describes how some jurisdictions have embraced burden-splitting regimes to accommodate competing interests even when the government must constitutionally shoulder part of the burden of proof.

A. Disentangling the Burdens of Production and Persuasion

Recognizing that burden allocation is not always binary allows courts to reach appropriate outcomes even when there are conflicting factors informing the burden allocation. After all, a burden of proof consists of four different components: (1) the burden of raising a contention; (2) the burden of producing evidence to support the contention; (3) the burden of persuading the decision-maker on the merits; and (4) the standard of proof that the decision-maker uses when making a merits determination.[274] In most criminal cases, it is not necessary or appropriate for either party to bear all of the burdens. And splitting the burdens between the parties or adjusting the standard of proof is often a good way to accommodate conflicting interests.

For the reasons discussed *supra* Part II, decision-makers should place greater emphasis on fairness concerns and rights-specific policy interests, which will often argue in favor of placing more burdens of proof on the

274. *See* Colgan, *supra* note 6, at 413.

government. At the same time, criminal defendants have an incentive to raise any and all constitutional claims that might result in suppression of the evidence or dismissal of the case against them. And the legal system undoubtedly has an interest in ensuring that scarce judicial and government resources are not spent obtaining information for, and adjudicating, frivolous constitutional claims.[275]

To address these concerns and prevent unjustified fishing expeditions, it would be reasonable to impose an initial burden of production on the defendant to raise a constitutional claim and point to something in the facts of the instant case suggesting a constitutional problem. That initial burden—although low—should be high enough to serve efficiency and system-preservation interests by reducing the incidence of frivolous claims. But decision-makers must be careful not to set that burden of production so high that it compromises both efficiency and fairness by requiring the defendant to produce evidence that is difficult or impossible for the defendant to obtain.

Massachusetts once made the mistake of setting the burden of production too high when crafting its current burden-shifting test to address racial profiling by law enforcement officers enforcing the traffic code. In *Commonwealth v. Lora*,[276] the Massachusetts Supreme Judicial Court initially required a defendant "to present sufficient evidence of impermissible discrimination" based primarily on "statistical evidence demonstrating disparate treatment of persons based on their race."[277] If the defendant met that standard, the burden then shifted to the state "to provide a race-neutral explanation for such a stop."[278] In *Commonwealth v. Long*,[279] the court concluded that *Lora* "set the bar too high for defendants attempting to establish a reasonable inference of a discriminatory stop."[280] *Lora* focused on the use of statistical evidence to show discrimination. But, in *Long*, the court concluded that *Lora* "proved infeasible for defendants" because "providing statistical evidence sufficient to raise a reasonable inference that a motor vehicle stop was racially motivated" was too difficult.[281] In its place, *Long* adopted a reasonable person standard based on the facts of each case.[282]

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275. *See* Hay, *supra* note 40, at 652 (noting this is a justification for assigning the plaintiff the burden of proof).

276. Commonwealth v. Lora, 886 N.E.2d 688 (Mass. 2008).

277. *Id.* at 690.

278. *Id.*

279. Commonwealth v. Long, 152 N.E.3d 725 (Mass. 2020).

280. *Id.* at 731.

281. *Id.*

282. *See infra* notes 320–27 and accompanying text.

Once the defendant satisfies an initial reduced production burden, it may make sense to shift the burden of production to the prosecution when there are fairness or rights-specific policies that suggest the government should maintain, collect, and produce information relevant to the claim. Such a burden shift may be required to enable the court to decide the issue based on full information. When thinking about whether to require the government to bear a shifted production burden, courts should be careful not to indulge presumptions that government actors behaved regularly and lawfully when those presumptions are not supported by the facts on the ground.

When allocating the burden of persuasion and deciding on the standard of proof, decision-makers must determine which party should bear the risk of error, keeping equitable estoppel and rights-specific policy interests in mind. In many cases, giving due weight to fairness and rights-specific interests will mean shifting burdens that currently rest exclusively on defendants to the government, at least in part, or reducing the standard of proof a defendant must meet as part of a persuasion burden.

Cynics may claim that courts and legislatures have no desire to change the system in ways that make it easier for criminal defendants to assert rights violations. After all, many criminal procedure doctrines exist to make it harder for defendants to suppress otherwise reliable physical evidence or upend convictions after the fact. It is, of course, correct that some courts and legislatures—including perhaps the current Supreme Court—may not want to adopt the reforms suggested here. But, as this Article has shown, some courts and legislatures have shown a willingness to think about how to modify burden structures to give criminal defendants a fair opportunity to vindicate their constitutional rights. Perhaps this Article will give them a framework to use going forward.

As an example of how a burden-shifting regime could properly balance and address competing burden allocation factors, consider the competing considerations involved in allocating the burdens of proof in an ineffective assistance of counsel claim under *Strickland v. Washington*.[283] The law currently allocates all of the burdens of proof on *Strickland* claims to the defendant.[284] The defendant must raise the claim, produce evidence that trial counsel performed deficiently, produce evidence that trial counsel's deficient performance prejudiced the outcome of the case, and persuade the factfinder with respect to both prongs. Some efficiency and system-

283. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.").

284. *See id.* at 689–90, 693–94 (giving the defendant all of the burdens of proof).

preservation interests support the decision to place a burden on the defendant. After all, the defendant is the moving party who wants to upend a conviction, and the defendant has better access to relevant information about what counsel did and did not do than the prosecutor does. In addition, defendants have every incentive to file post-conviction challenges, and there is a system-preservation concern about opening the floodgates to unnecessary litigation. If defendants had no burdens to carry, frivolous ineffectiveness claims would predictably impose a significant tax on government resources.

At the same time, some of the courts' stated efficiency reasons for allocating the burden to the defendant are overblown. As discussed above, *Strickland*'s assumption that defense counsel have the time and resources to perform their constitutional role and should therefore be entitled to a presumption that their decisions are typically strategic is factually inaccurate.[285] And the assumption that attorneys will be chilled from becoming public defenders if defense attorneys are deemed structurally ineffective is more than questionable.[286]

There are also important fairness concerns and constitutional values that argue in favor of placing some of the burden of proof for *Strickland* claims on the prosecution. After all, it is the state that has made the decision to underfund indigent defense in ways that compromise defense attorneys' abilities to represent their clients. The state is at fault for the consequences of that underfunding and perhaps should equitably bear the burden of demonstrating why it does not or should not matter. Additionally, as a matter of constitutional policy, the only way the adversarial model will reach reliable outcomes is if there is effective counsel on both sides, so the system should create incentives for all system actors to care about the quality of indigent defense. Placing a burden on the state at the back end with respect to ineffectiveness challenges heightens the state's incentives to ensure that defense counsel is competent at the front end.

Disentangling the different components of a *Strickland* claim and the different aspects of the burden of proof might help allocate the parties' burdens appropriately. To address the efficiency and system-preservation concerns, it makes sense to put an initial burden on the defendant, and it needs to be more than simply the burden of raising the claim. The defendant should have the burden of producing *some* evidence that defense counsel performed deficiently. That initial showing should consist of information specific to the case at hand about what counsel did wrong or failed to do. It

285. *See supra* Part II.A.1.

286. *See supra* Part II.A.3.

could be buttressed by structural information about the caseloads the defense attorney was forced to carry at the time, but statistical information would not be required and would not be sufficient, without more, to meet the initial burden. Some additional showing that something *in that case* was done improperly would be necessary to address efficiency and system-preservation concerns.

Fairness and rights-specific interests would then suggest allocating at least some of the remaining burden to the government. Once the defendant has satisfied its burden of producing evidence of deficient performance, the burden of persuasion could be on the prosecutor to demonstrate that counsel's performance was not actually deficient or that there was no prejudicial effect.

Of course, as is true with any area of law, different decision-makers might accommodate the competing interests differently. Some might conclude that the right balance would allocate the burden of production *and* persuasion to the defense on the issue of deficient performance before giving the burden of persuasion to the government to disprove prejudice. Others might keep the burden of persuasion on the defendant on prejudice but reduce the quantum of proof required to win, as Alaska, Hawaii, and New York have done.[287] There may not be uniquely optimal distributions of the burdens for each context—and which burdens it makes sense to allocate to which side may also shift over time, based on empirical changes in the practices of system actors. But by taking each factor seriously and disentangling the different components of a claim and the different elements of the burden of proof, it should be possible to allocate burdens in ways that might accommodate the conflicting factors better than the current doctrine does, most of the time.

B. Constitutional Burden Allocation

There are times when the U.S. Constitution dictates either the allocation of a burden of proof or the quantum of proof that can be required as part of that allocation. For example, the Court has interpreted the Due Process Clauses to require that in criminal cases the government bears the burden of proving the defendant's guilt beyond a reasonable doubt.[288] This government burden "dates at least from our early years as a Nation"[289] and is

287. *See supra* notes 259–63 and accompanying text.

288. *See In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

289. *Id.*

"constitutionally required"[290] as a "fundamental principle[] . . . essential for the protection of life and liberty."[291] Any competing concerns of efficiency or system preservation must give way.

Due Process may dictate the allocation of the burden of proof in other criminal procedure contexts as well. Part III.B.1 explains why the Due Process Clause should be interpreted to enshrine aspects of the information principle in the Constitution, requiring the government to come forward with evidence to disprove a defendant's criminal procedure claim whenever the government has exclusive access to the relevant information. It also explores how lower courts have relied on the information principle to constitutionalize burdens under state law. Part III.B.2 then discusses how—independent of the information principle—rights-specific interests may mandate a particular burden of proof structure or combine with fairness interests in ways that require the government to meet a heightened standard of proof.

1. *Due Process Burdens and the Information Principle.* In Medina v. California,[292] the Court discussed when the Due Process Clause requires the government to bear the burden of proof on a rule of criminal procedure.[293] According to *Medina*, a court should first look to historical practice. If that practice shows that the government has traditionally shouldered the burden of proof on a constitutional criminal procedure claim, such that assigning the burden to the defendant would "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," the Due Process Clause requires allocating the burden to the government.[294] Under *Medina*, contemporary practice is also relevant, albeit in a "limited" way.[295] If courts and legislatures around the country allocate the burden of proof to the government on an issue, that might indicate that the burden allocation is fundamental and constitutionally required. And even if neither historical nor contemporary practice indicates that allocating a burden to the defendant violates due process, such an allocation is still

290. *Id.* at 362.

291. *Id.*

292. Medina v. California, 505 U.S. 437 (1992).

293. *See id.* at 446 (discussing when burdens are constitutionally required).

294. *Id.* at 445.

295. *Id.* at 447; *see also* Parke v. Raley, 506 U.S. 20, 32–33 (1992) (looking to evidence of "contemporary practice" and analyzing how state courts have allocated burdens to determine if allocating a burden to the defendant would be "fundamentally unfair").

constitutionally problematic if it "transgresses any recognized principle of 'fundamental fairness' in operation."[296]

Using *Medina*'s framework,[297] it is likely that due process constitutionally enshrines the information principle and requires the government to come forward with evidence to disprove a defendant's criminal procedure claim whenever the government has exclusive access to the relevant information. The defendant may still have the burden of raising the relevant constitutional claim, thereby putting the prosecution on notice of its burden, but the prosecution would then have to present evidence to disprove it.

Historically, there are reasons to believe that the failure to allocate any burden of proof to the government in such situations would offend principles of justice that are so rooted in the traditions and conscience of our people as to be ranked as fundamental. For example, treatises dating back to the early nineteenth century explain that "[i]n every case the onus probandi [the burden of proof] lies on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."[298] When the facts that support a claim "relate personally to the prosecutor, or be peculiarly within his knowledge . . . the burden is upon the prosecution to prove them."[299] It does not matter "whether it be of an affirmative or a negative character."[300] If "the subject-matter of

296. *See Medina*, 505 U.S. at 448 ("Discerning no historical basis for concluding that the allocation of the burden . . . to the defendant violates due process, we turn to consider whether the rule transgresses any recognized principle of 'fundamental fairness' in operation."); *see also Parke*, 506 U.S. at 34 (noting that courts must consider whether a burden structure is "fundamentally unfair in its operation").

297. I do not mean to endorse this framework as the proper one for states to use when interpreting the scope of their own constitutions. As many scholars have noted, there are problems with relying too much on history and original meanings when doing contemporary constitutional analysis. *See generally* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024) (criticizing originalism); *see also* Richard A. Primus, *When Should Original Meanings Matter*?, 107 MICH. L. REV. 165, 221 (2008) (arguing that "the two leading arguments for originalism rarely justify deciding cases on the basis of original meanings"). And there are reasons to think that lawyers and courts are particularly bad at unearthing constitutional history. *See, e.g.*, Larry Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 389–94 (2003) (describing the problem of lawyers and judges engaging in "law office history" that is superficial and uninformed). That said, *Medina* details the current United States Supreme Court framework for addressing what due process requires with respect to burden allocations in criminal cases at the federal level and is worth considering for that reason. *See Medina*, 505 U.S. at 446–48 (relying in part on history and tradition when interpreting the scope of the Due Process Clause).

298. WILLIAM H. BAILEY, ONUS PROBANDI, PREPARATION FOR TRIAL, AND THE RIGHT TO OPEN AND CONCLUDE 1 (1886); *see also* EDMUND POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 116 (1858) (same).

299. BAILEY, *supra* note 298, at 476.

300. *Id.* at 2 n.1.

the allegation *lies peculiarly within the knowledge* of one of the parties, that party must prove it."[301]

Courts have traditionally endorsed this view as well. In *Rex v. Turner*,[302] for example, the Court of King's Bench emphasized that, when proof is "easy on the one side, but almost impossible on the other," the person with easy access to the information should bear the burden of proof.[303] The "general rule [is] that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative."[304]

If placing the burden of proof on a criminal defendant to produce evidence to persuade the factfinder with respect to a specific criminal procedure right would make winning a claim impossible because it is not feasible for the defendant to obtain the relevant information, it would be fundamentally unfair to allocate the burden to the defendant. In *Medina* itself, Justice O'Connor concurred to emphasize that some of the "relevant considerations" in determining whether placement of a burden on the defendant is fundamentally unfair include "whether the government has superior access to evidence" and "whether the defendant is capable of aiding in the garnering and evaluation of evidence on the matter to be proved."[305]

These same feasibility principles will sometimes suggest that the defendant should bear part of the burden of proof. After all, when information is uniquely in the defendant's possession, it would be appropriate for courts to place at least some of the burden of producing that evidence on the defendant. For this reason, the Court has upheld against constitutional challenge allocations of the burden of proof to defendants who claim that they are not competent to stand trial[306] or to defendants who assert defenses like insanity[307] or extreme emotional disturbance.[308] For similar

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301. *Id. See also* SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE, § 79, at 90 (1842) ("[W]here the subject matter of a negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party.").

302. R. v. Turner (1816) 105 Eng. Rep. 1026 (K.B.).

303. *Id.* at 1028.

304. *Id.*

305. *Medina v. California*, 505 U.S. 437, 455 (1992) (O'Connor, J., concurring).

306. *See id.* at 452–53 (majority opinion) (holding that California's presumption of competence "does not violate the Due Process Clause").

307. *See* Leland v. Oregon, 343 U.S. 790, 799 (1952) ("In all English-speaking courts, the accused is obliged to introduce proof if he would overcome the presumption of sanity.").

308. *See* Patterson v. New York, 432 U.S. 197, 207 (1977) (rejecting a Due Process challenge to a New York statute that made the defense of extreme emotional disturbance an affirmative defense "only if the facts making the defense were established by the defendant with sufficient certainty").

reasons, lower courts allocate the burdens of proof to defendants to demonstrate indigence before they can qualify for appointed counsel under the Sixth Amendment.[309] Defendants have access to the relevant financial information about indigency, so asking the defense to produce that evidence is fair and necessary to a proper adjudication of the underlying issues.

In many criminal cases, though, the information principle argues for placing burdens of proof on the prosecution, because it is the government that typically has more relevant information. After all, the government must afford a defendant "a reasonable opportunity to demonstrate" a constitutional problem.[310] If the information necessary to a fair adjudication lies uniquely with the government, the Due Process Clause may require placing some of the burden on the government

Consider, for example, where the burden of proof should lie on the question of whether a state-sponsored identification procedure violated a defendant's due process rights. The Court has created a two-pronged test that asks first if the state-sponsored identification procedure was unnecessarily suggestive and second, if there is a substantial likelihood of an unreliable mistaken eyewitness identification as a result of the procedure.[311] Although the Court has not indicated who has the burden of proof on those issues, it seems that the government must bear at least some of the burden. As the Michigan Court of Appeals has recognized, "the defendant will be totally unaware of the fact that witnesses are trying to identify him" in many police-orchestrated identification procedures—like those involving one-way mirrors or the use of only photographs.[312] In those circumstances, "it may well be impossible for defendant to know who was present at the confrontation, what was said or what facts existed which might make it 'unnecessarily suggestive.'"[313] The information necessary to a fair adjudication of the issue lies exclusively with the government such that Due Process demands the placement of at least a production burden on the government.[314]

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309. *See, e.g.*, Commonwealth v. Godwin, 804 N.E.2d 940, 944–45 (Mass. App. Ct. 2004) (cataloguing courts that place burden of demonstrating indigency status on defendant).

310. *Medina*, 505 U.S. at 451.

311. Manson v. Brathwaite, 432 U.S. 98, 107–08 (1977) (endorsing in relevant part, the lower court's approach on "the constitutional issue" and "the second inquiry" which asks "whether, under all the circumstances, [the] suggestive procedure gave rise to a substantial likelihood of irreparable misidentification").

312. People v. Young, 176 N.W.2d 420, 425 & n.4 (Mich. Ct. App. 1970).

313. *Id.* at 425.

314. *See id.* (holding that the burden is on the prosecution to show fairness). There are jurisdictions that continue to place the burden entirely on the defendant, which may be constitutionally problematic. See *supra* note 27.

Similar reasoning motivated the Court to craft a new test to address a defendant's allegation that the prosecutor made racially-motivated peremptory challenges during jury selection in *Batson v. Kentucky*.[315] Knowing that the defendant could not possibly have access to the secret reasons for the prosecutor's use of peremptory strikes and recognizing that the information about the prosecutor's behavior across cases—which could suggest racial bias—is not available to a criminal defendant, the Court took two important steps that it thought the Constitution required.[316] First, it diluted the required showing that a defendant had to make to satisfy its burden of production to make it feasible for a defendant to make a prima facie showing of purposeful discrimination based on the information available to the defendant.[317] Second, once the defendant satisfied that lower production burden, it shifted the burden of proof to the prosecution to come forward with a race-neutral explanation for its behavior.[318] The Constitution required shifting the burden to the prosecution to make the defendant's constitutional right to have a jury selection process free of racial bias a reality.[319]

State courts have adopted similar burden-shifting regimes when interpreting state constitutional provisions to ensure that defendants will have meaningful access to remedies for violations of their state constitutional criminal procedure rights. Consider how Massachusetts has addressed racial profiling by law enforcement officers enforcing the traffic code. After acknowledging years of research and data demonstrating that "police stop drivers of color disproportionately more often than Caucasian drivers for insignificant violations,"[320] the Supreme Judicial Court of Massachusetts took an approach similar to *Batson*. Criminal defendants in Massachusetts now have the initial burden of filing a motion to suppress with evidence that supports a reasonable inference that the officer's decision to initiate a traffic

315. Batson v. Kentucky, 476 U.S. 79, 96–98 (1986) ("[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial.").

316. *See id.* at 92 (acknowledging that requiring defendants to prove a prosecutor's discriminatory intent across cases "has placed on defendants a crippling burden of proof"); *see also* Darryl K. Brown, Batson v. Armstrong: *Prosecutorial Bias and the Missing Evidence Problem*, 100 OR. L. REV. 357, 381 n.75 (2002) (interpreting *Batson* as requiring the prosecutor to "disclose her private rationales for exercising peremptory strikes" once the defense makes a prima facie showing of discrimination).

317. *Batson*, 476 U.S. at 93–94.

318. *Id.* at 97.

319. Once the prosecution provides all the relevant information that is uniquely in its possession, the court then has what it needs to make a final determination as to whether the prosecutor's proffered explanation is credible or if there was purposeful discrimination. *See id.* at 96–97.

320. Commonwealth v. Long, 152 N.E.3d 725, 735 (Mass. 2020) (citation omitted).

stop in the instant case was motivated by race or another protected characteristic.[321] Importantly, Massachusetts clarifies that, while defendants can create a "reasonable inference" of discrimination through statistics that demonstrate "consistent patterns of racially disparate traffic enforcement by the officer involved,"[322] those statistics are not necessary. Requiring such data imposes "too great an evidentiary burden on defendants," because the data are often "inaccessible."[323] To prevent the right of drivers to be free from racial profiling from being "illusory," the high court held that information based on the totality of the circumstances surrounding the defendant's particular traffic stop may also suffice to satisfy the defendant's initial burden.[324] The "defendant must produce evidence upon which a reasonable person could rely to infer that the officer discriminated on the basis of the defendant's race," and the defendant "has a right to reasonable discovery of evidence concerning the totality of the circumstances of the traffic stop," including data about the arresting officer's recent traffic stops and the department's policies regarding stops.[325] The high court deemed this lower defense burden and right to discovery necessary "to create a viable path for individuals to present and demonstrate their claims of racial profiling in traffic stops."[326] Once the defendant has satisfied this lower burden, Massachusetts shifts the burden of persuasion to the prosecution, which must rebut the inference of impermissible discrimination or risk suppression of any evidence obtained from the traffic stop.[327]

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321. *See id.* at 731 ("A defendant seeking to suppress evidence based on a claim that a traffic stop violated principles of equal protection bears the burden of establishing, by motion, a reasonable inference that the officer's decision to initiate the stop was motivated by race or another protected class.").

322. *Id.* at 733.

323. *Id.* at 737.

324. *Id.*

325. *Id.* at 739–40.

326. *Id.* at 733.

327. *See id.* at 731 ("If this inference is established, the defendant is entitled to a hearing at which the Commonwealth would have the burden of rebutting the inference. Absent a successful rebuttal, any evidence derived from the stop would be suppressed."). Interestingly, the Massachusetts justices split on what constitutional provision they thought required this lower defense burden and shift of the burden of persuasion to the prosecution. The majority located the requirements in the state constitution's equal protection clause while a concurrence would find them necessary under the state's protection against arbitrary searches and seizures. *Id.* at 731. One could plausibly argue that these burdens are required under the federal Due Process Clause as well. Many states read *Whren v. United States*, 517 U.S. 806 (1996), as necessarily deciding this question at the federal constitutional level, but *Whren* held only that selective police enforcement claims are better addressed through the Fourteenth Amendment and not the Fourth Amendment. *Id.* at 814. *Whren* did not discuss what the burden of proof should be with respect to selective enforcement claims. But whether these burdens are independently grounded in due process principles or thought to be part and parcel of equal protection or a substantive constitutional criminal procedure right,

Massachusetts is not alone in constitutionally adjusting the burden of proof to address racial profiling in law enforcement practices. New Mexico has adopted a similar burden-shifting regime under its state constitution.[328] And as discussed in Part I.B.1, the Third, Seventh, and Ninth Circuit Courts of Appeal have rejected attempts to place onerous burdens on defendants who allege selective police enforcement of the law based on race, noting that such burdens make it impossible for defendants to ever raise a federal selective enforcement claim.[329]

More state and federal courts should constitutionalize feasibility and fairness concerns in burden allocations, and more advocates should argue that the state and federal constitutions require burdens to be allocated in ways that make it possible for criminal defendants to obtain remedies for constitutional violations. As the above cases show, this does not always mean that the entire burden of proof rests on the government. It might involve a modified, less onerous production burden on the defense in the first instance to weed out frivolous claims. But courts should recognize that when the facts demonstrate that defendants do not have access to the relevant information, reducing the defendants' initial burden and shifting the burden to the government is constitutionally required, as a matter of fundamental fairness, to prevent the affected constitutional rights from having no available remedy.[330]

2. *Constitutionally Mandated Burdens Specific to the Underlying Rights.* There may also be times when a court adopts a burden of proof structure made necessary by the content of the specific constitutional right at

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the result is the same. The Constitution requires a lower initial defense burden of production with a shift of the burden of persuasion to the government to make it feasible for defendants to raise these claims and have access to meaningful remedies for violations of their rights. *See Long*, 152 N.E.3d at 731 (establishing this burden-shifting framework).

328. State v. Ochoa, 206 P.3d 143, 156 (N.M. Ct. App. 2008) (noting that the State has the burden of justifying its initial stop as supported by reasonable suspicion; then the defendant has an initial burden to "place[] substantial facts in dispute indicating pretext"; if the defendant succeeds in doing that, the burden shifts back to the state to show that the officer would have stopped the defendant without a pretextual motivation).

329. *See supra* note 91 (collecting sources).

330. For example, the Fourth and Tenth Circuits should revisit their decisions applying the onerous *Armstrong* standard to criminal defendants' claims of selective police enforcement. *See* United States v. Alcaraz-Arellano, 441 F.3d 1252, 1264 (10th Cir. 2006) (citing *Armstrong* for the proposition that "a selective-enforcement claim should be, as with selective-prosecution claims, 'a demanding one.'"); United States v. Mason, 774 F.3d 824, 830 (4th Cir. 2014) (reiterating that the *Armstrong* "standard is intended to be a 'demanding' and 'rigorous' one") (citations omitted).

stake.[331] For example, in *Miranda*, the Court declared that the government has the burden of proving a valid waiver of a suspect's *Miranda* rights before it may use statements resulting from a custodial interrogation against a criminal defendant.[332] That burden allocation was adopted to address concerns about how best to dispel the compulsion that the Court deemed inherent in custodial interrogations.[333] The Court held that the custodial interrogation environment was inherently compulsive, such that the government had to do something affirmative in order to comply with the Fifth Amendment privilege against compelled self-incrimination.[334] The Court did not want to hold that the government had to provide stationhouse defense lawyers to advise prisoners, but it recognized that having the same police officers whose very presence created the compulsion read the *Miranda* warnings that were designed to dispel that compulsion was odd.[335] In an effort to address this tension, the Court held that the warnings were sufficient to dispel the compulsion but gave the government a "heavy burden" to demonstrate that a waiver of a suspect's *Miranda* rights was knowing, intelligent, and voluntary.[336]

There are other contexts in which rights-specific interests combine with fairness concerns to impose a heightened burden of proof on the government. For example, in *United States v. Wade*,[337] the Court put the burden of persuasion on the government to prove "by clear and convincing evidence that the in-court identification[]" by a witness was not tainted by an impermissible out-of-court identification obtained in violation of the defendant's Sixth Amendment right to counsel.[338] In addition to citing

331. Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 22 (1975) ("The Court undoubtedly has both the power and the duty to fashion 'interpretative' implementing rules to fill out the meaning of generally framed constitutional provisions.").

332. Miranda v. Arizona, 384 U.S. 436, 476 (1966).

333. *See id.* at 475 ("Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.").

334. *See id.* at 467 ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

335. *See id.* at 536 (White, J., dissenting) ("The Court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney.").

336. *See id.* at 474–75 (majority opinion). Of course, as discussed earlier, the Roberts Court implicitly undermined this compromise in *Berghuis v. Thompkins*, 560 U.S. 370 (2010) by presuming waiver from the mere fact that the defendant gave a confession. *See supra* notes 24–26 and accompanying text.

337. United States v. Wade, 388 U.S. 218 (1967).

338. *Id.* at 240.

fairness concerns about equitably estopping the government from profiting from its prior violation of the defendant's Sixth Amendment right to have counsel present at a post-indictment, in-person identification procedure,[339] the *Wade* Court was also motivated by constitutional concerns related to the Sixth Amendment right to counsel. Specifically, the Court noted its concern that a later in-court identification would be unreliable because it might be based almost entirely on the impermissible out-of-court identification process.[340] To serve the Sixth Amendment's core constitutional commitment to ensuring that individuals have counsel at all critical stages of the trial process—a commitment motivated in part by the system's interest in ensuring reliable results—the Court allocated the burden of proof to the government and imposed a heightened burden, requiring the government to prove by clear and convincing evidence that any in-court identification had a source independent of the tainted out-of-court identification procedure.[341]

* * *

For each constitutional criminal procedure right, advocates, courts, and legislatures should consider (a) whether historical practice shows that the government has traditionally shouldered the burden of proof with respect to that constitutional criminal procedure claim; (b) whether contemporary practice indicates that a burden allocation may be constitutionally required; and (c) whether it would be fundamentally unfair to allocate the burden of proof to the defendant. The third consideration must assess whether the information principle dictates the allocation of at least part of the burden of proof to the government as a matter of due process. If due process does not require allocation of a burden to the government, it is also necessary to consider whether the specific constitutional right at issue mandates any particular burden structure. Only if the burdens are not set as a constitutional matter should courts address how the relationship among efficiency, fairness, and contextual policy interests should inform burden allocation as a

339. *See id.* at 240 n.31 (noting that, "it is only fair that the burden should . . . shift to the Government to convince the trial judge" that a later in-court identification by the same eyewitness "ha[s] an independent origin" (citation omitted)).

340. *See id.* at 240 ("A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one.").

341. *See id.* ("We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification."); *see also* State v. Phinney, 370 A.2d 1153, 1154 (N.H. 1977) (deciding under state law to heighten the prosecution's burden of proving that a confession was voluntary, requiring it to prove voluntariness beyond a reasonable doubt); State v. Wiley, 61 A.3d 750, 755 (Me. 2013) (same); People v. Crespo, 958 N.Y.S.2d 309, 2010 WL 3808691, at *3 (Sup. Ct. 2010) (same); State v. Janis, 356 N.W.2d 916, 918 (S.D. 1984) (same).

prudential matter. Finally, for the reasons discussed in Parts II & III.A, courts should be more attentive to fairness concerns and rights-specific interests, and should consider more carefully whether the facts on the ground support presumptions of regularity when thinking about how to balance the various factors, keeping in mind that burden-splitting and burden-shifting regimes are often good ways to accommodate competing considerations.

CONCLUSION

For too long, courts, legislators, advocates, and scholars have avoided nuanced conversations about how to allocate burdens of proof in criminal procedure, creating a patchwork of state and circuit splits on important questions affecting individuals' abilities to vindicate their rights. The resulting lack of clarity has led to significant doctrinal gaps and unprincipled determinations that conflict with basic considerations central to burden allocation. Having described the factors that matter in criminal procedure burden allocation and the problems with how courts have been addressing them, this Article encourages advocates, researchers, and decision-makers to more directly and carefully raise and analyze burden allocation in criminal procedure going forward. By disentangling the different components of the burden of proof and using burden-splitting and burden-shifting regimes, decision-makers can chart a path forward that both addresses efficiency and system-preservation interests, while simultaneously promoting fairness and the protection of defendants' constitutional rights.