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Symposium: Criminal Law at the Crossroads:
Turn to Accuracy

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SYMPOSIUM

CRIMINAL LAW AT THE CROSSROADS: TURN TO ACCURACY

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It is customary at the USC Gould School of Law to commemorate the publication of books authored by members of the faculty. A while before the publication of *In Doubt: The Psychology of Criminal Justice*,¹ Dean

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1. DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF CRIMINAL JUSTICE* (2012).

Robert Rasmussen summoned me to discuss a way to commemorate its release. The conversation quickly converged on the idea that rather than hold an event to celebrate the publication of the book, we should seize the opportunity to hold an earnest discussion about the core issues raised in it: What has brought the criminal justice process to its current state, and more importantly, where should the process go from here? In that vein, we invited leading figures working at the forefront of these questions to participate in a conference: *Criminal Law at the Crossroads*. We also invited the speakers to submit their papers for publication in a special Symposium by the same name, and they responded graciously. It is an honor to pen the opening article of this Symposium.

In the first part of this Article, I explore this particular moment in the history of the criminal justice system, which sets the backdrop for this Symposium. The second part presents what I believe to be a cardinal deficiency of the criminal justice system: the low importance that the accuracy of verdicts occupies in the criminal process. Specifically, I examine four key features of the process that hinder its ability to reach accurate verdicts. The third part will offer a blueprint for addressing those hindrances and increasing the system's ability to reach accurate results. The fourth part will conclude with observations of the synergistic nature of both the costs of the current state of affairs, and the benefits to be gained from prioritizing the attainment of accurate outcomes as the primary objective of the criminal justice system.

I. A SPECIAL MOMENT IN TIME

These are exciting times for observers of the American criminal justice system, as notable shifts are afoot. First, the system seems to be withdrawing from the punishment binge that has been raging for some four decades. The story of the escalation of punishment is by now well known.² Ever since the ascendance of tough-on-crime politics in the 1970s, harsher responses to convicted criminals became the mainstay of political campaigning and governing, a rare instance of true bipartisanship in the American political landscape. The ever increasing punishment scales—notably, mandatory minimum punishments, repeated offender enhancements, rejection of parole releases, “truth-in-sentencing” regimes,

2. See generally, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (discussing the effect of “governing through crime” policies); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (documenting the instability of the American criminal justice system and the increased focus on punishment since the 1970s).

and weapon enhancements—coupled with the vast expansion of drug-related crimes, resulted in what the late William Stuntz labeled a “punishment tsunami.”³ During this period, the number of people placed under the supervision of state and federal correctional authorities jumped almost fourfold,⁴ and the prison population increased almost fivefold.⁵ The American rate of incarceration has reached levels of almost five times higher than in the United Kingdom and ten times higher than in some northern European countries.⁶ All the while, it appears, the public was quite willing to sustain a fourfold increase in the cost of the correctional system, reaching an expenditure of over \$80 billion in 2010.⁷

But the wheels of history have begun to turn. Constrained public budgets coupled with a sustained criticism of the prevailing incarceration rates have created peculiar political alignments that are slowly bending the punitive trajectory of the system.⁸ Reversing thirty years of stable increases, the rate of incarceration has begun a moderate decline,⁹ and the rate of death sentences meted out in 2013 was about one quarter of what it

3. STUNTZ, *supra* note 2, at 251.

4. In 1980, the number of people incarcerated in jails and prisons or placed on probation and parole was 1,840,400. That number reached 7,231,400 in 2009. SUNY AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.1 (2011).

5. The number of people incarcerated in American prisons increased from 319,598 in 1980 to 1,524,650 in 2009. *Id.*

6. ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 tbl.2, 5 tbl.4 (10th ed. 2013), *available at* http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf (listing incarceration rates worldwide). The United States incarcerates 716 people for every 100,000; the comparable rate for England and Wales is 148, Denmark is 73, Finland is 58, and Norway is 72. *Id.*

7. The total expenditure for corrections increased from \$21,371,000 in 1982 to \$80,241,549 in 2010. *Compare* TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, NCJ 236218, JUSTICE EXPENDITURES AND EMPLOYMENT, FY 1982–2007—STATISTICAL TABLES 5 tbl.2 (2011), *available at* <http://www.bjs.gov/content/pub/pdf/jee8207st.pdf>, with TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, NCJ 242544, JUSTICE EXPENDITURES AND EMPLOYMENT EXTRACTS, 2010—PRELIMINARY tbl.1 (2013), *available at* <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4679>.

8. See, e.g., Brandi Grissom, *From the Tea Party, a Softer Line in Criminal Justice*, TEX. WKLY. (July 10, 2013), <http://www.texastribune.org/2013/07/10/tea-party-influence-felt-criminal-justice/> (explaining that, in Texas, more Republicans and Democrats are working together on legislation to prevent wrongful convictions); Jerry Markon & Fredrick Kunkle, *Cuccinelli Says Sentencing Policy Should Be Judged, in Part, on Cost*, WASH. POST (Aug. 18, 2013), http://www.washingtonpost.com/politics/cuccinelli-says-sentencing-policy-should-be-judged-in-part-on-cost/2013/08/18/b6496e38-068c-11e3-88d6-d5795fab4637_story.html (noting that Virginia’s leading conservatives are changing their attitudes toward the criminal justice system in line with national trends).

9. 2012 marked the fourth year of declining prison populations. See LAUREN E. GLAZE & ERINN J. HERBERMAN, BUREAU OF JUSTICE STATISTICS, NCJ 243936, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 (2013), *available at* <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4843>.

was in the mid-1990s.¹⁰ Notably, six state legislatures have expunged the death sentence from their books over the past six years,¹¹ and California came close to repealing its regime by way of a popular ballot initiative in 2012.¹² To be sure, these changes have been facilitated by the steady decline in crime rates, as manifested by a 42 percent decrease in violent crime from the apex in 1993 to 2011.¹³ Crucially, the political wind seems to have been knocked out of the law-and-order rhetoric. While in 1994, an astounding 50 percent of the American public maintained that crime or violence was the single most serious problem facing the nation, that number has been hovering around 2 percent since 2003.¹⁴

Second, one of the mainstay features of the criminal justice system has been the racial disparity in the disposition of punishment.¹⁵ Critics have long charged that whether due to the racially disparate punishment rates for drugs such as crack cocaine and powder cocaine,¹⁶ or due to disparate law enforcement practices,¹⁷ members of minority groups are incarcerated at

10. DEATH PENALTY INFO. CTR., *THE DEATH PENALTY IN 2013: YEAR END REPORT 2* (2013), available at <http://deathpenaltyinfo.org/documents/YearEnd2013.pdf>. By the same token, the number of executions in 2013 is 60 percent lower than it was in 1999. *Id.* at 1.

11. These states include Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007). *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Mar. 8, 2014).

12. See Paige St. John, *California Death Penalty Repeal, Proposition 34, Rejected*, L.A. TIMES (Nov. 7, 2012, 12:52 PM), <http://latimesblogs.latimes.com/california-politics/2012/11/proposition-34-california-death-penalty.html> (explaining how California voters' proposition to repeal the death penalty failed to pass in 2012).

13. *Violent Crime Falls, As Does Public Concern*, WASH. POST (Aug. 18, 2013, 5:49 PM), http://www.washingtonpost.com/politics/violent-crime-falls-as-does-public-concern/2013/08/18/d68cc95a-084f-11e3-b87c-476db8ac34cd_graphic.html.

14. *Id.*

15. See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (noting the stark racial disparities in the criminal justice system); MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995) (same).

16. See David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1283 (1995) (stating that, of the thousands of federal prisoners serving mandatory sentences for crack cocaine, "[n]ine out of ten of them are black" and "were sentenced under laws that treat crack offenders far more harshly than the predominately nonblack defendants caught with the more common, powder form of cocaine"); K. JACK RILEY, NAT'L INST. OF JUSTICE & OFFICE OF NAT'L DRUG CONTROL POLICY, *CRACK, POWDER COCAINE, AND HEROIN: DRUG PURCHASE AND USE PATTERNS IN SIX U.S. CITIES* tbls.12 & 13 (1997), available at <https://www.ncjrs.gov/pdffiles/167265.pdf> (showing a survey's findings of race and drug use in six cities).

17. Devon W. Carbado, Cheryl I. Harris & Kimberle Williams Crenshaw, Op-Ed., *Racial Profiling Lives On*, N.Y. TIMES (Aug. 14, 2013), http://www.nytimes.com/2013/08/15/opinion/racial-profiling-lives-on.html?_r=0 (noting that the Supreme Court's Fourth Amendment jurisprudence has given police vast discretion to "employ excessive force against African-Americans and Latinos who have shown virtually no indication of wrongdoing").

considerably greater rates than whites for comparable crimes.¹⁸ Black juveniles are more likely to be charged with crimes than white juveniles, and to be tried as adults.¹⁹ Convicted killers are considerably more likely to be sentenced to death for killing white victims than for killing black victims, especially if they are black.²⁰ Recent data reveal that racial bias also affects the success of claiming self-defense to negate responsibility for homicide charges.²¹

Yet, amidst this dire disparity, there are preliminary signs that change is in the air. In 2010, Congress enacted the Fair Sentencing Act,²² which had the explicit purpose of alleviating the penalties for drug offenses that were particularly burdensome on African American defendants.²³ In August 2013, Attorney General Eric Holder announced a major shift in the

18. See AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 4 (2013), <https://www.aclu.org/sites/default/files/assets/1114413-mj-report-rfs-rel1.pdf> (“[O]n average, a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates.”).

19. See GERARD A. RAINVILLE & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, NCJ 197961, JUVENILE FELONY DEFENDANTS IN CRIMINAL COURTS (1998), available at <http://www.bjs.gov/content/pub/pdf/jfdcc98.pdf>.

20. See, e.g., DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (finding that in the 1970s and 1980s black defendants in Georgia were more likely to receive the death sentence for killing white victims than for killing black victims). This disparity has been observed in a number of jurisdictions, including northern states. See David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 207–08, 214 (2003) (noting that race-of-victim disparities found in Georgia occur in other jurisdictions); Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978–1999*, 4 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 40, 46 (2004) (finding that individuals who kill white victims in Maryland are at a higher risk of being sentenced to death than those who kill nonwhite victims). This finding has been confirmed by the General Accounting Office. See U.S. GEN. ACCOUNTING OFFICE, GGD-90-57, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990).

21. Notably, black defendants charged with killing white victims are four times less successful in establishing a self-defense claim than white defendants charged with killing white victims. Most successful in making self-defense claims are white defendants charged with killing black victims. John Roman, *Is American Criminal Justice Color-Blind? The Statistics Say No*, METRO TRENDS BLOG (July 16, 2013), <http://blog.metrotrends.org/2013/07/american-criminal-justice-color-blind-statistics/>.

22. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 U.S.C. & 28 U.S.C.).

23. The Act reduced the disparity in the amounts of powder cocaine and crack cocaine required for the imposition of mandatory minimum sentences and eliminated the mandatory minimum sentence for simple possession of crack cocaine. See Editorial, *The Fair Sentencing Act Corrects a Long-Time Wrong in Cocaine Cases*, WASH. POST (Aug. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204360.html> (comparing the Fair Sentencing Act with prior law).

policy of the Department of Justice. Federal prosecutors would no longer charge low-level drug offenders with the “draconian mandatory minimum sentence laws” that were enacted in response to the drug epidemic of the 1980s.²⁴ At the same time, in a federal courtroom in Manhattan, Judge Shira Scheindlin struck down the New York Police Department (“NYPD”) flagship policy known as “stop and frisk,” which had accounted for over four million registered stops in a period of eight years. Much to the consternation of the NYPD and Mayor Michael Bloomberg, the judge found that the high ratio of minority stops amounted to a racially discriminatory practice that violated the protections of the Fourteenth Amendment.²⁵

Third, the notion of innocence has recently been gaining traction in the debate over the criminal justice system. The Anglo-American criminal justice process has long prided itself with having “the best Manner of Trial in the World.”²⁶ The system relies heavily on an intricate arrangement of procedural mechanisms and safeguards which are deemed to produce factually correct outcomes.²⁷ The United States Supreme Court routinely lauds the protections guaranteed in the Bill of Rights and rarely expresses any doubt that a person awarded the constitutional protections and found guilty by a jury of peers might be anything but factually guilty.²⁸ Justice Scalia has dismissed false convictions as an “insignificant minimum,”²⁹ and has characterized them as a testament not to a failure of the process, “but its success.”³⁰ The insistence on the process’s impeccability is

24. Charlie Savage & Erica Goode, *Two Powerful Signals of a Major Shift on Crime*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/us/two-powerful-signals-of-a-major-shift-on-crime.html?pagewanted=all>.

25. See Joseph Goldstein, *Police Dept.’s Focus on Race Is at Core of Ruling Against Stop-and-Frisk Tactic*, N.Y. TIMES (Aug. 14, 2013), <http://www.nytimes.com/2013/08/15/nyregion/racial-focus-by-police-is-at-core-of-judges-stop-and-frisk-ruling.html?ref=shiraascheindlin> (describing the reasoning behind the decision); Ian Urbina, *Blacks Are Singled out for Marijuana Arrests, Federal Data Suggests*, N.Y. TIMES (June 3, 2013), <http://www.nytimes.com/2013/06/04/us/marijuana-arrests-four-times-as-likely-for-blacks.html> (discussing disparity in arrests between blacks and whites for marijuana use).

26. MATTHEW HALE, *HISTORY OF THE COMMON LAW OF ENGLAND* 206 (3d ed. 1739).

27. See ROBERT P. BURNS, *A THEORY OF THE TRIAL* 153 (1999) (describing the high quality of trial judgments); Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 34, 34–47 (Harold J. Berman ed., 2d ed. 1971) (stating that the adversarial trial process results in impartiality and lack of prejudice); Monroe H. Freedman, *Our Constitutional Adversary System*, 1 CHAP. L. REV. 57, 78 (1998) (noting superiority of the adversary system in deciding disputes).

28. See *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring) (criticizing the petitioner for challenging his conviction after benefiting from “the full panoply of protections that our Constitution affords criminal defendants”).

29. *Kansas v. Marsh*, 548 U.S. 163, 199 (2006) (Scalia, J., concurring).

30. *Id.* at 193. Justice Scalia insists on this proposition even though, in reality, a large number of exonerations were obtained despite fierce resistance by prosecutors and even judges. On prosecutorial

prevalent also among law enforcement officials who operate the system on a day to day basis. A majority of surveyed police chiefs, prosecutors, and trial judges insist that mistaken verdicts occur at an infinitesimal rate, if at all.³¹ Despite some early and poignant critiques—notably, the work of Edwin Borchard,³² and Jerome Frank’s iconic *Courts on Trial*³³—the prevailing sentiment has resonated firmly with the belief that innocent people are sent to prison very rarely, if ever, and they certainly do not get executed by the state. This article of faith was famously captured by Judge Learned Hand’s assurance that while the criminal justice procedure had always been “haunted by the ghost of the innocent man convicted,” that concern was merely “an unreal dream.”³⁴

In recent years, this comforting narrative has begun to erode. The persistent revelations of false convictions have generated a newfound skepticism,³⁵ leading some observers to declare an “innocence

intransigence in the face of exculpating DNA evidence, see generally Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) (questioning why prosecutors ignore postconviction charges of innocence).

31. A survey of 798 Ohio law enforcement officials found that some 30 percent of police chiefs and prosecutors and 15 percent of judges believed that the incidence of false convictions in their jurisdiction was zero, and a large percent (approximately 77, 78, and 46 percent, respectively) maintained that the incidence was less than 0.5 percent. Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, 53 CRIME & DELINQ. 436, 452 tbl.3 (2007). Tellingly, perhaps, this trust in the system was weaker when respondents were asked about the rate of false convictions in other jurisdictions in the United States, with a large majority of responses above 0.5 percent. *Id.* at 453 tbl.4. Notably, the national estimates failed to meet the respondents’ normative beliefs, as a majority (79, 78, and 78 percent respectively) maintained that the acceptable level ought to be below 0.5 percent. *Id.* at 454 tbl.5. Similar findings were made in a survey of Michigan law enforcement officials. See Marvin Zalman, Brad Smith & Angie Kiger, *Officials’ Estimates of the Incident of “Actual Innocence” Convictions*, 35 JUST. Q. 72, 82–90 (2008) (replicating the Ramsey and Frank study in Michigan and reaching similar conclusions).

32. See EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932) (analyzing miscarriages of justice through a variety of American and British cases in which innocent defendants were wrongly convicted).

33. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 165–85 (1973) (analyzing the defects of the trial court system). See also JEROME FRANK & BARBARA FRANK, *NOT GUILTY* 199–249 (1957) (noting that the conviction of innocent individuals is too often ignored).

34. *United States v. Garrison*, 291 F. 646, 649 (S.D.N.Y. 1923).

35. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011) (examining the cases of exonerees); GEORGE C. THOMAS, III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* (2008) (reviewing the United States Supreme Court’s jurisprudence and its failure to protect the innocent); Saundra D. Westervelt & John A. Humphrey, *Introduction to WRONGFULLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 1, 6 (2002) (Saundra D. Westervelt & John A. Humphrey eds., 2001) (“[E]xploring numerous causes of wrongful conviction . . . as well as the social characteristics of the offenders . . . who appear to be at the highest risk of wrongful conviction.”).

revolution.”³⁶ Much of this transformation has been spurred by the work of the New York-based Innocence Project, founded and directed by Barry Scheck and Peter Neufeld.³⁷ The Innocence Project specializes in employing DNA technology to reexamine the integrity of convictions, and as of the middle of April 2014, it listed 316 exonerations based on that technology alone.³⁸ The National Registry of Exonerations, established by Samuel Gross and Robert Warden, tracks all exonerations regardless of the technology used to prove the errors. As of the middle of April 2014, the Registry listed a total of 1350 exonerations.³⁹

The sudden cracks that have appeared in the trusted criminal process have kindled a growing interest in its potential to convict and punish innocent people. Reports of exonerations have become a mainstay of journalistic reporting. Real life cases have become the subject of theatrical productions,⁴⁰ dramatic movies,⁴¹ documentary films,⁴² investigative work,⁴³ and book-length treatments.⁴⁴ Innocence is increasingly becoming

36. See Mark Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 267 (2004) (noting the innocence revolution’s realization that the criminal justice system is not as accurate as once believed); Lawrence C. Marshall, Walter C. Reckless Memorial Lecture: The Innocence Revolution and the Death Penalty, in 1 OHIO ST. J. CRIM. L. 573, 573–76 (2004) (describing the innocence revolution in the U.S. criminal justice system); Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188–95 (2010) (using the backdrop of the innocence revolution to examine prosecutorial charging decisions).

37. On the work of the Innocence Project, see *Mission Statement*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about/Mission-Statement.php> (last visited Apr. 21, 2014) (describing the founding and purpose of the Innocence Project).

38. *DNA Exoneree Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Apr. 21, 2014).

39. See NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Apr. 21, 2014) (showing the current number of exonerations). This number does not include an additional one thousand or so inmates who were exonerated after being convicted in mass conviction cases, such as in the case of Tulia Texas, and in the aftermath of the Rampart Police Scandal in Los Angeles.

40. See Ken Jaworowsky, *When Justice Makes You Gasp: ‘The Exonerated,’ Revived at the Culture Project*, N.Y. TIMES (Sept. 19, 2012), http://theater.nytimes.com/2012/09/20/theater/reviews/the-exonerated-revived-at-the-culture-project.html?_r=0 (describing a play detailing the story of six death row inmates unjustly sentenced to die).

41. CONVICTION (Fox Searchlight Pictures 2010); THE HURRICANE (Universal Studios 1999).

42. AFTER INNOCENCE: FREEDOM IS JUST THE BEGINNING (Showtime Independent Films 2005); THE THIN BLUE LINE (Third Floor Productions 1988); THE TRIALS OF DARRYL HUNT (Break Thru Films); *Frontline: Burden of Innocence* (PBS television broadcast May 1, 2003); *Frontline: The Case for Innocence* (PBS television broadcast Jan. 11, 2000); *Frontline: The Confessions* (PBS television broadcast Nov. 9, 2010); *Frontline: What Jennifer Saw* (PBS television broadcast Feb. 25, 1997).

43. See, e.g., DAVID PROTESS & ROBERT WARDEN, A PROMISE OF JUSTICE: THE EIGHTEEN-YEAR FIGHT TO SAVE FOUR INNOCENT MEN (1998) (describing the effort of a journalist, law professors, and students to exculpate four men who were wrongfully convicted); James S. Liebman et

a topic of legal scholarship,⁴⁵ including books authored by Symposium participants Donald Dripps and Brandon Garrett.⁴⁶ The topic is also drawing interest from criminologists.⁴⁷ The growing interest in the issue of innocence is building on the sustained work done by legal psychologists since the 1970s.⁴⁸

al., *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711 (2012) (documenting Texas's wrongful execution of Charles DeLuna).

44. See, e.g., RAYMOND BONNER, *ANATOMY OF INJUSTICE: A MURDER CASE GONE WRONG* (2012) (the case of Edward Lee Elmore); SARAH BURNS, *THE CENTRAL PARK FIVE: A CHRONICLE OF A CITY WILDING* (2012) (the five youths convicted in the Central Park Jogger case); JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2012) (the case of Ron Williamson and Dennis Fritz); JOHN HOLLWAY & RONALD M. GAUTHIER, *KILLING TIME: AN 18-YEAR ODYSSEY FROM DEATH ROW TO FREEDOM* (2010) (the case of John Thompson); TIM JUNKIN, *BLOODSWORTH* (2005); TOM WELLS & RICHARD A. LEO, *THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR* (2008) (the case of 4 sailors convicted in the Norfolk case). For an early and influential account of false conviction cases, see BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* (2003) (examining various cases).

Notable among the books is *Picking Cotton*, which was authored jointly by the exoneree Ronald Cotton and his accuser, Jennifer Thompson-Cannino. JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TORNEO, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* (2009).

45. For notable scholarly works, see generally Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) (focusing on the problem of false confessions); Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157 (2010/2011) (questioning the definition of exoneration and innocence in light of the Innocence Movement); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173 (2008) (investigating what we do and do not know about false convictions); and D. Michael Risinger & Lesley C. Risinger, *Innocence Is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869 (2011/2012) (discussing how the lack of early discovery severely disadvantages innocent criminal defendants).

For book-length treatments, see generally AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009) (discussing injustices in trial courts); JAMES M. DOYLE, *TRUE WITNESS: COPS, COURTS, SCIENCE, AND THE BATTLE AGAINST MISIDENTIFICATION* (2005) (examining psychologists' methods for reliable eyewitness identification); JON B. GOULD, *THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM* (2008) (examining Virginia's experience with wrongful convictions and criminal justice reform); RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* (2008) (analyzing police interrogation practices in the United States and how it influences judges and juries in determining guilt); DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT* (2012) (discussing American focus on convictions); and THOMAS, *supra* note 35 (analyzing the law surrounding wrongful convictions).

46. See DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* (2003) (arguing that the criminal justice system does not give sufficient protection to the innocent from wrongful convictions); GARRETT, *supra* note 35, at 176 (discussing challenges to defendants in proving their innocence).

47. EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD (Allison Redlich et al. eds.) (forthcoming); Westervelt & Humphrey, *supra* note 35. See also LEO, *supra* note 45 (examining police interrogation practices and its potential to extract confessions from innocent suspects).

48. SIMON, *supra* note 1; CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL

In all, the waning of the tough-on-crime sentiment and policies, the increasing sensibility to racial disparities, and in particular, the newfound recognition of the prospect of false convictions are gradually altering the criminal justice system's longstanding inertia and bringing it to a metaphorical crossroads.⁴⁹ This Symposium seeks to help with mapping this shifting landscape, promoting a deeper understanding of the complex seismic forces at play, and offering insight into the available courses of action. This is indeed an opportune moment to question some of the fundamental issues that underlie and drive the criminal justice process. In particular, the time is ripe for a close and critical examination of the place that verdict accuracy occupies in the operation of the system. It is reassuring to note that the issue of accuracy figures prominently throughout this Symposium.⁵⁰ Brandon L. Garrett's article is devoted to mistakes made in sentencing decisions.⁵¹ Laurie L. Levenson offers a disheartening account of postconviction proceedings as ill-suited for the task of accurate factfinding.⁵² The article by James S. Liebman and David Mattern describes the criminal justice process as a rule-based bureaucracy that is detached from a results-oriented conception of its performance.⁵³ Erin Murphy's article portrays a rather grim picture of how forensic sciences are currently used to discover the truth.⁵⁴ Daniel Richman's article is devoted to addressing doubts surrounding the ability of the process to distinguish accurately between true and false prosecutions.⁵⁵ And Christopher

RESEARCH (Brian L. Cutler ed., 2011); POLICE INTERROGATIONS AND FALSE CONFESSIONS: CURRENT RESEARCH, PRACTICE, AND POLICY RECOMMENDATIONS (G. Daniel Lassiter & Christian A. Meissner eds., 2010); REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, *INSIDE THE JURY* (1983); ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1976); MICHAEL J. SAKS & REID HASTIE, *SOCIAL PSYCHOLOGY IN COURT* (1979); Gary L. Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOL. 1546 (1978). The foundation for the field of legal psychology was laid by the pioneering work of HUGO MUNSTERBERG, *ON THE WITNESS STAND* (1908). For a lucid history of the field, see DOYLE, *supra* note 45.

49. Tellingly, there are signs that the criminal justice system is warming up to the possibility of error in convictions they obtain. In 2012, prosecutors and police personnel cooperated in the uncovering of 54 percent of the exoneration cases revealed that year. THE NAT'L REGISTRY OF EXONERATIONS, UPDATE 2012 (2013), https://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE4_1_13_FINAL.pdf.

50. The prevalence of the reference to the topic of accuracy in this collection of papers is notable in light of the fact that the conference speakers were given free rein in the choice of their topics.

51. Brandon L. Garrett, *Accuracy in Sentencing*, 87 S. CAL. L. REV. 499 (2014).

52. Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545 (2014).

53. James S. Liebman & David Mattern, *Correcting Criminal Justice Through Collective Experience Rigorously Examined*, 87 S. CAL. L. REV. 585 (2014).

54. Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633 (2014).

55. Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673 (2014).

Slobogin's paper revolves primarily around the process's "accuracy problem."⁵⁶

II. CONCERNS OVER THE ACCURACY OF THE PROCESS

We now turn to examine the capacity of the justice process to reach accurate factual findings. The array of factors that hinder that capacity is too broad to be addressed comprehensively in the limited space of this Article. Accordingly, I will focus on the following four hindering factors: problems with the reliability of the evidence produced by police investigations, the opacity of the process, the intensity of the adversarial process, and the muddled understanding of the system's goals.

A. THE QUESTIONABLE ACCURACY OF THE EVIDENCE

It is broadly appreciated that criminal verdicts are forged by the evidence off which they feed. But the influence of the available evidence on the criminal justice process runs deeper and wider. The evidence can have a crucial impact on both the formal and informal junctures and points of discretion strewn along the winding process—including police and prosecutorial decisions, indictments by grand juries, defense strategies, plea offer negotiations, admissibility determinations, factfinding and verdict decisions, sentencing, appeals, and postconviction review. Analyses of known false conviction cases,⁵⁷ coupled with the psychological research discussed extensively in *In Doubt*, give reason to suspect that the available evidence does not always correspond to the facts of the actual criminal event.⁵⁸

The birthplace of errors is invariably the police investigation. Any investigative work is susceptible to various cognitive and motivational biases which, in the criminal context, can readily escalate and produce sets of inculpatory evidence that are putatively compelling, yet potentially mistaken.⁵⁹ Eyewitness identifications are often mistaken, due to a

56. Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699 (2014).

57. See GARRETT, *supra* note 35, at 176 (discussing the faulty nature of the evidence in 250 DNA exonerations).

58. SIMON, *supra* note 1, at 50–143.

59. For a psychological account of the cognitive and motivational forces that can sway even the well-intended investigators, see SIMON, *supra* note 1, at 21–39. See also LEO, *supra* note 45, at 2–3 (arguing that coercive interrogation can lead to false confessions and wrongful convictions); Saul M. Kassin, Itiel E. Dror & Jeff Kukucka, *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. APPLIED RES. MEMORY & COGNITION 42, 43 (2013) (criticizing forensic practices due to their susceptibility to error and bias); D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*,

combination of suboptimal witnessing conditions, cognitive limitations, and the substandard and haphazard procedures employed by many police departments.⁶⁰ Witnesses' memories for criminal events are invariably incomplete, and often contain false facts that were induced by incorrect interviewing procedures.⁶¹ Confessions too can produce false evidence. Interrogations are usually triggered by concluding that the suspect has lied to the police,⁶² a determination that is frequently based on poor diagnostic and guilt-confirming protocols.⁶³ Moreover, most American police departments follow accusatory interrogative methods that obtain confessions primarily through psychological coercion. These protocols are at once very impactful but poorly diagnostic of the suspect's guilt, and thus have the potential to yield confessions from both guilty and innocent suspects.⁶⁴ In short, the investigative process produces unknown mixtures of accurate and inaccurate evidence. Importantly, the ensuing adjudicative phase is not well equipped to detect and correct for mistaken evidence.⁶⁵

B. PROCESS OPACITY

The second key feature that hinders the accuracy of the criminal

90 CALIF. L. REV. 1, 38 (2002) (discussing how forensic expert findings can be influenced by irrelevant information).

60. See SIMON, *supra* note 1, at 50–89; Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 10–13 (2009) (noting that empirical data shows difficulties with the reliability of eyewitness identification).

61. See SIMON, *supra* note 1, at 90–119; Ronald P. Fisher & Nadja Schreiber, *Interview Protocols to Improve Eyewitness Memory*, in 1 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY 53, 53–63 (Michael P. Toglia et al. eds., 2007) (examining the deficiencies of eyewitness interviews conducted by police).

62. CRIMINAL INTERROGATION AND CONFESSIONS 101–37, 154–69 (Fred E. Inbau et al. eds., 5th ed. 2012); LEO, *supra* note 45, at 25.

63. See ALDERT VRIJ, DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES 141–88 (2d ed. 2008) (arguing that truth and lie detection methods operate at low levels of reliability); Charles F. Bond & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 230 (2006) (finding that determinations of whether an individual is lying are correct only 54 percent of the time); Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 L. & HUM. BEHAV. 469, 469–72 (2002).

64. SIMON, *supra* note 1, at 120–43; LEO, *supra* note 45, at 23; Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOLOGIST 431, 432–33 (2012).

65. SIMON, *supra* note 1, at 144–205. See also GARRETT, *supra* note 35, at 145–212 (observing failures to detect innocence at trial and in postconviction proceedings); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 180 (2011) [hereinafter Simon, *Limited Diagnosticity*] (noting that the assessment of evidence at trial is effected by systematic problems with producing evidence); Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 L. & CONTEMP. PROBS. 167, 203 (2012) [hereinafter Simon, *More Problems*] (explaining that the legal mechanisms used to promote diagnosticity of the trial process are often ineffective).

justice process is its opacity, namely the limited access that legal actors—especially factfinders—have to the best available evidence. One important cause of opacity has to do with the generally poor documentation and record keeping of the investigative process. Despite the seriousness and potent impact of the criminal process, criminal investigations are not regularly documented in a complete or reliable manner. **The absence of a dependable record can be critical**, as the omitted information could well assist in determining the veracity of the evidence collected. For example, in evaluating a witness's identification testimony, factfinders are bound to benefit from records of the lineup used, the exact instructions given to the witness, the speed of her choice, her statement of confidence, and more.⁶⁶ It is likewise difficult to assess the reliability of a witness's memory for the specific facts of a criminal event without benefit of access to memorialized statements given soon after the crime. It is also difficult to assess the accuracy of detectives' accounts that are based on a partial paraphrasing of interviews, jotted down some time thereafter.⁶⁷ Factfinders would benefit from learning precisely how the interviewer's questions were phrased, which facts were first suggested by the interviewer, and what kind of pressure was applied on the witness to produce memories that she initially failed to recall.⁶⁸ The absence of a reliable record is particularly acute in the context of interrogations of suspects, where disputes often arise over the content of the statements attributed to the suspect and the investigative means used to elicit them,⁶⁹ as well as over procedural issues, such as whether the defendant was read his *Miranda* rights and whether they were

66. See, e.g., Margaret C. Reardon & Ronald P. Fisher, *Effect of Viewing the Interview and Identification Process on Juror Perceptions of Eyewitness Accuracy*, 25 APPLIED COGNITIVE PSYCHOL. 68 (2011) (discussing a study that revealed greater accuracy in evaluating the accuracy of witnesses by simulated jurors who were exposed to videotapes of the witnesses' interviews and the ensuing lineups); Melanie Sauerland & Siegfried L. Sporer, *Fast and Confident: Postdicting Eyewitness Identification Accuracy in a Field Study*, 15 J. EXPERIMENTAL PSYCHOL.: APPLIED 46 (2009) (showing that knowledge of the witnesses' reaction time at the lineup and reported confidence can assist in assessing their accuracy).

67. See Michael E. Lamb et al., *Accuracy of Investigators' Verbatim Notes of Their Forensic Interviews with Alleged Child Abuse Victims*, 24 L. & HUM. BEHAV. 699 (2000) (discussing a study of experienced forensic investigators in Israel that found that investigators' reports missed some two-thirds of the information stated by child witnesses and did not include any of the questions they asked).

68. On the variety of interviewing techniques and investigative pressures that have the potential to produce inaccurate memorial reports, see SIMON, *supra* note 1, at 111–16; Fisher & Schreiber, *supra* note 61, at 53; Jeffrey S. Neuschatz et al., *False Memory Research: History, Theory, and Applied Implications*, in 1 THE HANDBOOK OF EYEWITNESS PSYCHOLOGY, *supra* note 61, at 239.

69. See Thomas P. Sullivan, *Recording Federal Custodial Interviews*, 45 AM. CRIM. L. REV. 1297, 1306 (2008) (discussing the benefits to all parties of recording custodial interviews); LEO, *supra* note 45, at 9–40 (describing police interrogation techniques and contradictions).

legally waived.⁷⁰

The paucity of the investigative record also opens the door to evidence drift, which stands for the generally unnoticed discrepancies between the statements given by the witness at the first interview and the synthetic testimony delivered ceremoniously in the courtroom, months and even years later on.⁷¹ Over the natural course of the legal process, narratives become crystalized, gaps get filled, and ambiguity is replaced by the certitude that is expected for courtroom consumption. Habitually, evidence drift intensifies the testimony and strengthens the respective party's case.⁷²

Investigative opacity also has serious ramifications for the internal working of the criminal justice system. In private conversations that I hold with some regularity with law enforcement personnel and judges, they frequently state their frustration with their own limited access to the best available information. Ranking police commanders lament their inability to oversee the work of their detectives, and report experiencing occasional unease when referring questionable cases to the prosecution. Prosecutors express a certain discomfort with prosecuting cases based on evidence they cannot verify as well as with the swearing contests that often ensue (as a separate matter, prosecutors also maintain that well-documented cases are more convincing to juries). Judges often bemoan spending scarce adjudicative resources trying to resolve factual disputes that could easily have been clarified or averted by recording the investigation. And to the extent that they take ownership over the evidence presented in their courts, judges express disaffection with deciding admissibility questions without being able to probe the genesis of the evidence. There is little doubt that the jurors' onerous task suffers from their lack of access to potentially useful decision aids.⁷³

However, the dearth of reliable and complete investigative records is not the sole cause of the process's opacity. Criminal verdicts, especially

70. See Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001).

71. SIMON, *supra* note 1, at 159–60.

72. As the bulk of the evidence presented at criminal trials is offered by the prosecution, the most likely effect of evidence drift is to make the case seem more inculcating than the witnesses' original perception of the criminal event. On the drift from raw statements to synthesized testimony, see *id.* at 15, 146, 159–60.

73. See, e.g., Reardon & Fisher, *supra* note 66 (discussing a study that revealed greater circumspection in trusting inaccurate witnesses by simulated jurors who were exposed to videotapes of the witnesses' interviews and the ensuing lineups); Sauerland & Sporer, *supra* note 66 (showing that knowledge of the witnesses' reaction time at the lineup and reported confidence can assist in assessing their accuracy).

plea bargains, are often based on a selective and skewed subset of the available evidence. It is important to acknowledge that the criminal process harbors an inherent informational asymmetry. True, the best available evidence is usually known to the defendant, but that knowledge is typically barred from being admitted due to constitutional principles that are unrelated to the accuracy of the process. The evidence that is available for the adjudicative process is virtually monopolized by the state. The state has both the resources and the power to perform criminal investigations, while most defendants—who are invariably under arrest during much of the investigative process—lack the resources, expertise, and legal authority to investigate their cases.⁷⁴ It is not hard to see how in an adversarial system, prosecutors would be tempted to use the state's virtual monopoly to their advantage, primarily by presenting the factfinder with the inculpatory evidence but holding back evidence that might weaken the state's case. To be sure, the United States Supreme Court created the *Brady* doctrine to prevent the abuse of this asymmetry,⁷⁵ but as Erin Murphy⁷⁶ and Laurie Levenson⁷⁷ remind us, in practice the right to discovery in criminal proceedings is miserly at both pretrial and postconviction phases of the process. The *Brady* doctrine has been whittled down over the years,⁷⁸ and is breached all too often.⁷⁹ Moreover, discovery rights are awarded only

74. See SIMON, *supra* note 1, at 44–45 (“Effectively, investigations are driven by a one-sided quasi-adversarial process, on which the accounts of the state go largely unchecked and unopposed.”). See also GARRETT, *supra* note 35, at 35 (finding that evidence of innocence was often concealed and many defendants did not have resources to find better evidence).

75. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Court mandated the discovery to the defense of exculpatory and impeachment evidence that is material to the case.

76. Murphy, *supra* note 54, at 645–52.

77. Levenson, *supra* note 52, at 567–70.

78. On the *Brady* doctrine and its eventual history, see Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002).

79. See EMILY M. WEST, INNOCENCE PROJECT, COURT FINDINGS OF PROSECUTORIAL MISCONDUCT CLAIMS IN POST-CONVICTION APPEALS AND CIVIL SUITS AMONG THE FIRST 255 DNA EXONERATION CASES 4 (2010), available at http://www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf (finding that 38 percent of prosecutorial misconduct allegations in 65 DNA exoneration cases involved *Brady* violations); Molly Hennessey-Fisk, *Texas Ex-Prosecutor's Sentence Sends Warning on Wrongful Convictions*, L.A. TIMES (Dec. 28, 2013, 5:10 PM), <http://www.latimes.com/nation/la-na-prosecutor-misconduct-20131229,0,923426.story#axzz2p5yvXdJ5> (discussing a case in which the prosecutor intentionally withheld evidence that would have exonerated the defendant); Steven Zeitchik, *New Crop of Documentaries Make the Case for Prosecutorial Misconduct*, L.A. TIMES (Feb. 7, 2014, 7:00 AM), <http://www.latimes.com/entertainment/movies/moviesnow/la-et-mn-docs-prosecution-20140209,0,1570470.story#ixzz2seXI2iBU> (describing films documenting cases of prosecutorial misconduct).

partially in the ubiquitous practice of plea negotiations.⁸⁰ As a result, criminal defendants facing decades of imprisonment are entitled to learn far less about the evidence they face than litigants in simple contract or tort proceedings.⁸¹ Given the adversarial nature of the process, exculpating evidence that is not disclosed to the defense is unlikely to ever reach the jury, which further hinders the diagnostic potential of the trial to tell apart correct prosecutions from mistaken ones.

C. EXCESSIVE ADVERSARIALISM

The outcome of any legal disposition is obviously related to the nature of the process from which it emanates. It follows that the accuracy of the American criminal justice system is closely linked to the capacity of the adversarial process to produce correct results. The adversarial system is one of the most defining features of the Anglo-American legal tradition, and while its historical evolution was not driven by the goal of truth discovery,⁸² its suitability for the task has become an article of faith among the system's proponents.⁸³ As argued by Monroe Friedman, the adversarial process offers the factfinder "the strongest case that each side can present," which is essential for reaching an "informed, considered, and fair judgment."⁸⁴ Lon Fuller insisted that adversarial zeal was essential for enabling adjudicators to "gauge the full force of the argument."⁸⁵ This discursive style might indeed be well suited for debates over moral issues, value judgments, and political choices. But zealous argument seems poorly suited as a means for proving objective factual matters, such as whether a certain person was present at a particular location or whether the lighting at the crime scene was sufficient to observe the details of a particular event. As noted by Susan Haack, "[I]nquiry is a very different enterprise from

80. The Court has ruled that the prosecution has no pre-plea agreement duty to disclose evidence that could impeach its witness. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

81. See Murphy, *supra* note 54, at 645–52; David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L. REV. 683, 713–18 (2006) (comparing the civil and criminal discovery processes).

82. For an important historical analysis of the development of the Anglo-American criminal justice system, see generally JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003).

83. See Fuller, *supra* note 27, at 39–40 (characterizing the adversary process as an effective means for combating the natural human tendency to jump to premature conclusions); STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM* 48–51 (1984) (describing how judges in the inquisitorial system are deemed more likely to act upon their biases than judges in adversarial systems).

84. Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975).

85. Fuller, *supra* note 27, at 35.

advocacy.”⁸⁶

The American variant of the adversarial system has been criticized for its excesses, which as described by Robert Kagan, result in a “markedly inefficient, complex, costly, punitive, and unpredictable method of . . . dispute resolution.”⁸⁷ Justice William Brennan lamented that criminal prosecutions can become “sporting events.”⁸⁸ Jerome Frank famously described the process as a “fight theory,” rather than a “truth theory.”⁸⁹ The lawyer, Frank explained, “aims at victory, at winning in the fight, not at aiding the court to discover the facts,” an endeavor that entails tactics that are akin to “throwing pepper in the eyes of the surgeon when he is performing an operation.”⁹⁰ American adversarialism is recently coming under unprecedented attack,⁹¹ as demonstrated also in this Symposium, notably in the papers by Christopher Slobogin,⁹² Erin Murphy,⁹³ and Laurie Levenson.⁹⁴

There is good reason to believe that in excessive doses, the adversarial system compromises the goal of accuracy more than it promotes it. The zeal that accompanies excessive adversarialism is the likely explanation for the occasional misconduct by state officials, which readily wreaks havoc on the factfinding task. Indeed, the annals of false conviction cases are replete with suggested testimony, coercion of witnesses, fabrication of evidence, and concealment of exculpatory evidence.⁹⁵ Forty-four percent of the

86. Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 AM. J. JURIS. 43, 49 (2004).

87. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 4 (2001). Kagan also explains that American adversarialism has a “tendenc[y] toward punitiveness, cumbersomeness, inconsistency, inequality, and political volatility.” *Id.* at 65. See also Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 425 (1992) (discussing excesses in the adversary process).

88. William J. Brennan Jr., Tyrell Williams Memorial Lecture: The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report, in 68 WASH. U. L. Q. 1, 16 (1990).

89. FRANK, *supra* note 33, at 80.

90. *Id.* at 85. For other classic critiques of American adversarialism, see generally MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1978); LLOYD L. WEINREB, *DENIAL OF JUSTICE* (1977).

91. See, e.g., Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911 (2011/2012) (analyzing imbalances in the current American adversary system); Jennifer L. Mnookin et al., *The Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 725 (2011) (describing recent scrutiny of forensic sciences).

92. Slobogin, *supra* note 56.

93. Murphy, *supra* note 54.

94. Levenson, *supra* note 52.

95. For specific instances, see the causes of exoneration cases listed by The Innocence Project, *Know the Cases*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Mar. 11, 2014), and The Nat’l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Mar. 11, 2014).

convictions listed in the Registry of Exonerations involved official misconduct, as did some half of the DNA exonerations.⁹⁶

But the ill effects of excessive adversarialism are present even when all actors execute their roles honestly and dilligently. Adversarialism can compromise the process by influencing the selection of witnesses on grounds other than the accuracy of their testimony. Lawyers might elect not to call to the stand an honest and reliable witness who might seem unappealing to the factfinder or who might not hold up well to the vigor of cross-examination due to a personality trait, low intelligence, and the like. By the same token, a lawyer would be tempted to call a witness who can be trusted to stand up to the task, even in the face of doubts over the integrity of the witness or the reliability of his account.

The accuracy of the process can be readily thwarted by witness preparation. Lawyers routinely prepare witnesses before the trial, and while the practice verges on subornation of perjury,⁹⁷ failing to do so can amount to a breach of the professional responsibility the lawyer owes her client in an adversarial system.⁹⁸ As observed by Judge Frankel, witness preparation is a “major item of battle planning, not a step toward the revelation of objective truth.”⁹⁹ Lawyers are permitted to explain the applicable law to the witness, to discuss the witness’s probable testimony, to inform the witness of other testimony to be presented, and to ask the witness to reconsider his or her recollection in light of all this information.¹⁰⁰ Lawyers are also permitted to prepare the witness for hostile cross-examination, to rehearse the testimony, and to suggest alternative word choices.¹⁰¹ In short, lawyers have considerable latitude to mold the witness’s testimony to fit a particular conclusion, thus weakening its correspondence to the actual criminal event.¹⁰²

96. See The Nat’l Registry of Exonerations, *supra* note 95; Michael J. Saks & Jonathan. J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 *SCIENCE* 892, 892 fig.1 (2005).

97. FRANKEL, *supra* note 90, at 15.

98. See 2 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b (2000) (noting that “[professional] rules requiring inquiry to support factual allegations . . . may require a lawyer to interview witnesses to gain the necessary factual foundation”).

99. FRANKEL, *supra* note 90, at 16.

100. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 116 cmt. b.

101. *Id.*

102. One simulation study found that witnesses’ testimony became skewed in favor of the lawyer who cross-examined them, and the strength of the distortion was mediated by the manipulateness of the individuals playing the role of the lawyers. Blair H. Sheppard & Neil Vidmar, *Adversary Pretrial Procedures and Testimonial Evidence: Effects of Lawyer’s Role and Machiavellianism*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 320, 325–28 (1980). Another study found that forewarning a prosecution witness about an expected hostile cross-examination by the defense attorney resulted in a

Adversarialism can also obstruct accuracy through the excessive application of trial procedures. For one, lawyers frequently drench their courtroom presentation with all sorts of affective matter and emotional appeals that paint defendants and witnesses in either a contemptible or venerable light. Oftentimes, these depictions have little or nothing to do with the facts of the case. Studies have found that exposing jurors to emotionally arousing or gruesome evidence can increase the propensity of the jurors to vote to convict, even in “whodunit” cases, in which the evidence has no probative value whatsoever.¹⁰³

Cross-examination is generally touted as the “greatest legal engine ever invented for the discovery of truth,”¹⁰⁴ but in the hands of the zealous lawyer it easily becomes a weapon to sway the factfinder toward his client’s preferred version of the facts.¹⁰⁵ Skilled lawyers can use cross-examination to undermine the testimony of even honest and accurate witnesses,¹⁰⁶ a feat that is considered by some commentators to be another professional duty that lawyers owe their clients.¹⁰⁷ One contemporary trial advocacy manual evokes images of hunting the adversary’s witnesses during cross-examination: “Close all the gaps he might try to slither through” and “pin him down—don’t spring the trap too soon.”¹⁰⁸ Studies show that subjecting witnesses to cross-examination can also result in substantive changes in their testimony.¹⁰⁹ especially when confronted with questions phrased in “lawyerese,” that is, leading questions, questions phrased in the negative or double negative form, and multipart questions.¹¹⁰

strengthening of the witness’s inculcating testimony, which led in turn to higher conviction rates by a simulated jury. The effect was most pronounced for witnesses whose testimony was actually mistaken. Gary L. Wells, Tamara J. Ferguson & R. C. L. Lindsay, *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688, 694 (1981).

103. See, e.g., David A. Bright & Jane Goodman-Delahunty, *The Influence of Gruesome Verbal Evidence on Mock Juror Verdicts*, 11 PSYCHIATRY, PSYCHOL. & L. 154, 154 (2004); Kevin S. Douglas, David R. Lyon & James R. P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors’ Decisions in a Murder Trial: Probative or Prejudicial?*, 21 L. & HUM. BEHAV. 485, 485, 492 (1997).

104. 5 WIGMORE, EVIDENCE § 1367 (Chadbourn rev. 1974). For endorsements of this position by the Supreme Court, see *Lilly v. Virginia*, 527 U.S. 116, 124 (1999), and *Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

105. See SIMON, *supra* note 1, at 180–83.

106. FRANK, *supra* note 33, at 80–85; FRANKEL, *supra* note 90, at 16.

107. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474–75 (1966).

108. KEITH EVANS, *THE COMMON SENSE RULES OF TRIAL ADVOCACY* 135–36 (1994) (emphasis omitted).

109. One study found that almost three-quarters of witnesses altered their responses on at least one of the four critical factual issues. Tim Valentine & Katie Maras, *The Effect of Cross-Examination on the Accuracy of Adult Eyewitness Testimony*, 25 APPLIED COGNITIVE PSYCHOL. 554, 556–57 (2011).

110. Mark R. Kebbell & Shane D. Johnson, *Lawyers’ Questioning: The Effect of Confusing*

D. GOAL DISPLACEMENT

Given the pressing societal need to punish criminal behavior and the solemn nature of depriving people of their liberty and even life, one would expect that the accuracy of these fateful determinations would be the paramount goal of the criminal justice process. Few events in our social lives are more disconcerting than seeing guilty people escape punishment or witnessing the ostensibly benevolent state inflict inordinate pain on innocent people and their families. What about the process, one must wonder, could be more important than ensuring that we are dispensing freedom and deprivation to the correct people? Yet, perplexingly, the criminal justice system sidelines the accuracy of its somber endeavor in favor of a slew of other goals, interests, and constraints, which are borne primarily by bureaucratic considerations and system defensiveness.¹¹¹

The **relegation of factual accuracy pervades the entire criminal justice process,** as manifested by the manner in which investigations are conducted, forensic evidence is tested, charging decisions are made, admissibility of evidence is determined, cases are adjudicated, and postconviction proceedings are decided.¹¹² The relegation of accuracy is especially jarring in the decisions rendered by the judiciary, the branch entrusted with the task of protecting citizens from unlawful or overreaching intrusions by the state. Nowhere is this attitude more disconcerting and harmful than in the decisions of the United States Supreme Court. The Court's approach is centered decidedly on the preeminence of procedure.¹¹³ Notwithstanding occasional pronouncements touting the importance of finding the truth,¹¹⁴ that goal is effectively eclipsed by the dictates of the Court's narrow and wooden prescribed procedural regime.¹¹⁵ To a large

Questions on Witness Confidence and Accuracy, 24 L. & HUM. BEHAV. 629 (2000); Nancy W. Perry et al., *When Lawyers Question Children: Is Justice Served?*, 19 L. & HUM. BEHAV. 609 (1995). The latter experiment found that convoluted questions had adverse effects on subjects in four age groups ranging from kindergarten to college. Perry et al., *supra*.

111. On the defensive nature of the criminal justice system, see SIMON, *supra* note 1, at 213–15.

112. See *id.*; Levenson, *supra* note 52; Murphy, *supra* note 54.

113. See 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2 (3d ed. 2007); MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 222 (1986).

114. See, e.g., *Teague v. Lane*, 489 U.S. 288, 334, 344 (1989) (Brennan, J., dissenting) (refusing to apply the plurality's rule, arguing that it has insufficient truth-seeking functions); *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (affirming that the purpose of the constitutional standard of proof beyond a reasonable doubt is to overcome an aspect of a criminal trial that impairs the truth-finding function).

115. See DRIPPS, *supra* note 46, at 142–51 (noting the importance assigned to procedural justice); THOMAS, *supra* note 35, at 139 (discussing the centrality of procedural justice); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6 (1997) (proposing that criminal justice is too dependent upon procedural, and not substantive, safeguards).

extent, the procedures themselves have become the ultimate goal of the process,¹¹⁶ with fairness serving as its guiding principle. Yet the Court's conception of fairness is devoid of moral content and is only loosely related to factual accuracy. Fairness serves rather as a mechanical device for balancing out the litigants' respective advantages and disadvantages in the adversarial contest. The process is deemed fair if the playing field is roughly level,¹¹⁷ with little regard to which team actually deserves to prevail.

The supremacy of the Court's proceduralism was manifested starkly in the case of *Herrera v. Collins*, where the Court left open the question whether a "truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional."¹¹⁸ In a subsequent case, Justice Scalia insisted that "[t]his Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent."¹¹⁹ In plain language, the Court could conceivably condone the execution of an actually innocent person, as long as no obvious flaws can be found in the procedure that produced that grotesque result. Moreover, the *Herrera* Court added that if it were to recognize the "assumed right" to have one's conviction overturned due to truly persuasive proof of innocence, the threshold for establishing it would necessarily be "extraordinarily high."¹²⁰ And even if the Court were to bar the execution of a properly convicted but innocent person, that relief would likely not be made available to noncapital defendants, many of whom spend decades or their entire lives in prison.

The relegation of accuracy is evident from the Court's proclivity to preserve convictions in the face of questionable evidence and to uphold the actions of the state in the face of inadequate procedures and improper

Importantly, the Court's conception of the Due Process clause offers criminal suspects and defendants only a stunted form of procedural protection. See, e.g., *Perry v. New Hampshire*, 132 S. Ct. 716 (2012). On the Court's refusal to recognize a freestanding right to Due Process protection, see Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001).

116. For example, in discussing the admissibility of confession evidence, Chief Justice Rehnquist explained: "The inquiry made by a court concerned with these matters is not whether the proponent of the evidence wins or loses his case on the merits, but whether the evidentiary Rules have been satisfied." *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

117. See H. RICHARD UVILLER, *THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR?* 9 (1999) (discussing the limits of parity and the concept of the level playing field).

118. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

119. *In re Davis*, 557 U.S. 952, 954 (2009) (Scalia, J., dissenting).

120. *Herrera*, 506 U.S. at 417.

behavior of its agents.¹²¹ The Court's reasoning reveals a distinct prioritization of a convenient and efficient administration of the system over the value of reaching the correct verdict. In the *Herrera* opinion mentioned above, the prospect of executing an innocent person was justified as a way to serve the interest of finality.¹²² A challenge to admissibility of eyewitness identifications obtained from suggestive lineups was rejected primarily out of consideration for the state's ability to prosecute crimes effectively.¹²³ A defendant's right to disclosure of exculpatory impeachment evidence in advance of plea negotiations was rejected due to the fear of "seriously interfere[ing] with the Government's interest in securing those guilty pleas" and, again, "the efficient administration of justice."¹²⁴ Likewise, a request for an evidentiary hearing to investigate allegations that members of a jury consumed large amounts of alcohol and drugs during a trial was rejected by the Court in favor of the interests of finality, frank deliberation, and oddly, the public's trust in the system.¹²⁵

It would not be surprising to find that the Court's values percolate through the system and ultimately affect the behavior of other legal actors. When speaking in private with law enforcement officials and judges, I invariably encounter a good deal of professionalism and conscientiousness toward their difficult work. Yet when I probe for their conception of their role in the process,¹²⁶ they typically frame their responses in concrete and narrow terms that pertain to the immediate tasks at hand. And while they seem genuinely loathe to contribute to a faulty outcome, they often state straightforwardly and non-self-consciously that reaching accurate results is "not actually my job."

Patching together the statements made in these conversations leads to the sense that legal actors are disinclined to take ownership over the results of the criminal justice process, and tend to believe that the ultimate responsibility resides elsewhere. Instead, I observe a certain proneness to

121. See SIMON, *supra* note 1, at 212–13; Levenson, *supra* note 52.

122. *Herrera*, 506 U.S. at 417 (1993) (expressing concern over "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases").

123. *Mason v. Brathwaite*, 432 U.S. 98, 112–13 (1977) (describing the exclusion of an identification as a "Draconian sanction" for the prosecution, while making light of the risk that a misidentification posed to the defendant).

124. *United States v. Ruiz*, 536 U.S. 622, 631, 633 (2002).

125. *Tanner v. United States*, 483 U.S. 107, 120–21 (1987).

126. On the construct of role conception, see generally D. J. Hickson, *A Convergence in Organization Theory*, 11 ADMIN. SCI. Q. 224 (1966); Daniel J. Levinson, *Role, Personality, and Social Structure in the Organizational Setting*, 58 J. ABNORMAL & SOC. PSYCHOL. 170 (1959).

deflect difficult and questionable decisions onto the laps of other actors, particularly those operating downstream: police investigators will refer problematic cases to the prosecution in the belief that it is the prosecutor's job to decide what to do with questionable evidence. Prosecutors will pursue unclear cases in the belief that it is the judge's job to determine the admissibility of the evidence and the jury's to determine its veracity. By the same token, judges will allow the admission of questionable evidence leaving the tough task of assessing its reliability to the jury. This form of deflecting responsibility is flawed on many levels, not least because the mere progression through the lengthy process tends to reaffirm the perceived validity of the case. It is flawed also because in voting for conviction, the jury might not have suspected that the state's agents provided them with anything but the most objective and reliable evidence that could have been made available.

Once the jury has voted to convict, the deflection of responsibility reverses direction. The reverence of appellate and postconviction courts for the criminal process and their trust in the wisdom of American juries lead them to be exceedingly deferential to criminal convictions. These courts are loathe to interfere in the factfinding task,¹²⁷ which virtually guarantees the perpetuation of any errors that might be lurking in the case.¹²⁸ It is noteworthy that federal courts award relief in only 0.4 percent of the noncapital habeas corpus cases they review.¹²⁹

127. In habeas proceedings, this deference is imposed by statute. Specifically, 28 U.S.C. § 2254(d) (2012) requires courts to defer to reasonable factual determinations by state courts. As the Court has stated, "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). *See also* *Sumner v. Mata*, 449 U.S. 539, 544–52 (1981) (discussing the enactment and meaning of 28 U.S.C. § 2254(d)).

128. The effectiveness of appellate and postconviction review is strongly undermined by the fact that the access to these courts is restricted by a host of intricate procedural conditions, such as filing deadlines, contemporaneous objection at trial, narrow categories of cognizable claims, and exhaustion of claims. *See, e.g.*, 28 U.S.C. §§ 2241–2266 (2012) (imposing procedural conditions on postconviction cases); RANDY HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (6th ed. 2005) (explaining these procedural conditions); Levenson, *supra* note 52, at 551–60.

129. NANCY J. KING, FRED L. CHEESMAN & BRIAN J. OSTROM, *HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996* (2007). Of this slim yield, most interventions are based on legal errors, namely, procedural flaws committed during the investigation or trial; the rate of successful challenges on factual grounds is infinitesimal. In the rare instances that these courts extend themselves to examine factual findings, they routinely rely on the record developed by the trial court and examine the evidence in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). Reviewing courts also apply high thresholds for intervention and entertain only a "sharply limited" review of claims challenging the sufficiency of evidence. *Wright v. West*, 505 U.S. 277, 296 (1992). *See also* 7 LAFAYE ET AL., *supra* note 113, § 27.5. A commonly used standard is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 318–19.

To better understand how these localized behaviors come about and what effect they have on the process's outcomes, it would be beneficial to step back and examine the process from a fresh vantage point. Conventional criminal scholarship tends to focus on narrow slices of the legal process: the specific circumstances that permit searching a home, the nuances of exercising a rule of evidence, or the exact wording of a jury instruction. This type of scholarship misses crucial insights that can be derived only from examining the system's overall performance and the crucial interactions among its myriad of actors. To be sure, some important observations along these lines can be found in the literature. Jerome Frank stated that lawyers should not be blamed for their efforts to disrupt the truth-seeking function of the trial; the blame lies rather in "the system that virtually compels their use, a system which treats a law-suit as a battle of wits and wiles."¹³⁰ William Stuntz has drawn our attention to the effect that changes in legislation, funding, and prosecutorial power have on the behavior of the criminal defense bar and on the ensuing litigation.¹³¹ Daniel Richman has artfully portrayed the interplay between prosecutors and their investigative agents.¹³² And the Chief Judge of the Court of Appeals for the Ninth Circuit, Alex Kozinski, has stated simply that "[s]ome prosecutors don't care about *Brady* because courts don't make them care."¹³³ Numerous papers in this Symposium indicate a growing appetite for examining the mutual interplay between and among the actors and institutions that drive the process as it winds its way toward disposition.

Indeed, the criminal law debate has much to gain from taking a bird's-eye view of how the entire system operates as a whole,¹³⁴ and from adopting a theoretical framework to provide insight into this systemic

130. FRANK, *supra* note 33, at 85.

131. Stuntz, *supra* note 115, at 31–45.

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

133. *United States v. Olsen*, 737 F.3d 625, 631 (Kozinski, C.J., dissenting from order denying rehearing en banc) (emphasis omitted).

134. For early work incorporating the systemic approach, see generally Stuntz, *supra* note 115, and Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201 (2005). The system-wide approach is also beneficial in that it affords the possibility of empirically testing the performance of the system as a whole, and thus helps examine how well it attains the social ends for which it is designed. See Marshall, *supra* note 36, at 573–74 (discussing the concept of criminal law's recent "innocence revolution" and how it is "born of science and fact"). The absence of empirical data leaves too much leeway for basing the delicate choices on the policymakers' (often misguided) preconceived notions and beliefs. The need for empirical approach figures most prominently in the papers by Dripps, Liebman and Mattern, and Weisberg. See Donald A. Dripps, *Does Liberal Procedure Cause Punitive Substance? Preliminary Evidence from Some Natural Experiments*, 87 S. CAL. L. REV. 459 (2014); Liebman & Mattern, *supra* note 53; Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785 (2014).

approach. The field of organizational science offers a framework that is potentially suitable and most useful for this purpose. This discipline—which has been largely ignored in criminal legal scholarship—applies insights from sociology and management science to examine the inner workings of organizations and institutions.¹³⁵ One important strand of this literature pertains to the crucial role of organizational goals.¹³⁶ In the classic formulation offered by Max Weber, well-functioning organizations are operationalized through a set of formalized rules, procedures, regulations, and tasks that are rationally designed to promote the objectives of the organization.¹³⁷ Weber's key observation is that the behavior of organizational actors is shaped by the formal structure of the organization.¹³⁸ In accordance with his idealistic view of bureaucratic behavior, Weber deemed the goals that drive individual actors to be closely interrelated with the goals of the organization, thus resulting in an alignment of the actor's behavior with the desired performance of the organization.¹³⁹

Subsequent scholarship has taken a more jaundiced view of organizational behavior and its susceptibility to goals that diverge from the Weberian ideal. Philip Selznick notes that organizational goals subsist under constant environmental pressures, and are modified, abandoned, deflected, or elaborated by the processes within the organizational structure.¹⁴⁰ Robert K. Merton, followed by many others, observed a pattern of disjunction between the overall goals of an organization, on the one hand, and the local goals, objectives, and incentives that motivate its subunits and production-line workers on the other.¹⁴¹ This phenomenon of goal displacement typically takes the form of a reversal of means and ends, by which the rules and procedures that were designed to facilitate and

135. For general surveys of organizational science, see HOWARD P. GREENWALD, *ORGANIZATIONS: MANAGEMENT WITHOUT CONTROL* (2008); DAVID JAFFEE, *ORGANIZATION THEORY: TENSION AND CHANGE* (1st ed. 2001).

136. On the concept of organizational goals, see Edward Gross, *The Definition of Organizational Goals*, 20 *BRIT. J. SOC.* 277 (1969).

137. See MAX WEBER, 2 *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 956–58 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978) (offering a foundational treatment of bureaucratic organizations); JAFFEE, *supra* note 135, at 89–92 (outlining the central concepts of Weber's theory of bureaucracy).

138. WEBER, *supra* note 137, at 958–59.

139. *Id.* at 959.

140. Philip Selznick, *An Approach to a Theory of Bureaucracy*, 8 *AM. SOC. REV.* 47, 47–48 (1943).

141. ROBERT K. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 199–202 (rev. ed. 1957); JAFFEE, *supra* note 135, at 94–105; JAMES G. MARCH & HERBERT A. SIMON, *ORGANIZATIONS* 12–82 (1958); Selznick, *supra* note 140, at 48.

systematize the performance of the bureaucratic apparatus tend to be fetishized and followed for their own sake, regardless of their consequences and impact on the system's overall performance.¹⁴² At the same time, the loyalty and organizational identification of the members drift from the level of the organization to their respective subunits.¹⁴³ Organizational science research teaches that goal displacement tends to be strongest for organizations that operate in complex environments, especially those lacking tangible objectives.¹⁴⁴ Goal displacement is also likely to be pronounced where the purpose and values of the organization are not conveyed in a clear and coherent manner.¹⁴⁵ Goal displacement is reinforced by the psychological coping mechanism of moral disengagement and the underlying deflection and diffusion of responsibility.¹⁴⁶ Obscuring personal agency enables individual actors to quell any pangs of conscience they might feel for deviating from the organization's mission or for contributing to the production of wrong results.¹⁴⁷

It is not difficult to see how the framework of organizational science could serve to illuminate some of the problems with the criminal justice system.¹⁴⁸ As mentioned, the role conceptions of its personnel are often framed in terms of localized objectives, rule-following, and the prioritization of the administrability of the system over the substance of the outcomes it produces. It should be kept in mind that this instance of goal displacement is more than just an unintended consequence of the kind that can occur in virtually every organizational system. The criminal justice system is special in that its goal displacement is endorsed, if not prescribed through the dictates of legislatures and courts.¹⁴⁹ But there is more than just

142. A key theme in organizational science is the distinction between the intended and unintended consequences of organizational design. See Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894–95 (1936).

143. Charles W. Mueller & Edward J. Lawler, *Commitment to Nested Organizational Units: Some Basic Principles and Preliminary Findings*, 62 SOC. PSYCHOL. Q. 325, 326 (1999).

144. W. Keith Warner & A. Eugene Havens, *Goal Displacement and the Intangibility of Organizational Goals*, 12 ADMIN. SCI. Q. 539, 540 (1968).

145. PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* 25–27 (1957). See also Robert M. Krone, *Symposium Introduction: Total Quality Management (TQM): Achievements, Potentials, and Pitfalls*, 8 J. MGMT. SCI. & POL'Y ANALYSIS 195, 199–201 (1991).

146. Albert Bandura et al., *Mechanisms of Moral Disengagement in the Exercise of Moral Agency*, 71 J. PERSONALITY & SOC. PSYCHOL. 364, 364 (1996).

147. ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* 75–81 (1988).

148. For incorporation of this framework, see Liebman & Mattern, *supra* note 53 (arguing for a more empirical and objective analysis of data to ensure more accurate outcomes in the criminal justice system); Carol S. Steiker & Jordan M. Steiker, *Lessons for Law Reform from the American Experiment with Capital Punishment*, 87 S. CAL. L. REV. 733 (2014) (using capital punishment to demonstrate how complex systems can fail to achieve their goals).

149. See *supra* text accompanying notes 112–29.

goal displacement at play. The criminal justice process is typified also by poor mechanisms for aggregating and sharing information, fierce conflict amongst some of its major players—namely, prosecutors and defense attorneys¹⁵⁰—and ineffective mechanisms for discovering errors. Juries and appellate courts are at best imperfect and unpredictable organs for detecting and correcting mistakes that were generated upstream, especially given evidence drift and the tendency of errors to escalate and become reified over time.¹⁵¹ And even if juries and appellate courts could be trusted to perform this difficult task reliably, it is undeniable that such belated interventions are a grossly inefficient and ruinous way to reach just outcomes.¹⁵² There is even less merit to the rarer and more remote remedy of a gubernatorial pardon, as suggested by the *Herrera* Court,¹⁵³ not to mention the exceedingly unlikely prospect of an exoneration some 10 or 20 years down the road.

III. TURNING TOWARD ACCURACY: SYSTEM DESIGN AND GOAL CONGRUENCE

Given the invocation of the crossroads metaphor to capture this special moment in the history of the criminal justice system, it seems fair to expect that this paper will suggest which directions the system should turn as it crosses through the proverbial intersection. Indeed, numerous insightful and useful suggestions for reform are strewn throughout the Symposium papers. My following suggestions will be confined to measures that seek to promote the goal of accuracy. First and foremost, I will address the measures that emanate from the insights of organizational science, and will later incorporate into this framework ways to overcome the other factors that hinder the attainment of accurate verdicts. The strengths of the organizational science literature are not limited to providing analytic and critical insights. Its real value lies in its capability to prescribe constructive

150. On the concept of role conflict in organizations, see John R. Rizzo, Robert J. House & Sidney I. Lirtzman, *Role Conflict and Ambiguity in Complex Organizations*, 15 Admin. Sci. Q. 150 (1970).

151. On evidence drift, see *supra* notes 71–72 and accompanying text. On the escalation of error, see *supra* notes 59–65 and accompanying text.

152. On the burdens that the criminal process imposes on criminal defendants, see generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (paperback ed. 1992). On the harm of being falsely convicted, see *AFTER INNOCENCE: FREEDOM IS JUST THE BEGINNING* (Showtime Independent Films 2005), and *LIFE AFTER EXONERATION PROGRAM*, <http://www.exonerated.org/> (last updated Oct. 4, 2013).

153. As the Court stated, “Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.” *Herrera v. Collins*, 506 U.S. 390, 411–12 (1993) (footnote omitted).

ways to design, run, supervise, and improve the performance of organizations. The following comments are intended as a primer on the possible ways in which this body of literature can spur critiques and reforms of the operation of the criminal justice system.¹⁵⁴

A major insight from the organizational science literature concerns the importance of aligning and integrating the organizational goals into the organizational structure,¹⁵⁵ and of generating the appropriate culture for their achievement.¹⁵⁶ One framework that is potentially useful for an improved criminal justice system is the Total Quality Management approach (“TQM”), a mainstay in the management literature over the past thirty years.¹⁵⁷ The TQM framework emphasizes quality attainment as the dominant priority of the organization.¹⁵⁸ Quality is best achieved through a well-conceived system design that is subject to continuous improvement, which is geared toward reducing deviations from ideal performance down to the level where no further reduction can be feasibly accomplished.¹⁵⁹ This striving for quality and continuous improvement lie at the heart of TQM.¹⁶⁰

Drawing on insights from industrial engineering, TQM has a technical and a social component. The technical dimension pertains to the design and quality of the tools and procedures that make the system operate. The social

154. True, with almost 18,000 police departments, more than 3000 local counties, 50 states, plus a separate federal criminal justice system, the American criminal justice apparatus cannot be characterized as a discrete system. *Local Police*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=71> (last updated Apr. 4, 2014). Still, this variety of local systems does share some important core values, needs, and constraints, and all are ultimately bound by key constitutional principles as articulated by the United States Supreme Court. Moreover, the insights from organizational science can be readily applied independently at the level of the localized systems.

155. On the concept of organizational alignment, see Thomas C. Powell, *Organizational Alignment as Competitive Advantage*, 13 STRATEGIC MGMT. J. 119, 119–21 (1992). On the concept of goal congruence, see *id.*, and Jeffrey B. Vancouver, Roger E. Millsap & Patricia A. Peters, *Multilevel Analysis of Organizational Goal Congruence*, 79 J. APPLIED PSYCHOL. 666, 666–67 (1994). On intra-organizational goal conflict, see Karen A. Jehn, *A Qualitative Analysis of Conflict Types and Dimensions in Organizational Groups*, 42 ADMIN. SCI. Q. 530 (1997).

156. On the impact of organizational culture, see NORMA M. RICCUCCI, UNSUNG HEROES: FEDERAL EXECUCRATS MAKING A DIFFERENCE 99 (1995); EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP (Warren Bennis et al. eds., 2d ed. 1992); and Andrew M. Pettigrew, *On Studying Organizational Cultures*, 24 ADMIN. SCI. Q. 570, 574 (1979).

157. GREENWALD, *supra* note 135, at 399. The TQM approach is most strongly associated with the work of W. Edwards Deming. See generally W. EDWARDS DEMING, OUT OF THE CRISIS (1986) (discussing ways by which organizational management can increase productivity, lower costs, and become more efficient).

158. GREENWALD, *supra* note 135, at 399.

159. *Id.* at 399–401.

160. See *id.*; DEMING, *supra* note 157; Barbara A. Spencer, *Models of Organization and Total Quality Management: A Comparison and Critical Evaluation*, 19 ACAD. MGMT. REV. 446, 447 (1994).

dimension pertains to the pattern of relations within the system, including the expectations that actors have of one another, procedures for shared assessments, and the incentives and sanctions that are used to promote desired behavior. Steeped in Japanese culture,¹⁶¹ the TQM approach calls for the elimination of adversarial relationships and promotion of cooperation among its units and actors.¹⁶² Ideally, all organizational members should be rallied to participate in the collective effort to improve the organizational performance beyond the status quo. The TQM approach promotes probing fact gathering and frank internal discussion, and emphasizes the importance of continuous improvement and learning,¹⁶³ as well as cross-unit efforts to identify and solve quality problems.¹⁶⁴ The involvement of production-line personnel in improving the system's overall performance should also nourish their identification with the organization and commitment to the attainment of the organizational goals.¹⁶⁵

Crucial to the success of a quality-driven organization is the articulation of an organizational mission, that is, a statement of its core objectives, values, and goals. Clear mission statements are key to helping organizational actors appreciate the deeper meaning of their roles, providing them with guidance for instances that fall outside the purview of the regular procedures, and advising them how to interact with the other parts of the organization.¹⁶⁶

It must be acknowledged that the task of formulating organizational goals is not as straightforward as it may seem, especially for organizations that operate in highly complex and constrained environments.¹⁶⁷ For one, goals and motivations can be framed at various points along a continuum,

161. See DEMING, *supra* note 157, at 1–15 (describing studies and data of Japanese management as the background for a discussion on Western management).

162. GREENWALD, *supra* note 135, at 400.

163. Spencer, *supra* note 160, at 447.

164. *Id.*

165. See Glen E. Kreiner & Blake E. Ashforth, *Evidence Toward an Expanded Model of Organizational Identification*, 25 J. ORGANIZATIONAL BEHAV. 1, 2 (2004) (explaining that organizational identification may create a sense of belonging among individual actors and improve performance).

166. On the importance of clearly defined organizational missions, see, for example, Christopher K. Bart, Nick Bontis & Simon Taggar, *A Model of the Impact of Mission Statements on Firm Performance*, 39 MGMT. DECISION 19, 19, 32 (2001). On the topic of conflicts within organizations, see Jehn, *supra* note 155, at 554.

167. See Herbert A. Simon, *On the Concept of Organizational Goal*, 9 ADMIN. SCI. Q. 1, 16 (1964) (explaining the many factors taken into consideration when designing goals for complex organizations). It has also been observed that organizational goals are among “the most slippery and treacherous” of all concepts in organizational science. W. RICHARD SCOTT, ORGANIZATIONS: RATIONAL, NATURAL, AND OPEN SYSTEMS 285 (3d ed. 1992).

ranging from concreteness to abstraction, or in psychological terms, from proximal goals to distal goals.¹⁶⁸ Concrete goals refer to the immediate task at hand, whereas abstract goals pertain to higher-order objectives that are sought to be achieved by performing the proximal task.¹⁶⁹ As Herbert Simon pointed out, a bricklayer may characterize his work as “[l]aying bricks,” “[b]uilding a wall,” or “[h]elping to erect a great cathedral.”¹⁷⁰ It is not hard to see how defining goals at different points on this continuum will lead to different role conceptions and divergent behaviors. Overly concrete goal definitions could lead organizational actors to a state of indifference toward the overall objectives of the organization. Conversely, overly abstract goals can be too vague to provide useful guidance.¹⁷¹ Given the ubiquity of goal displacement, and its strong presence in the American criminal justice system,¹⁷² we have more reason to be concerned about overly concrete, rather than overly abstract, goals.

A second conceptual difficulty in formulating the goals of an organization stems from the fact that at any given moment, the organization is invariably driven by a host of coexistent motivations and objectives.¹⁷³ A natural goal for a manufacturer would be to provide its customers with a superior product. But the organization will undoubtedly also be working toward other objectives, such as developing new products, building ties to its customers’ communities, ensuring that its employees are productive and satisfied, and much more.¹⁷⁴ Naturally, mission statements cannot include every one of the goals being pursued by the organization.

Third, goals are invariably constrained by the costs they impose and

168. On the typology of proximal and distal goals, see Albert Bandura & Dale H. Schunk, *Cultivating Competence, Self-Efficacy, and Intrinsic Interest Through Proximal Self-Motivation*, 41 J. PERSONALITY & SOC. PSYCHOL. 586, 586–87 (1981), and George Manderlink & Judith M. Harackiewicz, *Proximal Versus Distal Goal Setting and Intrinsic Motivation*, 47 J. PERSONALITY & SOC. PSYCHOL. 918, 918 (1984). According to “action identification theory,” the level of abstraction can be used as a psychological coping mechanism. See Robin R. Vallacher & Daniel M. Wegner, *What Do People Think They Are Doing? Action Identification and Human Behavior*, in MOTIVATIONAL SCIENCE: SOCIAL AND PERSONALITY PERSPECTIVES 215, 217–25 (E. Tory Higgins & Arie W. Kruglanski eds., 2000) (explaining the various psychological factors that influence how and why abstraction levels vary).

169. Bandura & Schunk, *supra* note 168, at 587.

170. H. Simon, *supra* note 167, at 10.

171. Examples of abstract (or distal) goals include the maximization of profit or the achievement of happiness through commercial success.

172. See *supra* Part II.D.

173. See Jehn, *supra* note 155, at 530–33 (discussing the need to address conflict reduction, productivity, and satisfaction).

174. See GREENWALD, *supra* note 135, at 399 (discussing both social and technical components to TQM, each of which are designed to achieve different organizational goals); Spencer, *supra* note 160, at 447 (summarizing the contradictory aspects of effective management under TQM).

the trade-offs they entail.¹⁷⁵ In order to survive, a manufacturer must provide a product of value to its customers at an acceptable price. In devising its goals, the manufacturer could prioritize the price dimension and thus frame its goal as minimizing the price of the product, which could lead it to seek out less costly ingredients or cheaper suppliers. Conversely, the manufacturer could prioritize the quality of the product and thus frame its goal as providing the best product that is economical. This latter approach would likely steer it toward exploring superior ingredients or innovative production technologies. In this example, the cost dimension and the quality dimension operate effectively as both goals and as constraints on one another. Given the inevitableness of constraints, any goal that is chosen will necessarily be restricted by limits of feasibility.

These conceptual difficulties are bound to plague the goal choice of any organization that operates in complex environments, and indeed, they apply to the criminal justice system. First, as discussed above, there are serious differences of opinion regarding the correct level of abstraction for the criminal system's mission, namely, following concrete procedures versus seeking the discovery of the factual truth.¹⁷⁶ Second, the criminal justice process must fulfill a broad array of coexistent objectives, such as promoting the public's acceptance of verdicts, expressing society's values, asserting the authoritative power of the state, bringing closure to victims, and finalizing disputes.¹⁷⁷ Finally, the process must comport with numerous constraints, such as limited resources, principles of fairness, cost-effectiveness, expedience, legitimacy, and the protection of the privacy and autonomy interests of the people involved.¹⁷⁸

There is no obvious Archimedean Point from which these conceptual difficulties can be resolved in a universal or deterministic fashion. This, however, does not undermine the possibility of principled and informed goal choices. Organizations do make such choices routinely, based on myriads of factors gleaned from their professional experience,

175. See H. Simon, *supra* note 167, at 3–6 (describing the costs associated with organizational goals).

176. See *supra* Part II.

177. See, e.g., JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 5 (1994) (noting the criminal trial as a function of self-governance); BURNS, *supra* note 27, at 224 (noting that the trial is a condition of decent society, “one of the last bulwarks against the bureaucratized cruelties that have accompanied the ‘onslaught of modernity’”); ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS (2013); RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM (2003) (noting the jury's role in checking abuses of power and expressing community values).

178. The array of coexistent objectives and constraints can be labeled “collateral values.” Mirjan Damaška, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 301 (1998) (internal quotation marks omitted).

understanding of their environment, assessment of their competences and weaknesses, values, preferences, and more. And while formulating a mission statement for the criminal justice system warrants further discussion and elaboration, it seems fair to say that we have considerable experience with our extant system, and we can also benefit from our knowledge of different criminal justice systems across historical periods, legal regimes, crime waves, and more. Accordingly, the ground is solid enough to propose that the overarching goal of the American criminal justice system should strive toward the basic social need it is designed to attain: to punish the guilty and refrain from punishing the innocent.¹⁷⁹

Thus, I propose that the criminal justice system be reformed to approximate a TQM design, with accuracy being the operational property of quality. The legal mechanism for implementing this objective could be founded on an expanded interpretation of a “freestanding” conception of due process,¹⁸⁰ which would enable legislatures and courts to provide criminal suspects and defendants the most basic and genuine form of due process: ensuring that their liberty and life will be deprived only following a process that minimizes the risk of mistakes to an unavoidable minimum.

To provide greater clarity and specificity about how such a regime might work, we can address the three other accuracy-hindering factors mentioned above: the questionable accuracy of the evidence, the opacity of the process, and excessive adversarialism.¹⁸¹ Consistent with the systemic approach advocated by the organizational science literature, treatment of these factors ought to be integrated into the overall design of the system. First, a TQM-inspired design would address the accuracy of the evidence by instituting accuracy promoting procedures and embedding them upfront, in the normal operation of the process.¹⁸² By way of analogy, ensuring the quality of ingredients before they enter the production line avoids the

179. See DRIPPS, *supra* note 46, at xvi (arguing that state courts should operate under a due process regime “dedicated to separating the innocent from the guilty”); SIMON, *supra* note 1, at 215–22; THOMAS, *supra* note 35, at 2 (emphasizing that the “prime directive of a criminal justice system is to protect the innocent, at a reasonable cost”); Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 CRIM. JUST. 39, 40 (2005) (arguing that the criminal justice system should focus on reliability, in line with the movement to exonerate the wrongfully convicted).

180. See Israel, *supra* note 115, at 305 (defining freestanding due process as an application of the Fourth, Fifth, Sixth, and Eighth Amendment guarantees that provide constitutional regulation of the criminal justice system); Taslitz, *supra* note 179, at 47 (explaining that freestanding due process involves both the incorporation of the Bill of Rights and procedural safeguards in criminal proceedings); DRIPPS, *supra* note 46, at xvi (discussing due process framework).

181. See *supra* Part II.A–C.

182. See *supra* text accompanying notes 161–65.

myriad of costs associated with detecting and fixing breakages, in addition to the intangible damage, such as harm to morale, legitimacy, and the sense of professionalism. Thus, for example, a restaurateur is best advised to verify the freshness of the meat when purchasing it from the butcher, rather than waiting for the steak to turn green, having the dish sent back by a flustered customer, or being served a lawsuit for causing food poisoning.

Given the benefit of minimizing the incidence of error from the start, the criminal law debate has much to gain by shifting its attention from the courtroom to the police station, and by looking beyond constitutional protections and procedural rights toward the adequacy of the practices by which the evidence is produced.¹⁸³ The most straightforward way to correct for the questionable accuracy of the evidence is by improving the investigative practices. The psychological research shows that there is a wide range of ways to collect evidence, with some methods being considerably more accurate than others.¹⁸⁴ Notably, incorrect investigative practices not only fail to uncover human error, but they can actually induce error and thus lead the investigation and the ensuing adjudicative process astray.¹⁸⁵ Fortunately, a large body of research has generated a menu of “best practice” procedures that are based on the best currently available psychological research and are oftentimes endorsed by leading law enforcement personnel. As previously discussed, these practices offer a slew of concrete and feasible accuracy enhancing recommendations pertaining to police investigative procedures, including lineups, witness interviews, and interrogations of suspects.¹⁸⁶ In short, adherence to best practice procedures is bound to improve the accuracy of the evidence on which the entire process is based, thus enhancing the integrity of the ensuing proceedings.

Second, an accuracy-promoting organizational design should also

183. Any effort to reform criminal investigations must include substantial revision of the collection of forensic evidence. *See generally* NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009) (providing an agenda for improvements in forensic science and its application to many fields, including the criminal justice system).

184. *See* Kassin, Dror & Kukucka, *supra* note 59, at 42–43 (discussing various shortcomings of evidence collecting methods); SIMON, *supra* note 1, at 48–49, 83–89, 118–19.

185. On the difference between spontaneous errors and induced errors, *see* SIMON, *supra* note 1, 6–7.

186. For specific best practice procedures, *see* SIMON, *supra* note 1, at 48–49, 83–89, 118–19, and *Model Legislation*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/Model-Legislation.php> (last visited Mar. 15, 2014). The proposed best practices satisfy the Weberian concept of formalized procedures that are rationally designed to promote the objectives of the organization. *See* WEBER, *supra* note 137, at 956 (identifying integral characteristics of modern bureaucracy); JAFFEE, *supra* note 135, at 89–92 (summarizing Weber's theory of bureaucracy).

strive to shine daylight into the opaque corners of the process, thus making the proceedings more transparent. Transparency can be feasibly achieved by creating an extensive electronic record of the entire investigation, and making it available to all parties. The record should capture every interaction with witnesses and other important investigative efforts. In all, the investigative materials should include a reliable and complete record of every lineup, witness interview, and interrogation.¹⁸⁷ One must acknowledge that adhering to the eighteenth century's method of preserving human testimony—namely, storage in the memory of the witnesses—is hardly compelling these days, especially in light of the vast research that demonstrates the depletion, fungibility, and porousness of the human memory system,¹⁸⁸ and in light of the affordability of reliable technological alternatives.

The potential benefits borne by more transparent evidence cannot be overstated. Open access to all the available evidence should improve police work, preserve the evidence more accurately, provide oversight over questionable investigations, enable more fair and rational plea negotiations, prevent evidence drift, reduce frivolous defense claims, minimize excessive charges, obviate unnecessary adjudication, enable better factfinding at trial, and also limit appeals, postconviction review, innocence claims, and large payouts for faulty prosecutions.¹⁸⁹ Over time, the proposed regime is bound to enhance the professionalization and the integrity of the process, and ultimately also its legitimacy in the public's eye. It is important to note that there is little merit to the widely held concern that greater transparency will undermine the prospect of successful prosecutions.¹⁹⁰ Various forms of transparent procedures, including open-file regimes, have been the norm in a number of jurisdictions, such as Arizona, Colorado, New Jersey, and North Carolina.¹⁹¹ Some states, notably Florida and Vermont, even offer

187. The recording should include all investigative efforts, even if they are not used in court, such as interviews with witnesses whose statements do not support the prosecution.

188. See DANIEL L. SCHACTER, *THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS* (2001); 1 *THE HANDBOOK OF EYEWITNESS PSYCHOLOGY*, *supra* note 61; SIMON, *supra* note 1, at 50–119.

189. For a fuller articulation of this argument, see Simon, *Limited Diagnosticity*, *supra* note 65, at 218–22, and Simon, *More Problems*, *supra* note 65, at 206–09.

190. See Memorandum on Electronic Recording of Confessions and Witness Interviews from the Office of the General Counsel Investigative Law Unit, Fed. Bureau of Investigation, at 3 (Mar. 23, 2006) (“[A]s all experienced investigators and prosecutors know, perfectly lawful and acceptable interviewing techniques do not always come across in recorded fashion to lay persons as proper means of obtaining information from defendants.”). For a critique of that position, see Sullivan, *supra* note 69, at 1315–34.

191. For a review of the success of these more transparent regimes, see THE JUSTICE PROJECT, *EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW* 15–17 (2007),

criminal defendants the right to depose the prosecution's witnesses ahead of the trial.¹⁹² These states do not appear to show any of the calamities predicted by the critics of transparency.¹⁹³

Finally, the reformed system should also address the harms wrought by the excesses of adversarialism. There is little doubt that the adversarial system is here to stay. American adversarialism has roots in the Bill of Rights, is deeply entrenched in our lay culture, and is keenly heralded by the mainstream legal community.¹⁹⁴ Still, it is imperative to appreciate that this method of dispute resolution is neither immutable nor monolithic. The particular form of procedural regimes varies from one jurisdiction to the next, and is likely influenced by the rules, customs, and culture of the respective systems.¹⁹⁵ Indeed, it has been observed that American adversarialism is substantially more combative than the English variant from which it emanated,¹⁹⁶ and it is this divergence that gives reason for guarded optimism. While remaining faithful to the adversarial character of the procedure, we can judiciously emulate some of the features of the English practice. These feasible and palatable changes have the potential to curtail some of the excesses of American adversarialism.

For example, English judges often play an active role in the

http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf.

192. The deposition of prosecution witnesses by defendants in criminal proceedings is permitted in some form also in Indiana, Iowa, Missouri, and North Dakota. See George C. Thomas III, *Two Windows into Innocence*, 7 OHIO ST. J. CRIM. L. 575, 592–98 (2010).

193. For a listing and discussion of the various discovery regimes, see Milton C. Lee, Jr., *Criminal Discovery: What Truth Do We Seek?*, 4 UDC/DCSL L. REV. 7, 19–22 (1998).

194. See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1636 (2009) (noting that the inquisitorial system was “the principal evil at which the Confrontation Clause was directed.” (quoting *Crawford v. Washington*, 541 U.S. 36, 50 (2004)) (internal quotation marks omitted)); Van Kessel, *supra* note 87, at 410–12 (“In direct proportion to our worship of the adversary structure is our reactionary distaste for anything characterized as inquisitory.”).

195. The intensity of adversarialism also varies depending on the specific relationships between the litigants. In private conversations, prosecutors often state that they have good working relationships with some defense attorneys, but not with others; similar sentiments are expressed by defense attorneys. See FEELEY, *supra* note 152, at 177–81 (discussing relationship dynamics between prosecutors and defense attorneys).

196. As noted by Graham Hughes, while England may be the cradle of the adversary system, “the child it reared never grew to the giant proportions of the sibling who crossed the Atlantic.” Graham Hughes, *English Criminal Justice: Is It Better Than Ours*, 26 ARIZ. L. REV. 507, 588 (1984). See also KAGAN, *supra* note 87, at 89–93 (noting the differences between criminal adjudication in Great Britain and the United States); Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 82–83 (1991) (arguing that judicial tolerance of combative practices contributes to excessive adversarialism in the American legal system); Van Kessel, *supra* note 87, at 426–63 (noting the excesses of American adversarialism relative to both the English and Continental judicial systems).

presentation of the evidence. Judges handle some of the questioning and cross-examination directly, which tends to elicit a restrained account of the testimony and can soften the bite of lawyers' follow up questioning.¹⁹⁷ Importantly, judges sum up the evidence after closing arguments.¹⁹⁸ The judicial summation minimizes the risk that jurors will reach outlandish factual determinations and thus channels the lawyers' arguments and claims toward more temperate accounts of the case.¹⁹⁹ Moreover, the flow of evidence suffers less from adversarial obstruction, as disagreements between the opposing attorneys are generally resolved via personal communication prior to making objections, and most objections are made outside the presence of the jury.²⁰⁰

American adversarialism would do well also by shifting toward the stringent English policy regarding witness preparation. The core principle of the English approach is that "[t]he witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said."²⁰¹ Displaying a healthy sensitivity to the subtler aspects of real world adjudication, English courts warn that witness preparation stands to distort witnesses' testimony, even subconsciously.²⁰² But to prevent compromising witness testimony due to nervousness or ignorance of the process, English courts permit contact with witnesses for the limited purpose of providing them with a basic familiarization with the mechanics of the legal process.²⁰³ Importantly, this familiarization cannot refer in any way to the facts of the case at hand.²⁰⁴ It can be conducted only by lawyers who have no knowledge of the case, and a record of the session must be kept.²⁰⁵

IV. CONCLUSION: SYNERGISTIC COSTS AND BENEFITS

It must be appreciated that the factors that currently hinder the

197. Van Kessel, *supra* note 87, at 524.

198. *Id.* at 433-34.

199. *Id.* at 434.

200. See JOHN BALDWIN & MICHAEL MCCONVILLE, JURY TRIALS (1979); E.C. FRIESEN & I. R. SCOTT, ENGLISH CRIMINAL JUSTICE: AN INTRODUCTION FOR AMERICAN READERS 70 (1977) ("Objections on points of evidence are relatively rare. . . . Where problems of admissibility are spotted in advance they are often discussed informally by opposing counsel and agreement reached.").

201. R. v. Momodou, [2005] EWCA (Crim) 177, [61].

202. "An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be 'improved.'" *Id.*

203. *Id.* at [62].

204. *Id.*

205. *Id.* at [64].

accuracy of the criminal justice process tend to exacerbate one another, ultimately making for a deleterious brew. For example, investigators who fail to follow best practice procedures are least likely to document their investigations, just as investigators who do not record their work are least inclined to adhere to meticulous investigative procedures. Evidence that is both opaque and prone to error is more likely to lead prosecutors to overcharge and defense attorneys to raise frivolous arguments, thus aggravating the adversarial nature of the process. Aggravated adversarialism, in turn, tends to increase the suspiciousness and enmity between the lawyers, which can readily polarize and bias their views of the case,²⁰⁶ and thus further escalate the conflict. Aggravated adversarialism encourages baseless defense claims and aggressive cross-examination of prosecution witnesses, which tends to frustrate police investigators and align them more strongly with prosecution. This alignment can reinforce inferior investigative work and discourage frankness about the weaknesses of the case, which further exacerbates both the proneness to error and the opacity of the process. The combination of error proneness, opacity, and heightened adversarialism makes the task of the judge and jury particularly difficult, which leads litigants to give up on the search for factual truth and focus instead on procedural violations.²⁰⁷ Limiting the judicial inquiry to the domain of proceduralism sends a message to investigators that they may settle for pro forma execution of their tasks rather than a sustained commitment to the search for truth, and as Jerome Frank lamented, it reinforces the lawyers' conception of their roles as warriors, rather than truth seekers.²⁰⁸

By the same token, the benefits borne by a well-designed accuracy promoting criminal justice system promise to be synergistic and mutually reinforcing. Investigators who follow best practices are more likely to record their good work, just as investigators who expect to be held accountable for their work are more likely to perform at the highest of standards.²⁰⁹ More accurate and transparent testimony can be expected to reduce the distrust between the adversarial parties, and thus soften the

206. See Kathleen A. Kennedy & Emily Pronin, *When Disagreement Gets Ugly: Perceptions of Bias and the Escalation of Conflict*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 833, 833 (2008) (showing that adversarial rivals adopt more biased views due to their perception that their opponents are biased, with the result of an escalation of the conflict).

207. Stuntz, *supra* note 115, at 37–45.

208. See FRANK, *supra* note 33, at 80–81 (describing the “fight theory” and “truth theory” of justice, and arguing that legal actors “have allowed the fighting spirit to become dangerously excessive”).

209. See Rizzo, House & Lirtzman, *supra* note 150, at 150–51 (noting the importance of accountability and role identity within an organizational framework).

contentiousness of the adversarial process. The range of plausible claims would be curbed, with the effect of narrowing the opportunities for unjust prosecutions and frivolous defenses.²¹⁰ The parties should also be less inclined to sort out the murky facts through the costly, cumbersome, and imprecise process of litigation. Prosecutors would be in a position to pursue strong cases more forcefully, and defense attorneys would be better equipped to defend innocent defendants and to pursue valid claims of their clients. An environment that offers more accurate evidence, transparency, and tempered adversarialism will make the factfinding task more conducive to a keen pursuit of the truth. The recognition of the truth-seeking function as the core goal of the process will come full circle by reinforcing investigators to adhere to best practice procedures and make their work transparent, and by leading lawyers to lower their weapons and engage in the pursuit of factual truth.

210. Indeed, law enforcement agencies that record interrogations report that the number of motions to suppress confessions has been reduced dramatically and, in some jurisdictions, has been eliminated altogether. Thomas P. Sullivan, Andrew W. Vail & Howard W. Anderson III, *The Case for Recording Police Interrogations*, LITIGATION, Spring 2008, at 30, 34.