

DEFENSE COUNSEL, TRIAL JUDGES, AND EVIDENCE PRODUCTION PROTOCOLS

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I. INTRODUCTION

The Supreme Court’s rationale for the right to counsel, in the seminal line of decisions from *Powell* through *Gideon*, was the belief that defense attorneys are critical to accuracy and reliability in criminal adjudication as well as to fairness.¹ Yet a half-century after *Gideon*, the problem of sustaining adequate funding for indigent defense in state and local justice systems is more than familiar; well-documented accounts of insufficiently funded defense programs are legion,² and the American political process suggests no realistic hope for a sustainable remedy.³ Moreover, we know from nearly three decades of litigation under *Strickland v. Washington* that woefully poor lawyering will fulfill the low doctrinal bar that defines ineffective assistance of counsel.⁴ If

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1. See *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. For a good overview and insightful account of reform efforts, see Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 431-64 (2009); see also ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 16-20 (2004), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf. The Spangenberg Group, led by Robert Spangenberg, has been the leading investigator, analyst, and consultant for two decades on problems in state indigent defense systems. For some of the group’s reports documenting failure of defense provision, see *Publications*, SPANGENBERG GROUP, <http://www.spangenberggroup.com/pub.html> (last visited Nov. 3, 2012).

3. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 834-35 (2004).

4. See generally *Strickland v. Washington*, 466 U.S. 668, 690 (1984). One reason that adequate defense counsel can be insufficient to prevent failures in the adjudication process is familiar: constitutionally adequate counsel can be far from optimal or even good defense counsel. See *id.* at 712. Evidence is

that were not enough to prompt concern about criminal adjudication's reliability and fairness, we now have the troubling insights from the hundreds of documented wrongful convictions in the last two decades: criminal adjudication sometimes demonstrably fails in its most serious cases *despite* constitutionally adequate defense counsel.⁵ Defense counsel is necessary for reliable and fair adjudication, but it is not sufficient, at least in the manner or quality that is commonly provided.⁶

Setting aside both the prospect of sustainable funding increases and a more rigorous *Strickland* standard as unpromising routes to reform (and also as topics well addressed in existing literature), I want to explore another avenue for improving defense counsel performance and perhaps prosecutor performance as well: a reconsideration of the judge's role in adversarial adjudication as a route to improve performance of counsel.⁷ The gist of the argument is as follows: judges should make greater use of their capacity to closely supervise counsel (on both sides, though my focus is on the defense) in a key aspect of the lawyer's adjudicatory role—factual investigation and evidence production.⁸ Simple strategies exist to do so without breaching the traditional roles of judge and lawyer, and doing so would serve both public ends and very likely improve the quality of those aspects of legal representation beyond evidence production that are protected from judicial (or any) intrusion by laws of privilege.⁹

In the adversarial system, the parties—in reality, the *attorneys*—have near-exclusive control of the critical tasks of factual investigation, evidence production, and evidence “scrutiny,” a term I use to refer to the range of tools both to assess the accuracy of one's own evidence and to probe the reliability of an opponent's evidence through cross-examination, invoking evidence rules, or

indisputable that, in some cases, *better* counsel could change outcomes and probably could have prevented some wrongful convictions. Yet *Strickland* quite explicitly leaves a very wide range of lawyering behavior within the purview of constitutionally adequate lawyering. *See id.* at 713. A wide range of defense lawyering, from mediocre (if that) to better, is consistent with the Sixth Amendment, even though some of those levels of lawyering contribute to (or in some sense cause) miscarriages of justice. All of this is simply one way of stating a widely acknowledged point: the Constitution regulates provisions of defense counsel lightly and deferentially.

5. For the most comprehensive assessment of the first 250 confirmed wrongful conviction cases in recent decades, which describes these sources of error, see BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 175-86 (2008); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 927-29 (2008).

6. For an account of the value of effective counsel regardless of whether a defendant suffers prejudice from ineffective representation, see *Strickland*, 466 U.S. at 706-09 (Marshall, J., dissenting).

7. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1881 (1994) (noting other *Strickland* standard approaches); Drinan, *supra* note 2, at 451-31.

8. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1633-40 (2005) [hereinafter Brown, *Decline of Defense Counsel*].

9. *See id.* at 1636-40.

otherwise.¹⁰ The party monopoly over the evidentiary record means that attorneys' failures to investigate or to produce and scrutinize evidence can change adjudicative outcomes in ways that should be recognized as deficient—or simply of—public adjudication.¹¹ The injury to *party* interests is apparent, although the magnitude of principal-agent problems (costs for the lawyer's errors are borne by a client who has insufficient control over his lawyer's performance) that are a root cause of defense-side failures are widely under-acknowledged. In addition, *public* interests suffer as well.¹² These include interests distinct from those the prosecution represents, primary among them the *judicial* interest in reliable court judgments.¹³

Recognizing the broader state interests allocated to parties in adversarial litigation generates an argument for greater judicial supervision of evidence production.¹⁴ Despite the tradition of judicial passivity in the adversary system regarding evidence production in particular, judges clearly have authority to supervise party evidence production, as well as practical means to do so.¹⁵ Judges have not always taken as passive a role in the evidentiary record and fact-finding decisions as they commonly do in contemporary adjudication.¹⁶ One avenue for reform exists in established models of protocols or checklists that courts have long used in plea colloquies, which prosecutors increasingly adopt for management of *Brady* material and other obligations, and which have gained attention and acceptance in a wide variety of professional settings.¹⁷ Protocols can be efficient and cost-effective (at least for courts) tools that do not intrude on the privileged aspects of attorney-client relationships nor lawyers' professional judgments and strategic decisions in the course of litigation. In Part II, I develop an account that justifies judicial supervision of evidence production within the traditions of adversarial adjudication, grounded in the court's dependence on party-generated records for fact-finding and reliable judgments. Part III provides a basic sketch—through a model of a standard checklist that has much in common with existing practices in adjudication as

10. *Cf. id.* at 1588 (commenting on leaving investigation in the hands of the parties). Additional tests of opponents' evidence can be attempted through investigating the credibility of the source (e.g., a witness's forensic analytic method) or producing contradictory evidence. See Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2211-12 (2010). Parties can assess the strength of their evidence sources in the same ways to help decide whether and how to present evidence. See Brown, *Decline of Defense Counsel*, *supra* note 8, at 1601-02.

11. See Brown, *Decline of Defense Counsel*, *supra* note 8, at 1604.

12. See *id.* at 1594-95.

13. See *id.*

14. *Cf. id.* at 1610 (listing three reasons states employ accuracy compromising procedures).

15. See *id.* at 1633-34.

16. See *id.* at 1632.

17. See N.Y. CITY BAR, REPORT BY THE CRIMINAL COURTS COMMITTEE AND CRIMINAL JUSTICE OPERATIONS COMMITTEE RECOMMENDING ADOPTION OF *BRADY* CHECKLIST 2 (2011), available at http://www2.nycbar.org/pdf/report/uploads/7_20072170-ReportrecommendingtheadoptionofBradychecklist.pdf (proposing *Brady* checklist and noting use of similar checklists in the medical field).

well as other professional contexts—of how supervision could work, and how judges could do so without any direct involvement in evidence generation.¹⁸

II. INTERDEPENDENT ROLES IN ADVERSARIAL ADJUDICATION

A. *Judicial and Party Duties Regarding “Finding” Facts*

The justification for judicial supervision of defense representation rests on the interdependence of the roles that lawyers and judges play in the common law adversarial system.¹⁹ Their distinct roles in that system, at the most basic level, are the following: Fact investigation and evidence production is the job of the parties, which effectively means their attorneys.²⁰ Constitutional doctrines, and statutory law such as discovery rules, provide parties with tools and opportunities to discover facts and produce evidence of them in court.²¹ The court in the adversary system *finds* facts and enters a judgment based on those findings. But courts “find” facts in a distinctive and limited sense: they depend entirely on evidence presented by the parties.²² The system leaves it to the parties to *find* facts in another, more literal sense; they must learn of all the relevant facts out in the world, then marshal admissible evidence to prove them in court.²³ As part of this evidence production process, parties also do most of the scrutinizing of evidence for reliability and credibility—by producing contradictory or impeachment evidence, by conducting cross-examination, and by invoking evidence rules (which courts do not enforce absent parties’ invocation) that impose minimal reliability requirements.²⁴ The judge or jury, as fact-finder, makes conclusions about credibility and reliability based on the parties’ evidence production and their efforts to demonstrate reliability.

B. *Sixth Amendment Mandates to Fulfill Role Duties*

The Sixth Amendment specifies a set of core requirements for criminal adjudication, but those rights or entitlements do not require the prevailing division of judicial-attorney authority regarding evidence production, even though the Supreme Court’s decisions specifying those rights both assume and

18. *Cf. id.* at 2, 4 (noting use of checklists in medical field and providing sample *Brady* checklist).

19. *See* Brown, *Decline of Defense Counsel*, *supra* note 8, at 1632-33.

20. *See id.* at 1588.

21. *See, e.g.*, Jencks Act, 18 U.S.C. § 3500 (2012); FED. R. CRIM. P. 16; *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

22. *See* Brown, *Decline of Defense Counsel*, *supra* note 8, at 1632. There are very limited exceptions, such as the rarely used court-appointed expert under FED. R. EVID. 706 and its state equivalents or a judge’s occasional supplemental questions to witnesses. *See id.* at 1633.

23. *See id.* at 1588.

24. Courts do some of the work of assessing evidence reliability by applying the evidence rules although, notably, they do so only when the parties invoke those rules. *See* Brown, *Decline of Defense Counsel*, *supra* note 8, at 1633.

reinforce an adversarial model.²⁵ Some Sixth Amendment doctrines are positive entitlements that improve adjudicative accuracy—most importantly, the Counsel Clause doctrine that requires appointment of an attorney who will provide adequate representation.²⁶ The Trial Clause likewise requires the state to provide a properly constituted forum in a specific location.²⁷ Other Sixth Amendment provisions, however, especially those that speak directly to evidence production, are better understood as negative rights: they prevent the government from depriving defendants of *opportunities*, but they do not mandate that those opportunities are utilized or otherwise require specific processes designed to assure evidential comprehensiveness and reliability.²⁸ This becomes clear if one focuses not on the Amendment’s provisions as defendant rights but instead on their regulatory structure.²⁹ Sixth Amendment rights in effect regulate *judges* and, more broadly, governmental (judicial and legislative) control of the adjudication process and forum.³⁰

Confrontation Clause doctrine, for example, defines the types of witness statements for which courts must provide defendants a cross-examination *opportunity* before admission of the witness’s statements.³¹ It does not, however, mandate that defense counsel (or anyone else) confront those witnesses.³² Use of the adversary system’s “great engine for truth” is at the complete discretion of defense counsel.³³ The same is true for the Compulsory Process Clause, which merely bars courts from denying defendants *opportunities* to produce certain evidence.³⁴ It does not assure that defendants (or anyone else) will use the subpoena power to produce evidence essential for

25. The Supreme Court frequently uses inquisitorial adjudication—or its understandings of it—as a foil to define adversarial system premises in constitutional doctrine. See David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634 (2009) (identifying and criticizing the Court’s “anti-inquisitorial” reasoning).

26. See *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963).

27. See U.S. CONST. amend. VI (requiring a “speedy and public trial . . . [in the] district wherein the crime shall have been committed”).

28. The mandate that prosecutors disclose exculpatory evidence, from the Due Process Clauses and *Brady v. Maryland*, 373 U.S. 83, 87-89 (1963), is another example of positive right, and one that operates on a litigating party rather than on courts.

29. On the right/regulation distinction in constitutional criminal procedure, see Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1003-09 (2010).

30. One could describe *Strickland* (and *Gideon*) the same way, that is, as a rule that bars judges from entering criminal judgments against defendants who lacked effective counsel. See *Strickland*, 466 U.S. at 695-99; *Gideon*, 372 U.S. at 345.

31. See *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004).

32. *Id.*

33. JOHN HENRY WIGMORE, 5 EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourne ed., Little, Brown & Co. 1974) (1940).

34. See *Holmes v. South Carolina*, 547 U.S. 319, 319 (2006) (“[T]he Compulsory Process . . . Clause[] . . . guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986))).

a full factual record.³⁵ Even the Trial Clause, of course, merely bars courts from denying defendants an *opportunity* for a trial, which the vast majority are induced to waive.³⁶

All of this is simply to emphasize that the Sixth Amendment does not mandate that the defense attorney fulfill his evidence production role, save to the extent required to meet the extremely deferential standard for ineffective assistance defined by *Strickland*.³⁷ Neither the Sixth Amendment nor the Due Process Clause dictates or guarantees the prerequisites for reliable adjudication. Rather, they define components of a process in which reliable adjudication is more likely if attorneys do their jobs well.³⁸ *Jackson v. Virginia* provides a limited safeguard against inaccuracy; convictions must be based on an evidentiary record from which a reasonable fact-finder could reach a guilty verdict.³⁹ But *Jackson*'s deferential standard, which requires construing the trial evidence record crafted by the attorneys in favor of conviction, looks only at evidence the parties produced, not at whether there were failures of evidence production that resulted in an inadequate evidentiary record or one skewed wrongly toward conviction.⁴⁰ Adversarial litigation, then, depends mostly on those parties—the attorneys—to provide the substantive prerequisites of a full evidentiary record covering all the relevant facts.

35. *See id.* at 326-30 (holding unconstitutional a state rule that barred defendants from introducing evidence of “third party guilt”); *Rock v. Arkansas*, 483 U.S. 44, 55-56 (1987) (holding that the witness competency rule unconstitutionally barred defendant’s witness); *Crane*, 476 U.S. at 690 (holding unconstitutional the exclusion of testimony about the circumstances of defendant’s confession).

36. Similarly, the speedy trial guarantee prohibits courts from postponing trial to the defendant’s disadvantage, though trial delay caused by defendants does not violate the guarantee. *See Barker v. Wingo*, 407 U.S. 514, 530-33 (1972) (defining the speedy trial doctrine). Even the Counsel Clause, which provides a positive entitlement of representation to defendants, can be understood, in part, to define its entitlement by operating on *courts*. *See* U.S. CONST. amend. VI. Adequate counsel is required for a judgment to stand; its absence means the court’s judgment fails. The doctrine does not work directly on *attorneys*. If the lawyer performs inadequately, no sanction *for him* follows from the constitutional violation. And only uncommonly does such a violation trigger other sanctions for an attorney. For an example of such a sanction, see *In re Sturkey*, 657 S.E.2d 465, 469 (S.C. 2008), in which the court imposed a nine-month suspension for defense attorney who provided inadequate representation to clients by accepting an excessive case load.

37. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

38. That helps explain why defendants have no constitutional right to accurate adjudication. *See Herrera v. Collins*, 506 U.S. 390, 408-11 (1993).

39. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

40. *See id.* For an example of how this can matter, consider a prosecution that rests heavily on expert testimony of a prosecution witness who in fact gives unreliable or incorrect testimony. *Jackson* dictates that appellate courts credit the expert’s testimony after conviction, even if error or unreliability in the testimony was not revealed because a party failed to find or produce available evidence of unreliability. *See id.* Note, the prosecution might fail in this respect as well; its more thorough investigation might have revealed evidential unreliability and led prosecutors to decline to offer the evidence. In addition to *Jackson*, the beyond a reasonable doubt standard of proof protects defendants against inadequate evidence production by prosecutors by requiring acquittal for insufficient proof. *See Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993) (stating the standard required by due process in adult criminal prosecutions); *In re Winship*, 397 U.S. 358, 368 (1970) (holding the standard is required for juvenile adjudications by constitutional due process). Evidence rules, if parties invoke them, similarly keep certain unreliable evidence from misleading the fact-finder.

C. *Autonomy and Incentives in Lawyer and Judicial Roles*

The consequence of dividing fact-finding roles between judges and attorneys, and of the minimal mandates on defense attorneys to fulfill their role obligations, could seem odd if it were it not so familiar. Adversarial adjudication separates responsibility for the final judgment from the production of an adequate evidentiary record on which the judgment depends. Judges not only “find facts” without any power to investigate and produce evidence of them but also exercise effectively no supervision over the attorneys’ evidence production efforts on which judgments depend. Judges, in other words, play no part in ensuring the evidential comprehensiveness necessary for adjudicative accuracy and the soundness of their decisions. Attorneys have almost complete discretion to manage their evidence production efforts and yet no formal responsibility, in the sense of incurring direct consequences, for lapses in evidence production that lead courts to inaccurate judgments. Neither attorneys nor judges (nor juries) have singular, direct responsibility for the accuracy of the final judgment because judgments are results of a system and process involving several actors, none of whom bear final responsibility for its substance.

A different emphasis on the same features of adversarialism is to recognize that this system depends almost none on one actor *supervising* another. It relies somewhat more so on one actor providing *redundancy* for another—to wit, attorneys for each party should overlap in their fact-investigation efforts. But, adversarialism optimizes the evidence production largely through incentives. One set of incentives is the wide range of finality rules, which incentivize production of all evidence in the *first* trial by making relitigation difficult after a trial court judgment.⁴¹ More fundamentally, the parties have distinct, self-interested incentives to produce certain kinds of evidence (roughly, incriminating evidence for prosecutors, exculpatory or impeachment evidence

41. Double Jeopardy is a strong finality rule for prosecutors. But, defendants face substantial barriers to reversing convictions, roughly, proof of a constitutional deprivation or legal error by the court that overcomes harmless-error or materiality standards as well as possibilities of procedural default. See Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y.L. SCH. L. REV. 911, 916-17 (2001). Defendants, notably, are barred from grants of a new trial simply for failing to produce relevant evidence in the first trial. See, e.g., *State v. Jones*, 245 S.E.2d 711, 719 (N.C. 1978). For both sides, there are very narrow exceptions to a general rule against second trials solely on grounds of failure to produce evidence in the first trial. See, e.g., Mary Ellen Brennan, *Interpreting the Phrase “Newly Discovered Evidence”: May Previously Unavailable Exculpatory Testimony Serve as the Basis for a Motion for a New Trial Under Rule 33?*, 77 FORDHAM L. REV. 1095, 1106 (2008). For prosecutors, see *Brown v. Ohio*, 432 U.S. 161, 169 (1977), explaining the due diligence exception to Double Jeopardy for newly discovered evidence. For defendants, statutes provide limited grounds to overturn convictions for new evidence discovered post-trial. See, e.g., N.Y. CRIM. PROC. LAW § 44.10 (McKinney 2012). For a good overview of a broad range of finality rules and their incentive effects, see Saul Levmore & Ariel Porat, *Bargaining with Double Jeopardy*, 40 J. LEGAL STUD. 273, 273-88 (2011). A separate incentive to produce reliable evidence arises from evidence rules. See Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 233-35 (1988) (arguing evidence rules generally incentivize parties to produce the better source of evidence among available alternatives).

for defendants).⁴² Ideally, those role incentives fulfill the public purpose of generating a full evidentiary account for the court. On the defense side, however, this incentive regime is undermined by significant principal-agent problems in the defendant-attorney relationship, especially in appointed-counsel relationships, which make up the majority.⁴³ Penalties for defense lawyers' evidentiary-production failures (and other failures) fall on the *client*.⁴⁴ Virtually no mechanisms exist to link the attorney directly to those penalties or otherwise to align the agent's decision making more closely to the principal's interests.⁴⁵ The primary means for a client to monitor and incentivize his attorney is unavailable. When the government selects and pays counsel, it takes over the principal's best means of controlling his agent. Defendants with appointed counsel have little ability to influence their agent's performance (especially when in pretrial detention) or to affect the attorney's compensation, reputation, or future employment.

That gap between the attorney's autonomy and the party or client's interests further weakens the prospect that the attorney will properly fulfill his public adjudicatory role to provide the court with a sufficiently comprehensive evidentiary record, upon which reliable judicial judgments depend. Nonetheless, as developed below, this weakness in the incentives for defense attorneys may also provide an opportunity to improve attorney evidence production by relying less on aligning the attorney-client relationship to incentivize the lawyer's performance and more on judicial monitoring of that performance.

D. Masking Public Interests as Private Interests

The adversarial division of evidence production and fact-finding has given rise to a deeply engrained assumption, even though it is one not necessarily entailed by the adversarial model. The premise is that party failures of evidence production result in only *party* injuries. Thus, this is an understanding of the costs of such failures as essentially *private*. This is so even in criminal litigation, despite its explicitly public nature. If the defense *attorney* fails to produce evidence that raises sufficient doubts about his client's guilt even though such evidence exists, the *defendant*, not his agent, bears the burden of his agent's lapse in the form of wrongful conviction and punishment—an

42. See Brown, *Decline of Defense Counsel*, *supra* note 8, at 1597-1604.

43. See *id.* at 1601-04. In other contexts, notably corporate governance, the principal-agent problem attracts tremendous scholarly attention exploring ways to tie agents (firm managers and CEOs) more closely to their principals' interests or means for principals to more effectively monitor agents. See, e.g., Daniel R. Fischel, *The Corporate Government Movement*, 35 VAND. L. REV. 1259, 1281 (1982). Individual clients of all sorts (in contrast to large firms) generally have few means to monitor their attorneys' shirking or self-dealing. See, e.g., Brown, *Decline of Defense Counsel*, *supra* note 8, at 1603.

44. See Brown, *Decline of Defense Counsel*, *supra* note 8, at 1603-04.

45. See *id.* The Strickland test only protects against the few prejudicial outcomes that arise from poor lawyering errors. *Id.*

example of remedial structure that ignores the principal-agent problem. The idea that evidence-production failures implicate only private interests is surely an extension of the same idea in civil litigation, where it is more plausible, although not incontestable.⁴⁶

No commitment to the *public* interest in accurate criminal judgments has led to a mechanism to vindicate that interest in and of itself. Party interests serve as proxies for the public interest in accurate adjudication, even though parties can forfeit or waive their abilities to vindicate their interests. Thus, for example, there is no judicial authority to supplement evidence when party production is inadequate for a reliable judgment. Likewise, there is no means for the parties (beyond *Jackson*, which defers to the party-constructed record), much less a court *sua sponte*, to void a judgment because it is wrong or insufficiently reliable *simpliciter*.⁴⁷ Thus, no mechanism exists in adversarial criminal adjudication for the state *qua* state, perhaps through the court, to act upon its independent interest in preventing or remedying wrongful harms to defendants through (even negligently caused) evidence production errors by attorneys on either side.⁴⁸ And the same is true even when party evidentiary production failures disserve public interests in law enforcement.⁴⁹ If either the prosecution or the defense lay the groundwork for a wrongful conviction (or inaccurate sentencing decision) through lapses in investigation and evidence generation, the state's interest in law enforcement often suffers.⁵⁰ But the remedy is solely for the parties to act in their role capacities, without waiving or forfeiting their limited opportunities to do so.

46. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984).

47. Convictions can be overturned for a variety of legal errors, of course, or under *Jackson* for the prosecution's failure to produce sufficient evidence, but not for the defense team's failure to produce available evidence sufficient for a reliable verdict. See *Jackson v. Virginia*, 443 U.S. 307, 326 (1979). The very limited qualification of that is *Strickland*; an attorney's decisions not to investigate and produce evidence might fail the reasonable performance requirement of *Strickland*, but there is no necessity under *Strickland* that they do so. See *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). Attorney failures to produce evidence have no necessary or consistent correlation with *Strickland*'s deferential ineffectiveness standard.

48. See, e.g., James S. Liebman et al., *Los Tocayos Carlos*, 43 COLUM. HUM. RTS. L. REV. 711 (2012), available at <http://www3.law.columbia.edu/hrlr/ltr/> (book-length study of a wrongful execution); David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, NEW YORKER (Sept. 9, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (accounting the prosecution of Todd Willingham, who was convicted and executed based on unreliable expert testimony regarding arson); see also *Cavazos v. Smith*, 132 S. Ct. 1077, 2, 4 (2012) (affirming a homicide conviction based heavily on testimony by state expert witnesses, despite the Court's recognition of doubts about defendant's guilt). California's governor commuted Smith's sentence shortly after the Supreme Court's decision. See *Jerry Brown Commutes Grandmother's Murder Sentence*, L.A. TIMES (Apr. 4, 2012), <http://latimesblogs.latimes.com/lanow/2012/04/shaken-baby-clemency.html> (citing governor having "significant doubts" about guilt). See generally Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 VA. L. REV. 1723, 1735 (2001) (discussing the history of admission of expert evidence without basis for reliability).

49. See, e.g., Brown, *Decline of Defense Counsel*, *supra* note 8, at 1597-98.

50. This is true at least when a wrongful conviction means that a real offender has avoided prosecution. In some cases, inaccurate convictions occur when no crime in fact occurred at all—as when a defendant's accurate self-defense claim is rejected by the court.

Greatly undervalued, then, is the recognition that the adversarial system—especially in public litigation such as criminal law—delegates to parties a *public* function of evidence production on which the *state* action of judicial judgment and its enforcement entirely depends. Again, on this view, these public interests should be understood as distinct from those represented by the prosecutor, who prioritizes the executive branch’s criminal enforcement policies (and partially serves victim interests as well). In adjudicative failures, the *state* incurs a broader injury than solely the undermining of specific enforcement choices.⁵¹ Likewise, its responsibility to minimize those failures is broader than those served by the prosecution in an adversarial party role.⁵² These state interests are, in significant part, the interests best represented by the *courts*.

The integrity of courts’ judgments are undermined by party-evidential failures, yet courts usually lack any way to monitor or remedy parties’ inadequate fact development because they have no independent knowledge of facts and evidence. Further, the state’s interests are broader than the integrity of judgments *per se* because the consequences of judicial judgments have broader public implications. Important state actions and policies depend on criminal court judgments and are triggered by them. Criminal judgments are essential to implementing state crime control and penological policies—the costly and most coercive power over citizens and residents, and now imposed in the United States on a uniquely vast scale.⁵³ The state may suffer costs if guilty offenders go unpunished due to wrongful convictions,⁵⁴ and it certainly wastes money on wrongful incarceration. (It is worth emphasizing that wrongful convictions can include “partially wrongful” judgments, meaning errors in adjudication of those who are guilty of some offense but who are “over-convicted” in a judgment that misdescribes their wrongdoing, or whose sentencing factors are inaccurately determined.) The state’s interests in adequate adjudication should include the loss of moral legitimacy, even when

51. See, e.g., Brown, *Decline of Defense Counsel*, *supra* note 8, at 1610.

52. It is possible in theory, if not practically in the United States, to design the prosecutor’s role as one more oriented toward serving broader, less partisan interests. For a brief description of how the German prosecutor’s office is built on this model, see Jenia Iontcheva Turner, *Prosecutors and Bargaining in Weak Cases: A Comparative View*, in *THE PROSECUTORS IN TRANSNATIONAL PERSPECTIVE* 5-7 (SMU Dedman Sch. of Law, Legal Studies Research Paper No. 87, Erik Luna & Marianne Wade eds., 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1862161.

53. See generally Talia Fisher, *Conviction Without Conviction*, 96 MINN. L. REV. 833, 881 (2012) (“Criminal punishment is a potent manifestation of state coercion . . .”). Criminal punishment is not, however, the *only* manifestation of the state’s coercive power over citizens and others, given the federal government’s assertion of authority in the last decade to detain and sometimes adjudicate citizens and non-citizens outside the criminal justice system and, more recently, to kill them as well. See, e.g., Jonathan Hafetz, *Military Detention in the “War on Terrorism”*: Normalizing the Exceptional After 9/11, 112 COLUM. L. REV. SIDEBAR 31, 36-42 (2012).

54. I share the view—I hope widely held—that failure to convict and punish some offenders entails no costs to the state, and would be a sound policy choice by the state, which is why prosecutors widely exercise their discretion not to prosecute provable offenses in certain cases and settings. For a contrary view, see Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1473-80 (2004).

adjudicative failure arises from errors of the *parties* to whom the state has delegated critical components of the adjudicative process. A liberal democracy has a responsibility not to unduly harm its citizens and residents by acting upon inadequate fact-finding mechanisms of its own design.

III. REFORM WITHIN ADVERSARIAL ADJUDICATION: SUPERVISION THROUGH PROTOCOLS

The foregoing highlights the weaknesses and tradeoffs but leaves out affirmative rationales for the adversarial model's design choices, which are more than simply reliable fact-finding. Adversarialism's choice of party control privileges party autonomy, and it diminishes state control over investigation, evidence production, and (via the jury) fact-finding in order to serve a distrust of state officials dominating those functions. The strong role for parties is also a commitment to a vision of fairness with a priority on process participation—arguably even over substantive results. But the emphasis need not imply an agenda for wholesale revision of the tradition nor a transfer of evidence control from parties to judges. Much room for variation in the details remains, which provides space for relatively modest reforms that are consistent with adversarial party control and yet address some of those weaknesses.

The standard adversarial model places the judge in a largely passive role.⁵⁵ But it is well recognized that judges often play a much more active part in the management of litigation *outside* of evidence production, including regulation of parties' evidence production.⁵⁶ The practice of "managerial judging" is one notable example, although the strongest examples are mostly in federal civil litigation.⁵⁷ Yet on a wider scale, in many state criminal courts, judges actively manage their dockets and the pace of litigation.⁵⁸ Many states authorize judicial involvement in plea-bargain negotiations.⁵⁹ As in civil litigation, criminal court judges set timetables for discovery, motions practice, and the trial.⁶⁰ More informally and controversially—but still substantially—they exert influence on parties' choices among pleas, bench trials, or jury trials.⁶¹ Judges can do so by controlling the plea discount, which raises costs of opting for trial,⁶² and by other options available to players in an iterated game, such as

55. See Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 199, 216-20 (2000) (explaining that another aspect of the trial judge's passivity is restrictions on judicial comments to juries about evidence).

56. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380-81 (1982).

57. See *id.*

58. See *id.* at 377-78 & n.4 (recognizing that judges' adoption of a managerial role is also occurring in state courts).

59. See, e.g., N.C. GEN. STAT. § 15A-1021 (2012) (authorizing the judge's role in plea negotiations); ILL. SUP. CT. R. 403(d).

60. See Resnik, *supra* note 56, at 399.

61. See STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 38, 126-27 (2009).

62. See *id.* at 38.

sanctioning with unfavorable treatment in future cases.⁶³ That means of judicial control is especially effective in jurisdictions with public defenders, who are often long-term repeat players in judges' courtrooms, but it also applies whenever judges and lawyers expect to interact repeatedly over time. Finally, trial judges' influence over *appointed* counsel is often greater still.⁶⁴ Judges usually control the appointment process and so have influence over counsel who seek—or even seek to avoid—appointments.⁶⁵

From these examples of supervisory and managerial power, we can see possibilities for a greater judicial role in supervising party evidence production or, perhaps more precisely, supervising and improving the quality of lawyering. One way in which criminal judges already control defense lawyering quality is through management of indigent defense budgets. Appointed counsel must seek judicial approval for funds to investigators or experts: authority that gives judges a direct role in setting levels of a party's evidence production efforts. Decisions to approve or deny those requests—and to signal whether requests are plausible in the first place—are decisions to increase or restrict evidence production.⁶⁶

A barrier to relying on judges to improve party evidence production is the widespread perception that judges use their supervisory power, whether over other evidence production or other matters, to serve narrowly defined *judicial* interests. In particular, judges generally seek to conserve judicial and indigent-defense budget resources, avoiding docket backlogs by favoring practices that speed case disposition.⁶⁷ It may not be in the judiciary's institutional self-interest to hold defense attorneys to high professional standards of investigation and evidence production.⁶⁸ Thorough evidence preparation often, though not always, takes more time, which could delay dispositions. While the policy choice for reliable adjudication over speedy adjudication should be easy in

63. See *id.* at 125-27 (describing state trial judge's ability to signal and discipline defense attorneys regarding appropriateness of a plea, jury trial, or bench trial for individual cases); *Frontline: The Plea* (PBS television broadcast June 17, 2004) (documenting a New York judge's influence on a defendant's decision to plead guilty), available at <http://www.pbs.org/wgbh/pages/frontline/shows/plea>.

64. See BOGIRA, *supra* note 61, at 125-27.

65. See *id.*

66. See *Ake v. Oklahoma*, 470 U.S. 68, 69 (1986) (experiencing Due Process right to expert assistance for "significant factor"); *Husske v. Commonwealth*, 476 S.E.2d 920, 926 (Va. 1996) (denying indigent defendant funds for his own DNA expert when prosecutors had DNA expert); Darryl K. Brown, *Executive Branch Regulation of Criminal Defense Counsel and the Private Contract Limit on Prosecutor Bargaining*, 57 DEPAUL L. REV. 365, 383 & n.84 (2008) (describing executive and judicial branch influence on defense resources and representation).

67. See *Husske*, 476 S.E.2d at 920, 924-25.

68. For scholarly accounts of incentives on elected judges, see Gregory A. Huber & Sanford C. Gordon, *Directing Retribution: On the Political Control of Lower Court Judges*, 23 J.L. ECON. & ORG. 386, 387 (2007); Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q.J. POL. SCI. 107, 109-10, 120 (2007). Accounts are plentiful of judges encouraging or permitting defense lawyers to assist defendants in guilty pleas with minimal or no preparation. See, e.g., AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 7, 13-14 (2009); *Frontline: The Plea*, *supra* note 63 (interviewing attorney Stephen Bright and describing defense attorneys who facilitate guilty pleas within moments of meeting clients).

theory, in reality judges often face significant pressure to move their dockets efficiently. Judges, after all, are monitored by their own principals for whom docket backlogs may be salient: chief judges, legislatures (who may control reappointment), or even electorates (who also may). Even without the cynical public choice assumption that judges push speedy dispositions because they self-interestedly seek to minimize workloads, the metrics for measuring docket management efficiency or case dispositions per year are much more readily available than measures of adjudicative quality.

There is no easy solution to that problem other than changing judicial incentives by restricting the judicial role. But it is not clear that the problem is universal and insurmountable. Countervailing forces can point the other way, such as judges' professional-ideological commitment to adjudication standards, reputational advantages in certain jurisdictions, or the minimal real effects on docket management from requiring thorough fact investigation from attorneys. Moreover, to the extent judicial self-interest does push against judicial supervision, institutionalizing the supervisory practice in the form of a rule can work to ensure both party and *judicial* commitment. Consider the form such a rule—a protocol or checklist—might take.

Criminal litigation already incorporates mandatory protocols for judges and attorneys, and some are well-established. The standard plea colloquy, defined by Federal Rule of Criminal Procedure 11 and its state equivalents, is in effect a mandatory checklist that judges employ ubiquitously and that appellate courts can easily review.⁶⁹ Judges question defendants about each required issue in the protocol to ensure the defendant's knowledge and consent regarding waivers of rights.⁷⁰ Appellate courts do the same when reviewing the validity of pleas.⁷¹ State versions of the plea colloquy rule have added various items to the list.⁷² Some components are, in effect, judicial supervision of defense attorney performance.⁷³ Consider the requirement from *Padilla v. Kentucky* that non-citizen defendants must be informed of deportation risks arising from guilty pleas.⁷⁴ *Padilla* held that a defense lawyer's failure to so advise a non-citizen client violates the adequate-performance standard for defense counsel defined in *Strickland*.⁷⁵ Before *Padilla*, many states had already required judges to inquire whether defendants were aware of those risks before accepting a guilty plea.⁷⁶ Post-*Padilla*, even judges in states without

69. See FED. R. CRIM. P. 11.

70. See *id.*

71. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1477 (2010).

72. See *id.* at 1482.

73. See *id.*

74. *Id.*

75. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

76. For state rules requiring trial courts to advise defendants of possible immigration consequences, see ALASKA R. CRIM. P. 11(c)(3)(C) (2009-2010); CAL. PENAL CODE § 1016.5 (West 2008); CONN. GEN. STAT. § 54-1j (2009); D.C. CODE § 16-713 (2001); FLA. R. CRIM. P. 3.172(c)(8) (Supp. 2010); GA. CODE ANN. § 17-7-93(c) (1997); HAW. REV. STAT. § 802E-2 (2007); IOWA R. CRIM. P. 2.8(2)(b)(3) (Supp. 2009); MD. RULE 4-242 (2009); MASS. GEN. LAWS, ch. 278, § 29D (2009); MINN. R. CRIM. P. 15.01 (2009); MONT.

such a statute make that inquiry to defendants to ensure that a judgment entered on a guilty plea is constitutionally valid.⁷⁷

There are other examples as well. The New Jersey Supreme Court recently adopted stringent requirements for admission of eyewitness testimony.⁷⁸ State courts must now hold a hearing on reliability of identification evidence and rule on its admissibility according to more stringent set of criteria than federal constitutional law requires—a reform that amounts to checklist of best practices for the state’s production of identification evidence.⁷⁹ In other jurisdictions, such as Illinois, courts are required by statute to hold reliability hearings before jailhouse informants can testify in capital cases.⁸⁰

Criminal justice officials other than judges rely on written protocols to ensure performance of essential tasks in a range of contexts.⁸¹ Some police departments have adopted internal protocols for eyewitness identification procedures to reduce risks of error and increase reliability.⁸² In addition, all police departments long ago standardized the *Miranda* warnings (often on a card carried by officers) to ensure all components of *Miranda*’s requirements are conveyed.⁸³ The United States Justice Department requires prosecutors to seek supervisory approval before initiating certain prosecutions or agreeing to some plea dispositions.⁸⁴ More recently, a growing number of prosecutors’ offices employ, and bar organizations endorse, the practice of using written

CODE ANN. § 46-12-210 (2009); N.M. R. CRIM. FORM 9-406 (2009); N.Y. CRIM. PROC. LAW ANN. § 220.50(7) (McKinney Supp. 2009); N.C. GEN. STAT. § 15A-1022 (2007); OHIO REV. CODE ANN. § 2943.031 (West 2006); OR. REV. STAT. § 135.385 (2007); R.I. GEN. LAWS § 12-12-22 (West Supp. 2008); TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West Supp. 2009); VT. STAT. ANN. tit. 13, § 6565(c)(1) (Supp. 2009); WASH. REV. CODE § 10.40.200 (2008); WIS. STAT. § 971.08 (2005-2006).

77. See *State v. Henderson*, 27 A.3d 872, 914 (N.J. 2011).

78. See *id.* at 872.

79. *Id.* (requiring new jury instructions addressing unreliability of eyewitness testimony). *Henderson* supersedes, in New Jersey, the federal constitutional standards that permit admission of less reliable eyewitness testimony. See *Manson v. Braithwaite*, 432 U.S. 98, 117 (1977); see also *Neil v. Biggers*, 409 U.S. 188, 199 (1972) (discussing the five-factor test for admissibility); *United States v. Wade*, 388 U.S. 218, 228-29 (1967).

80. See ch. 725 ILL. COMP. STAT. 5/115-21(d) (2003) (stating the reliability hearing procedure and requirements). At least one federal court of appeals has held that the defendant’s due process rights were violated by the false testimony of a government witness that was key evidence leading to a murder conviction, even when the prosecutor was not aware of the witness’s perjury at trial. *Killian v. Poole*, 282 F.3d 1204, 1208-11 (9th Cir. 2002) (reversing the murder conviction); see also *Maxwell v. Roe*, 628 F.3d 486, 508-12 (9th Cir. 2010) (holding that perjury by the prosecution’s “prize” witness violated the defendant’s due process rights).

81. See *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

82. See *id.*

83. See *id.* *Miranda* requires a person in custody must, prior to interrogation, be clearly informed, he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning.

Id. at 479.

84. See, e.g., U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL ch. 9-27.000 (2002), available at justice.gov.usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (“Federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney . . . for reasons set forth in the file of the case.”).

checklists to ensure that prosecutors and their agents (such as police) fulfill obligations under *Brady v. Maryland* to disclose exculpatory evidence.⁸⁵

These checklist practices mimic protocols adopted in a variety of professional settings.⁸⁶ The practice is a response to well-recognized and predictable patterns of failure by individual actors, including highly trained professionals, to adhere consistently to repetitive best-practices tasks.⁸⁷ Failures can be especially significant in systems settings—work environments in which several actors contribute to a collective endeavor, from health care provision to large-scale engineering projects.⁸⁸ Adjudication is exactly that sort of system (a criminal justice *system*). It depends on prosecutors, defense attorneys, judges, and other professionals—such as police and forensic scientists—fulfilling their independent roles sufficiently well in order for the outcome of the group process to be of sufficiently high quality. Protocols specify best practices, remind individuals of multiple important actions they may otherwise overlook (or deem unnecessary on a particular occasion), and help to add cross-checks or redundancy into systems that are vulnerable to failures due to lapses of a single actor.

From these models, one can see how judges could efficiently and justifiably exercise their capacity to supervise lawyers' fulfillment of their evidence production duties through checklists, and they could do so without taking an active investigative role themselves and without intruding unduly on attorneys' independent professional judgments. A minimal model would entail the judge asking the defense attorney a series of standard questions about his evidentiary preparation. Courts could inquire, for example, whether counsel requested and obtained discovery from the prosecutor; interviewed the arresting officer or state witnesses; interviewed other known witnesses; interviewed his client about the alleged conduct and events; contacted potential witnesses suggested by the client, police reports, or other witnesses; visited the crime

85. See *Brady v. Maryland*, 373 U.S. 83, 88 (1963); *Kyles v. Whitley*, 514 U.S. 419, 428 (1995) (requiring disclosure by prosecutors of exculpatory, impeachment, or mitigation evidence in possession of state officials to the defense). On the use (or recommendation to use) such checklists, see N.Y. CITY BAR, *supra* note 17; Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2238-48 (2010) (describing and recommending prosecutors' use of checklists for discovery practice); Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2029-35 (2010) (discussing judicial supervision of discovery practices).

86. See, e.g., INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 155-97 (Linda T. Kohn et al. eds., 2000). The medical profession has made more progress in recent years in urging doctors and other care providers to employ checklists or written protocols of best practices in a range of settings, with the goal (and some documented effect) of reducing unintentional errors that result in harm to patients. See *id.*; see also *To Err Is Human: Building a Better Healthcare System*, INST. MED. (Nov. 1, 1999), <http://iom.edu/~media/Files/Report%20Files/1999/To-Err-is-Human/To%20Err%20is%20Human%201999%20%20report%20brief.pdf> (summarizing the report). See ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2011) for a popular account of, and argument for, checklists employed in a range of settings, including the airline industry, large-scale construction industry, and medical settings).

87. See GAWANDE, *supra* note 86, at 1-13.

88. See *id.* at 15-31.

scene; reviewed forensic reports; confirmed accreditation of forensic experts and facilities; reviewed recordings of defendant statements, surveillance cameras, and the like; obtained and reviewed health or other records of his client where relevant; etc. The list could vary somewhat depending on the nature of the case, although asking a question irrelevant to a specific case—and obtaining the quick answer that would explain its irrelevance—is a minimal cost.

Judges could cover such a checklist orally with counsel as a prerequisite to commencing a guilty plea hearing or a trial (or better, before confirming an impending trial date). Alternately, judges might dictate such a checklist by local rule and require counsel to file written responses before a plea hearing or trial. Details, of course, could vary; judges might require that counsel speak with clients and carry out other tasks at least one day before a guilty plea hearing (a rule that would improve defender practices in far too many state courts).⁸⁹ For trials, questions could be added about subpoenas for defense witnesses, notice obligations for alibi or other defenses, or preparation for state expert witnesses or for defense expert evidence. Equivalent queries could be designed for prosecutors, which sometimes could aid defendants—for example, if the judge addresses disclosure of exculpatory *Brady* material or accreditation of experts.⁹⁰ Enforcement could be easy; neither a guilty plea nor trial could proceed until counsel has confirmed he has completed the essential steps of fact investigation and evidence preparation. And the more formalized this checklist requirement, the more likely judges will overcome countervailing incentives to skip it. Codification of this model in Federal Rule of Criminal Procedure 11 would be the strongest form; a local court rule could have much the same effect within its jurisdiction.

This expanded form of judicial supervision is, nonetheless, appropriately limited. The judge does not actively take part in the evidence-production duties, which remain in party control. He simply seeks to ensure that the attorneys have fulfilled their investigation, production, and scrutiny duties on which the court depends for reliable fact-finding. Such queries address only one part of an attorney's full set of professional duties and choices in representation. Beyond investigation and evidence production, attorneys must make a range of strategic and tactical judgments regarding plea negotiation or trial preparation and, in the course of all this, engage in ongoing counseling of clients regarding the clients' own decisions. Prosecutors have different, but comparable, consulting tasks with supervisors, law enforcement, victims, and witnesses.

89. See BACH, *supra* note 68, at 58-60 (accounting lax defender practices in Oconee County, Georgia).

90. The quality of expert analysis can cut both ways for defendants, of course, and prosecutors are not institutionally suited toward skepticism of the quality of state evidence. But, greater scrutiny of the quality of analytical methods and experts' credentials could, at the margins, prompt less use of the least reliable (most inaccurate) forms of such evidence.

These separate aspects of legal representation correlate roughly with the privileged components of a lawyer's work: attorney-client communications are protected by a strong privilege, and the content of most preparation efforts and tactical or strategic decision making is protected by a limited but substantial work-product privilege. The judge's protocol on the attorney's fact investigation efforts intrudes on none of this privileged activity. Judges could resolve occasional close questions about a work-product privilege covering disclosure of investigation details case-by-case. On the other hand, judicial inquiries about evidentiary preparation serve at least a couple of important interests. One is the court's public interest in a full evidentiary record as a basis for a reliable judgment. Another is the protocol's effect of improving the quality of defense representation, which the state should take a particular interest in for appointed counsel in light of the state's inevitable intervention in that principal-agent relationship. Ensuring better evidentiary preparation by both parties will likely have the indirect effect of improving those privileged parts of the attorney performance that judges cannot supervise. Client counseling and strategic and tactical decision making will surely improve when the attorney has a more complete, detailed base of factual and evidentiary knowledge to work from.

IV. CONCLUSION

Any improvement in adjudication from judicial supervision of attorney evidence production would depend on the underlying capacity of the adversarial system. The state or locality must provide enough resources for a system of defense representation that gives counsel the resource capacity for each client to complete sufficient evidentiary preparation. The same must be true for prosecutors' offices and local courts as well. As obvious as that point is—as implicit as it is in *Gideon* and *Strickland*—it is simply not the case in some jurisdictions. No amount of judicial supervision and insistence can cure the recurrent problems in many jurisdictions of grossly insufficient funding that simply deprives appointed counsel of the basic capacity to sufficiently prepare each case and adequately represent each client. Not all problems of insufficient evidence production are functions of resource constraints. There are enough jurisdictions with adequate capacity that something else explains the problem, such as local norms that tolerate or encourage minimal defense investigation or shirking by individual lawyers. At least for jurisdictions with that kind of “slack” in the system—the structural capacity to carry out adjudication on better developed evidentiary records—judicial supervision could make a difference, and a rule mandating it could help overcome judicial resistance and institutionalize a better standard of practice for both the bench and the bar.