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February 8, 2014

# Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure

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**Quasi-Inquisitorialism:**

**Accounting for Deference in Pretrial Criminal Procedure**

Jennifer E. Laurin\*

**Abstract**

The actions of police and prosecutors that take place long before a criminal trial are frequently critical to, even dispositive of the accuracy and reliability of case disposition. At the same time the regulatory touch of constitutional criminal procedure in the pretrial realm is notoriously, even insistently, light. Proposals to address actual or risked deficiencies in this arena have proliferated in recent years, exemplified by pushes for social-science-rooted investigative best practices, for broader defense access to evidence prior to trial, for more oversight in plea bargaining, and so on. But in the face of these critiques, broad pretrial discretion largely reigns.

A prevailing explanation for this state of affairs is rooted in our putative preference for an accusatory rather than inquisitorial system of criminal justice. And the leading solutions on offer have urged in whole or in part a turn away from adversarial obsession and an embrace of more inquisitorial traditions. The difficulty, however, is that this approach sets the task before us as one of bucking a powerful anti-inquisitorial self-understanding handed down from the Court. As such, it essentially concedes the irrelevance of constitutional doctrine for the progressive future of criminal justice, and also demands that lower courts and non-judicial actors reinvent a counter-tradition in criminal adjudication: no small task.

The central argument of this Article is that this prevailing account is incomplete, and that the gaps have real-world consequences for criminal justice reform. The Article uncovers an additional and consequential strain in the doctrinal narrative, one that depicts the pretrial world as the very inquisitorial, Continental mode that is so roundly rejected in the context of adjudication. This “quasi-inquisitorialism” in turn enables the Court to construct a separate realm of prosecutorial and police bureaucracy, professionalism, and expertise that purportedly fills the gap in judicial oversight. In addition to offering a fuller explanation of the structure of the Court’s constitutional criminal procedure doctrine, this account aims for greater leverage for reform. The Article concludes by suggesting that exploiting this quasi-inquisitorial narrative might offer promising inroads – doctrinally, politically, or both – for reformed approaches to investigative oversight, pretrial discovery, and plea bargaining.

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\* Professor, University of Texas School of Law. For extremely helpful input in the development of this project, I thank Darryl Brown, Paul Butler, Maximo Langer, Richard Leo, and other participants in the following workshops: The University of Florida, Levin College of Law Junior Scholars Conference; the June 2013 Roundtable of the Program on Understanding Law, Science and Evidence at UCLA; the 2013 Law and Society Annual Meeting, the 2013 AALS Criminal Justice Section Mid-Year Meeting, and the 2013 Vanderbilt Criminal Procedure Roundtable. For invaluable research assistance I thank Alex Holmes and Ale Avila.

## **Introduction**

A man is arrested for robbery when a trained dog “matches” his scent to scraps of cloth at the crime scene, despite contradictory security video footage.<sup>1</sup> Another is convicted of theft based upon a show-up identification by a woman looking down from a fourth-floor apartment into a dark parking lot at three o’clock in the morning.<sup>2</sup> An innocent young man pleads guilty to robbery after a sample of his DNA matches blood shed at the scene, only to be exonerated five years later when a laboratory mix-up comes to light and his cousin’s DNA is found to be the true match.<sup>3</sup> A woman pleads guilty to fraud charges, not knowing that a key witness in the case had told FBI agents that the defendant’s allegedly false statements were true.<sup>4</sup>

All of these cases share three features: They are real; they raise evident reliability and accuracy concerns; and, emanating as they do from evidence gathering and evaluation that occurs prior to trial, they are largely beyond criminal procedure’s trial-focused regulatory reach.

The variety of ways in which pretrial activities have the potential to generate error is increasingly well-documented. Social science research in particular has made valuable if unsettling contributions in this arena, demonstrating that long-standard investigative techniques in relation to eyewitnesses and confessions raise serious accuracy concerns, that what passes as scientific evidence is sometimes unreliable in its foundations or in the manner in which it is generated, and that a variety of cognitive and motivational biases can lead investigations astray and confound the ability to catch errors down the road.<sup>5</sup> So, too, has recent work in law and social science illuminated the extent to which errors in gathering and assessing evidence prior to trial can “contaminate” a criminal investigation, be falsely corroborated through a variety of procedural missteps and cognitive errors, and remain undetected through systematic accuracy defects in the crucible of trial.<sup>6</sup> Of course, we might be less concerned about the prevalence of pretrial error given that some ninety-six percent of defendants simply admit guilt.<sup>7</sup> And yet guilty pleas themselves introduce non-trivial accuracy concerns given the breadth of criminal

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<sup>1</sup> John Schwarcz, Picked from a Lineup, on a Whiff of Evidence, N.Y. Times (Nov. 4, 2009), available at [http://www.nytimes.com/2009/11/04/us/04scent.html?\\_r=0](http://www.nytimes.com/2009/11/04/us/04scent.html?_r=0).

<sup>2</sup> Perry v. New Hampshire, 132 S. Ct. 716 (2012).

<sup>3</sup> Lawrence Mower & Doug McMurdo, Las Vegas Police Reveal DNA Error Put Wrong Man in Prison, Las Vegas Rev.-J. (Jul. 7, 2011), <http://www.lvrj.com/news/dna-related-error-led-to-wrongful-conviction-in-2001-case-125160484.html>.

<sup>4</sup> U.S. v. Conroy, 567 F.3d 174, 176—77 (5th Cir. 2009).

<sup>5</sup> See, e.g., Committee on Identifying the Needs of the Forensic Science Community, National Research Council of the National Academies, Strengthening Forensic Science in the United States: A Path Forward 127—82 (2009) [hereinafter NAS Report]; Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291; Gary L. Wells, Eyewitness Identification: Systemic Reforms, 2006 Wis. L. Rev. 615.

<sup>6</sup> See, e.g., Brandon Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong (2010); Richard Leo, Police Interrogation and Criminal Justice (2008); Dan Simon, In Doubt (2011).

<sup>7</sup> See Mark Motivans, Federal Justice Statistics, 2009, at 12 (Dec. 21, 2011) (reporting that “[n]inety-seven percent of convictions in U.S. district court in 2009 were the result of guilty pleas, compared to 96% in 2005); Thomas H. Cohen & Tracey Kyckelhahn, Felony Defendants in Large Urban Counties, 2006 (May 26, 2010) (reporting that 95% of state convictions were through guilty plea).

law, the range and severity of sentences, and parties' (prosecutors and defendants) nearly unfettered discretion to bargain with charges and punishment and extract finality-preserving (and potentially accuracy-thwarting) waivers of rights to discovery, post-conviction review, and even the guarantee of effective assistance of counsel.<sup>8</sup>

Of course, this state of affairs exists in large part thanks to the structure of American criminal procedure doctrine, which relies almost entirely on trial-based procedures to guarantee accuracy, and extends a comparatively feather-weight regulatory touch to the pretrial realm. Yes, the Fourth Amendment imposes some pretrial gatekeeping through warrant doctrine and the requirements of probable cause, but these purposely "flexible" strictures are protective of significant police discretion, and the Court has repeatedly resisted the suggestion that heightened reliability concerns (such as, for example, reliance on anonymous informants) should alter such an approach.<sup>9</sup> Notwithstanding efforts by the Warren Court to shine the light of the Fifth, Sixth, and Fourteenth Amendments in the dark corners of police precincts, criminal procedure doctrine protects against little other than deliberate law enforcement overreach in the course of an investigation – again, even in the face of demonstrable risks of error in evidence gathering (as, for example, with unreliable eyewitnesses or apparently schizophrenic confessors).<sup>10</sup> Similarly immune from accuracy-focused scrutiny are the assessment, charging, and even dispositional decisions made by prosecutors: The constitution demands little if any evidentiary disclosure, imposes no conditions on the terms of bargains, and seemingly permits waiver of any right conceivably characterized as knowing and voluntary.<sup>11</sup>

The magnitude of our criminal justice system's accuracy problem is widely debated, but the notion that it is non-trivial and that greater attention to pretrial activities is an important part of the solution is widely accepted.<sup>12</sup> Moreover, there is wide agreement about the general

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<sup>8</sup> See, e.g., Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance: Waiving Padilla and Frye*, 51 *Duquesne U. L. Rev.* 647 (2013); Samuel R. Wiseman, *Waiving Innocence*, 96 *Minn. L. Rev.* 952 (2012) (reviewing doctrine and concerns in this area).

<sup>9</sup> See *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013); *Illinois v. Gates*, 462 U.S. 213, 239 (1983); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 *Va. L. Rev.* 881 (1991) (making point that the "flexible" and "common sense" attributes of probable cause are hallmarks of its deference to police judgment, but also arguing that pre-search review by magistrates and post-search review by courts actually entail review of differing stringency).

<sup>10</sup> See, e.g., *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012) (rejecting suggestion that unreliability of eyewitness evidence renders its use at trial unconstitutional absent "the taint of improper state conduct"); *Colorado v. Connelly*, 479 U.S. 157, 163–64 (1986) (discussing the Fourteenth Amendment's protections against certain types of police interrogatory techniques).

<sup>11</sup> See, e.g., *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (rejecting an extension of *Brady* to the pretrial plea stage); *United States v. Mezzanatto*, 513 U.S. 196 (1995); *Bordenkircher v. Hays*, 434 U.S. 357 (1978).

<sup>12</sup> For general affirmation of this proposition from a diversity of participants in and observers of the criminal justice system see Am. Bar Ass'n, *Achieving Justice: Freeing the Innocent, Convicting the Guilty* (2006); Brad Smith et al., *How Justice System Officials View Wrongful Convictions*, 57 *Crime & Delinquency* 663, 671–75 (2011); Jon B. Gould et al., *Predicting Erroneous Convictions: A Social Science Approach to Miscarriages of Justice*, at iii (Dec. 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/241389.pdf>. But see *Improving Forensic Science in the Criminal Justice System: Hearing Before the U.S. Senate Committee on the Judiciary* (Jul. 18, 2012) (testimony of Scott Burns, Executive Director, National District Attorneys Association), available at <http://www.judiciary.senate.gov/pdf/12-7-18BurnsTestimony.pdf> (touting "99.9999%" accuracy of criminal justice system as "a pretty good track record").

character (if not the details) of attention that is required. Evidence gathering and investigative practices should be more systematized and regulated to reflect what is known about best practices especially in relation to eyewitnesses, interrogations, informants, and forensic science; defendants should have greater access to discovery and the state's investigative apparatus prior to trial, and especially in connection with evaluating plea offers; and plea bargaining, including the terms of offers and the rights that can and cannot be on the bargaining table, should be scrutinized to ensure that prosecutors are not de facto final adjudicators.<sup>13</sup>

But it is equally well-understood that courts, the Supreme Court chief among them, have by in large remained on the sidelines in these debates. Again and again, the Supreme Court has, by wide majorities, rejected invitations to refashion constitutional criminal procedure to feature reliability guarantees beyond those provided by fair trials. In one of last Term's two drug-sniffing dog cases, *Florida v. Harris*, a unanimous Court insisted in the face of evidence of the questionable accuracy of such canine technology that demanding and scientifically guided tests of reliability were inconsistent with the "flexible" conception of probable cause contemplated by the Fourth Amendment.<sup>14</sup> In the previous Term, the Court's eight-to-one decision in *Perry v. New Hampshire*, which rejected the notion that evidentiary unreliability was both a necessary and sufficient condition for establishing a violation of due process read almost as if the last three decades of research about the risks of eyewitness identification (research that pervaded the parties' briefs) had not transpired.<sup>15</sup> The Court – frequently a significant majority of it – is clear-eyed in declining to adapt to the lessons of the last decades.<sup>16</sup>

Of course, judicially fashioned, constitutionally rooted criminal procedure is far from the only or most meaningful doctrinal space that might attend to pretrial reliability concerns. Yet extra-judicial arenas for oversight have to date yielded less change than critics might have hoped. Greater oversight of investigators and prosecutors through subconstitutional judicial doctrine such as state evidence law or rules of criminal procedure, as well as organizational reform in this arena, has largely taken the form of exceptions to a rule of continuing down the standard (Court-modeled) path.<sup>17</sup> In other words, despite the changed, more accuracy-focused backdrop for

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<sup>13</sup> See, e.g., Garrett, *supra* note 6; Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 Cal. L. Rev. 1585, 1591 (2005); Am. Bar Ass'n, *Achieving Justice: Freeing the Innocent, Convicting the Guilty* (2006).

<sup>14</sup> 133 S. Ct. 1050, 1055 (2013).

<sup>15</sup> *Perry*, 132 S. Ct. at 731 (Sotomayor, J., dissenting) (making the same point).

<sup>16</sup> See Keith A. Findley, Judicial Gatekeeping of Suspect Evidence: Due Process and Evidentiary Rules in the Age of Innocence, 47 Ga. L. Rev. 723, 736 (2013) ("The retreat from evidentiary reliability as a constitutional principles . . . appears complete.").

<sup>17</sup> See, e.g., Erik Luna & Marianne Wade, Prosecutors As Judges, 67 Wash. & Lee L. Rev. 1413, 1418-20 (2010) (observing that just as the judiciary has been loath to scrutinize prosecutorial activities, "[j]awmakers also have been wary to hamper prosecutors and instead have facilitated the prosecutorial function through the passage of more crimes and harsher punishments," and internal regulation has been sporadic and "often employing hortatory language or pitched at a level of generality that confines little"); Sandra Guerra Thompson, Eyewitness Identifications and State Courts As Guardians Against Wrongful Conviction, 7 Ohio St. J. Crim. L. 603, 628-31 (2010) (discussing minority examples of reformed approaches to oversight of eyewitness identification evidence); Jenia Iontcheva Turner, Judicial Participation in Plea Negotiations: A Comparative View, 54 Am. J. Comp. L. 199, 212-13 (2006) (discussing outlier approaches in oversight of plea bargaining).

criminal justice reform conversations, the basic structure of criminal oversight continues largely to track the structure of the Court's criminal procedure jurisprudence.

What explains both the presumption and endurance of pretrial deference? Legal realist accounts aside, there is a prevailing understanding of the Court's criminal procedure jurisprudence that is frequently offered by the Court, and held up by commentators, as justifying or at least explaining doctrinal inattention to pretrial reliability concerns: the notion that "ours is an accusatorial and not an inquisitorial system."<sup>18</sup> As the story goes, more or less constitutionalized (American) values of individual autonomy and limited state insinuation prevail over (foreign) technocratic and bureaucratic idealization of substantive accuracy; judges are umpires rather than invested participants in development of the case, and parties to litigation independently develop and present oral narratives subject to cross examination and evaluated by neutral factfinders; and procedural interventions enforced by the court do little more than police the playing field on which the parties' dialectic truth-elucidation occurs.<sup>19</sup> Accordingly, the constitution does not require, *and* the theoretical underpinnings of our system of criminal justice militate against constructions of the Fourth, Fifth, Sixth, and Fourteenth Amendments that would insert overweening, Continental-style courts in greater oversight of pretrial evidence gathering, case evaluation, charging, and disposition.<sup>20</sup> All this is the outgrowth of what David Sklansky has termed the Court's "anti-inquisitorial" commitment.<sup>21</sup>

Anti-inquisitorialism has not gone unchallenged. From some quarters, the critique has been normative: Scholars have urged ending or at least loosening anti-inquisitorialism's hold on American criminal procedure, to adopt some of the doctrines and institutional arrangements that are more a feature of Continental criminal law and that, those scholars argue, are better designed than the status quo to achieve reliable outcomes.<sup>22</sup> Other push-back has centered on the accuracy of anti-inquisitorialism as a positive account of our criminal justice system. Judge Gerard

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<sup>18</sup> *Rogers v. Richmond*, 365 U.S. 534, 540—41 (1961).

<sup>19</sup> See, e.g., John H. Langbein, *The Origins of the Adversary Criminal Trial* 330—31 (2003) (discussing role of procedure in preventing rather than correcting error); Miriam Damaska, *Evidentiary Barriers and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506, 554—87 (1973) [hereinafter *Damaska, Two Models*]; Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009, 1016—19 (1974) (discussing connections between theoretical and technical facets of accusatorial criminal procedure); Luna & Wade, *supra* note 17, at 1429 (contrasting party- versus judicially based responsibility for development of facts in adversarial and inquisitorial systems); see also Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 Cornell L. Rev. 1181, 1187—88 (2005) (discussing closely related adversarial ideal in American civil litigation).

<sup>20</sup> See *infra* Part I.

<sup>21</sup> See generally *Anti-Inquisitorialism*, 122 Harv. L. Rev. 1634 (2009).

<sup>22</sup> See Lloyd L. Weinreb, *Denial of Justice* 117—46 (1977); George C. Thomas, *Supreme Court on Trial* (2010); Brown, *supra* note 13, at 1591 (pointing to extra-judicially generated procedures and institutions that are superior substitutes for failed adversarial procedures); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from the Administrative State*, 61 Stan. L. Rev. 869, 877—78 (2009) (proposing institutional checks on combined investigative and adjudicative role of prosecutors consistent with inquisitorial bureaucratic models); Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 Seton Hall L. Rev. 893, 900-01 (2008); Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. Int'l L. & Com. Reg. 319 (2011) (proposing adoption of many inquisitorial doctrines and institutions).

Lynch’s seminal article on plea bargaining as “administrative justice” is a classic example of a broader literature suggesting that pure adversarial justice is, for better or for worse, a myth readily debunked by examining American criminal justice in action.<sup>23</sup> But comparatively little work has been done to assess the premise that the anti-inquisitorial narrative is in fact an important driver in the Court’s hands-off stance toward pretrial activities.

This Article aims to problematize that account by suggesting that buying the anti-inquisitorial narrative as a central justificatory account for American criminal procedure has obscured a distinct and important counter-punctual theme in the Court’s own jurisprudence: that of pretrial quasi-inquisitorialism. To be sure, the Court frequently declines to intervene in the regulation of pretrial activities on the ground that “our” system adversarial justice contra-indicates such a result. But often the Court simultaneously offers a positive depiction of how it conceives of the non-accusatory space where oversight is eschewed – a depiction that imbues police, prosecutors, and their respective institutional contexts with characteristics more resonant with certain features of the Continental rather than common law adversarial tradition – in particular, bureaucratic accountability, intrinsically or professionally inculcated accuracy-based orientations, and discernible, extra-judicial expertise.<sup>24</sup>

Thus, for example, throughout its Fourth Amendment jurisprudence, the Court has pushed back against technically exacting standards for probable cause or reasonable suspicion, and has diminished the prospect for exclusion of evidence – but it has done so while characterizing law enforcement regulatory regimes and professional expertise as operating to constrain the discretion otherwise afforded by lack of judicial, legal review.<sup>25</sup> Similarly, in regard to the prosecutorial role, the Court has repeatedly advanced a conception of the prosecutorial function as being meaningfully overseen through a professionally inculcated justice-seeking orientation, mechanisms of internal, administrative regulation that guide prosecutorial discretion, and viable claims to comparative expertise with regard to review, charging, and even (in the context of pleas) case disposition.<sup>26</sup>

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<sup>23</sup> Gerard Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2120–21 (1998) (arguing that because of plea bargaining “the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize,” and proposing injection of adversarialism into plea bargaining process); see also Brown, *supra* note 13, at 1351; Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How do the French do it, How Can We Find Out, and Why Should We Care*, 78 *Cal. L. Rev.* 539 (1990); Goldstein, *supra* note 19, at 1016, 1020–25 (1974) (characterizing American criminal procedure as a mix of both accusatorial and inquisitorial systems and briefly detailing historical and contemporary inquisitorial features); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 *Crime & Just.* 1, 9 (2012).

<sup>24</sup> See, e.g., Miriam Damaska, *Adversary System*, in 1 *Encyclopedia of Crime and Justice* 24, 28–29 (Sanford H. Kadish ed., 1983) (pointing to “nonpartisan” investigation, “self-propelling” officials “affirmatively obligated to carry out state policies” as hallmarks of inquisitorial model); Marc L. Miller & Ronald F. Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, in *The Prosecutor in Transnational Perspective* 392, 401 (Eric Luna and Marianne Wade, eds.) [hereinafter *Luna & Wade, Prosecutor in Transnational Perspective*] (contrasting American and Continental norms of prosecutorial accountability as being primarily political in the former case, and primarily professional and bureaucratic in the latter).

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part II.

Thus, while declining to fashion a pretrial *judicial* role resonant with accounts of the interventionist, management-oriented, inquisitorial jurist, the Court has cited – or assumed – the presence of some of the very institutional features that often held out as hallmarks of more accuracy-focused Continental pretrial activities. To be sure, the point is not to suggest that the Supreme Court itself intends to align pretrial processes with an actual inquisitorial system – consciously pursuing a Frenchifying of American criminal investigations.<sup>27</sup> Moreover, as the Article will discuss, there is ample reason to be skeptical, perhaps even cynical, about the Court’s quasi-inquisitorial invocations.<sup>28</sup> Nevertheless, the Article urges that there is value in taking the Court’s justificatory premises, and revealing that the Court’s depiction of “our” system of criminal procedure has not been as wholly anti-inquisitorial as prevailing accounts suggest.

That value is (at least) two-fold. In a descriptive and analytic vein, the contention of this Article is that quasi-inquisitorialism has real explanatory power in respect of the court’s pretrial criminal procedure doctrine, despite the Court’s failure to expressly or consistently instantiate the paradigm in formal doctrine. Critically as well, as the Article will develop, the Court’s quasi-inquisitorial narrative is as much a construct as its anti-inquisitorial framework, in that, as the Article will highlight, the empirical assumptions on which the quasi-inquisitorial account rests are frequently contestible or unrepresentative at best, thin and disingenuous at worst. But identifying those assumptions and accounting for how they have become a feature of the Court’s doctrine provides a clearer and richer understanding of how contemporary criminal procedure doctrine itself describes the field that it occupies.

Second, apart from the intrinsic value of a clarifying account, identifying and illuminating the inquisitorial narrative offers a more practical cash-out. The prevailing approach often frames the task for reformers with accuracy-rooted concerns as one of bucking a powerful anti-inquisitorial self-understanding handed down from the Court. In so doing, it essentially concedes the irrelevance of constitutional doctrine for the progressive future of criminal justice. Moreover, scholarship urging doctrinal reform in state courts, or greater legislative or rulemaking action, hasn’t grappled with extent to which Supreme Court’s anti-inquisitorial narrative sets the terms for other actors’ –most politically powerful salient among them law enforcement and prosecutors – public account of how the criminal justice system should function. In other words, the political feasibility of greater pretrial scrutiny, no less than the jurisprudential feasibility, hinges in part on offering a viable narrative for such a scheme. An intuition driving this Article is that recovering the Court’s quasi-inquisitorialism might offer a principled narrative for characterizing constraints on pretrial discretion as consistent with rather than departing from “our” paradigm of criminal justice, thus grounding proposals for legislative

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<sup>27</sup> Indeed, as many comparative criminal procedure scholars have observed, what precisely it would mean to “Frenchify” our more adversarial processes is contestable, given the variations in on-the-ground “inquisitorial” practice and the absence of any “pure” form of inquisitorial justice system. See, e.g., Craig M. Bradley, *The Convergence of the Continental and Common Law Model of Criminal Procedure*, 7 *Crim. L.F.* 471, 474 (1996) (arguing that adversarial and inquisitorial models are not so starkly distinguishable); Erik Luna & Marianne Wade, *Prosecutors As Judges*, 67 *Wash. & Lee L. Rev.* 1413, 1464-65 (2010) (describing spectrum of similarities between American and European prosecutorial practice).

<sup>28</sup> See *infra* Part II.C.

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or institutional reform, or perhaps even doctrinal shift, in relation to pre-trial investigative and prosecutorial practices.<sup>29</sup>

The Article proceeds as follows. Part I elaborates on the breadth of discretion afforded police and prosecutors in their pretrial activities, and presents the standard accusatorial explanation. Part I also describes prevailing views on how best to address the pretrial reliability deficit, and documents how many eschew traditional reification of “our” adversary system in favor of concessions to inquisitorial approaches – concessions with which the Court’s “anti-inquisitorial” paradigm has no truck. Part II identifies and develops the theme of quasi-inquisitorialism, tracing the Court’s emergent conception of police and prosecutors in the pretrial realm as working against a backdrop of bureaucratic oversight and organizational or professional norms and expertise that at least partially (putatively) fill the oversight gap in criminal procedure doctrine. To be sure, the Court’s reliance on quasi-inquisitorial attributes should rarely be taken at face value as a descriptive matter. To this point, Part II explores at some length the causes and motivations behind quasi-inquisitorialism, and argues that they have structural qualities, and that the narrative is frequently a motivated strategy to diminish the role of judicial oversight (as in the case of evidentiary exclusion) or to maintain the limited judicial role dictated by anti-inquisitorialism against the challenge mounted by innocence- and reliability-focused concerns.

Nevertheless, there are at least some signals, particularly in the prosecutorial sphere, that the Court should be taken at its word in actually presuming – however unrealistically – the existence of quasi-inquisitorial constraints. Moreover, regardless of whether the Court’s anti-inquisitorial narrative has significant predictive force with respect to its own jurisprudence, the Article suggests that it supplies a viable tool of persuasion in criminal justice arenas that may be more receptive to an anti-inquisitorial counter-weight – if only it were offered. Part III closes by sketching general strategies for better leveraging the quasi-inquisitorial narrative, as well as both legal and political inroads that might be created in the specific arenas of investigative practices, discovery reform, and plea bargaining.

## **I. Pretrial Discretion and the Pervasive Yet Incomplete Anti-inquisitorial Account**

### **A. The Pretrial-Adjudicatory Divide and Its Consequences**

In the range of pretrial activities they undertake, police and prosecutors famously enjoy broad discretion. To be sure, the Fourth Amendment formally serves as a pervasive regulatory backdrop for the work of law enforcement in the investigative stage of a case, particularly in relation to gathering evidence, and to a lesser extent in making use of evidence prior to trial. Thus, police ordinarily must make an advance showing of probable cause and obtain a warrant to

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<sup>29</sup> Cf. Kessler, *supra* note 19, at 1183 (arguing in context of civil adjudication that “recovering our lost inquisitorial tradition may offer our best chance to provide meaningful due process in the modern world of civil procedure”). Others have made the point that accusatory justice is not just a legal but a cultural obsession. See, e.g., Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 *Notre Dame L. Rev.* 403, 505-06 (1992) (“The basic assumptions underlying the nonadversary approach cut against the grain of our national character. The American-style adversary system—with its emphasis on the contest between the lawyers for the individual and for the state, rules designed to shield the accused from the process, and extensive use of the lay jury—has its roots in the individualism, populism, and pluralism that are natural ingredients of our character and that strongly influence our view of the proper structure and role of social and political institutions.”).

search for and seize evidence from one’s “person[], house, papers, and effects” (though not one’s car).<sup>30</sup> But given the relatively low and factually contextual hurdle of probable cause, generously deferential post-hoc review of warrants, and diminished remedies in the criminal realm, Fourth Amendment doctrine serves as a fairly light substantive constraint in regard to law enforcement activity around evidence gathering.<sup>31</sup> Warrant applications as well as charging decisions may be and typically are premised on evidence that is a far cry from trial-based standards of reliability or admissibility.<sup>32</sup> As a unanimous Supreme Court reaffirmed this Term (rejecting a Florida appellate court’s innovation), the “flexible” conception of probable cause that has prevailed precludes the type of “judicial gatekeeping” that (at least nominally) regulates the quality of evidence considered at trial from operating via the Fourth Amendment to review of police and prosecutorial determinations of probable guilt.<sup>33</sup> But in all events, in the minerun of searches and seizures an exception to the warrant requirement – be it consent, exigency, searching incident to arrest, or any number of other Court-sanctioned end-runs – means that the minimal friction provided by substantive warrant doctrine is essentially absent, with deference to an officer’s “reasonable suspicion” of criminal activity forming the outer limit of constitutional oversight.<sup>34</sup>

So too do the Fifth and Fourteenth Amendments provide little opportunity for scrutinizing the reliability of evidence gathering and evaluation. While the prohibition on compelled self-incrimination does speak directly to a particular, and particularly important, form of evidence – namely, the confession and other testimonial statements<sup>35</sup> - its stringency is cabined. It prohibits the admission into evidence of a defendant’s statement procured through police *compulsion*, but not, in the terminology of Professors Kassin and Wrightsman, “voluntary false confessions” that, however unreliable, are the product of the confessor’s own proclivities – such as the confession of a schizophrenic in *Colorado v. Connelly*.<sup>36</sup> Moreover, scrutiny of interrogations is, even within narrow constitutional confines, notoriously light. Waivers of

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<sup>30</sup> U.S. Constitution, Amend. IV; *Illinois v. Rodriguez*, 497 U.S. 177, 185–86 (1990). For the latest such seeming carve-out see *Maryland v. King*, 133 S. Ct. 1958, 1969–70 (2013).

<sup>31</sup> See Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 *Tex. L. Rev.* 1051 (2013).

<sup>32</sup> See, e.g., *United States v. Harris*, 403 U.S. 573, 584–85 (1971); *Bennett v. City of Grand Prairie*, 883 F.2d 400, 405 (5th Cir. 1989) (holding polygraph results valid basis for probable cause determination though inadmissible at trial); see generally *Brinegar v. United States*, 338 U.S. 160, 174 (1949).

<sup>33</sup> *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013). (rejecting “inflexible” test for reviewing reliability of dog sniff evidence that formed basis for warrant application); *Brinegar v. United States*, 338 U.S. 160 (1949) (rejecting notion that trial-based evidentiary standards applied in assessing reliability of warrant).

<sup>34</sup> See, e.g., *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring).

<sup>35</sup> And critically, not other, non-oral forms of evidence that an individual might be compelled to surrender – personal effects such as papers, or non-oral attributes of their physical person such as blood or voice exemplars. See *Pennsylvania v. Muniz*, 496 U.S. 582, 591–92 (1990) (discussing distinction between testimonial and physical evidence, only the former enjoying protection under the Fifth Amendment); *Andresen v. Maryland*, 427 U.S. 463, 476 (1976) (holding that Fifth Amendment does not per se bar admission into evidence of business records created by defendant).

<sup>36</sup> 479 U.S. 157, 163–64 (1986); see Saul Kassin & Lawrence Wrightsman, *Confession Evidence*, in *The Psychology of Evidence and Trial Procedure* 67 (1985).

pursuant to *Miranda v. Arizona* are readily obtained and rarely second-guessed.<sup>37</sup> The Court has likewise made clear that the constitution is unconcerned with the per se reliability of eyewitnesses or informants, at least in the absence of improper (perhaps deliberately improper) police conduct in procuring the evidence.<sup>38</sup> The Court continues formally to adhere to a constitutional prohibition on the use of unduly suggestive procedures in procuring eyewitness identifications, but since *Manson v. Brathwaite* the two-step due process test of asking first whether suggestive procedures were used, and then whether an out-of-court identification was nevertheless “reliable,” has permitted most fruits of bad procedures to come into evidence, and has used what social science has demonstrated to be highly questionable indicia of “reliability” in doing so.<sup>39</sup> Generally speaking, the requirements of due process place no affirmative obligations on investigators in regard to evidence gathering,<sup>40</sup> and absent a show of animus or physical mistreatment toward a defendant it provides little negative constraint as well.

The same hands-off stance prevails to an even larger degree with regard to prosecutorial conduct prior to trial. So long as probable cause is satisfied, prosecutorial charging enjoys a presumption of regularity, rebutted only by clear proof of misconduct – a standard that is (by design) all but impossible to meet.<sup>41</sup> The power afforded by charging discretion is of course vastly magnified by resistance (somewhat mitigated with the Court’s recent decisions in *Lafley v. Cooper*<sup>42</sup> and *Frye v. Missouri*<sup>43</sup>) to the notion that the plea bargaining which displaces trial practice in the overwhelming majority of criminal cases should enjoy anything like the scrutiny that attends courtroom proceedings. Indeed, the Court has yet to identify a deal too sweet to be voluntary, a right too essential to be waivable, or a plea condition too offensive to justice to permit.

Moreover, constitutional rules that would subject the prosecutor’s (and police’s) actions to the scrutiny of the defense – in particular the rule of *Brady v. Maryland* and its progeny entitling the defense, as a feature of due process, to favorable information within the control of the state<sup>44</sup> – do little or nothing to cure information asymmetries prior to trial. First, the scope of *Brady*’s disclosure requirement is formally limited to information both favorable and “material” to the defense – and thus excludes not only information relevant to the prosecution’s case more

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<sup>37</sup> See *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) (“Cases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.”); Leo, *supra* note 6, at 282–83.

<sup>38</sup> See, e.g., *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012) (rejecting suggestion that unreliability of eyewitness evidence renders its use at trial unconstitutional absent “the taint of improper state conduct”).

<sup>39</sup> Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 *Vand. L. Rev.* 451, 468–76 (2012) (summarizing social science research and the role of the Court’s due process test in insulating bad practices); Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 *Marquette L. Rev.* 639 (2009) (discussing pro-admissibility outcome).

<sup>40</sup> See, e.g., *Baker v. McCollan*, 443 U.S. 137, 146 (1979).

<sup>41</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *United States v. Armstrong*, 517 U.S. 456 (1996).

<sup>42</sup> 132 S. Ct. 1376 (2012).

<sup>43</sup> 132 S. Ct. 1789 (2012).

<sup>44</sup> 373 U.S. 83 (1963); see also *United States v. Bagley*, 473 U.S. 667 (1985).

generally, but also (by the terms of the Court’s doctrine) favorable information incapable by its own force of affecting a juror’s judgment.<sup>45</sup> So too has the Court rejected the suggestion that in the ordinary course due process requires the state to make available *potentially* favorable evidence – for example, physical evidence susceptible of forensic analysis.<sup>46</sup> But most critically, even information that falls within the ambit of *Brady*’s mandate need not, consistent with the prosecution, be disclosed *prior* to trial.<sup>47</sup> In sum, the heart of constitutional criminal procedure – Sixth Amendment rights and the guarantee of due process – is essentially viewed as irrelevant to pretrial production or use of evidence (scientific or otherwise) absent evidence of fabrication, framing, or other egregious misconduct.

But so what? None of this would be concerning if any one of three circumstances prevailed: if pretrial activities did not create systemic reliability concerns; if constitutional criminal procedure protections that attend the (more regulated space of) the trial were sufficient to address those concerns; or if other sub-constitutional strictures adequately filled the gap created by the Court’s conception of pretrial discretion. Unfortunately none of the three conditions is currently satisfied.

As to the first, others have documented in significant detail a state of affairs that I merely summarize here: Evidence gathering and evaluation by police and prosecutors creates systemic, not just episodic, reliability concerns. First, legal, scientific, and social scientific scholarship, along with the anecdotal evidence that can be gleaned from the hundreds of exonerations of the last three decades, has shown that a range of traditional investigative techniques and tried-and-true evidentiary standbys deserve less confidence than they have long enjoyed.<sup>48</sup> Eyewitness evidence, long viewed with caution by courts and practitioners,<sup>49</sup> is now documented and widely viewed as being not only highly error prone,<sup>50</sup> but also systematically skewed by long-standing practices in identification procedures – non-blind administration, and positive feedback provided to witnesses, in particular.<sup>51</sup> Research has demonstrated that interrogation, particularly of certain population groups (e.g. the young, the mentally ill) and when conducted in a manner consistent with techniques long taught in police academies, generates not random but systematic risks of

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<sup>45</sup> See *Moore v. Illinois*, 408 U.S. 786, 795 (1972) (“We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.”).

<sup>46</sup> See *Illinois v. Fischer*, 540 U.S. 549 (2004); *Arizona v. Youngblood*, 488 U.S. 51 (1988).

<sup>47</sup> *Connick v. Thompson*, 131 S. Ct. 1350 (2011); *United States v. Ruiz*, 536 U.S. 622 (2002).

<sup>48</sup> See, e.g., Garrett, *supra* note 6; National Registry of Exonerations, available at <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (documenting more than a thousand exonerations since 1989, most of which featured either eyewitness identifications, confessions, forensic evidence, or informant testimony).

<sup>49</sup> See *United States v. Wade*, 388 U.S. 218 (1967).

<sup>50</sup> See, e.g., Gary Wells, More of What Chiefs Need to Know About Eyewitness Identification, *Police Chief* (Jul. 23, 2013) (summarizing eight studies showing, across the board, that in approximately one-third of positive eyewitness identifications witnesses selected innocent fillers); Department of Justice, Technical Working Group for Eyewitness Evidence, NCJ 178240, *Eyewitness Identifications: A Guide for Law Enforcement*, at iii (1999) (cautioning about fallibility of eyewitnesses particularly in light of DNA exonerations).

<sup>51</sup> See, e.g., Simon, *supra* note 6, at 90–119 (summarizing social science evidence).

error in the form of false confession.<sup>52</sup> Scientific evidence is far from error-free, and again here the concern is not simply the possibility of malevolent fraud or isolated negligence, but structural conditions that undermine accuracy in the production and use of scientific evidence: Lack of professional and institutional independence of forensic analysts from law enforcement customers raises concerns about bias and lack of incentive to develop robust validation and quality control in the field.<sup>53</sup>

Moreover, lessons from the field of psychology illuminate that a variety of cognitive as well as motivational biases confound the ability of police and prosecutors to screen against the use of unreliable evidence and methods, even given their vested interest in preventing both “type one” and (certainly) “type two” error.<sup>54</sup> The very act of “committing” to a particular suspect in an investigation – a mental leap that attends most critical pretrial activities such as conducting eyewitness procedures (in which a chosen suspect participates), interrogating (in which a particular suspect’s criminal involvement is vetted), testing evidence (in which at least sometimes a particular individual’s suspected physical connection to a crime is analyzed), and (in the case of prosecutors) filing charges – disables rational, well-motivated police and prosecutors from perceiving indicia of unreliability in the evidence and methods described above. Such mental commitments tend, despite best intentions, to drive individuals systematically to gather and evaluate new evidence in a manner that confirms prior beliefs and discredits contradictory beliefs – even when disconfirming evidence would be more probative.<sup>55</sup> These cognitive biases take hold in trained professionals no less than among the lay public.<sup>56</sup> Moreover, the professional and institutional context in which police and prosecutors work can exacerbate *motivational* bias that results not simply from hard-wired heuristic tendencies but from more context-specific and conscious incentives and desires. Resource constraints, organizational and professional structures and incentives (including a vested interest in arrest and conviction) systematically undermine the reliability of police and prosecutorial judgments in

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<sup>52</sup> See Leo, *supra* note 6.

<sup>53</sup> See generally NAS Report, *supra* note 5.

<sup>54</sup> See generally Findley & Scott, *supra* note 5.

<sup>55</sup> For a review of the leading studies see Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 *Rev. Gen. Psychol.* 175, 175 (1998). More recent work has documented confirmation bias in the law enforcement context. See, e.g., Karl Ask & Pär Anders Granhag, Motivational Bias in Criminal Investigators’ Judgments of Witness Reliability, 37 *Journal of Applied Social Psychology* 561, 579–80 (2007) (finding disconfirmation bias regarding witness statements in study group of Swedish investigators); Barbara O’Brien, A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making, 74 *Mo. L. Rev.* 999, 1033 (2009) (documenting confirmation bias among individuals tasked to persuade others of their belief in the guilt of a suspect).

<sup>56</sup> See, e.g., Ask and Granhag, *supra* note 45, at 579–80 (identifying confirmation bias in controlled study of trained investigators); Saul M. Kassin & Christina T. Fong, “I’m Innocent!”: Effects of Training on Judgments of Truth and Deception in the Interrogation Room, 23 *Law and Human Behavior* 499, 511–12 (1999) (finding that trained investigators were more likely than lay people to incorrectly “detect” deception in suspects); Christian A. Meissner & Saul M. Kassin, “He’s Guilty!”: Investigator Bias in Judgments of Truth and Deception, 26 *Law & Human Behavior* 469, 478–79 (2002) (same); Eric Rassin, Blindness to Alternative Scenarios in Evidence Evaluation, 7 *Journal of Investigative Psychology and Offender Profiling* 153, 162 (2010) (finding that trained investigators, in contrast with laypeople, exhibited blindness toward alternative suspects).

evidence gathering and evaluation.<sup>57</sup> At bottom, the concern is that from the standpoint of accuracy in criminal justice the universe of pretrial activities are precisely where external scrutiny should be at its peak, rather than (as the current doctrinal approach dictates) at its nadir.

Conceding that fact, there is another ameliorating possibility: that trial-based protections are adequate to catch error that persists through the pretrial process. Unfortunately, this notion too turns out to be fanciful.<sup>58</sup> Structural limitations on the defense capacity – including limited knowledge of the state’s case and limited investigative resources – and sheer lack of counsel’s skill or will are surely one category of concern.<sup>59</sup> But recent psychological research has shown as well that even under ideal laboratory conditions the tools of truth elucidation in which we place greatest faith – lay juror judgment and cross-examination – are less fool-proof than we imagine. Jurors, as it turns out, systematically over-estimate the credibility of government witnesses in general (especially police), and the reliability of two particularly risky forms of evidence: eyewitness identification and confessions.<sup>60</sup> Moreover, the traditional tools of interrogating this evidence at trial – cross-examination, and consideration of whether individual facts are corroborated by other evidence – are far less reliable tests than is typically understood.<sup>61</sup> And judicial gatekeeping under federal or state rules of evidence has not by in large served as an effective backstop for a range of risky types of evidence – with scientific evidence being the paradigmatic, but not the sole, example of this weakness.<sup>62</sup> More generally, judicial or jury assessment of reliability of evidence can be thwarted by “pseudo-corroboration” – the susceptibility of jurors (and others) to the allure of coherence in an evidentiary narrative, combined with the risk that early investigative error is compounded by the accumulation of evidence that converges on an internally consistent *but false* conclusion.<sup>63</sup> In sum, trial doctrines and processes neither incentivize better pretrial practices, nor do nearly as good a job at detecting error as our faith in the trial and the “unparalleled protections against convicting the innocent” entailed by that institution would counsel.<sup>64</sup>

But there is a bigger systemic concern, which is that the criminal trial itself borders on the illusory.<sup>65</sup> In terms of sheer numbers the criminal trial is vastly overshadowed by the system

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<sup>57</sup> See Ask and Granhag, *supra* note 45, at 562–63 (discussing factors that generate motivational bias for investigators).

<sup>58</sup> See, e.g., Simon, *supra* note 6; Brown, *supra* note 13, at 1592–1612.

<sup>59</sup> See, e.g., *id.*; Michael McConville & Chester L. Mirsky, Criminal Defense of the Poor in New York City, 15 N.Y.U. Rev. L. & Soc. Change 581, 762 (1986-87) (reporting study results that defense counsel only interviewed witnesses and visited crime scenes in only 4% of nonhomicide cases).

<sup>60</sup> See, e.g., David Harris, Failed Evidence 46–48, 53–54 (2012) (summarizing research demonstrating juror over-estimation of reliability of confessions and value of witness confidence); Leo, *supra* note 6, at 266.

<sup>61</sup> See Garrett, *supra* note 6; Simon, *supra* note 6.

<sup>62</sup> See, e.g., NAS Report, *supra* note 5; Peter J. Neufeld, The (Near) Irrelevance of Daubert to Criminal Justice: And Some Suggestions for Reform, 95 Am. J. Pub. Health 107 (2005).

<sup>63</sup> See *id.*

<sup>64</sup> *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O’Connor, J., concurring).

<sup>65</sup> Indeed when one considers the world of misdemeanor prosecutions it’s almost zero. See Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1353–65 (2012) (discussing plea rates and accuracy concerns in misdemeanor adjudication). While concerns about discretion and accuracy are vast and acute in the misdemeanor

of plea bargaining that resolves some ninety-six percent of criminal cases.<sup>66</sup> Adjudication by formal confession of liability would of course still be unproblematic if we had confidence that all guilty pleas equated with actual guilt. Yet skepticism on that score is widespread – even from otherwise confident proponents of the status quo in criminal justice.<sup>67</sup> The problem is multi-layered: Broad substantive criminal law and high, sometimes mandatory, penalties provide prosecutors with significant leverage in plea negotiations; and defendants frequently lack both discovery to assess the true strength of the state’s case, as well as (in the special case of the innocent defendant) reliable mechanisms to signal true lack of guilt.<sup>68</sup> Moreover, the high value of finality in the negotiated resolution of cases – why, after all, would the state make a time-saving deal only to face appellate litigation down the road?<sup>69</sup> – has fostered a regime in which the rights that might guard against inaccurate outcomes are bargained away as conditions of favorable treatment. As others have documented, discovery waivers, waivers of the right to challenge the effectiveness of counsel, and waivers of the right to post-conviction DNA testing are all widespread features of standard plea agreements in the state and federal systems.<sup>70</sup>

Be that as it may, there is yet a third and quite important possibility, which is that even given broad pretrial discretion as an embedded feature of criminal procedure doctrine, and risky evidentiary inputs that trials currently do not adequately vet, there exist adequate corrective mechanisms outside criminal procedure doctrine to both better equip trial processes to sort out bad evidentiary inputs, or directly correct flaws in pretrial practices. This sub-constitutional, and even extra-judicial space has been where much (indeed, the most creative and important) recent scholarship attending to reliability concerns created by pretrial discretion has focused its attention. Many, for example, have called on judges to more consistently embrace their discretion under state and federal rules of evidence to act as gatekeepers for not just scientific

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adjudication, and while quasi-inquisitorialism might provide some inroads in that distinctive context, see *infra* Part III, the bulk of the discussion in this Article has felony cases in mind.

<sup>66</sup> Motivans, *supra* note 7; Cohen et al., *supra* note 7.

<sup>67</sup> Compare *Lafleur v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (stating that plea bargaining “presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”), with *Kansas v. Marsh*, 548 U.S. 163, 198 (2006) (Scalia, J., concurring) (positing impressive error rate in criminal convictions of 0.027%).

<sup>68</sup> See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *Harv. L. Rev.* 2463, 2468 (2004) (observing that plea bargains are based not on goals of punishment but “wealth, sex, age, education, intelligence, and confidence,” and that structural influences skew bargains even more than trials); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909, 1947–49, 1951, 1965–66 (1992) (discussing factors undermining accuracy of guilty pleas).

<sup>69</sup> See *United States v. Mezzanatto*, 513 U.S. 196, 207 (1995) (discussing prosecutorial bargaining incentives based on resource limitations).

<sup>70</sup> See, e.g., King, *supra* note 8, at 648-50 (discussing ineffective assistance of counsel waivers); Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 *Duke L.J.* 209 (2005) (showing in study of 1,000 randomly selected plea agreements found that nearly two-thirds contained waivers of defendants’ rights to appeal); Susan R. Klein, *Monitoring the Plea Process*, 51 *Duq. L. Rev.* 559, 580-81 (2013) (discussing empirical research documenting presence of *Brady*, DNA, and post-conviction waivers in federal plea agreements); Wiseman, *supra* note 8, at 989 (discussing DNA waivers in federal and state courts); Turner, *supra* note 17; see also Memorandum from Attorney General Eric H. Holder, Jr., *Guidance Regarding Use of DNA Waivers in Plea Agreements*, <http://www.gov/ag/ag-memo-dna-waivers111810.pdf> (erecting presumption against but not banning DNA waivers).

evidence (as the post-*Daubert* regime contemplates), but other error-prone products of the investigative stage, including eyewitness testimony, confessions, and informants.<sup>71</sup> Others have called for a focus beyond the trial, to “new ways to ensure accuracy *other* than adversarial scrutiny and the incentives arising from trials and bargaining,” including expansion of pretrial discovery, direct improvements in the quality of investigation, and “increasing the involvement of the judicial branch” in pretrial rather than trial-centered activities.<sup>72</sup> Adoption of reliability-enhancing procedures for investigators; institutional arrangements such as blinding, more segmented case staffing, or greater supervisory or prosecutorial review of police investigations; and prosecutorial rulemaking to create checks on charging, discovery, and plea bargaining have all been advanced.<sup>73</sup>

But while these calls have been heeded in some quarters, the best examples of reform approaches remain largely features of outlier practices. The recording of interrogations is increasingly a part of law enforcement practice, though due largely not to judicial or legislative mandate but rather individual adoption by law enforcement agencies.<sup>74</sup> Even so, persistent opposition remains, and as Richard Leo and others have argued, recording does not diminish the importance of the (dramatically less popular) need for interrogation practices to change in the first instance.<sup>75</sup> A small number of jurisdictions have been leaders in reforming approaches to eyewitness identification, both through required investigative procedures that comport with best practices from the social science research,<sup>76</sup> and through greater courtroom scrutiny via, for example, jury instructions that specifically educate jurors on the reasons for eyewitness error.<sup>77</sup> And yet, many more jurisdictions remain without such reforms.<sup>78</sup> Expanded discovery and access to evidence has been dramatic in certain limited areas – specifically, *post*-conviction

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<sup>71</sup> See Sandra Guerra Thompson, Judicial Gatekeeping of Police-Generated Witness Testimony, 102 J. Crim. L. & Criminology 329, 339 (2012) (reviewing proposals).

<sup>72</sup> Brown, *supra* note 13, at 1645.

<sup>73</sup> see, e.g., Garrett, *supra* note 6; Simon, *supra* note 6; Barkow, *supra* note 22; Bibas, *supra* note 66, at 2543; Maximo Langer, Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure, 33 Am. J. Crim. L. 223, 295–97 (2006); Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29, 37 (2002).

<sup>74</sup> See Harris, *supra* note 54 ; Thomas P. Sullivan, Electronic Recording of Custodial Interrogations: Everybody Wins, 95 J. Crim. L. & Criminology 1127, 1127 (2005) (“In the past few years, the many benefits of complete audio or video recording of custodial interviews have become increasingly apparent to all parties.”).

<sup>75</sup> See Leo, *supra* note 6, at 296 (encouraging recording of confessions but conceding that “most police departments still do not” do so, including the FBI and several major urban departments).

<sup>76</sup> See, e.g., State v. Lawson, 352 Or. 724, 757 (Or. 2012); Tex. Code Crim. P. Art. 38.20; N.C. Gen. Stat. § 15A-284.50; N.J. Att’y Gen., Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Procedures (Apr. 18, 2001), available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

<sup>77</sup> See, e.g., State v. Guilbert, 306 Conn. 218, 229 (2012); State v. Cabagbag, 127 Hawai’i 302, 311 (Hawaii 2012); State v. Henderson, 208 N.J. 208 (2011).

<sup>78</sup> See Police Executive Research Forum, A National Survey of Eyewitness Identification Procedures in Law Enforcement Agencies, NIJ Grant No. 2010-IJ-CX0032 (Mar. 8, 2013), available at <http://policeforum.org/library/eyewitness-identification/NIJEyewitnessReport.pdf>. Federal courts have been particularly resistant to change. See, e.g., United States v. Luis, 835 F.2d 37, 41 (2d Cir. 1987); see Sandra Guerra Thompson, Judicial Gatekeeping of Police-Generated Witness Testimony, 102 J. Crim. L. & Criminology 309 (2012).

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access to biological evidence.<sup>79</sup> But aside from a small number of jurisdictions that have moved to open- or nearly-open file discovery, pretrial, and especially pre-plea access to evidence remains limited and apparently largely governed by the discretion of individual offices or prosecutors.<sup>80</sup> Greater prosecutorial rulemaking, both internally and as a prompt for changes in police practices, has been identified as a promising reform, but there is little evidence that it has garnered mainstream adoption.<sup>81</sup> A small number of states have moved to insert judges more directly into pretrial processes, for example via requirements for court-supervised pretrial and pre-plea disclosure, or judicial monitoring of pleas.<sup>82</sup> But again, this is a minority approach; far more courts and rulemakers have expressly rejected invitations to such an approach.<sup>83</sup>

## **B. Beefing Up the Standard Account**

Returning for the time being to the realm of court-driven oversight, what accounts for the stark and, more importantly, the *persistent* divide in criminal procedure doctrine between the judicial scrutiny that attends pretrial and trial-focused activities? A prevalent (though certainly not exclusive) explanation from observers of doctrine in this area has been, to use the Court's phrase "our preference for an accusatorial rather than an inquisitorial system of criminal justice."<sup>84</sup> Roughly speaking, that preference is understood to root constitutional criminal procedure protections exclusively in the institution of the adversary trial, and more broadly to reject founding-era features of Continental European criminal process in favor of the common law trial procedures associated primarily with England.<sup>85</sup>

In part, the accusatory-inquisitorial distinction functions as an interpretative touchstone for divining the meaning of key constitutional criminal protections that by their terms pertain to

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<sup>79</sup> See Innocence Project, Post-conviction DNA Testing, available at <http://www.innocenceproject.org/Content/304.php> (last visited Aug. 19, 2013) (documenting access to forensic evidence for post-conviction DNA testing in all fifty states).

<sup>80</sup> See, e.g., Bruce Green, Federal Criminal Discovery Reform: A Legislative Approach, 64 Mercer L. Rev. 639 (2013) (noting that expanded federal attention to discovery compliance has been tethered to constitutional standard and not broader norms); Janet Moore, Democracy and Criminal Discovery Reform After *Connick* and *Garcetti*, 77 Brook. L. Rev. 1329, 1373 (2012).

<sup>81</sup> See Wright & Miller, *supra* note 68.

<sup>82</sup> Arizona R. of Crim. P. 15.8, 17.4; Fla. R. Crim. P. 3.172; Ill. S. Ct. R. 402(d); *State v. Warner*, 762 So. 2d 507, 513 (Fl. 2000); Idaho Crim. R. 11; Ill. Sup. Ct. R. 402 (d); N.J. S. Ct. R. 3.9; *Medlin v. State*, 276 S.C. 540 (1981); *State v. Wakefield*, 130 Wash.2d 464; *People v. Fontaine*, 28 N.Y.2d 592, 593 (1971). [Insert North Carolina, Ohio, Texas, and Massachusetts].

<sup>83</sup> See Brown, *supra* note 13; Turner, *supra* note 17, at 202—04, 212—13; King, *supra* note 8, at 671 (discussing non-constitutional options for restricting waiver but finding little adoption to date); Wiseman, *supra* note 8, at 963 (discussing small number of states enacting legislation to preclude waiver of DNA testing).

<sup>84</sup> *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964).

<sup>85</sup> It bears noting, however, that two central feature of American accusatory criminal justice – the centrality of defense counsel, and the figure of the public prosecutor as the state's representative in litigation – were deliberate departures from the English common law at the time of the founding, and indeed in the case of the latter represent adoption of a feature of Continental institutions. See *United States v. Ash*, 413 U.S. 300, 308 (1973); *Powell v. Alabama*, 287 U.S. 45, 60-66 (1932).

initiation of a “criminal case” and at “trial.”<sup>86</sup> Thus, the Framers’ putative distaste for Continental adjudication based upon confessions and other evidence procured in secret and through coercive means provides a historically inflected interpretative touchstone for the Fifth Amendment right against compelled self-incrimination, and the Sixth Amendment counsel, jury, and confrontation rights. Exemplary is the Court’s account in the nineteenth century decision *Brown v. Walker* of the historical roots of the self-incrimination prohibition: “The maxim, ‘Nemo tenetur seipsum accusare,’ had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons . . . . So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.”<sup>87</sup> Similar is the Court’s recent account of the confrontation clause as drafted to reflect the Founders’ understanding of the English common law as guaranteeing “live testimony in court subject to adversarial testing” in contrast to Continental systems’ condoning of “examination in private by judicial officers,” as well as their outrage at notorious examples of England’s departure from common law guarantees in, among other instances, the trial of Sir Walter Raleigh.<sup>88</sup>

But if conceptions of adversarial justice operate as a rule of constitutional inclusion, so too do they delineate exclusion from the ambit of oversight. The modern Court has assiduously policed the line between where the Constitution guarantees adversarial scrutiny and where it does not, a fact of significant consequence for oversight of pretrial activities.<sup>89</sup> To be sure, early decisions occasionally blurred this line, as when the Court in *Boyd v. United States* characterized the Fourth and Fifth Amendments as enjoying an “intimate relation . . . almost running into each other” such that “compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the fifth amendment to the constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the fourth amendment.”<sup>90</sup> But that sentiment has been abandoned with the rise of a starker accusatory-inquisitorial distinction. Thus, in *Anderson v. Maryland*, the Court backtracked from *Boyd* and held that the Fifth

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<sup>86</sup> U.S. Const. amends. V & VI.

<sup>87</sup> 161 U.S. 591, 596-97 (1896); see also *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) (stating Fifth Amendment exclusionary mandate premised on notion that “ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth”); *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (“Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end.”); *Chambers v. Florida*, 309 U.S. 227, 237 (“The determination to preserve an accused’s right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes.”).

<sup>88</sup> *Crawford v. Washington*, 541 U.S. 36, 43 (2004); see also *Blakely v. Washington*, 542 U.S. 296, 313 (2004) (“Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury.”).

<sup>89</sup> Cf. *Van Kessel*, supra note 28, at 493-95 (making similar point with regard to trial, rather than pretrial, procedures).

<sup>90</sup> 116 U.S. 616, 634—35 (1886).

Amendment did not per se forbid the state from seizing business records or admitting them against the authoring defendant at trial: nothing about such a seizure compelled the statements made by the defendant in the records, and compulsion to assist police in evidence gathering was beyond the purview of Fifth Amendment concerns.<sup>91</sup> In a similar manner, the Court has rejected interpretations of the Confrontation and Compulsory Process clauses of the Sixth Amendment that would require fuller discovery in the pretrial realm. Thus, in *Pennsylvania v. Richie*, the Court explained that such an interpretation of the Confrontation Clause would expand the clause beyond its function of preserving “wide latitude at trial to question witnesses,” in the limited space of trial.<sup>92</sup>

By the time of *McNeil v. Wisconsin*, a majority of the Court actually embraced what it called an *inquisitorial* characterization of American criminal justice in the *pretrial* realm: “What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties. . . . Our system of justice is, and has always been, an inquisitorial one at the investigatory stage.”<sup>93</sup> As a sphere of criminal justice processes that was beyond the core concern of adversarial procedural protections, it was only natural that in regard to pretrial activities “legalistic” norms of assuring reliable evidence in the trial sphere would be unwelcome – a premise that *Brinegar* introduced by way of a stark adversary/non-adversary divide, and that *Illinois v. Gates* drew upon in insisting that “flexible” and non-legalistic evaluations were requirements in substantive judicial review of pretrial evidence-gathering.<sup>94</sup>

Beyond the boundaries of the Fifth and Sixth amendments, provisions where historical *anti*-inquisitorial roots can plausibly be identified, the adversarial-inquisitorial contrast has still served broadly as a justificatory narrative. The Court has repeatedly rejected constructions of constitutional criminal rights that enshrine practices deemed more consistent with (some conception of) a system of adjudication that is quite truly *foreign* to our own adversarial one. An example of such practices are mechanisms of free-standing disclosure obligations on the state that would eschew party-driven case development. Thus, when the Court announced in *United States v. Bagley* that prosecutors had an affirmative constitutional duty to disclose favorable evidence, independent of any request from opposing counsel, it recognized that this was a “departure from a pure adversary model” of adjudication – a limited one, lest the Court “entirely alter the character and balance of our present systems of criminal justice”<sup>95</sup> – read, “our

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<sup>91</sup> *Andresen v. Maryland*, 427 U.S. 463, 476 (1976); see also *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Davis v. United States*, 512 US 452, 456—58 (1994); *Schmerber v. California*, 384 U.S. 757, 770 (1966).

<sup>92</sup> 480 U.S. 39, 52-53 (1987); see also [Compulsory Process cases].

<sup>93</sup> 501 U.S. 171, 189 n.2 (1991).

<sup>94</sup> See *Illinois v. Gates*, 462 U.S. 213, 230—31 (1983) (“Perhaps the central teaching of our decisions bearing on the probable cause standard is that it is a “practical, nontechnical conception.” *Brinegar v. United States*, 338 U.S. 160, 176 (1949).”); *id.* at 174 (“Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system . . . . However, [t]hose standards have seldom been so applied [in evaluating arrests].”).

<sup>95</sup> 473 U.S. 667, 675 (1985).

adversary system.” Notably, when the Court considered (and rejected) in *United States v. Ruiz* the notion that due process required disclosure of favorable evidence *prior* to trial, the briefs debated the extent of *Bagley*’s departure from the adversary system, with the government successfully characterizing a constitutional pretrial disclosure obligation as a “fundamentally alter[ing] the adversary system.”<sup>96</sup>

Similarly, the Court in recent times has repeatedly rejected the suggestion that due process of law entails a guarantee that pretrial procedures will produce reliable evidence or accurate outcomes, based upon constraints on the judicial role dictated by the adversary system. In regard to confessions in *Colorado v. Connelly*, jailhouse snitches in *Kansas v. Ventris*, and eyewitness identification in *Perry v. New Hampshire*, the Court has repeatedly rejected the suggestion (advanced by state supreme courts in two of the three instances) that the guarantee of due process contemplated rigorous judicial gatekeeping of the evidence gathered in investigation, absent affirmative allegations of deliberate police misconduct. In each instance, the Court affirmed that in “our” system, substantive accuracy is committed to the jury function mediated by the common law of evidence, while due process protects only against the state gaining an “unfair advantage” in adversary adjudication.<sup>97</sup> Thus, as with *Brady* doctrine, the premise is that constitutional criminal procedure guarantees only that courts maintain the level of the playing field for the adversary process – *and no more*.

Also rooted, at least in part, in “our” accusatory system has been the Court’s posture toward scrutiny of plea bargaining: a reluctance rooted in the adversarial ideals of a limited judicial role, and the interrelated values of party control and prosecutorial discretion.<sup>98</sup> In a sense, of course, conviction by plea is the antithesis of accusatory justice, lacking as it does any of the trappings of adversarial contest and epitomizing conviction by confession.<sup>99</sup> But as others have noted, plea bargaining is (at least in theory) the full flowering of adversarial values: “the adversarial notion that the parties stand as equal autonomous disputants before the court, and that the court is not an independent engine for state administration of justice, but rather an arbitrator of such disputes as parties choose to bring before it.”<sup>100</sup>

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<sup>96</sup> Reply Brief for the United States at 2, *United States v. Ruiz*, 536 U.S. 622 (2002); see also Brief for Respondent at 12, *United States v. Ruiz*, 536 U.S. 622 (2002) (arguing that *Bagley* modified the adversary system); see also *Wardius v. Oregon*, 412 U.S. 470, 474 (1973) (“[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused and his accuser.”).

<sup>97</sup> See *Perry v. New Hampshire*, 132 S. Ct. 716, 728 (2012); *Kansas v. Ventris*, 556 U.S. 586, 594 n.\* (2009); *Colorado v. Connelly*, 479 U.S. 157, 167 (1996).

<sup>98</sup> It remains to be seen whether last Term’s decisions in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Frye v. Missouri*, 132 S. Ct. 1399 (2012), represent exceptions to the rule or the proverbial camel’s nose.

<sup>99</sup> Compare *North Carolina v. Alford*, 400 U.S. 25 (1970) (requiring “factual basis” for plea), with *United States v. Mitchell*, 526 U.S. 314, 322–24 (1999) (describing plea colloquy as amounting more to a negotiated stipulation than adversarial confrontation).

<sup>100</sup> Lynch, *supra* note 23, at 2120-21 (noting as well, however, that in practice plea bargaining “actually looks, to most defendants, far more like what American lawyers would call an inquisitorial system than like the idealized model of adversary justice described in the textbooks”); see also Langer, *supra* note 71, at 247. Significantly, plea bargaining is, if present at all, a comparably minor feature of most Continental criminal law systems, reflecting (along with other rules limiting prosecutors’ charging discretion) the inquisitorial sensibility that “the state may not

These values have led the Court to reject a range of postulated roles for judges supervision or free-standing error-correction,<sup>101</sup> and relative judicial passivity in plea bargaining is a further manifestation.<sup>102</sup> Thus, in *Brady v. United States*, in which the defendant argued that the threat of the death penalty rendered his guilty plea to a charge carrying a term of years involuntary, the Court held that judicial assessment of substantive coercion should not undo the “mutual[] advantage” that presumptively flows from plea bargains negotiated by competent counsel and assented to by duly advised defendants.<sup>103</sup> In *Mezzanatto*, the value of “party control . . . consonant with the background presumption of waivability” eclipsed even Congressional judgment when the Court upheld agreements to waive the inadmissibility of a defendant’s statements in negotiations, enshrined by the Federal Rules of Evidence and Criminal Procedure for the very purpose of preserving the overall market for pleas.<sup>104</sup> On the flip side, federal courts governed by the procedural dictates of Rule 11 as well as a majority of state courts routinely reject as involuntary pleas that bear the imprimatur of judicial involvement in the bargaining process – a role thought by many commenters to be at times conducive rather than antithetical to accurate and just outcomes; such conduct, even if not outright unconstitutional, contravenes “[t]he judge’s role . . . [as] that of a neutral arbiter of the criminal prosecution.”<sup>105</sup>

The account that emerges is of a system of criminal procedure made both coherent and legitimate by adherence to core features of “our” accusatory system: the requirements of orality

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abandon its obligation to guarantee that the law on the books is enforced and that the facts support the charge.” Goldstein, *supra* note 19; see also Turner, *supra* note 17.

<sup>101</sup> See, e.g., *Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008); *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring); *McNeil v. Wisconsin*, 501 U.S. 171, 189 n.2 (1991) (“What makes a system adversarial rather than inquisitorial is not the presence of counsel, much less the presence of counsel where the defendant has not requested it; but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.”); Van Kessel, *supra* note 28, at 491-92 (“[T]o the extent the Court’s dicta constitutionalizes the process of “adversary testing,” it erects substantial constitutional barriers against assigning to judges the powers traditionally held by lawyers in the adversary system.”).

<sup>102</sup> This is resonant with the voluminous literature assessing the Court’s contract-based frame for understanding plea bargaining. See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909 (1992).

<sup>103</sup> 397 U.S. 742, 758 (1970); see also *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting) (describing “give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power”).

<sup>104</sup> *United States v. Mezzanatto*, 513 U.S. 196, 206 (1995) (invoking party control that is consonant with the background presumption of waivability).

<sup>105</sup> *United States v. Bruce*, 976 F.2d 552, 557 (9th Cir. 1992); see Fed. R. Crim. P. 11(c)(1); *United States v. Bradley*, 455 F.3d 453, 460–61 (4th Cir. 2006) (discussing concern with protecting judge as “neutral arbiter”); *United States v. Werker*, 535 F.2d 198, 202 (2d Cir. 1976); *State v. Williams*, 265 Wis.2d 229, 243 (2003). Cf. Brief for Respondent at 35–37, *United States v. Davila*, 133 S. Ct. 2139 (2013) (characterizing judicial “exhortation” of plea acceptance in inquisitorial terms). Several states, however, have fashioned regimes of judicial involvement, either in plea negotiation or in substantive review of a plea deal following bargaining. See, e.g., N.C. Gen. Stat. Ann. § 15A-1021(a) (“The trial judge may participate in [plea] discussions”); Vt. R. Crim. P. 11; Turner, *supra* note 17 (discussing Connecticut and Florida). The Supreme Court affirmed last Term that any outright ban on judicial involvement, as reflected in the federal rules, is “prophylactic” rather than “impelled by the Due Process Clause or any other constitutional requirement.” *United States v. Davila*, 133 S. Ct. 2139, 2142 (2013).

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and face-to-face confrontation of witnesses;<sup>106</sup> conviction on the basis of a contest of narratives developed through adversaries' independent investigative and advocacy efforts;<sup>107</sup> the role of the judge as a neutral arbiter and the centrality of the jury as fact-finder;<sup>108</sup> and more fundamentally, an expressed commitment to individual autonomy over truth-finding and, relatedly, bureaucratic expertise.<sup>109</sup> Inquisitorial systems serve as a structural "contrast model," a foil for understanding appropriate doctrinal and institutional arrangements in "our" system of criminal justice.<sup>110</sup> In the Court's account, embracing accusatory justice necessarily entails rejecting inquisitorial institutions and approaches; and conversely, rejecting inquisitorial institutions and approaches legitimates adversarialism.<sup>111</sup> Hence, as David Sklansky has explained, the orientation is not simply pro-adversarialist, but at least as importantly is an "anti-inquisitorial" stance.<sup>112</sup>

And herein lies the rub for efforts to map a different, more searching approach to legal oversight of pretrial activities. Scholars have unquestionably been more critical than the Court in their attitudes toward "our adversary system." Much of what commentators think would usefully fill the pretrial vacuum is *in fact* more resonant with, indeed often expressly inspired by, Continental legal systems. Strategies to expand defense access to evidence in the pretrial stage through greater openness in police and prosecutorial files, or to depoliticize and enhance the professionalism of police and prosecutor offices through rulemaking and expansion of bureaucratic checks, would certainly bring United States practices more in line with – though certainly not replicate – a European model of investigative practices.<sup>113</sup> So too would proposals to insert judges into substantive evaluation of charge or sentence bargaining that occurs in the course of guilty plea negotiation, as such practices would move away from the ideal of autonomous, party-driven control and the judge as umpire, and toward a conception of the judge as independently enforcing the state's commitment to accuracy.<sup>114</sup>

Moreover, these proposals are frequently accompanied by the concession that than, at least as a positive matter, greater scrutiny of pretrial practices is in tension with our putative

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<sup>106</sup> See *Crawford v. Washington*, 541 U.S. 36, 42 (2004); *Rogers v. Richmond*, 365 U.S. 534 (1961).

<sup>107</sup> See *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988); *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

<sup>108</sup> *Blakely v. Washington*, 542 U.S. 296, 312 (2004); *Crawford v. Washington*, 541 U.S. 36, 62 (2004).

<sup>109</sup> See *Blakely v. Washington*, 542 U.S. 296, 313 (2004) ("One can certainly argue that [efficiency or fairness] would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.").

<sup>110</sup> See Sklansky, *supra* note 19.

<sup>111</sup> *Withrow v. Williams*, 507 U.S. 680, 690-92 (1993); *McNeil v. Wisconsin*, 501 U.S. 171, 181-82 (1991); *United States v. Williams*, 504 U.S. 36, 41 (1991); *Berkemer v. McCarty*, 468 U.S. 420, 441 (1984) ("Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." (emphasis added)).

<sup>112</sup> See Sklansky, *supra* note 19.

<sup>113</sup> See Findley, *supra* note 22, at 900-01; Langer, *supra* note 71, at 253–55; Luna & Wade, *supra* note 17, at 1431–32 (2010).

<sup>114</sup> See *id.*

adversarial preferences, and hence faces significant doctrinal and political barriers to adoption.<sup>115</sup> However, it bears emphasizing that the crux of the tension is not so much “our” adversarial system itself, but rather in the dichotomous imperative of the contrast model.<sup>116</sup> In other words, it is the Court’s apparent commitment to barring *any* degree of inquisitorial incursion that is consequential here, especially in limiting hospitability to modified concessions to inquisitorial borrowing. Exemplary is the Court’s rejection of doctrinal inroads to expand judicial gatekeeping of eyewitness or confession evidence in *Connelly*, *Ventris*, and *Perry*, rooted in commitments foundational to “our” system of justice that juries are competent to hear and vet such evidence.<sup>117</sup> The discovery cases discussed above are the exception that proves this rule: The Court has jealously guarded the limited encroachment on party-controlled litigation that *Brady*’s affirmative prosecutorial obligation creates, repeatedly affirming that the obligation is no greater than the minimum required to equalize adversarial imbalance at (the adversary) trial.<sup>118</sup> The upshot is that pursuant to the Court’s anti-inquisitorial paradigm, both coherence and legitimacy (we are told) require vigilance *against* such practices.

It is worthwhile on this score to make what is perhaps an obvious point. There is no principled reason – and the Court never clearly offers one – why *some* increment of softening adversarial commitments, especially in the interest of enhancing accuracy (unquestionably at least one goal of our system of adjudication), cannot be tolerated. It is not our adversary system itself, but the nature of the Court’s anti-inquisitorialism, that explains the lack of traction for any such proposals – even in an era when the reliability of our criminal justice system, and in particular pretrial processes, is increasingly subject to question.

### **C. The Standard Account Is Incomplete**

Anti-inquisitorialism is undoubtedly an important conceptual and rhetorical commitment in the Court’s criminal procedure doctrine, and, as the previous Section elaborated, it offers at least a partial explanation for the Court’s seeming deafness to the increasingly high-pitched indictment of the breadth of substantive discretion committed to pretrial activities. Nevertheless, the explanation is both descriptively incomplete and normatively unsatisfying. The subsequent Part will make the descriptive case. It is worth pausing here to develop the normative point: What is the value of *looking for* an additional accounting of the Court’s jurisprudential preferences? Putting to the side the intrinsic value of (what this Article contends is) a more

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<sup>115</sup> See, e.g., Darryl Brown, American Prosecutors’ Powers and Obligations in the Era of Plea Bargaining, in Luna and Wade, *Prosecutor in Transnational Perspective*, supra note 24, at 202 (explaining that “[t]he paucity of affirmative prosecutorial obligations can be explained by the traditional presumption that an adversarial trial is the mode of disposition for criminal charges”); Leo, supra note 6; Andrew E. Taslitz, Temporal Adversarialism, Criminal Justice, and the Rehnquist Court: The Sluggish Life of Political Factfinding, 94 *Geo. L.J.* 1589, 1593 (2006).

<sup>116</sup> Professor Sklansky himself notes but does not emphasize the relevance of his account for criminal procedure doctrine, or the absence thereof, concerning pretrial activities. See Sklansky, supra note 19.

<sup>117</sup> See supra note 95 and accompanying text.

<sup>118</sup> See, e.g., *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *Moore v. Illinois*, 408 U.S. 786 (1972); see also *Arizona v. Youngblood*, 488 U.S. 51 (1988) (noting limited obligation); Brief for Petitioner, *Arizona v. Youngblood*, 488 U.S. 51 (1988) (arguing that obligation to preserve fruits of investigation was inconsistent with adversary system).

complete understanding of doctrine in this area, there are at least two additional reasons to give fuller consideration to an internal view of the Court's work.

The first relates what might some view as a quaint respect for the importance of the Court's jurisprudence. Scholarship aiming to remind us that constitutional criminal procedure is not the only or best game in town from the standpoint of improving criminal justice outcomes is essential and well-taken. But for better or for worse, the Court's criminal procedure doctrine remains a touchstone for our collective understanding of how if at all the Constitution constrains government in administering criminal justice. The lone centrality of anti-inquisitorialism leaves the Court vulnerable to a charge of total and complete deafness to the challenges that have been posed to the reliability of the criminal justice system – not simply in the academic literature, but in litigation and amicus practice before the Court over the last decade. Relatedly, it also leaves us lacking understanding of how, if at all, the Court has *adapted* to those challenges while still holding to the adversarial line. The account that follows aims to dispel the first notion by developing the second point – the dynamic of adaptation.

There is a second and even more practical cash-out. As Part I.A discussed, many have recognized that the odds of a fundamental shift in constitutional doctrine are slim, that the Supreme Court or even lower courts are inhospitable environments for the reliability-focused arguments of the day, and that those with aspirations to diminish pretrial discretion and enhance accuracy are best advised to take the route of direct institutional reform – prompted either by legislation or from within.<sup>119</sup> But in abandoning the Court's doctrinal ship for the putatively more serviceable vessels of state courts and legislatures, scholars and reformers may not have sufficiently grappled with the influence of anti-inquisitorialism as both a sometime-dictate of constitutional interpretation,<sup>120</sup> and a more pervasive legal-cultural benchmark.<sup>121</sup> Lower courts have widely taken the Court's anti-inquisitorial commitments to militate rejection of more far-reaching pretrial oversight.<sup>122</sup> And even in the political sphere, particularly in the

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<sup>119</sup> See Findley, *supra* note 22, at 913;

<sup>120</sup> Colin Starger, *The Logos of an Argument*, 99 *J. Crim. L. & Criminology* 1045 (2009) (arguing that logical structure of Supreme Court argumentation is influential in lower courts).

<sup>121</sup> See John H. Langbein, *The Origins of Adversary Criminal Trial* 343 (2003) (asserting adversarial infatuation “had the effect of perpetuating the central blunder of the inherited system: the failure to develop institutions and procedures of criminal investigation and trial that would be responsible for and capable of seeking the truth.”); Simon, *supra* note 6, at 214 (characterizing accusatorial rhetoric as “a form of legal nationalism” (emphasis in original)); Damaska, *supra* note 19, at 554–87; Goldstein, *supra* note 19, at 1016–19 (1974) (discussing connections between theoretical and technical facets of accusatorial criminal procedure); Luna & Wade, *supra* note 17, at 1505-06; William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure As an Instrument of Reform*, 54 *Ohio St. L.J.* 1325, 1355-62 (1993).

<sup>122</sup> See, e.g., Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 *S. Cal. L. Rev.* 323, 339 (2011) (observing that “most state courts continued to apply their own constitutional provisions in lockstep with federal analogues”). In this regard, it is worth observing that New Jersey and Alaska are the two states typically identified as occupying the leading edge of reform in regard to pretrial oversight – in particular a more direct role for the judiciary. Those states are also atypical in maintaining a far more hierarchical criminal justice bureaucracy than is the norm in the adversary approach, including strong norms of top-down prosecutorial leadership and supervision of police work, and supervisory action by the state supreme courts. That the greatest inroads have come in states that have gone in for a pound if for a penny is telling. See Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 *Tex. L. Rev.* 2055 (2006) (commenting on “outlier” features of New Jersey and Alaska).

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context of debates surrounding the appropriate boundaries of American prosecutorial discretion, there is evidence that the lack of any competitor to the standard account of “our” adversary system’s dictates creates an impediment to the more far-reaching types of approaches discussed above.<sup>123</sup> An important sentiment animating this Article, then is that if there are more nuanced aspects of the Court’s commitment to adversarialism, it is well to recover them in part to supply other actors and decisionmakers with plausible alternative narratives that are nevertheless rooted in the Court’s influential depiction of “our” criminal justice system.

**Comment [JEL1]:** How quasi-inquisitorialism has emerged is instructive in seeing what has influenced Court’s view of the criminal justice landscape.

## II. *J’Avoue*: The Supreme Court’s Quasi Inquisitorialism

This Part begins by re-examining the Court’s conception of police pretrial activities, especially evidence-gathering and arrest-making, that were discussed in Part I as framed by the anti-inquisitorial account. Returning first to Fourth Amendment doctrine, the discussion reveals that while the Court delineated a kind of negative space in which more interventionist constitutional protections tethered to the accusatory sphere had no traction, it also depicted that space as one in which police and prosecutors operating in the pretrial sphere are restrained by bureaucratic accountability, professionalism, and expertise that serve to legitimate the lack of (accusatorial) judicial oversight. After elucidating these themes in the context of Fourth Amendment doctrine, the account then continues to identify these same attributes in decisions regarding police work outside the narrow confines of search and seizure, – indeed, to varying degree but with nonetheless consistent repetition, throughout decisions concerning constitutional scrutiny of pretrial activities such as eyewitness procedures, interrogation, and evidence retention and access. The discussion then turns to the realm of prosecutorial discretion, and identifies similar themes and attributes in the Court’s characterization of the prosecutorial role in the context of substantial, in some instances near-total, judicial deference to pretrial prosecutorial conduct. Significantly, these qualities that the Court attributes to investigators and prosecutors are more resonant with institutional and professional attributes of Continental, inquisitorial systems of criminal justice than the traditional conception of the American system. They are also, for that reason, consonant with many of the types of reforms urged by those who criticize our adversarial system’s privileging of pretrial discretion over reliability. In other words, while disclaiming an formal inquisitorial mode, the Court appears to be leveraging a depiction of on-the-ground pretrial practice that offers, albeit informally, some of the accuracy-enhancing features that are attributed to Continental systems.

Several clarifications are in order at the outset. None of what follows should be taken to argue that the Court is self-consciously fashioning quasi-inquisitorial legal norms. The account

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<sup>123</sup> See, e.g., Bruce A. Green, Prosecutors and Professional Regulation, 25 Geo. J. Legal Ethics 873, 875 (2012); Pizzi, supra note 120, at 1355-62; Brief for National District Attorneys Association as Amici Curiae Supporting Petitioner, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145); Proposed Changes to Wash. RPC 3.8, available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplayArchive&ruleId=251](http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=251) (“A concern has been raised that suggested subsection (h) to RPC 3.8(h) is contrary to the adversary system of justice and fundamentally changes substantive law regarding the prosecutor’s role.”); Letter of Emmett Sullivan to Richard Tallman, (Apr. 28, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR%20Suggestions%202009/09-CR-A-Suggestion-Sullivan.pdf>; Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 1, 149–50 (Sept. 17, 1974) (Testimony of Richard Thornburg).

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identifies narrative themes and trends in what facts and circumstances clearly animate the Court's decisionmaking with regard to pretrial doctrine – *not* (or at least not usually) decision rules rooted in quasi-inquisitorial standards. But, although the Court consistently declines invitations to constitutionalize such attributes – as, for example, when it has rejected proposed Fourth Amendment reasonableness tests that are tethered to police department policies<sup>124</sup> – it nevertheless frequently highlights their presence in specific decisions, and, interestingly, signals the significance of such attributes at oral argument.

Nor does this Part aim to argue that the Court's positive account of bureaucratic, professional, and expert restraint should often be taken at face value. Indeed, the discussion throughout will highlight ways in which the Court's reliance on putative quasi-inquisitorial characteristics is empirically thin or even disinterested, and Section C will explore the extent to which marshaling the features of quasi-inquisitorialism has been largely motivated and opportunistic – both on the part of the Court (particularly as it has aimed to create space for diminishing judicial remediation of criminal procedure violations, and has benefitted from cover in holding that line against the innocence/accuracy assault), and the parties practicing before it. Nevertheless, not *all* deployments of the quasi-inquisitorial narrative have been cynical, and whatever the mix of reasons for its traction in the Court's jurisprudence, its presence there as a counterweight to a purer anti-inquisitorial account creates opportunities for recasting criminal justice norms. Or so Part III will argue.

## **A. Police in the Quasi-Inquisitorial Pre-trial Sphere**

### *1. Search and Seizure Sets the Stage*

Recall that, outside the context of custodial interrogation and the (readily waivable) constraints of *Miranda*,<sup>125</sup> police may operate relatively, and increasingly, free from judicial oversight in evidence gathering and evaluation. Significantly, however, as the Court began to roll back the requirement of pretrial oversight by magistrates through the warrant-issuing process, it began to look elsewhere to identify constraints to ensure a baseline of fairness *and* reliability in police work. What often filled the gap, according to the Court, were mechanisms of bureaucratic and professional rather than judicial accountability – within police hierarchy and, increasingly, through prosecutorial oversight. Each of these qualities – bureaucratic checks on investigative work, notions of professionalism that internalize the pursuit of reliable investigative output, and quasi-judicial supervision through the office of the prosecutor – is arguably more resonant with features of inquisitorial systems (in their real and idealized forms) than the clash of competitive adversaries that is prototypical of the accusatory model.<sup>126</sup>

#### a. The regulatory police bureaucracy

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<sup>124</sup> See, e.g., *Kentucky v. King*, 131 S. Ct. 1849, 1861 (2011); *Whren v. United States*, 517 U.S. 806, 815 (1996).

<sup>125</sup> See, e.g., Richard Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies For Dealing With The Obstacles Posed By Miranda*, 84 *Minn. L. Rev.* 397 (1999).

<sup>126</sup> See, e.g., Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *Yale L.J.* 480, 507–08 (1975); Frase, *supra* note 23, at 555–64; John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 *Yale L.J.* 1549, 1555 (1978).

Beginning in the 1970's, the Court's concession in *Terry v. Ohio* that police could stop, question, and even (protectively) frisk individuals based on a degree of suspicion short of probable cause<sup>127</sup> emerged as the proverbial camel's nose, enlarging the doctrinal tent for a range of scenarios where Fourth Amendment "reasonableness" was met by police searches lacking a warrant, probable cause, or *even* individualized suspicion. So long as a balance of "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty" tilted in the government's favor, seizures short of arrest, and the searches they entailed, would be permissible.<sup>128</sup> Significantly, the Court first moved in this direction in the context of reviewing random, warrantless vehicle stops conducted by federal Border Patrol agents – a law enforcement agency governed by both identifiable internal policies as well as a federal statutory and regulatory regime. The Court's decisions, which grew progressively less *legally* restrictive of police, drew heavily on these extra-legal agency guidelines, and a general expression of trust in an emerging bureaucratic regulatory framework for police agencies, to set the parameters for law enforcement discretion.<sup>129</sup>

When first confronted by such a challenge, in *United States v. Brignoni-Ponce*, the Court rejected the authority of Border Patrol agents to stop vehicles in order to question occupants about their immigration status, where such stops were made by "roving" agents unassigned to a "fixed" Border Patrol checkpoint.<sup>130</sup> While these stops were less intrusive than arrests, the Court ruled that border agents would nevertheless be required to point to "specific articulable facts" justifying stops – lest they enjoy limitless discretion to detain residents as well as passers-through in the border region.<sup>131</sup> Just a year later, the Court changed its tune in *United States v. Martinez-Fuerte*, holding that routine, suspicionless stops at *fixed* checkpoints passed Fourth Amendment muster.<sup>132</sup>

What made the difference to the Court? One account, given by the majority in *Delaware v. Prouse*, is that the critical difference between *Martinez-Fuerte* and *Brigoni-Ponce* was that targets of stops were subjectively less offended by fixed checkpoints rather than roving stops – a notion that Justice Rehnquist, dissenting in *Prouse*, mocked with some justification.<sup>133</sup> But a more coherent distinction, and one that the Court would later make explicit, lay in the

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<sup>127</sup> 392 U.S. 1, 16 (1968).

<sup>128</sup> See *Brown v. Texas*, 443 U.S. 47, 50–51 (1979).

<sup>129</sup> See Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 *St. Louis U. Pub. L. Rev.* 3 (2003) (discussing emergency of police administrative rulemaking).

<sup>130</sup> 422 U.S. 873, 884–85 (1975).

<sup>131</sup> *Id.*

<sup>132</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976).

<sup>133</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979) (Rehnquist, J., dissenting) ("Because motorists, apparently like sheep, are much less likely to be 'frightened' or 'annoyed' when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop all motorists on a particular thoroughfare, but he cannot without articulable suspicion stop less than all motorists. The Court thus elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence.").

bureaucratic framework that necessarily attended the operation of “fixed” checkpoints, and the absence of such internal constraint where officers “roved” independently. Thus, *Martinez-Fuerte*’s analysis opens with a lengthy description of the checkpoint’s physical and regulatory infrastructure – featuring large signs providing notice of its location, and a system by which “point agents” made initial stops and referred some vehicles for secondary inspection.<sup>134</sup> The opinion notes that the distinction between fixed and roving patrols is one embodied in Border Patrol agency rules, and that checkpoints are governed by a set of internally promulgated criteria – aimed, critically, at assuring “effectiveness.”<sup>135</sup> Moreover, the Court pointed to demonstrated “effectiveness” of the Border Patrol’s operation, citing statistics on rates of finding undocumented individuals through secondary inspection.<sup>136</sup> Fixed checkpoints worked a lesser “interference with individual liberty,” within the meaning of the Court’s balancing test, but it was not solely or even most importantly because of the experience of those stopped, but rather because of the extra-legally cabined discretion of those stopping.<sup>137</sup>

As random vehicle interdiction became more widespread (fueled by a shift to drug enforcement priorities), the Court’s jurisprudence migrated out of the context of federal immigration enforcement and into the realm of state and local law enforcement practice. But both the formal distinction between roving and fixed stops, and the functional concern for the relative degree of bureaucratic oversight that the two types of police interventions enjoyed, remained a focus of the cases. Thus in *Delaware v. Prouse*, the Court considered the constitutionality of a random vehicle stop “for the purpose of checking the driving license of the operator and the registration of the car,” in the absence of probable cause or reasonable suspicion of wrongdoing.<sup>138</sup> The second paragraph of the Court’s opinion depicts the stop as the random, discretionary act of a low-level patrol officer who “was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General.”<sup>139</sup> Analogizing such action to “roving” patrols, and applying the three-part test described above, the Court held that such a stop was unreasonable within the meaning of the Fourth Amendment.<sup>140</sup> The state, according to the Court, could point to no “safeguards” other than individualized suspicion “to assure that the individual’s reasonable expectation of privacy is not ‘subject to the discretion of the official in the field.’”<sup>141</sup> Later that Term, the Court’s notion of “safeguards” crystalized even further in the form of bureaucratic control: In *Brown v. Texas*, the Court, in rejecting the reasonableness of another roving patrol officer’s car stop, distilled the principles of *Prouse* and *Martinez-Fuerte* to mean that “the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual, or that the seizure

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<sup>134</sup> *Martinez-Fuerte*, 428 U.S. at 546—47.

<sup>135</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 553—54 (1976)

<sup>136</sup> *Id.* at 554.

<sup>137</sup> See *id.* (discussing discretion in context of liberty interference prong).

<sup>138</sup> *Delaware v. Prouse*, 440 U.S. 648 (1979).

<sup>139</sup> *Id.* at 650—51.

<sup>140</sup> *Id.* at 657.

<sup>141</sup> *Id.* at 644—45.

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must be carried out pursuant to a *plan* embodying explicit, neutral limitations on the conduct of individual officers.”<sup>142</sup>

A decade later, the Court would reveal the endurance, though perhaps also the substantive thinness, of its conception of bureaucratic substitutes for legal scrutiny of police work. In *Michigan v. Sitz*, the Court reviewed, and reversed, a state court determination that random vehicle stops at fixed, non-permanent sobriety checkpoints on Michigan highways violated the Fourth Amendment. In the context of the above account of *Martinez-Fuerte* the opening paragraph of the *Sitz* opinion set the stage for a clear outcome: They recount that “the Michigan Department of State Police and its director, established a sobriety checkpoint pilot program in early 1986,” that the program was overseen by “a Sobriety Checkpoint Advisory Committee comprising representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute,” and that “the advisory committee created guidelines setting forth procedures governing checkpoint operations, site selection, and publicity.”<sup>143</sup> On the other hand, the Court rejected the lower court’s evaluation of the checkpoints’ alleged ineffectiveness – pointing to a one percent hit rate in finding intoxicated drivers – saying that absent indication that a program of stops had “no empirical” merit, a state program of stops will enjoy deference.<sup>144</sup>

b. Professional and organizational expertise

In so stating, the Court in *Sitz* relied heavily on another, quasi-inquisitorial theme: The conception of law enforcement activities, particularly at the operational rather than individual level, as rooted in professionally and organizationally imparted expertise.<sup>145</sup> Thus, with regard to effectiveness review, the Court declared, “Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.”<sup>146</sup> Or consider the Court’s more recent statement in last Term’s decision on the use of drug sniffing dog alerts in warrant applications. Permitting such use without resort to “inflexible” or “technical” evaluation of the dog’s reliability, and instead deferring to departments’ own choices in certification or training regimes, the Court expressed confidence that “law enforcement units have their own strong incentive to use effective training and certification programs, because only accurate drug-detection dogs enable officers to locate contraband without incurring unnecessary risks or wasting limited time and resources.”<sup>147</sup> These sentiments cast the police and prosecutors who

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<sup>142</sup> *Brown v. Texas*, 443 U.S. 47, 51(1979). Lower courts have taken this cue. See, e.g., *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1 (1983) (“High-level police approval has . . . been viewed by courts as a necessary component of a constitutionally valid drunk driving roadblock.”)

<sup>143</sup> *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444, 447 (1990).

<sup>144</sup> *Id.* at 453—54.

<sup>145</sup> See *Damaska*, *supra* note 128, at 113; *Frase*, *supra* note 23, at 576.

<sup>146</sup> *Id.* at 454.

<sup>147</sup> *Florida v. Harris*. 133 S. Ct. 1050, 1055 (2013).

invented the Michigan sobriety checkpoint as law enforcement technocrats, knowledgeably and properly incentivized (more so than courts) to pursue legitimate criminal problems through reasonable means.

It is well to point out that, in part, all of this is of a piece with an observation made usefully by others, that the Court's Fourth Amendment doctrine has tended increasingly to elevate the venerable police "hunch" to the status of expertise.<sup>148</sup> Indeed, even in *Brignoni-Ponce* and *Brown*, in which the Court rejected the state's suggestion that police could stop without articulating the basis for their suspicion, the Court emphasized that an "articulable basis" might arise from any number of factors, and that reviewing courts must consider that trained law enforcement agent may be "able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer."<sup>149</sup> But the exclusionary rule cases demonstrate that the point here is somewhat different, highlighting not so much the Court's deference to individual officers' "commonsense" though learned "judgments and inferences about human behavior,"<sup>150</sup> but rather its conception of the law enforcement *profession* as having developed and systematically inculcated expertise beyond the ken of judiciary. If the individual officer is concededly engaged in the "often competitive enterprise of ferreting out crime,"<sup>151</sup> the organizational and professional vehicles for imbuing her with training and expertise might still mitigate that bias.

In the Fourth Amendment context, this conception of professional and organizational expertise and an organizational incentives structure that adequately internalizes accuracy values as a substitute for judicial scrutiny is nowhere more pervasive than in contemporary exclusionary rule jurisprudence. The notion surfaced in sporadic, if spirited, fashion, in the first two decades of the life of the good faith exception to the exclusionary rule, adopted in *United States v. Leon*. Indeed, debates concerning the good faith exception, as reflected in *Leon* itself, were heavily concerned with whether the exclusionary remedy was necessary in order to bring about or ensure professionalized, well-trained, well-incentivized police departments; the *Leon* majority, however, was confident that an exception from exclusion for "objective[ly] reasonable[]" police error would not undermine a regime of "police training programs" that "are now viewed as an important aspect of police professionalism."<sup>152</sup> By *Hudson v. Michigan*, the Court viewed police training and discipline as sufficiently entrenched that entire Fourth Amendment rules – there the "knock and announce" rule – could be cleaved from the remedial scheme with no consequence: "[M]odern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect."<sup>153</sup>

<sup>148</sup> See generally Eric J. Miller, Detective Fiction: Race, Authority, and the Fourth Amendment, 44 *Ariz. St. L.J.* 213 (2012); L. Song Richardson, Police Efficiency and the Fourth Amendment, 87 *Ind. L.J.* 1143, 1144 (2012).

<sup>149</sup> *Brown*, 443 U.S. at 52 n.2; *Brignoni-Ponce*, 422 U.S., at 884–885.

<sup>150</sup> *Illinois v. Wardlaw*, 528 U.S. 119, 125 (2000); see also *Ornelas v. United States*, 517 U.S. 690 (1996); *United States v. Arvizu*, 534 U.S. 266, 272–73 (2002).

<sup>151</sup> *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

<sup>152</sup> *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984) (quoting Jerold Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 *Mich. L. Rev.* 1319 (1977)).

<sup>153</sup> *Hudson v. Michigan*, 547 U.S. 586, 598–99 (2006); see also *United States v. Caceres*, 440 U.S. 741, 755–56 (1979).

But *Hudson* was just the precursor to the Court's incorporation of presumed police professionalism into the contours of the exclusionary rule – and, indeed, identifying its *absence* as a basis for relief. Thus, in *Herring v. United States* the Court announced, seemingly categorically, that the exclusionary rule would be unavailable unless police officers were shown to act *culpably* in violating the Fourth Amendment – unless, that is, “recurring or systemic negligence” on the part of a law enforcement organization could be shown.<sup>154</sup>

c. The Prosecutor as Investigative Supervisor

A final, more recently emergent quasi-inquisitorial feature of the Court's search and seizure cases is worth noting: the Court's conception of *prosecutorial* review of police action as a discretion-checking mechanism. Although prosecutors have long played *some* role in pre-charge investigation, the investigative and prosecutorial functions in American criminal law have traditionally (excepting again federal prosecutors) been conceived of separate – indeed, sharply segregable.<sup>155</sup> This is in contrast to many Continental systems, where prosecutors are, either formally or practically as a consequence of light magisterial oversight, monitors of police investigative work.<sup>156</sup>

And yet the Court, particularly in its Fourth Amendment jurisprudence, has increasingly taken note of the oversight role sometimes played by prosecutors in criminal investigations – for example, in providing advice or even authorization with regard to searches or warrant applications<sup>157</sup> – and has even gone so far as to suggest that prosecutorial approval could insulate police error from scrutiny. Thus, in *Messerschmidt v. Millender*, in which the Court found that qualified immunity shielded an officer sued for swearing to and executing an allegedly over-broad warrant, the Court pointed to review and approval by both the officer's supervisor and a prosecutor as “pertinent in assessing whether they could have held a reasonable belief that the warrant was supported by probable cause.”<sup>158</sup> In so holding, *Messerschmidt* signaled the Court's approval of a position already staked out by several lower courts.<sup>159</sup> Indeed, while the Court's

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<sup>154</sup> 55 U.S. 140, 144 (2009); see also *Davis v. United States*, 131 S. Ct. 2419 (2011).

<sup>155</sup> Immunity doctrines in constitutional tort litigation, for example, premises the grant of absolute immunity to prosecutors versus merely qualified immunity to police on the conceptual distinction between prosecutorial and investigative functions. See *Buckley v. Fitzsimmons*, 509 U.S. 259 (1983); see also Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *Yale L.J.* 480 (1975) (explaining the “hierarchical” and “coordinate” models to illustrate features of continental and Anglo-American criminal processes respectively); Daniel C. Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *Colum. L. Rev.* 749 (2003).

<sup>156</sup> See, e.g., Van Kessel, *supra* note 28, at 421–22; Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 *Yale L.J.* 240, 250–64 (1977); Langbein & Weinreb, *supra* note 126, at 1555.

<sup>157</sup> See, e.g., *Devenpeck v. Alford*, 543 U.S. 146, 150 (2004) (suggesting police consultation with prosecutors supported reasonableness of actions); *Segura v. United States*, 468 U.S. 796, 812–13, 818 n.1 (1984) (Stevens, J., dissenting) (noting police delay in obtaining warrant, excused by Court, was explained not by magistrate unavailability but prosecutorial advice – disclaimed by Department of Justice in brief and at oral argument).

<sup>158</sup> *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1250 (2012).

<sup>159</sup> See *United States v. Pappas*, 592 F.3d 799, 802 (7th Cir. 2010); *Kelly v. Borough of Carlisle*, 622 F.3d 248, 255–56 (3d Cir. 2010); *United States v. Bynum*, 293 F.3d 192, 198 (4th Cir. 2002); *United States v. Johnson*, 78 F.3d

decision in *Burns v. Reed* still governs the question of whether prosecutors may enjoy absolute immunity for their conduct in participating in and advising police investigations (they do not),<sup>160</sup> in the recent case of *Pottawattamie County v. McGhee* the United States argued as amicus, and at least three justices exhibited sympathy to the view, that the rule should be revisited in light of the benefits of prosecutorial involvement including “efficient and productive” evidence gathering and avoiding “inadvertent” violations of suspects’ rights.<sup>161</sup>

## 2. The Pervasiveness of Quasi-Inquisitorialism

The Court’s increasingly express reliance on a putatively bureaucratically and professionally well-calibrated law enforcement profession to self-monitor its legal discretion in check has not been cabined to the search and seizure context. Rather, and perhaps as a consequence of the Court’s preoccupation with cabining exclusionary remedies, the Court’s harkening to internal police discipline and rulemaking as an alternative mechanism of constraint in the inquisitorial pretrial sphere has expanded beyond the Fourth Amendment context to other doctrinal areas implicated by evidence gathering and evaluation.

In some such cases the Court has, as in *Brigoni-Ponce* and *Brown*, seemingly relied on record evidence that bureaucratic control and professionalism was systemically lacking in order to constrain police discretion through constitutional doctrine. Exemplary is *Missouri v. Seibert*, in which the Court held that the Fifth Amendment barred admission of Mirandized statements made after an initial round of questioning in which *Miranda* warnings were deliberately not given – the so-called “question-first” interrogation tactic.<sup>162</sup> Apparently crucial to the Court’s determination that the fruits of that initial unwarned interview must be suppressed was its extended discussion of the extent to which “question first” had become a feature of police training and supervision, reflected in not only the individual interrogating officer’s training but also guidelines and model training promulgated by national and state-level professional organizations such as the Police Law Institute.<sup>163</sup> “The upshot,” Justice Souter wrote for the Court, was “a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy.”<sup>164</sup> That rebutting the assumption of professionalism was a circumstance of consequence is further highlighted by the result in *United States v. Patane*, decided the same day, holding that the *physical* fruits of unwarned interrogations need *not* be suppressed consistent with the Fifth Amendment.<sup>165</sup> Dissenting in that case was Justice Souter, who expressed confusion over the disparate

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1258, 1264 (8th Cir.1996); *United States v. Brown*, 951 F.2d 999, 1005 (9th Cir.1991); *United States v. Taxacher*, 902 F.2d 867, 872 (11th Cir.1990).

<sup>160</sup> 500 U.S. 478 (1991).

<sup>161</sup> Brief of Amicus Curiae United States of America at 12–13, *Pottawattamie County v. McGhee*, 08-1065 (2009); see also Transcript of Oral Argument, *Pottawattamie County v. McGhee*, 08-1065 (2009), available at [http://www.oyez.org/cases/2000-2009/2009/2009\\_08\\_1065](http://www.oyez.org/cases/2000-2009/2009/2009_08_1065).

<sup>162</sup> *Missouri v. Seibert*, 542 U.S. 600, 604 (2004).

<sup>163</sup> *Id.* at 605, 609—10 & n.2.

<sup>164</sup> *Id.* at 609 n.2.

<sup>165</sup> *United States v. Patane*, 542 U.S. 630, 633 (2004).

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outcomes.<sup>166</sup> A plausible explanation for the votes of at least some of the justices, such as Justice Kennedy who concurred in *Patane* and *Seibert*, were the differing records before the Court in relation to institutionalized legal flouting in the form of police training and supervision.<sup>167</sup>

More often, however, as in the Fourth Amendment context, the Court's conception, or presumption, of bureaucratic and professional checks has served to insulate police investigative activities. This has repeatedly been the case in the context of the Court's rejection of efforts to refashion the fair trial guarantee of the Due Process clause as a basis for more exacting evidentiary scrutiny – as in the context of eyewitness identification procedures and the use of informants. Perhaps most interestingly, in both of these arenas, as discussed above,<sup>168</sup> the Court's reasoning has been strongly resonant with anti-inquisitorial themes, insisting that “safeguards built into *our* adversary system” are adequate to the task of scrutinizing the evidentiary products of pretrial investigation.<sup>169</sup> But alongside the Court's conception of the appropriate structure of the trial space, and in particular proper adversarial limitations on the judicial role in that space, has been a quasi-inquisitorial account of the conditions under which pretrial activities are occurring. Thus, in *Manson v. Brathwaite*, the Court declined to fashion a *per se* rule of exclusion for identification evidence procured with suggestive procedures, and instead created a harmless-error-style review of the overall reliability of an identification where suggestion was employed, based in part of the Court's confidence that “[t]he interest in obtaining convictions of the guilty also urges the police to adopt procedures that show the resulting identification to be accurate,” since “[s]uggestive procedures often will vitiate the weight of the evidence at trial and the jury may tend to discount such evidence.”<sup>170</sup> In *Kansas v. Venstris*, in which the Court held that a defendant's pretrial statements to an informant illegally placed in his cell could be admitted for impeachment purposes, the Court also expressly rejected the invitation of amicus to “craft a broader exclusionary rule for uncorroborated statements” of “jailhouse snitches” based on the “inherent[] unreliability” of such witnesses. The parties, and in particular the United States as amicus at oral argument, had relied on “increasing police professionalism” and “internal discipline,” as well as ethical rules governing prosecutors, in urging the Court not to bar the use of such statements.<sup>171</sup>

But perhaps most exemplary are the Court's cases concerning preservation of and access to evidence. In *California v. Trombetta*, the Court considered whether the Due Process Clause required not only that the state disclose favorable evidence to the defense (as in *Brady v. Maryland*), but also that the state take affirmative measures to preserve evidence whose exculpatory value is yet unknown, in order to ensure the defendant's access to it down the

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<sup>166</sup> Id. at 647 (Souter, J., dissenting).

<sup>167</sup> See *Seibert*, 542 U.S. at 622 (Kennedy, J., concurring).

<sup>168</sup> See *supra* note 97 and accompanying text.

<sup>169</sup> See *Perry v. New Hampshire*, 132 S. Ct. 716 (2012).

<sup>170</sup> *Manson v. Brathwaite*, 432 U.S. 98, 111 n.12 (1977).

<sup>171</sup> See Brief for United States as Amicus Curiae at 28, *Kansas v. Venstris*, 129 S. Ct. 1841 (2009); Brief for Petitioner at 9, *Kansas v. Venstris*, 129 S. Ct. 1841 (2009).

road.<sup>172</sup> The evidence at issue in the case were breath samples of respondents, collected by an Intoxilyzer device in the course of a roadside test, administered by police, for intoxication.<sup>173</sup> The device, however, only recorded data from the samples and did not retain them; hence, by the time of trial the defendant did not have access to the original specimen of breath he blew into the device, in order to perform independent analysis. The Court reversed the state court determination that due process required preservation of the samples for use by defendants at trial, holding that “California’s policy” of destroying breath samples was not unconstitutional because (under a *Matthews v. Eldridge* procedural due process balancing) the exculpatory value of the evidence was low, and other means were for the defendants to impeach the Intoxilyzer results.<sup>174</sup> Important to the Court’s view that the value of the samples was minimal was the existence of a detailed administrative scheme authorizing and prescribing procedures for use, maintenance, and regular testing of Intoxilyzer devices, and the scheme’s contemplation that breath samples would not be retained.<sup>175</sup>

*Trombetta* was susceptible of the interpretation that something equivalent to the administrative scheme in place under California law was a necessary substitute for constitutional scrutiny – a view taken by a number of lower courts both before and following the decision.<sup>176</sup> The Court, however, soon disavowed any such implication. In *Youngblood v. Arizona*, the Court was again faced by a defendant’s claimed denial of due process due to the loss of forensic evidence prior to trial, but this time the record disclosed nothing like *Trombetta*’s detailed scheme governing the reliability of the Intoxilyzer. Rather, a forensic analyst working with blood evidence in *Youngblood*’s prosecution for rape and murder had both failed to refrigerate or freeze the evidence (in contravention of standard protocol in the field) and had delayed testing it for fifteen months, such that the samples yielded inconclusive results when ultimately tested for the presence of semen.<sup>177</sup> Nevertheless, the Court, citing *Trombetta*, held that where police operate “in good faith and in accord with their normal practice,” failure to preserve potentially useful evidence, even negligently so, does not constitute a denial of due process of law.<sup>178</sup>

In so holding, the Court moved away from *Trombetta*’s balancing of apparent reliability as measured by bureaucratic assurances of accuracy against the opportunity of the defense to impeach it, in favor of a bright line test considering only demonstrated official malice. It also established “normal” police practice – however objectively unreasonable – as the threshold for

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<sup>172</sup> 467 U.S. 479, 481 (1984)

<sup>173</sup> *Id.* at 482–83.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* & 483 n.3.

<sup>176</sup> See, e.g., *People v. Sheppard*, 701 P.2d 49, 52 (Colo. 1985) (“The state must employ regular procedures to preserve evidence that a state agent, in performing his duties, could reasonably foresee might be favorable to the accused.”); *Oshrin v. Coulter*, 142 Ariz. 109, 112 (1984) (distinguishing *Trombetta* on basis of reliability of procedures attending forensic evidence collection). Cf. *Stephan v. State*, 711 P.2d 1156, 1160 (Alaska 1985) (requiring standardized destruction procedures to be in place to comply with state constitutional due process guarantee).

<sup>177</sup> *State v. Youngblood*, 153 Ariz. 50, 54 (Ct. App. 1986), rev’d, 488 U.S. 51 (1988).

<sup>178</sup> *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

entitlement to deference. But it appeared to do so on the basis of the Court’s view that police and prosecutors are rightly motivated in their gathering and evaluation of evidence, presumptively motivated in the ordinary course to competently gather all evidence that *might* support guilt. Disinclined to fashion a (more inquisitorially inspired) rule imposing an “undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution,” the Court deferred to “police themselves” to “by their conduct indicate that the evidence could form a basis for exonerating the defendant.”<sup>179</sup> That Larry Youngblood was eventually exonerated of his crime through enhanced DNA testing on the same degraded evidence considered by the Court, puts into stark relief the fallaciousness of the Court’s judgment that “police themselves” are reliably entrusted with discerning the probativity of physical evidence to a defendant’s guilt or innocence.<sup>180</sup>

Lower courts following *Youngblood* have consistently embraced this attitude of presumptive regularity in the work of police,<sup>181</sup> though even while citing *Youngblood*’s standard to deny due process claims for the destruction of evidence, they frequently follow the example of *Trombetta* and ground absence of bad faith in compliance with documented procedures for handling of evidence.<sup>182</sup> Significantly, however, several state courts have rejected *Youngblood* as a template for due process analysis under their own state constitutions. And in purporting to adopt a *Trombetta* balancing inquiry have granted claims based on a lack of adequate administrative procedures to govern the regularity of evidence gathering and retention.<sup>183</sup> As Part III will discuss, the access to evidence cases therefore serve as an example of how clear emergence of a narrative competitor to anti-inquisitorialism can facilitate departures from the baseline of pretrial discretion established by the Court.

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<sup>179</sup> *Id.* at 57; see also *Illinois v. Fisher*, 540 U.S. 544, 548 (2004).

<sup>180</sup> See Innocence Project, Know the Cases: Larry Youngblood, [http://www.innocenceproject.org/Content/Larry\\_Youngblood.php](http://www.innocenceproject.org/Content/Larry_Youngblood.php).

<sup>181</sup> See, e.g., *Sadowski v. McCormick*, 785 F. Supp. 1417, 1423 (D. Mont. 1992) (“At the time the law enforcement officers made the decision not to gather numerous tools in the proximity of the shooting, the state arguably had an interest in preserving the evidence for purposes of fingerprinting and testing which was equally as compelling as Sadowski’s interest.”); *Campa v. Erwin*, No. C-1-03-550, 2005 WL 2313980, at \*7 (S.D. Ohio Sept. 21, 2005) (“[A]t the time the police failed to retain such evidence, they had at least as great an interest in preserving it as petitioner, because it would have been useful to the prosecutor”).

<sup>182</sup> See, e.g., *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991) (“FBI procedure allows the release of such evidence back to an innocent party as soon as possible. The car was examined for eight to nine hours by two examiners, and twelve blood samples and six bullet fragments were obtained. One hundred and fifty photographs were taken of the car before it was released. It strains credulity to ascribe bad faith to the police in this situation, as they would hardly have knowingly destroyed evidence that could have placed the yet to be identified driver in the getaway car.”); see also *United States v. Smith*, 534 F.3d 1211, 1224 (10th Cir. 2008); *United States v. Beckstead*, 500 F.3d 1154, 1161 (10th Cir. 2007); *Mitchell v. Goldsmith*, 878 F.2d 319, 322 (9th Cir. 1989).

<sup>183</sup> See, e.g., *State v. Bennett*, 142 Idaho 166, 170-71 (2005); *People v. Newberry*, 166 Ill. 2d 310, 316 (1995); *State v. Osakalumi*, 194 W.Va. 758, 760, 767—68 (1995); *Ex parte Gingo*, 605 So. 2d 1237, 1240—41 (Ala. 1992); *Hammond v. State*, 569 A.2d 81, 87 (Del.1989) preferring a balancing test that considers the bad faith, importance of the missing material, and sufficiency of other evidence and noting “for future guidance, that the agencies that create rules for evidence preservation should broadly define discoverable evidence to include any material that could be favorable to the defendant); see also *Illinois v. Fisher*, 540 U.S. 544, 549 (2004) (identifying nine state courts holding “as a matter of state constitutional law that the loss or destruction of evidence critical to the defense does violate due process, even in the absence of bad faith”).

## **B. Prosecutors in a Quasi-Inquisitorial Space**

This Part moves to the prosecutorial role prior to trial as depicted in the Court’s decisions concerning the charging power and discovery. It traces, again, conceptions of bureaucratic oversight and professional expertise that have been offered by the Court as gap-fillers in the spaces where “our” adversary system has militated against judicial checks of prosecutorial discretion in those spheres.

A caveat is in order at the outset. In drawing out similar quasi-inquisitorial themes in the Court’s account of both the police and prosecutorial role, the Article should not be taken as suggesting that the Court’s jurisprudence treats those two roles as substantially equivalent. As a matter of historical tradition as well as constitutional text, broad prosecutorial discretion in core activities such as charging has long been the American norm, whereas the Fourth Amendment by its text contemplates external review, through the warrant process, of police evidence gathering.<sup>184</sup> While warrant doctrine and other mechanisms of external legal restraint on police may have diminished in recent decades,<sup>185</sup> the view nevertheless remains that police – or at least individual police officers – are fundamentally engaged in a single-minded and “often competitive enterprise of ferreting out crime,” and must ordinarily account in some fashion to a more neutral party for their enforcement actions.<sup>186</sup> The American public prosecutor, by contrast, has always been situated in an (uncomfortable) tug and pull between partisan advocacy phere of trial and impartial justice-seeking in the lofty tradition of *Berger v. United States*.<sup>187</sup> Nevertheless, this Section suggests that there are marked similarities in the manner in which the Court draws the limits of police and prosecutorial discretion, and that those similarities cluster around the attributes of quasi-inquisitorialism discussed above: bureaucratic regulatory checks, and professional and organizational norms and expertise that fill the gap of judicial oversight in the pretrial realm.<sup>188</sup> To be sure, these themes may at times only be sketched in generalities: In the charging context, in particular, the Court has been clear that the presumption against scrutiny of individual prosecutorial decisionmaking is so strong as to effectively preclude review absent fairly direct evidence of discriminatory animus. And yet, even if hortatory, the gesture to presumed internal and external sub-judicial constraint and expertise remains present. And at

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<sup>184</sup> See, e.g., *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (“Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process . . .”).

<sup>185</sup> See *supra* Part II.A.

<sup>186</sup> See, e.g., *Reichle v. Howards*, 132 S. Ct. 2088, 2096 (2012) (observing that presumption of regularity attending prosecutorial decisions does not extend to police).

<sup>187</sup> 295 U.S. 78, 88 (1935).

<sup>188</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971) (“Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule so well expressed by Mr. Justice Jackson is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigation.”); *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968) (“[T]he subpoena involved here could not in any event qualify as a valid search warrant under the Fourth Amendment, for it was issued by the District Attorney himself, and thus omitted the indispensable condition that ‘the inferences from the facts which lead to the complaint ’\* \* \* be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.’”).

times, particularly in the discovery context, the actual presence or absence of such conditions emerges as more consequential.

### 1. Prosecutorial bureaucracy and expertise at the zenith of deference: Charging

It is a veritable truism that “[i]n our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute.”<sup>189</sup> Deference to prosecutorial decisionmaking, always high, is at its zenith in the context of the decision to charge.<sup>190</sup> Where probable cause exists, prosecutorial selection of and among charges is virtually immune from scrutiny absent fairly direct evidence of discriminatory animus in the decisionmaking.<sup>191</sup> Less often probed are the justifications for this posture of deference. To be sure, the Court itself has tended to let gesture to tradition fill in for rigorous reason-giving in this realm. Nevertheless, core features of the quasi-inquisitorial narrative are present.

Consider first the Court’s own defense of broad prosecutorial discretion to charge. Such deference, the Court has repeatedly said, rests on a constellation of factors: purported judicial inability to assess the criteria properly affecting a decision to charge such as “strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan”; and costs including “chill[ing of] law enforcement” from opening prosecutorial decisionmaking to outside inquiry and revelation of “the Government’s enforcement policy.”<sup>192</sup> Unquestionably, several values are reflected in this set of concerns. Separation of powers is one, as the Court has frequently, more or less explicitly, rooted its disinclination to second-guess prosecutorial decisions in its broader disinclination to question executive action.<sup>193</sup> Another is a concern for the volume and potentially chilling effect of litigation that would be generated by opening charging decisions to legal scrutiny by discontents.<sup>194</sup> But neither these nor other valid explanations of the concerns animating charging deference accounts for the impact of that deference – that is to say, the hits to fairness or reliability from removing charging from the ambit of judicial review. What, for example, gave the Court confidence in *Hartman v. Moore* to foreclose retaliatory prosecution claims based on particularized allegations that despite probable cause to charge “a prosecutor was nothing but a rubber stamp for [vindictive] investigative staff or the police,” on the ground that such circumstances are so “likely to be rare and consequently poor guides in structuring a cause of action” that little was lost by erecting a much higher per se rule of negating probable cause?<sup>195</sup>

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<sup>189</sup> *Wayte v. United States*, 470 U.S. 598 (1985).

<sup>190</sup> *Town of Newton v. Rumery*, 480 U.S. 386, 397 n.7 (2003).

<sup>191</sup> See *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

<sup>192</sup> *Wayte*, 470 U.S. at 607–08; see also *Armstrong*, 517 U.S. at 465; *United States v. Goodwin*, 457 U.S. 368, 380, n. 11 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

<sup>193</sup> See *Hartman v. Moore*, 547 U.S. 250, 263 (2006); *Armstrong*, 517 U.S. at 465; *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

<sup>194</sup> See *Hartman*, 547 U.S. at 263; *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987).

<sup>195</sup> *Id.* 264; see also *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999); *Town of Newton v. Rumery*, 480 U.S. 386, 397 (1987) (“[T]radition and experience justify our belief that the great majority of prosecutors will be faithful to their duty.”).

The quasi-inquisitorial strains in the Court’s reasoning address those concerns. Note the assumptions girding the widely cited litany of rationales behind deference: that the government *has* developed “enforcement priorities” and an “overall enforcement plan” and “policy.”<sup>196</sup> Any particular charging decision is thus not only based on an individual prosecutor’s assessment of a case’s strength, but is made against a constraining backdrop of higher-level bureaucratic decisionmaking. And in both case assessment and priority setting, the Court views prosecutors – both high-level and line-level – as guided by not only comparative expertise in the details of a particular case, but also by standards of evaluation set for the prosecutorial profession – chiefly by the ABA and state disciplinary authorities.

Thus, in *United States v. Lovasco* the Court erected a requirement of demonstrated governmental bad faith for defendants asserting a due process violation for prejudicial delay in prosecution, pointing to ABA prosecution standards and Code of Professional Responsibility as sources of the “wide range of factors in addition to the strength of the Government’s case” that prosecutors must consider “in order to determine whether prosecution would be in the public interest.”<sup>197</sup> Or, as the Court put it in *Cheney v. U.S. District Court for the District of Columbia*, “The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion.”<sup>198</sup> Against this backdrop, it is fitting that in *Heckler v. Chaney* the Court likened administrative agencies’ enforcement discretion to that extended to criminal prosecutors.<sup>199</sup>

## 2. Prosecutorial bureaucracy and expertise in the tug and pull of adversarial and inquisitorial models: Disclosure

While prosecutorial charging discretion features quasi-inquisitorial rhetoric with little substance, accounting for the Court’s posture in discovery doctrine encompassing the *Brady v. Maryland* line of cases requires a more nuanced account. In *Brady v. Maryland*, the Supreme Court held that the government violates the Due Process Clause of the Fourteenth Amendment if it fails to provide criminal defendants with information favorable to them and material to guilt or punishment, without regard to the prosecutor’s knowledge or intent concerning the information and its character.<sup>200</sup> Part I discussed the scope of *Brady* with regard to pretrial reliability concerns – in particular, the limiting of *Brady* doctrine to information known by the state to be favorable to the defense (and thus excluding “potentially” exculpatory information such as untested forensic evidence), and the cabining of *Brady* to the trial sphere (thus precluding a

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<sup>196</sup>Wayte, 470 U.S. at 607–08.

<sup>197</sup> *United States v. Lovasco*, 431 U.S. 783, 791–92 & nn. 9–10 (1977).

<sup>198</sup> 542 U.S. 367, 386 (2004); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 365 n.9 (1978) (noting that potential for abuse of charging discretion “has led to many recommendations that the prosecutor’s discretion should be controlled by means of either internal or external guidelines” including from ABA and ALI Model Code of Pre-Arrestment Procedure for Criminal Justice).

<sup>199</sup> 470 U.S. 821, 832 (1985).

<sup>200</sup> 373 U.S. 83 (1963).

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constitutional obligation to disclose at least impeachment evidence prior to trial).<sup>201</sup> The point for present purposes is to explore what the Court offers as justification for so limiting the scope of what the Due Process Clause would require from the state from the standpoint of affirmative disclosure obligations. And here, quasi-inquisitorialism plays a role befitting the already somewhat fraught relationship between *Brady* doctrine and “our” accusatory system.

*Brady* itself, as the Court has acknowledged, confounded the pure adversary model of criminal adjudication, in which equally positioned adversaries marshal and present, autonomously, their own best cases,<sup>202</sup> and in which the prosecutor is appropriately understood, at trial, as a zealous advocate of the state’s litigation position.<sup>203</sup> But *Brady*’s encroachment was slim. The line of cases from which it drew primary inspiration were those in which the Court had held that the constitution prohibited the prosecution from deliberate eliciting known falsehoods at trial, and consistent with that precedential basis the *Brady* duty was initially limited only to disclosure of evidence the defense had itself requested.<sup>204</sup> Only in subsequent decisions did the Court push harder on the doctrine’s reflected commitment to adversarialism, in moving to the understanding that due process required the state to shoulder a positive disclosure duty, irrespective of action by the defense; *Brady* is no longer about “withholding” evidence, but rather derogation of an affirmative responsibility to provide it.<sup>205</sup>

The rationale for this “departure from a pure adversary model,” according to the Court in *United States v. Bagley*, was the prosecutor’s unique hybrid role that “transcends that of an adversary: he ‘is the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.’”<sup>206</sup> Significantly, only a decade after *Brady* did the Court come to root its logic in the affirmative-duty language of *Berger v. United States* rather than in the more limited negative prohibition on prosecutorial subornation of perjury.<sup>207</sup> But the Court emphasized in *Bagley* that the departure was limited – lest “*Brady* . . . create a broad, constitutionally required right of discovery” that “would entirely alter the character and balance of our present systems of criminal justice” – read, “our adversary system.”<sup>208</sup> What emerges from examining decisions in which the Court has drawn the outer

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<sup>201</sup> See supra notes 42–45 and accompanying text.

<sup>202</sup> See *Giles v. State of Md.*, 386 U.S. 66, 116 (1967) (Harlan, J., dissenting) (asserting narrow *Brady* rule preserves both fairness of trial and fundamental approach of adversary system); see also Stephanos Bibas, *Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?, in *Criminal Procedure Stories* 129 (Carol Steiker ed., 2006).

<sup>203</sup> See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248-50 (1980).

<sup>204</sup> See 373 U.S. at 87–88.

<sup>205</sup> See *United States v. Bagley*, 473 U.S. 667 (1985); *Giles*, 386 U.S. at 116 (Harlan, J., dissenting).

<sup>206</sup> 473 U.S. 667 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

<sup>207</sup> *United States v. Agurs*, 427 U.S. 97, 110–11 (1976) (quoting *Berger*, 295 U.S. at 88 (1935)).

<sup>208</sup> Barbara A. Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 *Stan. L. Rev.* 1133 (1982) (*Brady* could have led to a system in which the prosecutor gathers and assembles all the facts--those helpful to his case, those neutral, and those favorable to the defense--and reveals the package completely. . . . Such a development would transform the nature of the prosecutorial office. Instead of preparing his case as an adversary--selecting and emphasizing helpful facts while deliberately passing by those less advantageous--the prosecutor would instead resemble the neutral magistrate in the inquisitorial system.”).

boundaries of *Brady* doctrine, as well as those in which it has maintained or expanded the doctrine's scope, is a view that the fullest flowering of the *Berger* ideal is secured not through judicial, constitutional oversight but rather through bureaucratic structures internal to prosecutor offices and a broader network of professional regulation.

Consider one of the most significant recent decisions announcing *Brady*'s limits, the Court's opinion in *United States v. Ruiz* holding that the due process based disclosure requirement embodied in the *Brady* line is solely a trial right, and that prosecutors need not provide impeachment evidence prior to entry of a plea.<sup>209</sup> The broader factual context in which *Ruiz*'s claim arose is important: *Ruiz* had declined to enter into a "fast track" plea bargain with federal prosecutors, in which she would have received a substantially discounted sentence in exchange for waiving her right to receive several categories of "favorable" evidence, including impeachment evidence.<sup>210</sup> As discussed in Part I, the Court's rejection of *Ruiz*'s claimed constitutional right to the evidence included in the proffered waiver sounded significantly in anti-inquisitorial terms, conceptualizing *Brady* as guaranteeing only a fair trial and entailing no greater affirmative prosecutorial duty in regard to case investigation or evaluation.<sup>211</sup> Yet at the same time, the *Ruiz* Court highlight a number of features of prosecutorial practice – at least in the specific federal context concerned in the case – that suggested a framework of non-judicial constraint to ensure sufficient information flow, more than the constitutional baseline, in many cases. The Court pointed to the "standard" nature of "fast track" plea agreements in the United States Attorney's Office at issue, and placed particular importance on the fact that such agreements included a promise to disclose evidence actually bearing on "innocence."<sup>212</sup> Additionally, the Court took significant note of internal Department of Justice practice governing disclosure of information concerning witnesses, echoed in statutory and regulatory framework, suggesting that prosecutors' expertise in weighing the benefits and burdens of disclosure was both guided and owed deference.<sup>213</sup> Thus, not only did the *Ruiz* Court distinguish exculpatory from impeachment evidence (a point noted by many<sup>214</sup>), but more importantly it did so in reliance on prosecutors' regularized, professionally developed commitment to disclose *at least* evidence of straightforward exculpatory value. (The question of whether the constitution so required was implicitly deferred.)

But the fullest, and perhaps most notorious, flowering of the Court's quasi-inquisitorial conception of the quasi-inquisitorial prosecutorial role was on display in the Court's ruling in *Connick v. Thompson*, which rejected the viability of a Section 1983 suit for *Brady* violations brought against the Orleans Parish District Attorney's Office, following a fourteen million dollar

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<sup>209</sup> 536 U.S. 622 (2002).

<sup>210</sup> *Id.* at 625.

<sup>211</sup> See *supra* Part I.B.

<sup>212</sup> *United States v. Ruiz*, 536 U.S. 622, 623, 625 (2002); see also Transcript of Oral Argument, *Ruiz*, 536 U.S. 622 (2002) (reflecting questioning on prosecutors' ethical and internal rule-based obligation not to prosecute absent belief in guilt).

<sup>213</sup> *Id.* at 631–32 (citing congressional testimony of former Acting Attorney General, discovery-related provisions of the U.S. Code, Federal Rules).

<sup>214</sup> See, e.g., R. Michael Cassidy, Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures, 64 *Vand. L. Rev.* 1429, 1441-42 (2011); Wiseman, *supra* note 8, at 992–93.

jury verdict for the formerly death-sentenced plaintiff.<sup>215</sup> The Court reasoned that where a plaintiff could show a complete absence of *Brady* training for Orleans Parish prosecutors, but could prove the existence of *Brady* violations only in a single case (in Thompson’s instance, the admitted hiding of exculpatory blood evidence by a trial prosecutor, and the apparent cover-up of that fact by others in the office), no civil rights action could lie: Such allegations failed to come within the rule that county entities may be sued where their inaction creates an “obvious” risk of constitutional wrongdoing by employees. In so holding, the Court depicted prosecutors as operating in a totalizing and mutually reinforcing network of bureaucratic and professional constraints: Not only are prosecutors formally trained in the substance of law, both in law school and throughout their careers, but they also (putatively) work within a hierarchy of office supervision (including direct personal supervision and promulgated training and policies), and are “subject to an ethical regime” portrayed by the court as not simply hortatory but rather substantively specific (“Among prosecutors’ unique ethical obligations is the duty to produce *Brady* evidence to the defense.”) and disciplinarily rigorous.<sup>216</sup> In such a context, neither the missteps of a few errant prosecutors in Thompson’s case,<sup>217</sup> nor even complete inattention by the district attorney himself, could upset the balance of an otherwise well-functioning regime that obviated the need for legal oversight.

The outcome and reasoning in *Connick* have been widely criticized on the ground that the Court’s presumption of functional bureaucratic and professional checks was belied by reality and bordered on the cynical.<sup>218</sup> And yet, at least to the latter charge, the Court has evinced a consistent and seemingly more sincere view in other recent decisions on *Brady* claims, even going so far in two recent cases to suggest that prosecutors are in a sense *legally* bound by disclosure standards that actually exceed the *Brady* test requiring that evidence be both favorable *and* material to the outcome of a case – and that the source and enforcement of that obligation is both sub-constitutional and largely internal to the prosecutorial office and profession. Of course, the Court has repeatedly indicated that it presumed prosecutors would both exceed the constitutional floor set by *Brady*, as prosecutors “anxious about tacking too close to the wind will disclose a favorable piece of evidence” even if it is doubtfully material.<sup>219</sup> The Court has also long drawn on a presumed bureaucratic prosecutorial tradition in lodging the disclosure duty with the state regardless of actual knowledge of favorable information in possession of other law enforcement actors: Prosecutors’ offices shoulder a responsibility to establish “procedures and regulations . . . to insure communication of all relevant information on each case to every lawyer

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<sup>215</sup> 131 S. Ct. 1350 (2011).

<sup>216</sup> *Id.* at 1361–63.

<sup>217</sup> *Id.* (noting that Court does not “assume that prosecutors will always make correct *Brady* decisions”).

<sup>218</sup> See, e.g., Ellen Yaroshfsky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 *Geo. J. Legal Ethics* 913 (2012); Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 *Fordham L. Rev.* 715 (2011); David Keenan et al., *Note, The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 *Yale L.J. Online* 203, 204 (2011); Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 *Brook. L. Rev.* 1329, 1330 (2012).

<sup>219</sup> *Kyles v. Whitley*, 514 U.S. 419, 439–40 (1995) (quoting *United States v. Agurs*, 427 U.S. 97 (1976)).

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who deals with it”<sup>220</sup> – indeed, a responsibility so core to their function that they enjoy absolute immunity for that (concededly) administrative task.<sup>221</sup>

But in two recent cases the Court suggested, albeit somewhat obscurely, a more far-reaching view concerning the scope of prosecutorial obligation and the interplay of constitutional and subconstitutional oversight. The first pass came in *Cone v. Bell*, a case presenting a *Brady* claim brought in federal habeas proceedings following a state conviction. The Supreme Court affirmed the lower federal court determination that the *Brady* claim was not procedurally barred, and also determined, applying the long-established *Brady* due process test, that evidence that materially mitigated Cone’s eligibility for a death sentence was improperly withheld.<sup>222</sup> In so holding, a footnote in Justice Stevens’s opinion for the Court’s made what might have been dismissed as a passing reference to the ABA Standards for Criminal Justice, which require disclosure of *all* favorable evidence to the defense, regardless of materiality.<sup>223</sup> And yet it was not so blithely ignored, as Chief Justice Roberts pointedly disclaimed the legal relevance of that reference in his concurring opinion.<sup>224</sup> The cause for alarm may well have been generated by the striking and lengthy exchange at oral argument in *Cone*, in which Justices Kennedy, Stevens, and Souter aggressively challenged the state’s position that a prosecutor’s judgment as to the immateriality of evidence obviated the legal obligation to disclose.<sup>225</sup>

But notwithstanding the Chief Justice’s admonishment, the relevance of subconstitutionally enforced discovery obligations reared its head again two Terms later, in *Smith v. Cain*, a case featuring another claimed *Brady* violation in Orleans Parish.<sup>226</sup> Perhaps taking a cue from the Court’s opinion in *Cone*, the ABA submitted a brief as amicus curiae, urging Court to recognize that prosecutors are bound by ethical standards that exceed the constitutional baseline, in particular state disciplinary rules modeled after ABA Model Rule 3.8(d), which requires all favorable evidence to be disclosed regardless of materiality, and which standard had been adopted by the state of Louisiana prior to the prosecution in *Smith*.<sup>227</sup> The brief prompted a pitched response from amicus curiae National District Attorneys Association (the only amicus submitted on behalf of the respondent State of Louisiana), which lambasted the ABA’s attempt to foist its Model Rules upon the Court and the states, who together occupy the field of prosecutorial regulation through constitutional and statutory standards.<sup>228</sup> Picking up on the import of the exchange by amici, the oral argument once again featured extended comments by multiple justices (a motley ideological lineup of Justices Kennedy, Scalia, and Sotomayor)

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<sup>220</sup> Kyles, 514 U.S. at 438 (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

<sup>221</sup> *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009).

<sup>222</sup> *Cone v. Bell*, 556 U.S. 449 (2009).

<sup>223</sup> *Id.* at 470 n.15.

<sup>224</sup> See *id.* at 746–78 (Roberts, C.J., concurring).

<sup>225</sup> See Transcript of Oral Argument at 33–35, *Cone v. Bell*, 556 U.S. 449 (2009).

<sup>226</sup> 132 S. Ct. 627 (2010).

<sup>227</sup> Brief of Amicus Curiae American Bar Association in Support of Petitioner at 5, 8–10, *Smith v. Cain*, 132 S. Ct. 627 (2010).

<sup>228</sup> Brief of Amicus Curiae National District Attorneys Association at 8–18, *Smith v. Cain*, 132 S. Ct. 627 (2010).

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reflecting their view that prosecutors were not just ethically but in fact legally obligated to disclose *all* favorable evidence – regardless of whether the *Brady* standard provided any constitutionally based relief.<sup>229</sup>

Critically, in both *Cone* and *Smith*, the justices aggressively challenged the states' position that the Court's past observation that "the prudent prosecutor will err on the side of transparency"<sup>230</sup> committed the disclosure decision wholly to the discretion of individual prosecuting attorneys.<sup>231</sup> Thus, there is reason to think that many on the Court view prosecutors as primarily constrained at the trial level *not* by *Brady* doctrine but rather by professional standards of conduct, reflected in model and state-promulgated disciplinary rules, and enforced (if at all) by bar committees and the types of internal office policies that featured prominently in the *Connick* and *Ruiz* decisions. In other words, where anti-inquisitorialism sets the outer limits of constitutional *Brady* doctrine, quasi-inquisitorialism is imagined to pick up the slack.

Critically, here, as with police, the extent to which quasi-inquisitorial conditions are *imagined*, posited rather than verified, is significant. The U.S. Attorney's Manual is a rare example (and an often-maligned one at that) of comprehensive prosecutorial guidance and rule-making.<sup>232</sup> Professional ethics and discipline is a far cry from the functional check on prosecutorial over-stepping that the Court portrays.<sup>233</sup> There is an unfortunate irony here, one that Part III will aim to cut through: The Court's largely distorted portrayal of the depth of quasi-inquisitorial structures effectively blocks efforts to address perceived accuracy and fairness deficits *either* through more robust conceptions of adversarialism – the injection, for example, of greater evidentiary disclosure and formal rights of consultation into the plea bargaining process, as Judge Lynch urged two decades ago – *or* through fully realized quasi-inquisitorial inroads – the formalization, say, of requirements concerning bureaucratic checks or internal procedural constraint in charging or discovery.<sup>234</sup>

### C. Taking Stock

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<sup>229</sup> Transcript of Oral Argument at 46, 49, 52, *Smith v. Cain*, 132 S. Ct. 627 (2010), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-8145.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf) (noting views of Justices Sotomayor, Kennedy, and Scalia, that legal issue of whether disclosure was required was separate from question of materiality).

<sup>230</sup> *Kyles v. Whitley*, 514 U.S. 419, 439–40 (1995) (quoting *United States v. Agurs*, 427 U.S. 97 (1976)).

<sup>231</sup> *Id.* at 46, 49, 52; *Smith v. Cain*, 132 S. Ct. 627 (2010), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-8145.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf) (noting views of Justices Sotomayor, Kennedy, and Scalia, that legal issue of whether disclosure was required was separate from question of materiality); Transcript of Oral Argument at 33–35, *Cone v. Bell*, 556 U.S. 449 (2009).

<sup>232</sup> See Barkow, *supra* note 22; Albert W. Alschuler, Two Ways to Think About the Punishment of Corporations, 46 *Am. Crim. L. Rev.* 1359, 1389 (2009) (describing U.S. Attorney's Manual as "noncommittal pabulum-language").

<sup>233</sup> See generally David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, The Myth of Prosecutorial Accountability After *Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct, 121 *Yale L.J. Online* 203 (2011).

<sup>234</sup> See Lynch, *supra* note 23.

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The foregoing discussion problematizes the completeness of adversarial and anti-inquisitorial narratives in accounting for the deference extended to pretrial activity by the Court's criminal procedure jurisprudence. It is worth asking *why* the quasi-inquisitorial narrative this Article identifies would have emerged.

To begin, and as previous sections foreshadowed, the Court's growing antipathy toward the exclusionary rule plays an important role, particularly in the growing interest in and purported identification of meaningful bureaucratic controls and professionalism in policing. Retrenchment of Fourth Amendment suppression remedies began in the early 1970's with the Burger Court's embrace of deterrence in *United States v. Calandra* as the sole rationale justifying exclusion of evidence the exclusionary rule.<sup>235</sup> And the implicit balancing of costs and benefits that inevitably accompanied that approach naturally invited the Court – and litigants – to look to viable alternatives for judicial oversight. Judicial as well as scholarly debates about the exclusionary rule, and the possibility of creating a “good faith exception” to it, were substantially focused on the relationship between the exclusionary remedy and what many took to be enhancement of police professionalism – with some opponents of exclusion arguing that it functioned to diminish that trend by creating an external incentive for police to lie or fabricate in order to avoid loss of reliable evidence that would convict the guilty.<sup>236</sup> By the 1980's, and especially after the Court formalized a good faith exception to the exclusionary rule, the Court had a reliable faction of justices keen for opportunities to make that exception the rule, and hence it is no surprise (given the dynamics of certiorari) that many of the search and seizure cases heard by the Court provided opportunities for the Court to hold up non-judicial mechanisms of police oversight.

It is likewise unsurprising that the Court's focus on the ills of exclusion in the Fourth Amendment context spilled over to other constitutional arenas bearing upon police-generated evidence. Thus, in *Manson v. Brathwaite*, in which (as discussed above) the Court declined to fashion a rule of per se exclusion of identification evidence procured through police suggestion (and harkened to adequate police incentives to avoid such conduct), the Court noted: that “inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm,” citing its recent exclusionary rule cases.<sup>237</sup> The Court made the same move a decade later when it rejected reliability as the touchstone for admission of confessions in *Colorado v. Connelly*, citing the line of cases limiting the exclusionary rule for the proposition that “[j]urists and scholars uniformly have recognized that

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<sup>235</sup> *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“[T]he rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”); see also Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 *Colum. L. Rev.* 670 (2011) (tracing this doctrinal progression).

<sup>236</sup> See, e.g., *Illinois v. Gates*, 462 U.S. 213, 261 & n.15 (1983) (White, J., concurring) (advancing lengthy defense of good faith exception and relying significantly on literature concerning discipline and professionalism); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 *U. Chi. L. Rev.* 665, 739–41 (1970); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 *J. Legal Stud.* 243, 275–76 (1973).

<sup>237</sup> 432 U.S. 98, 113 (1977).

the exclusionary rule imposes a substantial cost on the societal interest in law enforcement by its proscription of what concededly is relevant evidence.<sup>238</sup>

A second and closely related set of observations goes not to motive but opportunity, and concerns the role of data concerning investigative practices, particularly at the federal level, in shaping the Court's understanding of what criminal investigative practice entails – and perhaps accounts for an arguably distorted view of the realities of pretrial practice. One little-noted feature of the Supreme Court's criminal docket over the last three decades has been its increasingly federal focus, both in the direct subject matter of the cases and in the manner in which the issues have been presented to the Court.<sup>239</sup> There are at least three contributors to this phenomenon. First, the scope and volume of federal criminal law enforcement has expanded over the last four decades, such that the relative volume and importance of federal criminal matters has increased – with consequences for the fate of federal criminal cases in the Court's cert pool.<sup>240</sup> Second, at the same time the law has shifted to significantly restrict federal review of state criminal convictions through habeas corpus in a manner that limits the opportunity for state criminal procedure matters to come before the Court. Indeed, long before the enactment of congressionally imposed restrictions on federal habeas review under AEDPA,<sup>241</sup> the Supreme Court had dramatically curtailed its review of state criminal proceedings, including by essentially eliminated a raft of state-based Fourth Amendment cases from its docket when it held in *Stone v. Powell* that federal habeas review was unavailable for unconstitutional search and seizure claims in state convictions.<sup>242</sup> And thirdly, the enhanced role of the Solicitor General's Office in Supreme Court litigation has meant not only that federal criminal cases selected for certiorari application by the federal government have selected for review by the Court at a far higher-than-average rate, but also that the federal perspective on criminal procedure matters has been heard by the Court even in state cases by virtue of the Solicitor General's amicus participation.<sup>243</sup> All of this supports the intuition that, increasingly, when Supreme Court justices summon to mind an ideal type of criminal investigative functions, they imagine *not* the work of state police and prosecutors but rather (based on what they are repeatedly learning in briefing and oral argument)

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<sup>238</sup> 479 U.S. 157, 166 (1986) (quoting *United States v. Janis*, 428 U. S. 433, 448–49 (1976)).

<sup>239</sup> See, e.g., Amanda Frost and Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 Va. L. Rev. 719, 741(2010).

<sup>240</sup> This phenomenon has been widely noted. See, e.g., Barkow, *supra* note 22, at 884–85; William H. Rehnquist, *The 1998 Year-End Report of the Federal Judiciary, Third Branch*, at 1, 2 (1999) (addressing federalization of crime and impact on federal court dockets); James Strazella et al., *Task Force on the Federalization of Criminal Law*, Am. Bar Ass'n Criminal Justice Section, *The Federalization of Criminal Law* 15-16, 16 n.28 (1998).

<sup>241</sup> Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (1996) (codified as amended at 28 U.S.C. § 2254(b), (d)-(e), (i)); Frost & Lindquist, *supra* note 237. AEDPA's jurisdictional hurdles mean that where the Court has taken cases arises under 2254, the issues presented have nearly exclusively concerned procedural habeas matters rather than the merits of constitutional questions and the attendant factual issues of law enforcement conduct. See Justin F. Marceau, *Challenging the Habeas Process Rather Than the Result*, 69 Wash. & Lee L. Rev. 85, 108 (2012).

<sup>242</sup> 428 U.S. 465 (1976); see also John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 Cornell L. Rev. 259, 262 (2006).

<sup>243</sup> See Adam D. Chandler, *The Solicitor General of the United States: Tenth Justice or Zealous Advocate?*, 121 Yale L.J. 725, 728 (2011); Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. Rev. 1323, 1324 (2010).

that of the FBI, United States attorneys, and other federal personnel. Significantly, as noted at several points in the preceding discussion, the sorts of quasi-inquisitorial checks to which the Court increasingly adverts in its pretrial criminal procedure jurisprudence have been far more featured in federal investigative work than in the (far more significant as a matter of volume) world of state criminal practice.

A closely related point concerns a more widely noted and consequential shift in recent Supreme Court practice, namely, the increased specialization and professionalization of the advocates who practice before it.<sup>244</sup> Part and parcel of this has been the rise of amicus practice, to significant effect for certain categories of amici and certain categories of cases. In the criminal procedure context, two specific data points are worth noting: first, the apparently significant effect of amicus submissions by two public interest organizations with significant activity around criminal justice issues, the ACLU and Americans for Effective Law Enforcement, and the role of the Solicitor General.<sup>245</sup> All three parties, from varying perspectives, are inclined and able to place before the Court evidence of systemic practices – in the case of the ACLU and AELE due to their status as repeat players and clearinghouses of such information, and in the case of the Solicitor General because federal law enforcement and prosecution is, as a matter of fact, subject to far greater internal rulemaking and hierarchical administration than most state systems.<sup>246</sup> Significantly, however, at least one study of ACLU and AELE amicus practice prior to 1982 found that the latter organization was far more inclined to supply the Court with data on actual practices, while the ACLU’s advocacy trafficked more heavily in constitutional principle.<sup>247</sup> Moreover, given the frequency of Solicitor General participation in *all* criminal cases – state and federal – and its rate of participation in oral argument, descriptive accounts received by the Court increasingly reflect the conduct of federal and not state actors.<sup>248</sup> The combined consequence of frequent litigation featuring the practices

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<sup>244</sup> Indeed, the current Chief Justice has so remarked. See John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 *J. Sup. Ct. Hist.* 68 (2005), available at [http://faculty.maxwell.syr.edu/tmkeck/Readings/Roberts\\_2005.pdf](http://faculty.maxwell.syr.edu/tmkeck/Readings/Roberts_2005.pdf); see also Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 *Geo. L.J.* 1487, 1488 (2008).

<sup>245</sup> See, e.g., Gregg Ivers & Karen O’Connor, *Friends as Foes: The Amicus Curiae Participation and Effectiveness of the American Civil Liberties Union and Americans for Effective Law Enforcement in Criminal Cases, 1969-1982*, 9 *Law & Pol’y* 161, 172 (1987); Ryan C. Black & Ryan J. Owens, *Solicitor General Influence and Agenda Setting on the United States Supreme Court*, 64 *Pol. Res. Q.* 765 (2011). The American Civil Liberties Union frequently litigates and aims to participate as amicus in criminal cases raising privacy or liberty concerns, including much of the Fourth Amendment docket. Americans for Effective Law Enforcement “was incorporated in 1966 . . . for the purpose of establishing an ‘organized voice’ for the law-abiding citizens regarding this country’s crime problem, and to lend support to professional law enforcement.” See Americans for Effective Law Enforcement, <http://www.aele.org/About.html> (last visited Aug. 1, 2013). In particular, the AELE aimed to curtail the exclusionary rule. See Ivers & O’Connor, *supra*, at 164–65. The AELE frequently submits amicus briefs on behalf of law enforcement interests, beginning as early as 1967 in *Terry v. Ohio*. See Brief of Americans for Effective Law Enforcement as Amicus Curiae, *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>246</sup> See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 *U. Pa. L. Rev.* 959, 1000-01 (2009) (contrasting hierarchical criminal justice administration model of federal government and small number of states with majority approach); David M. Rosenzweig, *Confession of Error in the Supreme Court by the Solicitor General*, 82 *Geo. L.J.* 2079, 2087 (1994) (discussing role of Solicitor General in screening cases for certiorari).

<sup>247</sup> See Ivers & O’Connor, *supra* note 207, at 171–72.

<sup>248</sup> See Cordray & Cordray, *supra* note 241, at 1333.

of federal criminal justice actors, with regular amicus participation by an organization dedicated to placing before the Court evidence of successful police practices that obviate judicial supervision, is an arguably distorted presentation of data on internal controls and police professionalism.

That leads to a final point. Quasi-inquisitorialism has, in the main, functioned as a preservationist device. It has provided the Court cover in many cases to maintain a posture of deference to pretrial activities, even in the face of suggestion or evidence that the “presumption of regularity” attending those activities does not hold in the case before the Court, or even in the main. This was true in the Court’s early relaxation of the warrant requirement for checkpoints, as litigants and advocates in the political sphere suggested that law enforcement was engaging in increasingly more intrusive and less reliable investigative tactics; adverting to a semblance of bureaucratic checks in the cases before the Court, as in *Sitz*, provided cover from deafness to those concerns.<sup>249</sup> It is even more true in the more contemporary context of reliability concerns brought to light by DNA exonerations and the growing legal and social science literature addressing the systemic pretrial reliability concerns discussed in Part I.<sup>250</sup> In the face of increasing, increasingly professionalized, and increasingly politically visible amicus practice before the Court – in which reliability-minded reformers and scholars have taken substantial part – the Court could not sit mute. Reliance on putative quasi-inquisitorial attributes of police and prosecutors permits the Court to offer some response, provided by litigants keen to preserve the challenged discretion.<sup>251</sup> By that account, quasi-inquisitorialism frequently represents a kind of motivated adaptation to the anxiety introduced by the post-DNA criminal justice world.

### **III. Quasi-Inquisitorial Inroads**

While “ours” is probably best thought of as an essentially accusatorial system of criminal adjudication, the discussion in Part II reveals that this characterization does not fully capture even the Court’s *own* account of the structural features that form the backdrop to choices between deference and oversight in the pretrial realm. Not only does the Court in fact *have* an operative conception of those features, but that conception, trafficking as it does in conceptions of law enforcement and prosecutorial bureaucratic regularity, and professional and organizational expertise and restraint, has at least as much resonance with leading accounts of the investigative and prosecutorial apparatus of Continental, inquisitorial systems as with the

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<sup>249</sup> See, e.g., Brief for Respondents at 21, *Michigan v. Sitz*, 496 U.S. 444 (1990).

<sup>250</sup> See, e.g., *Perry v. New Hampshire*, 132 S. Ct. 716, 738-39 (2011) (Sotomayor, J., dissenting) (“It would be one thing if the passage of time had cast doubt on the empirical premises of our precedents. But just the opposite has happened. A vast body of scientific literature has reinforced every concern our precedents articulated nearly a half-century ago, though it merits barely a parenthetical mention in the majority opinion.”); Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent at 5–25, *Kansas v. Ventris*, 556 U.S. 586 (2009) (discussing systemic problems of reliability in use of informants).

<sup>251</sup> Thus, in *Kansas v. Ventris*, where the case before the Court featured use of an apparently unreliable informant whose conversations with the defendant violated the Fifth Amendment, with police knowledge, the Department of Justice nevertheless took (and the Court embraced) the view that police professionalism enforced through internal review and discipline, and prosecutorial ethics enforced through state and internal agency guidelines, sufficed to prevent misuse of informants in the ordinary case. Brief for the United States as Amicus Curiae Supporting Petitioner at 28, *Kansas v. Ventris*, 556 U.S. 586 (2009).

more autonomous, unrestrained, indeed zealous conception of the American legal adversary.<sup>252</sup> But where does identification of the “quasi-inquisitorial” features of that doctrine leave us? Returning to the examples of pretrial reliability concerns that opened this Article, what does this account offer those concerned about police reliance on questionable forensic or identification evidence, or about limited defense knowledge of or challenge to the prosecution’s case prior to a plea?<sup>253</sup>

This final Part suggests that, armed with the inquisitorial narrative, those concerned with the reliability deficit and pretrial discretion might engage in more exacting scrutiny and more potent advocacy concerning oversight of pretrial criminal practices – whether emanating from constitutional dictate, state law, or internal institutional design. The aim here is not to endorse any particular set of legal rules or institutional arrangements to mitigate the reliability deficit that flows from broad pretrial investigative and prosecutorial discretion, though the discussion takes as the overarching goal implementation of some set of reforms to investigative practices, disclosure, and even plea bargaining of the type that have, as Part I argues, garnered (in broad brush strokes) a significant consensus among scientists, social scientists, and legal scholars.<sup>254</sup> Rather, the discussion here is more strategic in nature, suggesting ways in which marshaling quasi-inquisitorialism might alter the terms of the debate on which these types of proposals, cutting as many of them do against the grain of long-standing adversarial traditions, might be met. This Part first offers two lessons that cut across specific doctrines or activities, and then turns to police investigation, discovery, and plea bargaining to briefly sketch some specific sites for applying those lessons.

#### **A. Cross-cutting Strategic Lessons: Lower Court and Legislative Advocacy, and Data Gathering**

Two cross-cutting strategic insights that might be gained from the above discussion are worth highlighting. The first echoes the call of many scholars and advocates to embrace with vigor the legal reform possibilities presented by investing attention and resources in lower court and legislative advocacy to as much if not a greater extent than Supreme Court practice.<sup>255</sup> This may seem a curious remark to follow upon a doctrinal exploration that took Supreme Court jurisprudence as its nearly exclusive focus. But the point flows from the frank concession of Part II that much of the impetus and traction for quasi-inquisitorial narratives in the Supreme Court’s pretrial criminal procedure jurisprudence has emanated from that narrative’s fit with preexisting jurisprudential (and even political) priorities. Those priorities are not equally as entrenched among state courts or among legislatures. Nor are state courts and legislatures, and their

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<sup>252</sup> See supra notes 18, 24, 51, 111–116 and accompanying text.

<sup>253</sup> See supra notes 1–4 and accompanying text.

<sup>254</sup> See supra notes 69–71 and accompanying text.

<sup>255</sup> See, e.g., Harris, supra note 58; Simon, supra note 6; Brown, supra note 13; Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 125 (2008) (describing pretrial accuracy-enhancing reforms “one of the most significant efforts to reform our criminal procedure in decades” and noting “it largely has not originated in the courts”); Ronald F. Wright, Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation, 105 Colum. L. Rev. 1010 (2005).

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constituent members, inclined to take as their touchstone for the current realities of pretrial police and prosecutorial work the relatively rarified world of federal criminal practice.<sup>256</sup>

And yet at the same time there is among state courts significant inclination to follow the Court's pace setting in constitutional criminal procedure, even where state constitutions would permit different and more expansive doctrinal moves, likely as a result of some combination of limited state court resources, the choices of advocates, and the cultural hegemony of the Court's account of "our" system of criminal justice.<sup>257</sup> The same trend can take hold even in legislative advocacy, particularly where powerful criminal justice stakeholders – police and prosecutors in particular – deploy constitutional argumentation and anti-inquisitorialism as a modality of political persuasion to characterize sub-constitutional reforms to pretrial oversight and practices as out of step with "our" adversarial system.<sup>258</sup> Making use of the Court's counter-punctual theme of quasi-inquisitorialism can change up these dynamics. This instinct is born out by the access to evidence jurisprudence discussed above, where the approach of *California v. Trombetta* to substantively examine actual evidence preservation practices as a feature of due process analysis, though essentially abandoned by the Court in *Youngblood*, remained influential in state court due process tests.<sup>259</sup>

A second and related insight concerns data, its assemblage and deployment in criminal practice as well as political advocacy. There has been a salutary uptick in academic attention to actual law enforcement and prosecutorial practices, particularly those that embody examples of the sorts of "best practices" that those concerned with pretrial reliability issues would hope to take hold. Here, however, my concern is more with documentation in individual cases of or systemic *departures* from those best practices, as evidence to rebut the heavy presumption of adequate internal and professional controls that features in quasi-inquisitorialism, and to prompt non-judicial actors to fill the space that the Court's doctrine has so often presumed occupied. As Part II.C. argued, there is some evidence that, at least before the Supreme Court, there is an imbalance in use of such evidence – no surprise, given barriers to gathering such information. Expanded amicus practice before the Court, especially by organizational actors with a long-term investment in gathering this type of data, may be changing that dynamic. But particularly in light of the systematic skew of the Court's criminal docket, discussed above,<sup>260</sup> such information comes too late in the form of a Supreme Court brief. To address this, criminal defense attorneys – individually or, more effectively, by leveraging bar associations and other networks – might well consider making greater use of collaborative information sharing and open record laws, as well as partnering earlier on with the civil rights bar which is often a repository for systemic information about law enforcement practices.<sup>261</sup>

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<sup>256</sup> See supra Part II.C.

<sup>257</sup> See supra notes 118–20 and accompanying text.

<sup>258</sup> See, e.g., note 121 and accompanying text; infra Part III.B.2.

<sup>259</sup> See supra notes 171–73 and accompanying text.

<sup>260</sup> See supra Part II.C.

<sup>261</sup> Significantly, many of the most noteworthy recent state court decisions adopting rules aimed at more rigorous judicial gatekeeping of police-generated evidence – among them the New Jersey and Oregon Supreme Court decisions incorporating social science research on eyewitness identification best practices into rules governing admissibility and jury instructions – featured amicus briefs by institutional stakeholder (including in both instances

## **B. Specific Applications**

### 1. Investigation

The fundamental reliability challenge posed by the substantial discretion afforded police in conducting criminal investigations is the twin risk that unreliable evidence will be introduced into the stream of proof, and that the harm will not be undone by courts (who exercise the lightest of gatekeeping touches with regard to some of the most problematic forms of evidence), or the institutional actors who enjoy deference (but for a variety of cognitive, motivational, or organizational features may lack adequate incentive or opportunity to catch error). As Part I recounted, the good news on this score has been the heightened attention to these concerns in academic literature and criminal justice professions, and the inroads that have begun to be made in bringing evidence generation and usage more in line with better or best practices – for example, the growing push to standardize eyewitness identification in accordance with scientific research, to enhance scrutiny and quality in the forensic sciences, to increase the transparency and reliability of interrogation. The bad news is the extent to which outliers remain – indeed, on balance, they likely remain the norm.<sup>262</sup>

What quasi-inquisitorialism offers here might be a legal reinforcement mechanism for bringing slow adopters into the fold – perhaps even by virtue of formal legal doctrine. Consider on this score the Court’s decision last Term in *Florida v. Harris*, one of the two Fourth Amendment drug-sniffing dog cases.<sup>263</sup> In evaluating whether the dog alert on which a search warrant application relied sufficed to establish probable cause – especially given the dog’s poor track record of false alerts against Mr. Harris himself – the Court held, unanimously, that dog sniff evidence deserved no more and no less than the same flexible “totality of the circumstances” test adopted by the Court in *Illinois v. Gates*.<sup>264</sup> On the one hand, and regrettably, this holding had the unfortunate consequence of seeming to reject efforts by state courts to fashion standards for “reasonableness” that incorporate attributes of reliability appropriate to certain categories of scientific evidence. Thus, the Court rejected the Florida state court’s test requiring written documentation of field performance and other measures deemed by the state court to be appropriate indicia of scientific reliability.<sup>265</sup> On the other hand, the Court signaled that law enforcement organizations would be held to a minimal threshold of validation, one essentially tracking standards adopted by the field of expertise implicated by the evidence at issue. Thus, police must point either to “satisfactory performance in a certification or training

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the Innocence Project), extensive fact-finding (including in the case of New Jersey by an appointed special master), and opinions situating the decisions in a factually rich local and national context. See *State v. Lawson*, 352 Or. 724, 757 (Or. 2012); Report of Special Master, *New Jersey v. Henderson*, A-8-08 (N.J. Sup. Ct. Jun. 8, 2010), available at <http://www.judiciary.state.nj.us/pressrel/HENDERSON%20FINAL%20BRIEF%20.PDF%20%2800621142%29.PDF> [hereinafter *Henderson* Special Master Report].

<sup>262</sup> See *supra* notes 72–81 and accompanying text.

<sup>263</sup> 133 S. Ct. 1050 (2013).

<sup>264</sup> *Id.*; see also *Illinois v. Gates*, 462 U.S. 213 (1983).

<sup>265</sup> *Gates*, 133 S. Ct. at 1055.

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program” by a “bona fide organization,” or at least recent completion of a law enforcement-sponsored “training program that evaluated his proficiency in locating drugs.”<sup>266</sup> Like the Court’s averment in recent exclusionary rule jurisprudence to the relevance of “systemic negligence,” the standard, even if deferential to the law enforcement field, does both acknowledge emerging trends in evidentiary standardization, and prevent law enforcement organizations from opting out of such trends.

Recall finally an additional, more specific, and more recent feature of the Court’s depiction of the quasi-inquisitorial investigative apparatus, an emerging formalization of the prosecutorial oversight function – as in the context of reviewing the “good faith” of warrant sufficiency in *Messerschmidt v. Millender*.<sup>267</sup> On balance, although the calculus is not straightforward, it would likely enhance the reliability of pretrial activity and decisionmaking if police action and evaluation of evidence were subject to prosecutorial scrutiny earlier rather than later.<sup>268</sup> And therefore, one might be encouraged by the possibility that law enforcement organizations and prosecutors offices might collectively take a cue from the Court to move toward more closely coordinated work, incentivized by enhanced protection against judicial second-guessing for law enforcement decisions. Of course, the danger is that what is are incentivized by doctrinal consideration of these arrangements is not formalized, independent review by prosecutors, but rather ad-hoc and deferential sign-off on police decisionmaking. This is of course a risk that is amply borne in the status quo. One might hope, however, both that prosecutors formally and openly placing their imprimatur on police decisionmaking would in most cases have adequate self-interest to exercise more searching review, and that courts following the *Messerschmidt* approach would be receptive to evidence (of the individual or systemic variety) that undermined the proffered independence of review.<sup>269</sup>

## 2. Discovery

Expanding and accelerating defense access to information concerning and evidence adduced in the state’s investigation is arguably the most promising mechanism to remedy reliability-diminishing features of pretrial activities. Greater parity in information permits scrutiny of investigative practices rather than simply the constructed fruits of those endeavors; affirmative access to the state’s investigatory apparatus, such as extending to the defense a right to test physical evidence or depose state’s witnesses,<sup>270</sup> further ameliorates errors that might flow from motivated thinking and other causes of tunnel vision; and advancing the timing of disclosure diminishes the ability of the state to take advantage of information asymmetries in plea bargaining, and prompts greater evidence-driven rather than risk-driven negotiation.<sup>271</sup> It is

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<sup>266</sup> *Id.* at 1056—57 & n.3 (citing police dog tactics literature).

<sup>267</sup> See Part II.A.1.c.

<sup>268</sup> See, e.g., Richman, *supra* note 150.

<sup>269</sup> 132 S. Ct. 1235 (2011).

<sup>270</sup> See Tex. Code Crim. P. Art. 38.43 (providing pretrial right to DNA testing of all forensic evidence in capital case); Fl. R. Crim. P. 3.220(a) (providing for criminal depositions).

<sup>271</sup> See, e.g., Bibas, *supra* note 66, at 2493, 2531—32; Darryl K. Brown, Defense Counsel, Trial Judges, and Evidence Production Protocols, 45 Tex. Tech L. Rev. 133 (2012).

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clear from the stability of *Brady* doctrine that liberalizing criminal discovery along such lines will be almost wholly an effort undertaken at the level of legislative craft, bar disciplinary attention, or the impetus of reform-minded offices. Efforts in those arenas have enjoyed notable, but ultimately isolated, successes. The key political barriers are as predictable as they are formidable: continued resistance by the organized prosecutorial bar.<sup>272</sup> Moreover, the terms of that (often successful) resistance are frequently sketched along two dimensions: The limited rather than expansive role for prosecutorial disclosure in “our” adversary system of criminal justice, and the appropriate balance already struck by the Court’s existing constitutional doctrine.<sup>273</sup>

Insights from the quasi-inquisitorial account might alter the terms of this debate. Advocates should make clear to courts, legislatures, and prosecutors themselves the extent to which the Court’s *Brady* decisions reflect a strong presumption that discovery in operation both exceeds *Brady*’s constitutional floor (in particular by sweeping more broadly than “material” evidence) and is enforced by a mutually reinforcing network of internal office policymaking and supervision, and state-level legal and ethical obligations. Certainly, constitutionally rooted anti-inquisitorial arguments such as those traced above, should be publicly challenged by reference to the Court’s own professed confidence and indeed intention that sub-constitutional norms should sweep more broadly than *Brady*.<sup>274</sup> So too should prosecutorial policymaking and internal practices with respect to disclosure be brought into the light – through open records act work, or, even better, through the electoral process in which most sitting chief prosecutors are formally called to account for their work.

### 3. Pleas

As a final set of preliminary thoughts, it is worth reflecting on whether the insights of the Article’s account open up any new ways of thinking about a seemingly intractable set of concerns surrounding plea bargaining. The intractability, I suggest, stems from at least two sets of sources: the first, the deeply embedded causes for skepticism of plea bargaining outcomes, including the evident reliability concerns generated by plea decisions that are uninformed as to the strength of the state’s case (in light of *Ruiz*) and frequently made against a backdrop of nearly

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<sup>272</sup> See, e.g., note 121 and accompanying text; Green, *supra* note 78; Moore, *supra* note 78.

<sup>273</sup> See Green, *supra* note 121 (tracing DOJ resistance to reform of Federal Rule 16 on ground that constitutional standard occupies the field); Brief for National District Attorneys Association as Amici Curiae Supporting Petitioner, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145); Proposed Changes to Wash. RPC 3.8, available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.proposedRuleDisplayArchive&ruleId=251](http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=251) (“A concern has been raised that suggested subsection (h) to RPC 3.8(h) is contrary to the adversary system of justice and fundamentally changes substantive law regarding the prosecutor’s role.”); Statement of James M. Cole, Deputy Attorney General, Committee on the Judiciary, U.S. Sen. (Jun. 12, 2012) (opposing congressional expansion of federal prosecutorial disclosure obligation in part on ground that bill would disrupt balance struck by constitutional doctrine); Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 1, 149–50 (Sept. 17, 1974) (Testimony of Richard Thornburg).

<sup>274</sup> See Letter of Emmett Sullivan to Richard Tallman, (Apr. 28, 2009), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/CR%20Suggestions%202009/09-CR-A-Suggestion-Sullivan.pdf> (urging expansion of Rule 16 discovery obligations and adverting to Supreme Court’s reliance on ABA standards in *Cone v. Bell*).

unconscionable retail “prices” for crimes (in light of the Court’s stingy substantive scrutiny of non-capital sentencing); the second, the deeply dissatisfying rubric through which the Court views the constitutionality of plea bargaining, namely waiver doctrine, which as it has evolved seemingly permits any bargain not physically coerced so long as trial (plea) counsel stands by its terms. The question of disclosure is addressed above, but in the main the circumstances that give rise to the accuracy-based ills of plea bargaining are more broadly structural than the instant focus on pretrial rules contemplates. The nub of the question is whether quasi-inquisitorialism assists in bringing to bear some greater scrutiny of plea bargaining than the constitutional floor of voluntariness currently contemplates.

One approach, a promising one explored at length by others, is to enhance internal prosecutorial rulemaking and supervision with respect to pleas – by, for example, setting standard, transparent, and non-coercive discounts within offices; formalizing channels for defense advocacy in connection with the deal, including before an audience that lacks the line prosecutor’s potentially skewed investment in the case; or taking certain waivers off the table – for example waivers of effective assistance of counsel or subsequent DNA testing, both of which strike at the heart of reliability in negotiated settlements.<sup>275</sup> Another approach urged, though sparsely adopted, is greater judicial scrutiny of plea bargaining, or more substantive judicial questioning in the course of plea allocutions – including, for example, reviewing evidence disclosed, or comparing deals offered to comparator cases.<sup>276</sup>

Drawing upon the quasi-inquisitorial narrative might enhance the case for adoption for either, or perhaps most innovatively a combination of, approaches. As the discussion in Part II.B demonstrated, one putative premise for the discretion afforded prosecutors in the pretrial sphere is the premise of internal and professional regulation and expertise guiding the judgments that enjoy deference. Concerns about lack of parity in bargaining have been mitigated in the Court’s mind not just by the presence of presumptively skilled defense counsel, but also by a conceptualization of the prosecutor’s unique role as offeror of deal terms. *Bordenkircher v. Hayes*, in which the Court held constitutionally permissible the “punishment” of a defendant’s refusal to plead guilty with an exponentially enhanced charge, was substantially premised on the presumed legitimacy of the prosecutor’s charge selections.<sup>277</sup> *United States v. Mezzanato* and *Town of Rumery v. Newton*, in which the Court sanctioned the permissibility of plea deals arguably countermanding both congressional commitments and broader public interests, featured accounts of prosecutor’s role that cast her as presumptively pursuing well-reasoned outcomes informed by broader bureaucratic commitments.<sup>278</sup> The aim here is to illuminate a less apparent dynamic in the Court’s plea bargaining jurisprudence, one rooted not as much in parity but rather in an embrace of the structurally privileged bargaining position of the prosecutor, alongside confidence that the privilege will be exercised with the restraint and regularity dictated by quasi-inquisitorial constraints.

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<sup>275</sup> See, e.g., Barkow, *supra* note 22; Bibas, *supra* note 228; Wright & Miller, *supra* note 115.

<sup>276</sup> See notes 68 & 80.

<sup>277</sup> 434 U.S. 357, 365 (1978).

<sup>278</sup> 513 U.S. 196, 207–08 (1995); 480 U.S. 386, 397 (1987).

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Recovering such a depiction might arm the reform-minded prosecutor with a politically tractable foothold for internal rulemaking – one, in fact, that embraces rather than diminishes the centrality of the prosecutorial role in our system. But courts might too, on their own instance or as a matter of legislative mandate, take a cue from the Court’s quasi-inquisitorial presumption of prosecutorial decisionmaking and bargaining. Though federal constitutional doctrine allows little space for such a move, legislatively enacted rules or state due process guarantees might require a (non-waivable) demonstration of the existence of the regularity and rationality presumed by quasi-inquisitorialism – perhaps *either* in the form of documented internal procedures concerning plea offers or alternately, failing that, judicial scrutiny of plea terms. For present purposes, the key advantage posed by such an approach would be its arguable consonance with and fulfillment of the Court’s own account of deference to an operative institutional and professional background against which the prosecutor’s role in plea bargaining is constrained.

### **Conclusion**

The primary focus of this Article has been a positive account of consequential themes in the Supreme Court’s criminal procedure doctrine – in particular, those features that I have characterized as attributing “quasi-inquisitorial” qualities to police and prosecutors in the pretrial domain that affords those actors significant, at times problematic, discretion. And yet, at bottom, the questions being asked, and partially, provisionally answered, are less about law as it is than about law as it might be. And in that regard, the intuition animating the preceding discussion is not so much that Supreme Court doctrine should be taken as the central regulatory vehicle in our criminal justice system, but rather that there are consequences of that jurisprudence – legal, political, cultural – that ripple beyond rule development or application in any given case. This also means that the core underlying concerns of this Article – the dynamics of legal change and reform – are necessarily much larger questions than can be fully and adequately vetted here. Thus, as always, the hope is that those in sympathy to the perspective animating this exploration, and particularly those engaged in the type of on-the-ground, constitutive work described herein, will further press these lines of inquiry.