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# Criminal Adjudication, Error Correction, and Hindsight Blind Spots

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*Abstract*

*Concerns about hindsight in the law typically arise with regard to the bias that outcome knowledge can produce. But a more difficult problem than the clear view that hindsight appears to provide is the blind spot that it actually has. Because of the conventional wisdom about error review, there is a missed opportunity to ensure meaningful scrutiny. Beyond the confirmation biases that make convictions seem inevitable lies the question whether courts can see what they are meant to assess when they do look closely for error. Standards that require a retrospective showing of materiality, prejudice, or harm turn on what a judge imagines would have happened at trial under different circumstances. The interactive nature of the fact-finding process, however, means that the effect of error can rarely be assessed with confidence. Moreover, changing paradigms in criminal procedure scholarship make accuracy and error correction newly paramount. The empirical evidence of known innocents found guilty in the criminal justice system is mounting, and many of those wrongful convictions endured because errors were reviewed under hindsight standards. New insights about the cognitive psychology of decision-making, taken together with this heightened awareness of error, suggest that it is time to reevaluate some thresholds for reversal. The problem of hindsight blindness is particularly evident in the rules concerning the discovery of exculpatory evidence, the adequacy of defense counsel, and the harmfulness of erroneous rulings at trial. The standards applied*

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*in each of those contexts share a common flaw: a barrier between the mechanism for evaluation and the source of error. This essay concludes that reviewing courts should consider the trial that actually occurred rather than what "might have been" in a different proceeding and proposes some new vocabulary for weighing error.*

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## *I. Introduction*

Constitutional requirements and standards of review that turn on hindsight warrant reconsideration in light of both recent social science on decision-making and empirical advances about error in the criminal justice process. For example, hindsight pervades the operation of the *Brady* rule governing prosecutors'

due process obligation to disclose exculpatory evidence,[1] the *Strickland* standard for assessing the adequacy of defense counsel under the Sixth Amendment,[2] and the question whether certain constitutional and evidentiary errors at trial require reversal.[3] While these standards have long been critiqued,[4] recent scholarship on reliability that DNA-based exonerations made possible substantially reinforces the claim.[5] Wrongful convictions occur, in significant numbers, and the adversarial orientation of police and prosecutors frequently precludes self-correction.[6] Other avenues for ensuring accuracy thus merit closer scrutiny, including the interstices where courts review claims of error and consider reversing convictions. As cognizance of wrongful convictions has grown, interest has increased in the mechanisms of error correction and the safety valve that appellate courts could provide.[7]

The manner in which courts evaluate the reliability of adjudication has also been illuminated by social science on the

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1. Brady v. Maryland, 373 U.S. 83, 87 (1963).

2. Strickland v. Washington, 466 U.S. 668, 690 (1984).

3. *See* 28 U.S.C. § 2111 (1994) (stating that convictions shall not be reversed for "errors or defects which do not affect the substantial rights of the parties").

4. *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 645 (2002) ("[I]f *Brady* provides a sense of security that defendants are constitutionally entitled to broad discovery, that sense of security is a false one."); *see also* Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 899 (2013) ("*Strickland* has been the subject of sustained academic criticism since it came down."); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 39 ("[T]he Court has shifted the evidentiary burden of proving error not harmless to criminal defendants by incorporating harmless error rules into the context of fair trial rights.").

5. *See generally, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (providing one of the earliest systematic looks at the first 200 cases in which DNA evidence exonerated defendants).

6. *See generally* George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169 (2005); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549.

7. *See*, *e.g.*, Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 481 (2009) ("After the exoneration of more than 200 people based on post-conviction DNA evidence, a growing movement against wrongful convictions has called increased attention to the prosecutorial suppression of material exculpatory evidence.").

unfolding of facts, the structure of decision-making, and the inevitability of biases.[8] In light of those developments, requiring assessments of what "might have been" appears to leave a barrier between reviewing courts and the root causes of error. Underenforcement of discovery obligations, the right to counsel, and exclusionary rules diminishes accuracy. And that underenforcement occurs in part because hindsight standards both preclude relief in individual cases[9] and impede reform.[10] Each of these standards has been revealed as having inconsistent application and insufficient rigor,[11] and each suffers from a similar disability. New vocabulary to discuss the weight of error could help strike the balance between meaningful review and an administrable reversal rate.

## *II. Finding the Blind Spot in Hindsight*

Even as the incarceration rate attracts bipartisan attention,[12] and scrutiny of investigative practices has given rise to conviction integrity units in prosecutors' offices,[13] the role of judges considering trial errors continues to contract because of habeas barriers and hindsight standards. Two developments in the scholarship on criminal trials have brought into sharp relief the problems with hindsight and this missed opportunity for

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8. *See generally* Chris Guthrie et al., *Inside the Judicial Mind,* 86 CORNELL L. REV. 777 (2001).

9. *See* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 7 (2002) (stating that the harmless error standard "create[s] a firewall between constitutional rights and remedies").

10. *See* Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995) ("When we hold errors harmless, the rights of individuals, both constitutional and otherwise, go unenforced . . . [and] the deterrent force of a reversal remains unfelt by those who cause the error.").

11. *See* Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1544 (2010) ("Scholars have repeatedly condemned Brady's materiality standard, often on the premise that it all too easily empowers overzealous prosecutors to engage in gamesmanship to dodge their obligations to disclose.").

12. Carl Hulse & Jennifer Steinhauer, *Sentencing Overhaul Proposed in Senate with Bipartisan Backing*, N.Y. TIMES, Oct. 1, 2015, at A19.

13. *See generally, e.g.*, CTR. FOR PROSECUTION INTEGRITY, CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM (2014).

more rigorous review: insights from cognitive psychology about the way in which evidence is received,[14] and new data on wrongful convictions.[15] Jurors reach verdicts according to a complex process, and they respond to evidence in part through unconscious biases that elide analysis.[16] Moreover, the strength of any piece of evidence cannot be evaluated in isolation because its weight and meaning arise from its relationship to other evidence. A clearer understanding of the way in which fact-finders make decisions reveals the impossibility of correctly evaluating a completed trial in hindsight. At the same time, greater awareness of the distribution of error at trial underscores the need for a tighter safety net to catch prosecutors' discovery violations, ineffective assistance of counsel, and wrongfully admitted evidence.

### *A. Unpredictable Evidentiary Interactions*

Experimental psychology has established that fact-finders do not engage in an atomistic weighing of probabilities at trial; they react to the evidence as a whole, in an integrated and non-linear process.[17] Trials involve partial stories, intricate constellations of facts dim and bright, complex decision-making by counsel about strategy and presentation, and testimony that flows into other

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14. *See, e.g.*, DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 170 (2012) (describing how "persuasion is often dominated by heuristic, superficial cues" including "associations, similarities, metaphors, emotive appeals, and narrative ploys" and concluding that factfinders place greater weight on these than on "analytic inferences that can be sustained by the evidence").

15. *See generally* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (2012).

16. *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 542 (1991) (analyzing an experiment with mock jurors that demonstrated that "story coherence, as determined by presentation order of evidence, affects verdict decisions in a dramatic way").

17. *See* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L. J. 281, 295 (2013) (explaining that "jurors have preexisting conceptions that affect how they process evidence, and that individual pieces of evidence interact with each other in ways that influence meaning").

pieces of evidence the moment it emerges.[18] Preexisting narrative constructs further affect how fact-finders receive and process information.[19] Verdicts are thus an interactive process, in which pieces of evidence alter each other when they come together,[20] and fact-finders themselves can change course through deliberation with other jurors.

As the Supreme Court has recognized, the sum of all of the evidence and argument at trial creates a new whole.[21] In *Old Chief v. United States*, the Court reasoned that the government could present a narrative case "to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault."[22] And in *Bruton v. United States*,[23] the Court stated that jurors cannot "segregate evidence into separate intellectual boxes."[24]

Given the interdependence of evidence, it is both difficult to understand what actually happened at a trial and all but impossible to envision what *might* have happened at some slightly different trial. The "legal truth" might not have been a guilty verdict with additional impeachment material on key

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18. *See* United States v. Schipani, 289 F. Supp. 43, 56 (E.D.N.Y. 1968) ("The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis which seldom needs to be analyzed precisely . . . [and] must be interpreted in the context of all the evidence introduced."); *see also* ROBERT P. BURNS, A THEORY OF THE TRIAL 150 (1999) ("Stories solve the problem of information overload by allowing a continuing reintegration of new information and reorganization of that information according to the changes in meaning that the new information allows or requires."); SIMON, *supra* note 14, at 175 (discussing the coherence effect and "bidirectional reasoning, in which the facts guide the conclusion, while the emergence of that conclusion reshapes the facts to become more coherent with it").

19. *See* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 116 (2000) (considering the way in which narrative constructs reach the unconscious and influence the perception of facts); *see also* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–96 (1981) (articulating the theory that narrative forms not only how facts are perceived at trial but also what those facts actually "are").

20. *See* Old Chief v. United States, 519 U.S. 172, 187 (1997) ("Evidence thus has force beyond any linear scheme of reasoning . . . .").

21. *Id.*

22. *Id.* at 188.

23. 391 U.S. 123 (1968).

24. *Id.* at 131.

prosecution witnesses, a superior defense lawyer, or the exclusion of unconstitutionally obtained evidence like a coerced confession. It is hard to say. One cannot step in the same river twice.[25] And courts cannot accurately reconstruct or redirect the ebb and flow of a completed trial.

Yet that reconstruction is precisely what hindsight standards demand: a clear vision of an error-free trial that did not occur. On direct appeal, or on state or federal habeas, judges are asked to imagine a different trial than the one that took place. They must then characterize the effect that the other, fictional trial would have had on the initial fact-finders. The difficulty—if not impossibility—of this task is compounded by the simple fact that trials tend to occur in close cases with complex fact-finding. When reviewing courts apply standards to those trials that require hindsight, many errors evade scrutiny.

### *B. Bias v. Blindness*

This blind spot presents different issues than the well-documented problem of "hindsight bias." Hindsight bias makes past events seem inevitable and clearly predictable after they have actually unfolded.[26] Decision-makers cannot suppress the influence of known results on judgments but remain largely unaware that outcome knowledge has altered their perception.[27]

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25. This is a saying widely attributed to early Greek philosopher Heraclitus. *See* Daniel W. Graham, *Heraclitus*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011) ("It is not possible to step twice into the same river according to Heraclitus, or to come into contact twice with a mortal being in the same state.").

26. *See* Doron Teichman, *The Hindsight Bias and the Law in Hindsight*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 354 (Doron Teichman & Eyal Zamir eds., 2014) (providing an overview of the intersection between the psychological literature on hindsight and legal scholarship); *see also* Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. 569, 570 (1988) (discussing how knowledge of a result affects the way an individual perceives past decisions); Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPER. PSYCHOL. 288, 293 (1975) (documenting the existence of hindsight bias). *See generally* Jay Christensen-Szalanski & Cynthia Fobian Wilhalm, *The Hindsight Bias: A Meta-Analysis*, 48 ORG. BEHAV. & HUM. DECISION PROCESSES 147 (1991) (recounting several studies of hindsight bias).

27. Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past*

Memory is a dynamic process, and awareness of a result highlights evidence and information consistent with that result, which makes the outcome appear much more likely at the earlier point in time. Belief perseverance can then make judges doubt the significance of facts that conflict with the status quo of a conviction.[28] This bias in favor of the known outcome partially explains the durability of wrongful convictions, sometimes even after new evidence like DNA exonerates a defendant.[29] In a broader sense, the confirmatory impulse known as hindsight bias "leads investigators, prosecutors, judges, and defense lawyers alike to focus on a particular conclusion and then filter all evidence in a case through the lens provided by that conclusion."[30]

Some legal judgments already recognize this hindsight danger and reflect adjustments for the potential bias.[31] This explains why, for example, after-acquired information is generally barred from liability determinations.[32] And it also figures in the assessment of whether an unnecessarily suggestive identification process infected an eyewitness's testimony.[33] The

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*Events After the Outcomes Are Known*, 107 PSYCHOL. BULL. 311, 322 (1990); *see also* DANIEL KAHNEMAN, THINKING, FAST AND SLOW 202 (2011) (noting that winning teams later appear much stronger than losing ones and that this new perception alters the "view of the past as well as of the future").

28. *See, e.g.*, KAHNEMAN, *supra* note 27, at 81 (describing experiments showing the difficulty of "unbelieving" falsehoods); *id.* at 305 ("Loss aversion is a powerful conservative force that favors minimal changes from the status quo in the lives of both institutions and individuals.").

29. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 316 (discussing notorious cases of enduring wrongful convictions and the mechanisms by which the guilt judgment "persisted on appeal and through postconviction proceedings, tainting perspectives on the relative strength of the States' and defendants' cases").

30. *Id.* at 292.

31. *See* Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 591, 620–24 (1998) ("When a court must determine what someone 'knew or should have known,' it is especially likely to fall prey to the hindsight bias.").

32. *See, e.g.*, FED. R. EVID. 407 (barring admission of evidence concerning subsequent remedial measures to prove negligence, culpable conduct, defective design, or the need for a warning).

33. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977) (listing the factors that determine admissibility of identification testimony).

phenomenon of 20/20 hindsight of course relates as well to failures to overturn error.[34] But even though confirmatory bias obstructs meaningful review of inadequacies in the criminal justice process, it is not the primary obstacle.

Blindness rather than bias may be the most significant impediment to review. When courts must determine whether a decision-making process was sound despite an exposed error, the hindsight they employ appears to offer a clear view but too often is clouded. Courts can only speculate about the effect of error, and it turns out that many errors they have deemed trivial may be contributing to wrongful convictions.

### *C. The Error-Correction Imperative*

Empirical evidence now reveals that hindsight standards jeopardize not just the legitimacy of the finding of legal truth but the accuracy of the "factual truth" as well.[35] Until recently, the Supreme Court only rarely expressed any doubt "that a person awarded the constitutional protections and found guilty by a jury of peers might be anything but factually guilty."[36] But in recent scholarship made possible by DNA exonerations, the analysis of wrongful convictions has established a significant population of "known innocents" in the criminal justice system.[37] That development has shifted the criminal procedure paradigm in terms of the primacy of accuracy. Error leading to wrongful

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34. *See* Findley & Scott, *supra* note 29, at 321 ("With hindsight knowledge that a jury found the defendant guilty beyond a reasonable doubt, judges are likely to be predisposed to view the conviction as both inevitable and a sound decision, despite a procedural or constitutional error in the proceedings.").

35. *See* GARRETT, *supra* note 15, at 200–04 (noting that hundreds of cases involving post-conviction exonerations through DNA evidence included a review on direct appeal in which errors were deemed inconsequential or evidence of guilt overwhelming).

36. Dan Simon, *Criminal Law at the Crossroads: Turn to Accuracy*, 87 S. CAL. L. REV. 421, 426 (2014); *see also* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (Judge Learned Hand) (referring to the wrongfully convicted defendant as a "ghost" haunting the criminal justice process like an "unreal dream").

37. *See* Garrett, *supra* note 5, at 37 ("Over the past decade, DNA technology challenged the Court's assumption of guilt with the postconviction exoneration of mounting numbers of innocent people.").

convictions is now real rather than theoretical, and the debate no longer involves speculation about the tolerable ratio of guilty acquittals to unjust convictions.[38]

Moreover, accounts of wrongful convictions increasingly reach popular culture,[39] and the criminal justice system's "potential to convict and punish innocent people" has entered the broader public consciousness.[40] The recent phenomenon of the "Serial" podcast, for example, alerted millions of listeners to the sometimes murky narrative that emerges in a criminal trial and the difficult process of pairing factual and legal truth.[41]

Though reliability has been called the "largely forgotten purpose of the rules,"[42] the confirmed incidence of "actual innocence" demands consideration of how particular practices might relate to correct outcomes.[43] The actual rate of false convictions remains unknowable.[44] DNA identification is not

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38. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (1765) ("Better that ten guilty persons escape than that one innocent suffer."); *see also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[A] fundamental value determination of our society is that it is far worse to convict an innocent man than to let a guilty man go free."); Alexander Volokh, *n Guilty Men*, 146 U. PENN. L. REV. 173, 174 (1997) (discussing the Blackstone Ratio).

39. *See generally, e.g.*, JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN (2006); JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TOMEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009).

40. Simon, *supra* note 36, at 428; *see also* Medwed, *supra* note 6, at 1551 (stating that the focus on innocence "by litigators, academics, legislators, authors, and even television executives signals a new era in which fact-based arguments surrounding guilt or innocence may begin to trump or at least hold their own with the traditional rights-based arguments that have been the norm in criminal law for generations").

41. *See, e.g.*, Matt Schiavenza, *Serial's Second Act*, THE ATLANTIC (Feb. 8, 2015), http://www.theatlantic.com/national/archive/2015/02/serials-second-act/385287/ (last visited Oct. 11, 2015) (noting defendant Adnan Syed's pending appeal on ineffective assistance of counsel grounds) (on file with the Washington and Lee Law Review).

42. Richard Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 486.

43. *See* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133, 134, 147 (2008) (discussing the "Reliability Model" that emerges from the "Innocence Movement").

44. Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES, Mar. 25, 2008, at A14. *But see* Kansas v. Marsh, 548 U.S. 163, 198 (2006)

available in every case, and many serious crimes do not involve the collection of DNA evidence.[45] But it is now apparent that more (and more egregious) errors occur in the criminal justice system than previously thought. The National Registry of Exonerations documents 1,733 wrongful convictions that have been exposed to date.[46] There have been 330 exonerations obtained through post-conviction DNA testing, including twenty defendants who had been sentenced to death.[47] Further, despite rhetoric about the potential costs of wrongful acquittals stemming from more rigorous procedures, there is no identifiable population of "known guilties" who are wrongly acquitted to compare to the growing dataset containing known innocents.[48] As Brandon Garrett has explained, "[C]onstitutional error no longer appears as a procedural technicality asserted by a probably guilty defendant."[49]

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(Scalia, J., concurring) (extrapolating from editorial and empirical challenges to the existence of wrongful convictions to conclude that the error rate is actually 0.027%).

45. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 531 (2005) ("Beneath the surface there are other undetected miscarriages of justice in rape cases without testable DNA, and a much larger group of undetected false convictions in robberies and other serious crimes of violence for which DNA identification is useless."); *see also* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 938 (2008) ("There are very few exonerations among convictions for nonhomicidal crimes of violence for which DNA evidence is of no value, for example, robbery.").

46. *National Registry of Exonerations*, UNIV. OF MICH. LAW SCHOOL, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Jan. 31, 2016) (on file with the Washington and Lee Law Review).

47. *Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start= 0&c4+Exonerated+by+DNA (last visited Oct. 11, 2015) (on file with the Washington and Lee Law Review).

48. Nor are the costs of false convictions and false acquittals properly viewed as "fixed quantities to be weighed against each other." Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1093 (2015). *But see* Larry Laudan, *The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?*, 1 OXFORD STUD. PHIL. L. 195, 202 (2011) (attempting to quantify the cost of false acquittals).

49. Garrett, *supra* note 5, at 38.

Accuracy, of course, is not the sole purpose or single-minded focus of criminal adjudication. It serves other goals and aspirations, including procedural fairness, individual autonomy, privacy and privileged relationships, and even the correction of some power disparities between the state and citizens.[50] The "new reliability" scholarship, however, has brought correct outcomes to the forefront.[51] It inspires discussion of best practices for investigators,[52] underscores the scientific shortcomings of some common forensic analyses,[53] and exposes the informational and resource asymmetries that can preclude true adversarial testing.

Yet the renewed imperative to achieve accurate results seems at odds with the limited avenues for error correction at later stages of criminal adjudication. Although *Brady* and *Strickland* claims of error were designed to trigger reversal only in a narrow band of cases, they were not intended to prevent any review at all.[54] To be sure, there is a "strong aversion of appellate and post-conviction courts to intervene in factual determinations made at the trial level,"[55] but the rules have no force if frontline institutional actors know that conduct is *completely* insulated from review.[56] The understanding that once error occurs, it will

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50. *See, e.g.*, Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 211 (2014) ("Adjudication's traditional purposes and rationales have been predominantly non-utilitarian. Constitutional rights to introduce evidence and confront state witnesses serve political norms that value individual autonomy and process participation, independent of whether they improve accuracy in trial judgments.").

51. Findley, *supra* note 43, at 134; Medwed, *supra* note 11, at 1550.

52. *See, e.g.*, Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 799, 805–06 (2013) (arguing for complete recording of interrogations and for pretrial reliability hearings to determine whether confessions are contaminated).

53. *See* Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CALIF. L. REV. 721, 721 (2007) (stating that criminal adjudication has "relied too readily upon faulty forensic evidence like handwriting, ballistics, and hair and fiber analysis").

54. *See generally* Brady v. Maryland, 373 U.S. 83 (1963); Strickland v. Washington, 466 U.S. 668 (1984).

55. SIMON, *supra* note 14, at 212.

56. *See* Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1366 (1994) ("[I]f

rarely be rectified, has led to the recent establishment of conviction integrity units to review potential errors,[57] and those reviews have in turn informed investigative and prosecutorial tactics in ongoing investigations.[58]

Nonetheless, executive self-correction still happens infrequently, and hindsight blindness should not preclude courts from engaging in guided speculation about the impact of errors. Reforms to date have focused largely on investigators and prosecutors rather than reviewing courts.[59] Yet there are now hundreds of cases that reveal the relationship between errors that were not fully assessed and persistent false convictions.[60] As applied, the current standards are afflicted by hindsight blindness that can preclude the necessary holistic inquiry. And this is especially concerning when the errors that appellate courts are weighing involve practices that have long been understood as related to accurate adjudication, such as the discovery of exculpatory material or the adequacy of defense counsel.

## *III. Weighing Exculpatory Evidence*

To begin with discovery obligations, due process imposes a duty on prosecutors to turn over exculpatory information in the possession of the government. Under *Brady v. Maryland*,[61] evidence favorable to an accused is discoverable if it is "material

committing an error has no adverse effect on the state, the deterrence of official misbehavior becomes difficult.").

57. Spencer S. Hsu, *D.C. Prosecutors Create Unit to Find Wrongful Convictions*, WASH. POST (Sept. 11, 2014), https://www.washingtonpost.com/local/crime/dc-prosecutors-create-unit-to-find-wrongful-convictions/2014/09/11/91a3722c-39da-11e4-bdfb-de4104544a37_story.html (last visited Feb. 2, 2016) (on file with the Washington and Lee Law Review).

58. *See* CTR. FOR PROSECUTION INTEGRITY, *supra* note 13 (discussing the effectiveness of conviction integrity units across the United States).

59. *Supra* notes 52–53 and accompanying text.

60. *See, e.g.*, James S. Liebman et al., *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 IOWA L. REV. 577, 623 (2013) (discussing the courts' failure to value the cumulative effect of multiple small exclusions like circumstantial evidence of non-matches between a perpetrator and the defendant).

61. 373 U.S. 83 (1963).

either to guilt or to punishment."[62] Evidence is material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[63] The standard is not just the lens through which the court looks upon post-conviction review but the definition of the government's due process obligation. Almost every court, as well as the Department of Justice, interpret the discovery requirement itself as extending only to material evidence.[64] The definition of material thus gives prosecutors flexibility—and causes reviewing courts difficulty—because it is a hindsight decision as to whether the suppression of evidence "undermines confidence in the outcome of the trial."[65]

### *A. Hindsight About Foresight*

The question starts out as one of foresight rather than hindsight. Foresight is a familiar construct in decision-making within the criminal justice process by investigators, prosecutors, and judges. To take just a few examples, probable cause to seek a search warrant, make an arrest, or charge a crime requires a prediction about the evidence that will be found or the likelihood of guilt.[66] Judges also routinely evaluate the admissibility of

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62. *Id.* at 87.

63. United States v. Bagley, 473 U.S. 667, 682 (1985).

64. Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 646 (2013). For examples from lower courts that have imposed broader discovery requirements, see United States v. Safavian, 233 F.R.D. 12, 16–17 (D.D.C. 2005) ("[T]he government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed—with the benefit of hindsight—as affecting the outcome of the trial."); United States v. Acosta, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005) ("Simply because 'material' failures to disclose exculpatory evidence violate due process does not mean only 'material' disclosures are required."); United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) ("T]he post-trial review determines only whether the improper suppression of evidence violated the defendant's due process rights. However, that the suppression may not have been sufficient to violate due process does not mean that it was proper.").

65. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

66. *See* Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (defining probable cause as "where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are

evidence by assessing what effect it might have on a jury.[67] But a *Brady* claim adds a challenging layer. Not only must the prosecutor show foresight to comply, but the judge then uses hindsight about that foresight to determine whether there has been a violation.[68] The limitations of hindsight already inhibit the evaluation whether a particular failure to disclose could have altered the course of a now-completed trial, and judges further consider whether a prosecutor would have anticipated the hypothetical course change at the time that the evidence was withheld.

Prosecutors acting in bad faith can find shelter behind this layered standard, and even those acting in good faith cannot apply it consistently. They interpret facts within their adversarial role, and potentially exculpatory evidence may not undermine their confidence in the defendant's guilt. Indeed, prosecutors are supposed to be convinced of a defendant's guilt before seeking charges and thus necessarily engage with the *Brady* standard through a lens clouded by cognitive bias.[69] Exculpatory evidence will of course appear meaningless or unconvincing, and the materiality element makes it easy to suppress. Starting out with an adversarial view of the case and

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sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed").

67. *See* FED. R. EVID. 403 (giving trial courts discretion to exclude evidence where its probative value is substantially outweighed by its prejudicial effect).

68. *See* Green, *supra* note 64, at 646 ("[A] federal prosecutor who seeks merely to abide by the constitutional minimum must predict *before* trial what a court will say *after* trial about the utility of favorable evidence in the [G]overnment's possession." (emphasis added)). The "inevitable discovery" doctrine applicable to the Fourth Amendment provides an analogue, according to which law enforcement, in possession of evidence after an illegal search, can argue that the evidence should not be suppressed because the investigation would eventually have uncovered that evidence. *See* Nix v. Williams, 467 U.S. 431, 444 (1984) (adopting the inevitable discovery exception).

69. Burke, *supra* note 7, at 494–96; *see also* Alafair S. Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593–1601 (2006) (explaining how confirmation bias, selective information processing, belief perseverance, and avoiding cognitive dissonance affect prosecutorial decision-making); KEITH A. FINDLEY & BARBARA O'BRIEN, PSYCHOLOGICAL PERSPECTIVES: COGNITION AND DECISION MAKING 36 (2014) ("[P]eople interpret information, form questions, and search for additional evidence in a way that supports existing beliefs without even knowing that they are doing so.").

then attempting to determine ex ante what the import of a piece of evidence might turn out to be is extremely difficult.[70]

It is then all but impossible for courts to critique that decision ex post. Courts must look back at the trial and consider whether suppressed evidence would have changed the outcome, and whether, in retrospect, it appears that prosecutors should have *prospectively* recognized the value and relevance of the evidence at issue. Even evidence that does not clearly call the conviction into question might have mitigated blame or modified the jury's perception of other evidence. Meaning is produced from the interaction between pieces of evidence and other facts and argument in the case, as well as preexisting narrative schemes to which individual fact-finders have been exposed.[71] Missing details may matter a great deal, and "true-but-incomplete account[s]" may seriously mislead.[72] As Justice Marshall wrote in *Bagley*,[73] the "private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference."[74] Accordingly, there is no way to evaluate whether a prosecutor's forecast of the effect any one piece of evidence might have on a trial fell short. Yet most scholarship and reform initiatives focused on *Brady* violations address whether to expand

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70. As Scott Sundby points out, there may even be an inherently unethical quality to *Brady* compliance under the current stringent materiality standard. A prosecutor only need turn over a piece of evidence if she concludes that it is "so exculpatory in nature that it actually undermines [her] belief that a guilty verdict would be worthy of confidence." Sundby, *supra* note 4, at 651. But having turned it over, she is supposed to resume "zealous efforts to obtain a guilty verdict" that she has just concluded would not be worthy of confidence. *Id.*

71. *See* Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 198 (2011) ("[E]vidence is likewise influenced by the other evidence in the case, [even] absent any rational connection between the items."); Robert P. Burns, *A Short Meditation on Some Remaining Issues in Evidence Law*, 38 SETON HALL L. REV. 1435, 1437 (2008) ("[A] single additional detail, and certainly a constellation of additional details, can substantially change the significance of the stories told at trial.").

72. Susan Haack, *The Whole Truth and Nothing but the Truth*, 32 MIDWEST STUD. PHIL. 20, 30 (2008); *see also id.* at 31 (explaining that "the effect of telling only part of the truth" can be "to *slant* or *skew* the audience's perception of the larger truth that is not told").

73. 473 U.S. 667 (1985).

74. *Id.* at 682.

prosecutorial obligations and mechanisms to ensure compliance,[75] rather than the approach that courts should take to determine whether there has been a violation.

### *B. The Example of Impeachment*

Perhaps the most challenging factual context is the question of impeachment evidence under *Brady*. *Giglio v. United States*[76] requires that prosecutors provide defendants with any material evidence that tends to impeach the credibility of government witnesses.[77] But the significance of impeachment material will not strike every institutional actor and fact-finder in the same way.[78] As with exculpatory information, "it is the job of the defense, not the prosecution, to decide whether and in what way to use" impeachment.[79] Layers of inference determine the potential import of impeachment material such as prior inconsistent statements, incentives to cooperate with the government, substance abuse and mental health issues, or potential animosity toward a defendant. Its exculpatory force will depend on which witnesses ultimately testify, how pivotal their testimony will be, whether impeaching them will successfully diminish their credibility in the eyes of fact-finders, and the significance of the impeached testimony in the context of other evidence in the case. Moreover, exposing one untrustworthy

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75. *See, e.g.*, Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 5–6 (2015) (summarizing scholarship on *Brady* reform that calls for a broader scope to the obligation, more sanctions for violations, or improved organizational dynamics within prosecuting offices).

76. 405 U.S. 150 (1972).

77. *See id.* (extending the *Brady* obligation to disclose favorable evidence to "any understanding or agreement" concerning a testifying witness's future prosecution). Disclosure of impeachment material is not, however, mandatory at the plea bargaining stage where most crucial decisions are made. United States v. Ruiz, 536 U.S. 622, 629 (2002).

78. *See* Davis v. Alaska, 415 U.S. 308, 318 (1974) (recognizing a defendant's constitutional right "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness").

79. *Bagley*, 473 U.S. at 698 (Marshall, J., dissenting).

witness might diminish and detract from the prosecution's case overall,[80] but to an unpredictable extent.

For instance, in *United States v. Bagley*,[81] the prosecution failed to reveal payments that government witnesses received in exchange for cooperation.[82] While rather obviously impeachment material, that evidence may or may not have made any difference in the case if it had been disclosed. The judges reviewing the case reached no consensus themselves on whether the suppressed material was significant.[83] In a self-contained demonstration of the hollowness of the materiality standard, the district court concluded that the impeachment material was not subject to disclosure, the Ninth Circuit disagreed, and the Supreme Court reversed.[84] More recently, in *Smith v. Cain*,[85] the prosecutor insisted at oral argument, to an increasingly incredulous Court, that inconsistent statements by the only eyewitness were not necessarily material to the case.[86]

Another illustration comes from a 2013 Ninth Circuit case involving a conviction for producing the chemical ricin for use as a weapon.[87] Prosecutors failed to reveal that the forensic science at the heart of the government's case was prepared by an analyst who had been found "incompetent and [had] committed gross misconduct."[88] The court concluded, however, that the defendant's intent—based on web sites he had visited, notes he took, and books he bought—was so clearly established that knowledge of the scientist's discharge would not have changed the outcome.[89] In dissenting from the denial of rehearing en banc,

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80. *See* SIMON, *supra* note 14, at 176 ("[D]iscrediting an evidence item results in the weakening of other evidence items supporting the same side.").

81. 473 U.S. at 667.

82. *Id.* at 682.

83. *Id.* at 684.

84. *Id.*

85. 132 S. Ct. 627 (2012).

86. *See* Transcript of Oral Argument at 29, Smith v. Cain, 132 S. Ct. 627 (2012) (No. 10-8145) (statement of Justice Ginsburg) ("But how could it not be material? Here is the only eyewitness. . . . Are you really urging that the prior statements were immaterial?").

87. United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting).

88. *Id.* at 627 (internal quotation marks omitted).

89. *Id.* at 633.

Judge Kozinski wrote that there is no difference between this analysis and concluding that it is "possible" that the defendant would have been convicted anyway.[90]

### *C. The Problem with Materiality*

The Court has long sowed this confusion about whether the omitted evidence itself must raise reasonable doubt to be material, or whether some scenario under which it might have interacted with other evidence to trigger a different course of events suffices.[91] Not surprisingly, the lower courts have articulated the level of certainty about outcome effect in a variety of ways.[92] The easier question—because the answer is almost always "no"—is whether a defendant can *prove* that the result would have been different, and that seems to be the burden-shifting inquiry in which most courts engage.[93] Judges are predisposed to view a conviction as correct, and that cognitive bias is compounded by the structural characteristics of the *Brady* standard.

Not only the epistemic challenges but also the innocence empirics support reform of that standard. Discovery under *Brady* serves the "general goal of establishing procedures under which criminal defendants are acquitted or convicted on the basis of all

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90. *Id.* at 630.

91. *See* United States v. Agurs, 427 U.S. 97, 112–13 (1976) ("[T]he omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.").

92. For example, among the thirty-seven federal districts with a local rule or order governing *Brady*, nineteen attempt a definition of *Brady* material, and five state that materiality is irrelevant to its application. FED. JUDICIAL CTR., *BRADY V. MARYLAND* MATERIAL IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS AND POLICIES: REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (2007); *see also* Robert Hochman, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1679 (1996) ("Left to their own devices, lower courts are in disarray over the precise scope of *Brady* duties and the proper rationales behind them.").

93. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 441 (1995) ("In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.").

the evidence which exposes the truth."[94] In general terms, thorough disclosure of potentially exculpatory information preserves the burden of proof, enables the assistance of counsel, and supports other fairness guarantees.[95] More specifically, Brandon Garrett's study of wrongful convictions concludes that "in thirty-four percent of all exonerations, police suppressed exculpatory evidence, and prosecutors did so in thirty-seven percent of all exonerations."[96]

Some of those cases involve deliberate suppression of evidence. The *Brady* standard gets substantial attention for enabling strategic behavior by prosecutors, and recent scholarship has focused on compliance issues.[97] But high profile cases—such as those concerning abuses in the New Orleans District Attorney's Office,[98] or the alleged excesses of the federal prosecutions of Senator Stevens[99] or W.R. Grace[100]—do not

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94. *Id*. at 440 (quotation marks omitted) (quoting United States v. Leon, 468 U.S. 897, 900–01 (1984)).

95. *See In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

96. Garrett, *supra* note 5, at 69 n.173.

97. *See, e.g.*, Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2090 (2010) (stating that *Brady* violations are "one of the most common types of prosecutorial misconduct").

98. *See generally* Smith v. Cain, 132 S. Ct. 627 (2012); Connick v. Thompson, 131 S. Ct. 1350 (2011).

99. In the 2009 *Stevens* case, the Department of Justice dismissed a public corruption indictment because of discovery violations, including the failure to disclose prior statements by a government witness that impeached his testimony. Charlie Savage & Michael S. Schmidt, *Inner Workings of Senator's Troubled Trial Detailed*, N.Y. TIMES, Mar. 15, 2012, at A19; *see also Prosecution of Senator Ted Stevens*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS (NACDL), https://www.nacdl.org/criminaldefense.aspx?id=23885 (last visited Oct. 29, 2015) ("Senator Ted Stevens was prosecuted and convicted for criminal ethics violations, subsequently lost his re-election campaign, and, only shortly before his tragic passing, was exonerated after a whistleblower revealed that prosecutors withheld critical evidence of the Senator's innocence in violation of his constitutional rights.") (on file with the Washington and Lee Law Review).

100. When the jury was instructed that the government similarly failed to disclose witness statements, that instruction apparently contributed to the 2009 acquittal of W.R. Grace and three of its former executives who had been charged with environmental crimes. United States v. W.R. Grace, 455 F. Supp. 2d 1177, 1178 (D. Mont. 2006); Kirk Johnson, *Asbestos Prosecution Results in Acquittals*, N.Y. TIMES, May 8, 2009, at A10. In the wake of these cases, the Department of Justice issued new guidelines on prosecutorial discovery obligations. *See* Memorandum from David W. Ogden, Deputy Attorney Gen., to Dep't

accurately represent the scope of systemic failure. The standard itself is inherently flawed and makes the ordinary, mistaken suppression of evidence unreachable.

State discovery rules have begun to employ broader standards that minimize self-serving reasoning by police and prosecutors,[101] and another proposal for reform would allow courts to identify such reasoning more readily by shifting the materiality inquiry from impact to potential. The *relevance* of evidence is substantially more accessible to the court's review than the *force* it might have had. Because the subjectivity of fact-finders provides the link between evidence and a guilt judgment, any piece of evidence that might be favorable, or could impeach the testimony of a government witness, has at least potential significance.[102]

One analogue can be found in the fraud context, where it has long been the government's position that statements are material if they "could have" deceived, without regard to whether they actually did.[103] Focusing on the capacity that exculpatory information has, rather than calculating the likelihood that it

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Prosecutors, Regarding Crim. Discovery (Jan. 10, 2010), http://www.justice.gov/dag/memorandum-department-prosecutors (last visited Oct. 29, 2015) (stating that prosecutors should take a broad view of materiality and err on the side of disclosing exculpatory and impeachment evidence) (on file with the Washington and Lee Law Review). Those measures, of course, still leave prosecutors "in charge of deciding what evidence will be material to the defense." Hon. Alex Kozinski, *Preface: Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PRO. iii, iv–vi (2015); *cf.* Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012) (requiring disclosure of all information "that may reasonably appear to be favorable to the defendant in a criminal prosecution").

101. *See, e.g.*, The Michael Morton Act, S. 1611, 2013 Leg., 83rd Sess. (Tex. 2013) (adopting an "open file" criminal discovery regime to encourage prosecutorial disclosures).

102. Similar standards have been advanced in professional responsibility codes. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (2012) (requiring the disclosure of all evidence that "tends to negate the guilt of the accused or mitigates the offense" without regard to materiality); *see also* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opnion_09_454.authcheckdam.pdf (establishing a similar standard for broader disclosure).

103. *Cf.* Neder v. United States, 527 U.S. 1, 22 n.5 (1999) (explaining that a statement is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question" (internal citation omitted)).

would have an impact at trial, makes sense here as well.[104] As in contexts like fraud and false statements, the potential connection between the undisclosed evidence and the question of defendant's guilt could control, instead of what will inevitably be conflicting assessments of its likely probative force. What, after all, is the harm in mandating disclosure of some evidence that is relevant but not necessarily favorable? Even if that approach leads to over-disclosure, there is no conceivable detriment to the government's case, and considerable benefit to *Brady* compliance overall.

Various codes of professional responsibility reflect this insight and make all evidence that "tends to negate guilt" discoverable.[105] Some even explicitly set aside materiality considerations.[106] Other proposed standards include the disclosure of "all evidence or information that [prosecutors] reasonably believe will be helpful to the defense or that could lead to admissible evidence."[107] No such proposal has gained traction in the courts, however. In fact, the relevance concept echoes a position from Justice Marshall's 1985 *Bagley* opinion that has largely languished in dissent since.[108]

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104. *See* United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979) (providing that "intrinsic capabilities" rather than ultimate effect of a false statement determine its materiality); *cf.* United States v. Parsons, 967 F.2d 452, 455 (10th Cir. 1992) (finding a false statement material even though it was "so ludicrous that no IRS agent would believe [it]").

105. *See* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2030 n.83 (2010) ("[T]he Brady duty runs to the State generally, whereas the ethical duty is personal to the prosecutor and is only triggered to the extent the prosecutor knows of information that tends to negate guilt or mitigate the offense.").

106. *See id.* at 1998 (noting that a prosecutor may "instruct[] all the attorneys in his office to focus on 'favorability' questions, while ignoring the issue of 'materiality'").

107. *Id.* at 1971; *see also* Green, *supra* note 64, at 641 (discussing the 2012 Fairness in Disclosure of Evidence Act, which would require prosecutors to turn over all potentially exculpatory evidence to the defendant, without regard to materiality).

108. *See* United States v. Bagley, 473 U.S. 667, 712 (1985) (Marshall, J., dissenting) ("Even though the prosecution suppressed evidence that was specifically requested, apparently the Court of Appeals may now reverse only if there is a 'reasonable probability' that the suppressed evidence 'would' have altered 'the result of the [trial].'").

Yet the connection between the *Brady* obligation and the course of trial as a "quest for truth" rather than a "sporting event" is newly relevant in light of heightened awareness of error.[109] Accordingly, rather than use the hindsight that materiality requires, courts might consider the relevance of undisclosed evidence in light of the factual record, without attempting to weigh its actual effect on a trial in which it never surfaced. The import of undisclosed evidence might then turn on the closeness of its connection to the facts rather than its speculative force at trial.

### *IV. Considering the Adequacy of Counsel*

The limitations of hindsight standards have similarly affected courts' review of the adequacy of defense counsel under the Sixth Amendment. The "skill and knowledge" of defense counsel is inextricably linked to whether a trial provides a "reliable adversarial testing process."[110] But the *Strickland v. Washington*[111] standard by which defense counsel is measured requires first that a defendant demonstrate that counsel's performance fall below an objective standard of reasonableness and second that the deficient performance "materially" affect the outcome of the case.[112] Claims of ineffectiveness depend on a showing that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

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109. *Id.* at 693; *see also* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279 (1963) ("[S]hall we continue to regard the criminal trial as 'in the nature of a game or sporting contest' and not 'a serious inquiry aiming to distinguish between guilt and innocence'?"); Colin P. Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77, 158–59 (2012) (analyzing conflicts in substantive and procedural due process in relation to the *Brady* framework); *New Perspectives on* Brady *and Other Disclosure Obligations*, *supra* note 105, at 1964 ("[P]rosecutorial disclosure is necessary to promote the public interest in achieving fair trials and reliable outcomes in the criminal justice system.").

110. Strickland v. Washington, 466 U.S. 668, 688 (1984); *see also* United States v. Wade, 388 U.S. 218, 227 (1967) (stating that the presence of defense counsel tests the government's case and thereby produces more accurate results).

111. 466 U.S. 668 (1984).

112. *Id.* at 687.

relied on as having produced a just result."[113] Thus, even once a defendant has met the weighty burden of demonstrating inadequate performance, she must go on to establish that those errors "actually had an adverse effect on the defense."[114] This is the functional equivalent of showing that exculpatory information was withheld in violation of *Brady*, and in addition that the exculpatory evidence in question would have materially affected the outcome of trial. In other words, given a record that reveals a demonstrably inferior advocate, courts must still decide whether a superior one would have produced a different result.

### *A. The Structure of* Strickland

Ineffective assistance of counsel claims are simultaneously the most commonly brought[115]—occurring far more frequently than *Brady* contentions—and among the most difficult to prove. The *Strickland* Court took note of the potential hindsight problem, but only with regard to the evaluation of attorney performance, and only in the direction of affirmance.[116] The Court discussed what social scientists would call "outcome bias," which in this context is the belief that an attorney should have known how a particular strategy would play out because it appears so clearly ill-advised after the fact.[117] Referring to the "distorting effects of hindsight," the Court concluded that a "fair assessment of attorney performance requires that every effort be made to eliminate [it]."[118] As a result, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable

113. *Id.* at 686.

114. *Id.* at 693.

115. *See* Nancy J. King, *Enforcing Effective Assistance After* Martinez, 122 YALE L.J. 2428, 2439 (2013) (discussing filing rates for independent assistance of counsel claims).

116. *Strickland*, 466 U.S. at 689.

117. *See id.* ("[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.").

118. *Id.*; *see also* Guthrie et al., *supra* note 8, at 800 (stating that the "hindsight bias likely influences findings of ineffective assistance of counsel" in the sense that "decisions a lawyer makes in the course of representing a criminal defendant can seem less competent after the defendant has been convicted").

professional assistance."[119] Under that standard, however, post hoc rationalizations for poor attorney decisions are at least as likely as hindsight bias arising from outcome knowledge. Even where counsel's errors probably cost a defendant an acquittal, a reviewing court can conclude that the "overall representation [was] not bad enough to rebut the presumption of reasonableness."[120]

The *Strickland* Court made no mention of the hindsight blindness that renders the prejudice prong an even more substantial hurdle. Cognitive constraints, however, preclude a clear view of the trial, and it is difficult, if not impossible, to determine whether a better lawyer would have achieved a favorable verdict. The most significant confirmatory bias is the one that makes conviction seem inevitable *despite* the quality of the lawyering.[121] *Strickland*'s prejudice prong requires the court to determine whether incompetent counsel mattered, but hindsight blindness hampers its ability to do so and almost always leads to affirmance.[122]

This is a notable oversight when the Court has otherwise displayed its awareness of the interwoven effects of attorney performance. For instance, when deciding that the denial of a paid attorney of the defendant's choice required reversal, the Court wrote that different counsel

> will pursue different strategies with regard to investigation and discovery, development of the theory of the defense, selection of the jury, presentation of the witnesses, . . . style of witness examination and jury argument . . . [and] whether and

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119. *Strickland*, 466 U.S. at 689; *see also id.* at 688–89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

120. George C. Thomas, III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 553.

121. *See, e.g.*, *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) ("Seemingly impregnable cases can sometimes be dismantled by good defense counsel.").

122. *See id.* ("[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent.").

> on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.[123]

Counsel's inadequacy is similarly integrated with the entire course of trial. Indeed, lawyers themselves "often have difficulty explaining precisely why a certain witness was called to testify and another was not, or why one line of defense was pursued and another was avoided."[124]

It was not until the Court's recent decisions extending the *Strickland* standard to the plea bargaining context,[125] however, that the Court even acknowledged that hindsight pervades the prejudice prong as well. And there, objecting to the Court's decision in *favor* of the defendant, Justice Scalia stated that prejudice would be determined "by a process of retrospective crystal-ball gazing posing as legal analysis."[126] Hindsight generally works *against* defendants, however. Reviewing courts rarely articulate counterfactuals that lead to acquittal. That they reach different results on similar fact patterns illuminates the subjective nature of the inquiry. Moreover, as with *Brady* violations, courts apply the burden to show outcome effects inconsistently.[127]

A very narrow set of deficiencies does fall into the category of presumed prejudice.[128] Some deprivations are so fundamentally unfair that the court need not even inquire about their impact, including the absence of counsel, the refusal of counsel to participate in the proceedings, and a conflict of interest that precludes counsel from acting as an advocate.[129] In these

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123. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006).

124. Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV 988, 990 (1973).

125. Missouri v. Frye, 132 S. Ct. 1399 (2012).

126. *Id.* at 1413 (Scalia, J., dissenting).

127. *See, e.g.*, United States v. Wines, 691 F.3d 599, 604 (5th Cir. 2012) (requiring the defendant to show a "substantial" and not just a "conceivable" likelihood of a different result).

128. *See* United States v. Cronic, 466 U.S. 648, 659 (1984) (finding that "complete denial" of the assistance of counsel constitutes per se prejudice), *abrogated on other grounds by* Cleveland v. United States, 531 U.S. 12, 26 (2000).

129. *See* Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) ("A guilty plea is open to attack on the ground that counsel did not provide the defendant with 'reasonably competent advice.' Furthermore, court procedures that restrict a

categories, the defendant is not required to make a showing of actual prejudice.[130] The complete or constructive denial of counsel will thus lead to reversal regardless of the reliability of the underlying verdict. But because of the actual prejudice standard that otherwise applies, claims about a defense lawyer who was present, but might as well have stayed home, will rarely succeed.[131]

Take defense counsel in *Muniz v. Smith*,[132] who fell asleep during the cross-examination of the defendant.[133] That examination reached a critical point when the defendant made ill-advised statements that ultimately led to the admission of a previously suppressed 911 call by his mother and laid the groundwork for a state rebuttal witness as well.[134] Presumably, had counsel been both wide awake and constitutionally adequate, the line of questioning concerning the credibility of other witnesses would have drawn an objection. The hindsight-based *Strickland* inquiry, however, did not provide relief because the significance of timely objections, or even an artful cross-examination, is simply unknowable.[135] The Sixth Circuit held here, for example, that there was no showing of prejudice

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lawyer's tactical decision to put the defendant on the stand unconstitutionally abridge the right to counsel." (citations omitted)).

130. *Id.*

131. *See* Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000) (finding that a habitually intoxicated lawyer—notorious for drinking during the time period of the trial but not actually in court—was not constitutionally ineffective because the petitioner could not show specific instances of deficient performance due to alcohol consumption); Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 542–43 (2009) (concluding that the *Strickland* standard shields "a wide array of stunningly incompetent and unprofessional representation"). *But cf.* Evitts v. Lucey, 469 U.S. 387, 395 (1995) ("[T]he Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); Hill v. Lockhart, 474 U.S. 52, 59 (1985) (stating that counsel's error in failing "to investigate or discover potentially exculpatory evidence" could prejudice defendant by precipitating a guilty plea).

132. 647 F.3d 619 (6th Cir. 2011).

133. *Id.* at 622.

134. *Id.* at 624–25.

135. *See* Strickland v. Washington, 466 U.S. 668, 710 (1994) (Marshall, J., dissenting) ("On the basis of a cold record, it may be impossible . . . to ascertain [if the prosecution's case] would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer.").

under *Strickland*, and that presumed prejudice only arises when a lawyer sleeps through a "substantial portion of defendant's trial."[136] A brief nap during a short cross-examination did not raise a "reasonable probability of a different outcome."[137]

### *B. Obstacles to Enforcement*

Even in recent cases where the Court has expanded the possibility of constitutionally inadequate assistance—including the failure to advise defendants entering guilty pleas of the collateral consequences of deportation,[138] exceedingly poor advice about rejecting a plea offer,[139] or the failure to even convey a plea offer[140]—the prejudice prong remains an obstacle to enforcement.[141] The 2012 *Lafler*[142] and *Frye*[143] decisions require assessment of the adequacy of counsel during plea bargaining, and this new set of considerations could make inroads into the problems with the standard itself. There are, however, more objective metrics of the effect of bad advice during plea bargaining than with regard to poor lawyering at trial. This is so because a defendant convicted at trial will typically receive a higher sentence than was offered in a plea agreement.[144] In the *Frye* case, for example, there was a "reasonable probability" that the defendant would have accepted the lesser plea because he ultimately pleaded guilty to a more serious charge with no

136. *Muniz,* 647 F.3d at 623.

137. *Id.* at 625.

138. Padilla v. Kentucky, 559 U.S. 356, 388 (2010).

139. Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012).

140. Missouri v. Frye, 132 S. Ct. 1399, 1409 (2012).

141. *See id.* ("To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel."); *Lafler*, 132 S. Ct. at 1389 (discussing the injuries experienced by defendants who "decline a plea offer as a result of ineffective assistance of counsel").

142. *Lafler*, 132 S. Ct. at 1376.

143. *Frye*, 132 S. Ct. at 1399.

144. *See* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 732–38 (2011) (discussing the meaning of prejudice in the context of plea bargaining).

promise of a sentencing recommendation from the prosecutor.[145] In the *Lafler* case, the defendant was made aware of the plea offer but got patently bad counsel about whether to accept it, including an incorrect explanation of the burden of proof for intent to murder.[146] The defendant then received a harsher sentence after trial than the one offered in the plea.[147]

There is little record of what occurs during plea bargaining, however, and it will not always be sufficiently apparent what the defendant would have done, especially before being confronted with the strength of the prosecution's case. Many defendants resist rational choices to accept pleas until trial begins, at which point their peril is more apparent, and they will even "plead blind" without any agreement in the hope of some mitigation from the court. Nonetheless, *Lafler* and *Frye* require that defendants show not only that the plea offer would have been attractive but also that it would have been adhered to by the prosecution and accepted by the trial court.[148] Historical practice might inform the assessment of whether prosecutors would have honored bargains and courts would have accepted them. Though still hindsight review, that is less speculative than determining whether a strategic error affected a particular jury's deliberations and decision.

Still, how to restore both the prosecution and the defense to the positions they would have occupied absent the constitutional violation remains a difficult remedial question. As Justice Scalia objected in *Frye*, it is conceivable that the application of hindsight standards to ineffective assistance of counsel with respect to plea bargaining will benefit some defendants who were not disposed to

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145. *Frye*, 132 S. Ct. at 1404–05.

146. *See Lafler*, 132 S. Ct. at 1389 (describing counsel's advice that "the prosecution would be unable to establish his intent to murder [the victim] because she had been shot below the waist").

147. *Id.* at 1383.

148. *See Frye*, 132 S. Ct. at 1411 (concluding that the defendant likely would have accepted the plea offer if it had been communicated to him, but that he failed to overcome the Court's "strong reason to doubt [whether] the prosecution and the trial court would have permitted the plea bargain to become final"); *see also Lafler*, 132 S. Ct. at 1388 (determining that the defendant satisfied the deficient performance prong of *Strickland* by showing that he likely would have accepted the plea offer if he had not been ill-advised).

plead guilty.[149] It will only be the rare case in which a plea offer sits idle for a month, or a lawyer clearly neglects to explain the strength of the prosecution's case, but almost every defendant convicted at trial can claim that she would have accepted a plea agreement. As a result, requiring effective assistance of counsel at the plea bargaining stage seems momentous but may not break substantial new ground in terms of the scope of the right to counsel and the overall quality of representation.[150]

What the reasoning in *Lafler* and *Frye* could achieve, however, is enlarged thinking about what it means to have an impact on the outcome of a criminal proceeding. Extending *Strickland* to plea agreements requires some new consideration of the difficulty with identifying the effect of errors and omissions. And that in turn suggests revised approaches to hindsight constraints in other contexts. To include the result of plea bargaining in the range of prejudicial errors at least hints at a broader and more holistic view of criminal adjudication as a process with a spectrum of possible conclusions. The injustice of a wrongful conviction sits at one end, and perhaps the highly speculative windfall of a wrongful acquittal on the other. But in between may be unfair procedures despite accurate results, a split verdict that the jury might reach, and sentences and collateral consequences that vary in severity for the defendant. If defendants should not experience shifts along that spectrum without adequate counsel within the meaning of the Sixth Amendment—and *Lafler* and *Frye* suggest that they should not—then "correct" outcomes do not excuse many other instances of deficient lawyering that currently elide review.

Even an error-free trial or a subsequent voluntary plea that follows the ill-considered decision to reject a plea cannot cure inadequate defense lawyering.[151] And if that is the case, it expands the potential claims about prejudice. Perhaps at other points in the trial as well—including when the court admits

149. *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting).

150. *See* Gerard E. Lynch, Frye *and* Lafler*: No Big Deal*, 122 YALE L.J. ONLINE 39 (2012) ("Finally, we know that the heavens will not fall as a result of *Frye* and *Lafler*, because the cases' rule is 'new' only to the Supreme Court.").

151. *See Lafler*, 132 S. Ct. at 1388 (rejecting the argument that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining").

evidence, when a jury is empaneled, and when a sentence is imposed—courts will begin to connect ineffective assistance of counsel to materially worse positions for defendants.

Recognizing that the inadequacy of counsel amplifies other errors and disadvantages for defendants also begins a conversation about whether hindsight standards have masked systemic problems and prevented reforms.[152] The fiftieth anniversary of the *Gideon*[153] decision extending the right to counsel to indigent defendants has occasioned a broader discussion of the crisis in public defense.[154] While there are some prosecutors who leverage the *Brady* standard to avoid discovery obligations, defense lawyers do not set out to be ineffective. Yet a distressingly large number of defendants do not receive constitutionally adequate counsel. Indeed, one study concluded that, at least in relatively uncomplicated cases, pro se defendants may achieve better results than counseled ones.[155] The hindsight-based prejudice standard is one of the obstacles to thinking beyond individual case outcomes to broader system failure.

Absent consequences for ineffective lawyering, there is little incentive for the criminal justice system to allocate increased resources and address that shortfall. As Donald Dripps writes, "Legislatures disinclined to fund indigent defense know that the failure to provide effective representation will lead to the reversal of few if any convictions."[156] A more expansive standard, less encumbered by hindsight analysis, could do more to underscore

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152. *See, e.g.*, Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2687–91 (2013) (attributing the failures of the system of public defense in part to the *Strickland* standard).

153. 372 U.S. 335 (1963).

154. *See* KAREN HOUPPERT, CHASING *GIDEON*: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE (2013) (documenting the crisis for public defenders, who serve more than 80% of criminal defendants, and are severely overworked and underfunded).

155. Erica Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 447–50 (2007).

156. Dripps, *supra* note 4, at 903; *see also* Smith, *supra* note 131, at 544 ("[A] toothless constitutional standard of effective representation . . . virtually invites legislatures to continue underfunding indigent defense.").

the way in which caseloads and resource constraints prevent effective advocacy.[157]

A wholesale response to the familiar "broken system" story at first sounds purely aspirational. But it could gain some momentum from the empirical evidence that ineffective assistance of counsel contributes to retail inaccuracy. Brandon Garrett reports that ineffective assistance of counsel claims were raised in 32% of the cases in his database of DNA exonerations.[158] Among those wrongful convictions were fifty-two adjudicated claims of ineffective assistance of counsel, only four of which produced a reversal of the conviction, and all of which involved a lawyer whose representation was so egregiously below the constitutional standard that he was subsequently disbarred.[159]

If one understands the right to counsel as deontological rather than consequential, any trial in which defense counsel fails to meet certain performance benchmarks may be insufficiently "fair" regardless of the correctness of the outcome. Even under the deferential standards of post-conviction review, counsel sleeping during the defendant's cross-examination or failing to test forensic evidence warrants reversal.[160] There is a baseline below which counsel's performance should never dip, particularly in death penalty cases. Yet *Strickland*'s hindsight

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157. *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20–21 (1997) (asserting that the *Strickland* standard "leaves no room" for system-wide assessments, and that the case-by-case approach makes it difficult to even separate "low-activity but good representation from laziness or incompetence"); *id.* at 20 ("Defendants tend to win ineffective assistance of counsel claims only when their lawyers had a conflict of interest or made some discrete error of great magnitude.").

158. GARRETT, *supra* note 15, at 205; *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994) (describing the low number of lawyers who are willing to commit to indigent defense in capital cases). Justice Ginsburg has also made the noteworthy observation that she has "yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial." Justice Ruth Bader Ginsburg, In Pursuit of the Public Good: Lawyers Who Care, the Joseph L. Rah, Jr. Lecture at the Univ. of the D.C., David A. Clarke Sch. of Law, THE SUPREME COURT OF THE UNITED STATES (Apr. 9, 2001), http://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-09-01a (last visited Nov. 1, 2015) (on file with the Washington and Lee Law Review).

159. GARRETT, *supra* note 15, at 205–06.

160. Muniz v. Smith, 647 F.3d 619, 622 (6th Cir. 2011).

component allows post-conviction reviewing courts to ignore cases in which defense counsel was barely more than present.[161] Though a requirement of reasonably competent counsel in every case is a long way off, it would be closer if hindsight figured less in the equation, and defendants did not bear the burden of showing that the trial would actually have proceeded differently with a superior advocate.

## *V. Determining the Significance of Error*

Both the *Brady* and the *Strickland* standards resemble the broader category of harmless error analysis, which similarly ties reversal to a hindsight evaluation. As with the "materiality" and "prejudice" inquiries, reviewing courts weigh the "harmfulness" of trial errors by looking back at a trial that never took place. For example, courts excise erroneously admitted evidence and then determine whether the evidence that remains appears adequate.

### *A. Quantitative Assessments of Impact*

With regard to most trial errors, including the erroneous introduction and exclusion of evidence, reversal occurs only where a "substantial right of the party is affected."[162] If a court "concludes with fair assurance" that the judgment "was not substantially swayed by the error," then the defendant's conviction will stand.[163] A higher standard applies to

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161. *See* Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786–87 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)) (citing examples of borderline incompetence under *Strickland*, including the attorney not being sober or awake); *see also* Strickland v. Washington, 466 U.S. 668, 689 (1984) (stating that the application of the professional reasonableness standard must be highly deferential).

162. *See* FED R. CRIM. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

163. Kotteakos v. United States, 328 U.S. 750, 765 (1946); *see id.* at 764–65 ("If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress.").

constitutional errors, which the court must find harmless beyond a reasonable doubt.[164] In theory, the *Chapman* standard for reviewing constitutional errors places a considerable burden on the government to demonstrate that the error did not "contribute to the verdict," but in practice the same hindsight disability obstructs review.[165] And errors are still further insulated from analysis by the procedural requirements of federal habeas claims. Under *Brecht v. Abrahamson*,[166] an error must have a "substantial and injurious effect or influence in determining the jury's verdict."[167]

Only structural errors—which include the complete absence of counsel, denial of the right to self-representation or to paid counsel of one's choice, a biased judge, a defective reasonable doubt instruction, denial of a public trial, and racial discrimination in the selection of the grand jury—lead to automatic reversal.[168] Although the Court recognizes structural errors as "[d]efects in the constitution of the trial mechanism itself,"[169] the category is narrow, and even a conviction tainted by a coerced confession can be upheld if the *Chapman* test is met.[170] This is so because the Supreme Court has reasoned that constitutional errors that occur during the presentation of the case may "be quantitatively assessed in the context of other

164. Chapman v. California, 386 U.S. 18, 25–26 (1967).

165. *See id.* at 24 ("[C]onstitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.").

166. 507 U.S. 619 (1993).

167. *Id.* at 623. In addition, a habeas court applies "doubly deferential" review, even of quite serious errors, asking only whether a state court got an ineffective assistance of counsel claim "reasonably right." *See* Fry v. Pliler, 551 U.S. 112, 121 (2007) ("[A] court must assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht* . . . ."); *see also* Findley & Scott, *supra* note 29, at 353 ("As grim as the prospects look for obtaining relief based on an innocence-based claim on direct appeal, the prospects are even grimmer thereafter.").

168. For the relevant cases, see generally Johnson v. United States, 520 U.S. 461 (1997), McKaskle v. Wiggins, 465 U.S. 168 (1984), United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), Tumey v. Ohio, 273 U.S. 510 (1927), Sullivan v. Louisiana, 508 U.S. 275 (1993), Walter v. Georgia, 467 U.S. 39 (1984), and Vasquez v. Hillery, 474 U.S. 254 (1986), respectively.

169. Arizona v. Fulminante, 499 U.S. 279, 291 (1991).

170. *Id.* at 282.

evidence presented in order to determine whether . . . admission was harmless beyond a reasonable doubt."[171] Thus, harmless error analysis ends up functioning in a similar fashion when applied to both evidentiary and constitutional errors.[172]

### *B. Photoshopped Trials*

The structure of the analysis weighs in favor of affirming convictions, but to differing extents depending on which of two inconsistent approaches a particular court applies.[173] In the jurisprudence of harmless error, courts have proceeded through either an "evidence-focused" or an "outcome-focused" inquiry.[174] In the former, an error is harmful if it contributed to the verdict, and the persuasive force of other evidence does not control.[175] In the latter approach, so long as there was sufficient evidence that was properly admitted to sustain the verdict, any error is deemed harmless.[176]

Although the "evidence-focused" inquiry appears more consistent with review of the actual trial, in practice, wherever courts perceive overwhelming evidence, they tend to view the error as insignificant and thus affirm.[177] What courts say they are doing when considering an error and the analysis that they perform often diverge. That is, despite the content of the *Chapman* standard for reviewing constitutional errors, the *Brecht*

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171. *Id.* at 308 (Rehnquist, C.J., dissenting).

172. *See, e.g.*, Rose v. Clark, 478 U.S. 570, 577–78 (1986) ("[T]he Court in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case.").

173. *See* Mitchell, *supra* note 56, at 1336 (stating that harmless error doctrine "has been plagued by . . . ambiguities since its inception," including "uncertainty about how harmless error should be judged").

174. *Id.* at 1341.

175. *Id.*

176. *Id.*

177. *See id.* at 1341–42 (proper application of the contribution-to-conviction test would deem an error "harmful unless it was relatively trivial" while the "overwhelming-evidence test would deem an error harmful only when the overall case against the defendant was relatively weak"); *cf.* Weiler v. United States, 323 U.S. 606, 611 (1945) (stating that the Court was not authorized to "reach the conclusion that the error was harmless because we think the defendant was guilty").

standard on federal habeas, and related iterations,[178] courts generally do not focus on the prejudicial "contributions" the error might have made but only on the general question whether "the record developed at trial establishes *guilt* beyond a reasonable doubt."[179] As a result, in upwards of two-thirds of all habeas cases in which a court identifies trial error, that error is deemed harmless.[180]

The reason the precise words of the standards do not matter very much is that no formulation can enable courts to see the outcome of an error-free trial that did not occur.[181] It is hard to identify meaningful distinctions between what are functionally just iterations of the same test.[182] And that test proceeds from the false premise that errors can be excised or airbrushed to enable review.

Applied narrative theory foretells the failure of these standards because it suggests that quantitative assertions are impossible to make. If a defense lawyer consistently fails to join issue with the government in an adversarial process, or a jury hears a defendant's coerced but compelling confession, how does one measure that impact? Given the "beyond a reasonable doubt" standard that the government must meet, even very small errors have the potential to alter the outcome. Trials may involve

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178. Brecht v. Abrahamson, 507 U.S. 619, 629 (1993).

179. Rose v. Clark, 478 U.S. 570, 579 (1986); *see also* United States v. Hasting, 461 U.S. 499, 510–11 (1983) ("The question a reviewing court must ask is this: absent the prosecutor's allusion to the failure of the defense to proffer evidence to rebut the testimony of the victims, is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?").

180. Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1066–67 (2005). *But cf.* D. Brian Wallace & Saul M. Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors*, 36 L. & HUM. BEHAV. 151, 152 (1998) (finding, in a simulation, that over 90% of judges would find admission of a coerced confession harmful).

181. *See* United States v. Dominguez Benitez, 542 U.S. 74, 86 (2004) (Scalia, J., concurring) (arguing that the difficulty of applying differing harm standards is especially acute "because they are applied to the hypothesizing of events that never in fact occurred," which is an enterprise "closer to divination" than "factfinding").

182. *See id.* (Scalia, J., concurring) (calling the "ineffable gradations of probability" in the various harm standards "quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking").

multiple missteps with cumulative impact. Death penalty cases, for example, have two distinct phases that require review, and the longer and more serious trials that death penalty cases involve are both more complex to assess and concern more serious and horrible crimes that already inspire confirmation bias. Nonetheless, when courts review error, it is as though they have "photoshopped" the trial and considered whether the new image supports a conviction.[183]

To mitigate hindsight bias requires articulating the standard in more holistic terms and considering new mechanisms for its application. And that may call for a more qualitative than quantitative approach. As Justice Stevens wrote in his *United States v. Hasting*[184] concurrence, the question is "what effect the error had or reasonably may be taken to have had upon the jury's decision" and "[t]he crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."[185] Indeed, there may be constitutional implications to the construction of the harmless error standard. The defendant has a right to present evidence to the jury empaneled to hear her case; invoking the "sympathy and opinion" of those jurors is an opportunity guaranteed by the Sixth Amendment.[186]

The standard originally did task courts with "pondering all that happened without stripping the erroneous action from the whole,"[187] but the most recent cases not only shift the burden but also change the question. In practice, when appeals courts look at the issue of evidence strength instead of error impact, they sit as

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183. *See* Mitchell, *supra* note 56, at 1354 ("[A]n assumption that appellate judges can conduct a fair second trial on the basis of 'untainted evidence' is problematic in that it assumes that fine distinctions can be drawn between tainted and untainted evidence when all of this evidence remains in the record as a coherent whole."). Indeed, the difficulty of excising evidence admitted in error has raised the question whether testimony could all be videotaped before a jury is empaneled. Once all errors and irrelevancies are removed according to a trial judge's rulings, the jury would then watch it. *See generally* Ronald Goldstock & James B. Jacobs, *A Blockbuster Trial,* 33 CRIM. L. BULL. 565 (1998).

184. 461 U.S. 499 (1983).

185. *Id.* at 516 (Stevens, J., concurring) (quoting Kotteakos v. United States, 328 U.S. 750, 763–64 (1946)).

186. *See* Mitchell, *supra* note 56, at 1355 ("Indeed, the defendant may seek to exploit the sympathies of jurors who have not become immune to the pleas of defendants or jaded by repeated encounters with hardened criminals.").

187. Kotteakos v. United States, 328 U.S. 750, 765 (1946).

fact-finders in the first instance. The result is that defendants receive a verdict not from "peers" but from "experienced jurists" who may have "become immune to the pleas of defendants."[188] Regardless of the type of error under review, the determination as to harm depends primarily on a "judgment about the factual guilt of the defendant."[189] And the trend has been to continue raising the bar for reversal by "reducing the number of errors that are reversible per se" and "reducing the burden of proof on the prosecution of convincing the appellate court that an error was harmless."[190]

The Supreme Court was recently poised to consider this conflict between determining guilt and weighing error in *Vasquez v. United States*.[191] *Vasquez* involved a conviction for conspiracy to possess cocaine with the intent to distribute it.[192] The government presented evidence of recorded telephone calls in which a witness told her husband that he and Vasquez were likely to be convicted, and that the defendant's lawyer had said so as well.[193] The Seventh Circuit held, in light of the other evidence in the case, that the error did not change the outcome of the proceeding.[194] Arguing to the Supreme Court, the defendant claimed that a reviewing court should determine how an error affected the jury that actually evaluated the trial.[195] The

188. Mitchell, *supra* note 56, at 1355. In *House v. Bell*, for example, Chief Justice Roberts explained that, even with regard to an actual innocence claim, the question is "not whether [the defendant] was prejudiced at his trial because the jurors were not aware of the new evidence" but whether "all the evidence, considered together, proves that [the defendant] was actually innocent, so that no reasonable juror would vote to convict him." 547 U.S. 518, 556 (2006) (Roberts, C.J., dissenting).

189. Edwards, *supra* note 10, at 1171; *see also* ROGER TRAYNOR, THE RIDDLE OF HARMLESS ERROR 35 (1970) ("A less stringent test may fail to deter an appellate judge from focusing his inquiry on the correctness of the result and then holding an error harmless whenever he equated the result with his own predilections.").

190. William M. Landes & Richard A. Posner, *Harmless Error*, 3 J. LEG. STUD. 161, 172 (2001).

191. 132 S. Ct. 1532 (2012).

192. United States v. Vasquez, 635 F.3d 889, 893 (7th Cir. 2011).

193. *Id.* at 896.

194. *Id.* at 898.

195. *See* Transcript of Oral Argument at 3, Vasquez v. United States, 132 S. Ct. 1532 (2012) (No. 11-199) (statement of Beau B. Brindley) ("It is impermissible for the reviewing court to merely ask the question of whether

government countered that the Court could assume instead that a hypothetical, reasonable jury heard the evidence.[196] The Justices repeatedly stated at argument, however, that they did not see the distinction between the two standards.[197] The case turned out to be a poor vehicle because it was not clear which standard the Seventh Circuit itself applied, or whether the standard applied would have made much difference. As a result, the Court ultimately dismissed the writ of certiorari as "improvidently granted."[198] It serves as an illustration, however, of the way in which hindsight standards continue to ease the government's burden of proof. [199]

Courts both discount the effect of the challenged error and weigh the evidence as a whole, and they then fail to engage in the required counterfactual reasoning. Especially once judges are themselves exposed to erroneously admitted evidence, it is profoundly difficult to assess what a hypothetical juror *without* that evidence would have concluded.[200] If evidence is

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some other jury, a reasonable jury that didn't hear the error that this jury heard, would convict him and determine harmlessness on that basis.").

196. *See id.* at 28 (statement of Anthony A. Yang) ("The harmless-error inquiry, as this Court explained in Neder and prior decisions, turns ultimately on one question: Whether a rational jury—and this is a quote—'whether a rational jury would have found the defendant guilty absent the error.'").

197. *See id.* at 8 (statement of Justice Alito) (stating that "I really don't understand the difference between" focusing on a "rational jury" and focusing on "this particular jury"); *id.* at 9 (statement of Justice Alito) (inquiring about the difference between "a fair possibility that this particular evidence caused the jury to convict" and a "fair possibility that this jury would have convicted without the evidence"); *id.* at 16 (statement of Justice Breyer) ("I didn't see some big war of standards. I just saw judges disagreeing about a fairly tough question in an individual case."); *id.* at 27 (statement of Justice Alito) ("How is an appellate court supposed to tell whether this particular jury was different from a hypothetical rational jury?").

198. *Vasquez*, 132 S. Ct. at 1532.

199. *See* Saltzburg, *supra* note 124, at 992 ("If the 'moral force' of the criminal law is not to be diluted on appeal, convictions must be reversed where the appellate court cannot arrive at a conclusion about the impact of an error on the jury verdict with the same degree of certainty demanded at the trial."); *see also* TRAYNOR, *supra* note 189, at 61 ("[T]he prosecution cannot on the one hand offer evidence to prove guilt . . . and on the other for the purposes of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt.").

200. *See* Wallace & Kassin, *supra* note 180, at 152 (concluding from an

interdependent, moreover, then demonstrating that any given piece did not "contribute" to the outcome ought to be a heavy burden.[201] There are no "scripts for conviction," and no clear way to determine whether an error meaningfully changed the narrative. Or at least one can rarely say "beyond a reasonable doubt" that an error did not make any contribution. As with *Brady* and *Strickland* violations, courts have overestimated the precision with which they can weigh the significance of an error or omission within the complete picture of the trial.[202] Indeed, they cannot actually do what harmless error review demands,[203] and a standard less encumbered by hindsight could produce both clearer and more accurate decisions.

## *VI. Limiting the Role of Hindsight*

Just as these three different contexts reveal common conceptual flaws, they might be reimagined in similar ways. Translating theoretical and empirical insights into adjustments to legal rules is a notoriously glacial process.[204] To attempt it at

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experimental analysis that judges exposed to prejudicial evidence admitted in error would view guilt as more likely than judges unaware of the evidence); *see generally* Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction*, 116 PSYCHOL. BULL. 117 (1984).

201. *See* Chapman v. California, 386 U.S. 18, 22–23 (1967) ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.").

202. *See* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 190 (2006) ("[P]rofessionals typically overestimate the power of their own professional skills, the reliability of their own judgments, and the strength of their ability to assess a particular situation."); Suzanna Sherry, *Judges of Character*, 38 WAKE FOREST L. REV. 793, 799 (2003) (reviewing the literature on the fallibility of judges); *see also* Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. R. 65, 1–3 (1983) (reporting that even graduate students in probability theory believe a conjunction is more likely than either of its constituent parts). *But see* Bruton v. United States, 391 U.S. 123, 136 (1968) ("We, of course, acknowledge the impossibility of determining whether in fact the jury did or did not ignore [the] statement inculpating petitioner in determining petitioner's guilt.").

203. *See* Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 516 (1998) ("[A] judge cannot possibly know or review what in the minds of the jurors led to the verdict.").

204. *See, e.g.*, Lisa Kern Griffin, *The Content of Confrontation*, 7 DUKE J.

all raises the question whether judges can account for social science in their own decision-making. Only recently, for example, has awareness about eyewitness error and false confessions made any incursion into the adjudicative realm.[205] But courts have begun to perceive the shortcomings of hindsight standards, and they might conduct a more searching review of the role of the error or omission at the actual trial, expand the violations that give rise to a presumption of prejudice, or remove materiality assessments from the calculus altogether.

### *A. Verdicts Untainted by Error*

Any effort to invigorate review will encounter not only the cognitive biases that confirm convictions but also conscious policy choices to avoid the inefficiency of retrials. The harmless error rule, for example, has long been understood as a protection for both the sustainability and the legitimacy of criminal adjudication.[206] Significant adjustments to harmless error rules would raise administrability concerns,[207] and there is "no reason

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CONST. L. & PUB. POL'Y 51, 63 (2011) (discussing the durability of myths about cross-examination and the courts' disinclination to "incorporate empirical data and the insights of social science"); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 ("What is remarkable, however, is the ever-widening gap between Fourth Amendment consent jurisprudence, on the one hand, and scientific findings about the psychology of compliance and consent on the other.").

205. *See, e.g.*, Jim Dwyer, *A Plan to Combat Mistaken Identifications and False Confessions*, N.Y. TIMES, June 1, 2015, at A21 ("[A] rare coalition of the New York State Bar Association, the District Attorneys Association of New York and the Innocence Project proposed on Tuesday that the state adopt practices to reduce the chances that juries would be swayed by mistaken eyewitnesses or false confessions.").

206. *See* United States v. Hasting, 461 U.S. 499, 509 (1983) (acknowledging that the goal of harmless error review is "to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error"); *see generally, e.g.*, Note, *The Harmless Error Rule Reviewed*, 47 COLUM. L. REV. 450 (1947).

207. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 696 (1994) (noting that the systematic costs of overturning jury verdicts are high); Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 447 (2009) (describing the harmless error rule as arising from concerns about efficiency and the finality of convictions).

to believe that appellate courts are much interested in increasing the number of correct-outcome cases that they will scrutinize closely."[208]

Efficiency ought to be only a secondary consideration,[209] but it is an imperative that requires some safety valve. One seems built-in however. The question is not whether a verdict was *untouched* by error but whether it stands *untainted* by it. Even the strictest of harmless error tests "would not require reversal for insignificant errors" or lead to "hypertechnicality."[210] There are trials in which it is apparent that no further disclosure, improved advocacy, or more precise application of the exclusionary rules could possibly change the outcome. For example, a witness with respect to whom impeachment material was withheld might be one of many possible sponsors for a business record, or an attorney might neglect the testing of flawed forensics that duplicate several other pieces of evidence.[211] Mitigating hindsight does not entail reversing for every trivial error.

The current process also insulates non-trivial errors from review, however, and reversal should occur *unless* the government can demonstrate that errors and violations were harmless beyond a reasonable doubt.[212] That showing requires not that the evidence of guilt was sufficiently overwhelming to

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208. Schauer, *supra* note 202, at 200.

209. *See* Brown, *supra* note 50, at 142 ("American courts, which have played the lead role in making criminal process more efficient, could improve American political decision-making by developing the law and practice of adjudication with less priority for its efficiency and more for its traditional, qualitative public interests."); Mitchell, *supra* note 56, at 1366 ("One goal of the harmless error doctrine is the preservation of public respect for the judicial system by not reversing for nonprejudicial errors[, but] public respect may also be undermined when significant errors go uncorrected, and when constitutional rights thus go unprotected."); *see also* TRAYNOR, *supra* note 189, at 19 ("The conservation of judicial resources, though itself a worthy objective, is a strange terminal point for an argument purportedly concerned with precluding miscarriages of justice.").

210. Mitchell, *supra* note 56, at 1367.

211. *See Strickland*, 466 U.S. at 693 ("Attorney errors come in an infinite variety and are as likely to be utterly harmless.").

212. *See, e.g.*, United States v. Ortiz, 474 F.3d 976, 982 (7th Cir. 2007) (stating that the reviewing court must be "convinced that the jury would have convicted even absent the error").

ignore the error altogether, but that in context, it is apparent that the jury reached a verdict untainted by the error.[213] Adjustments to the standard that excise materiality are unlikely, but much would change if courts applied the existing standard to the trial that occurred rather than "reviewing" an error-free trial that never took place and looking to the end of a road not taken.

That road simply cannot be seen clearly. Errors can contribute to verdicts by changing the shape of other pieces of evidence or the mind of one juror. To take just one example from "coherence based reasoning," as Dan Kahan explains, "evidence judged to have been of only modest weight early on will subsequently be re-evaluated and assigned a greater degree of weight consistent with the outcome most supported by the remaining evidence."[214] The question is whether it is reasonable to conclude that an error had any effect on the course a trial took, not whether it is reasonable to conclude that a conviction would have occurred regardless. Another way to think about this involves an attempt to evaluate how the error or omission in question affected the presentation and processing of evidence. If the working hypothesis is that an error was harmless, then the best way to establish that is by attempting to disprove it through consideration of scenarios under which the error would have been harmful.[215]

To account for the seriousness of an error and its likely role in the narrative course of trial, courts could also focus on the extent to which the evidence does intertwine. It is entirely possible for a case to have more than sufficient evidence to support a conviction but for an error nonetheless to contribute to the verdict. Those two facts can coexist because, even though the other evidence is weighty, it is not entirely independent from the error.[216] An adjusted analysis could account for factors such as

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213. *Id*.

214. Dan M. Kahan, *Laws of Cognition and the Cognition of Law*, 135 COGNITION 56 (2015).

215. *See* FINDLEY & O'BRIEN, *supra* note 69, at 37 (explaining that, "without testing for outcomes that would disprove a hypothesis, people may never consider that their hypotheses were wrong and that they had merely proposed conditions that coincidentally fit the actual rule or principle at work" but that, "[a]s any scientist knows, the inability to disprove a hypothesis is the closest one can come to proving the hypothesis to be true").

216. *See* Griffin, *supra* note 17, at 295 (discussing the way in which pieces of

whether evidence admitted or excluded in error is largely collateral or interacts with central elements of proof, whether witnesses with regard to whom impeachment material was withheld provided key testimony for the government, or whether counsel's deficient performance forfeited an opportunity to rebut damaging evidence.

On the other hand, when an error only compounds substantial disadvantages for the defense, it may be held harmless. The error may not be fully independent from the rest of the trial, but its effect will have been minimal. Considering the nature of an error does account for the weight of other evidence as well. But that is not to say that a strong government case excuses an otherwise egregious error, just that whether a case is closely balanced should factor into the assessment of the error itself. For example, one signal that the jury viewed a case as close could be a split verdict. Moreover, the record can reveal how much emphasis prosecutors placed on the error in questioning and argument, how much they profited from it or leveraged the opportunity,[217] the connection between the error and the defense theory of the case, and in some cases whether the jury asked questions that an evidentiary error might have affected, engaged in lengthy deliberations, or even reacted to erroneously admitted evidence with emotion or confusion.[218]

The dissenting judge in *Vasquez*, for instance, characterized the gravity of the error itself, which discredited "the defendant's own lawyer's argument about reasonable doubt."[219] The dissent then concluded that the error was harmful given the split verdict, the government's use of the evidence, and "the modest strength of

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evidence interact with and influence each other).

217. *See* United States v. Reyes, 577 F.3d 1069, 1077–78 (9th Cir. 2009) (finding harmful error because the prosecutor made an assertion in closing argument that the prosecutor "knew was contradicted by evidence not presented to the jury").

218. Similarly, jury questions have been held by some courts to signal the potential import of undisclosed evidence. *See* United States v. Garner, 507 F.3d 399, 407–08 (6th Cir. 2007) (finding that a reasonable probability existed that the outcome of the trial might have been different had defense counsel investigated cell phone records based in part on "the fact that the jury sent out a question during deliberations" asking about a cell phone number).

219. United States v. Vasquez, 635 F.3d 889, 899 (7th Cir. 2011) (Hamilton, J., dissenting).

the rest of the [G]overnment's case."[220] When it comes to analyzing an erroneous exclusion—such as discovery that a defendant did not receive, or an opportunity that a defense lawyer missed—the reviewing court (typically a habeas court) could consider what the fact-finder might have gained had the avenue not been cut off.[221]

This analytical approach is not unprecedented. Where a Confrontation Clause violation denies a defendant the opportunity to impeach a government witness for bias, the Supreme Court has at times engaged in a contextual consideration of the "damaging *potential* of cross-examination."[222] The Court has then weighed that potential gain against the importance of the prosecution witness's testimony, accounting for whether the testimony was cumulative, the presence or absence of corroborating or contradictory evidence on material points, and the overall strength of the case.[223] Without question, such an inquiry still involves speculation, but it at least considers not only "what might have been" but also "what was." The current standard arguably requires that approach already, and the missteps have been in application.[224]

An analogous theoretical move attempts to align decision-making with the purposes of standards of proof like "beyond a reasonable doubt."[225] When assessing whether discovery was material, counsel's performance prejudicial, or an error harmful, judges might also benefit from what Michael

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220. *Id.*

221. *See, e.g.*, Saltzburg, *supra* note 124, at 990 (noting that, because of a particular error, "[a] meritorious line of defense may be dropped, an important witness held back, or entire strategies abandoned even though they should prevail").

222. Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

223. *Id.*

224. *See* United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting) (calling the panel's ruling "dangerously broad" with "far-reaching implications for the administration of justice" because it "effectively announces that the prosecution need not produce exculpatory evidence so long as it's *possible* the defendant would've been convicted anyway").

225. Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1099 (2009) (discussing application of the "proof beyond a reasonable doubt" standard and stating that "courts lack a vocabulary through which to make their reasoning explicit and to justify their doubts and convictions about what a reasonable jury could or must conclude based on the evidence").

Pardo has called "second-order proof rules."[226] To determine whether there is a connection between error and outcome, courts could ask whether there are plausible explanations consistent with innocence that the error prevented the jury from considering. In Pardo's terms, this revised question gives courts a "vocabulary" with which to make reasoning about outcomes explicit.[227] He suggests using "explanatory inferences" to "avoid the problem of pure subjectivity that affects confidence-based probability assessments."[228] Thus, one useful inquiry might be whether a story of the jury's consideration of the case affected by the error makes more sense than one that does not. Reframing the inquiry along these lines would resolve, for example, the inconsistency between considering whether there is otherwise overwhelming evidence and whether an error contributed to the verdict in the harmless error calculus.[229]

Put another way, correct application of the test for prejudice requires a reviewing court to "consider the opposite." To borrow a term from management decision theory, one might view the possibility of different trial outcomes as "knowable unknowns" rather than "unknown unknowns."[230] When making a prospective decision, one can "imagine" a "known unknown" and should regard it as having a real possibility of occurring.[231]

Merely recognizing that hindsight is clouded[232] and "trying hard" to see around it does little to improve processing.[233]

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226. *Id.*

227. *Id.*

228. *Id.* at 1103.

229. *See* Vasquez v. United States, 635 F.3d 889, 899 (7th Cir. 2011) (Hamilton, J., dissenting) (describing this inconsistency).

230. Alberto Feduzi & Jochen Runde, *Uncovering Unknown Unknowns: Toward a Baconian Approach to Management Decision-Making*, 124 ORG. BEHAV. & HUM. DECISION PROCESSES 268, 270 (2014). As Feduzi and Runde explain, in the case of a die toss, the known unknowns are the elementary events 1, 2, 3, 4, 5, and 6. *Id.* The "unknown unknowns"—which are termed "Black Swans" when they go on to occur—would be ones "that the decision-maker does not imagine and therefore does not even consider." *Id.* An example here would be a seven-sided die and the event of rolling a 7. *Id.*

231. *Id.*

232. *See* Rachlinski, *supra* note 31, at 586–88 ("No matter how a judgment made in hindsight is restructured, the feeling that an outcome was both inevitable and predictable is impossible to avoid.").

233. *See* Baruch Fischoff, *Perceived Informativeness of Facts*, 3 J.

Decision-makers are oriented towards "unfoldings of the world described in sufficient detail to determine the relevant consequences of each of the possible courses of action."[234] But actively constructing a trial in which the error or the failure to disclose or perform *did* affect the verdict might mitigate some hindsight failures and further ensure correct placement of the burden of proof.[235] The Supreme Court offered a useful potential structure for such decision-making in its most recent *Brady* decision.[236] In *Smith v. Cain*,[237] the Court concluded that the government cannot meets its burden of showing that a violation is immaterial if it only "offers a reason that the jury *could* have disbelieved [the undisclosed evidence], but gives us no confidence that it *would* have done so."[238] If courts were to review errors in context and, when uncertain, proceed as though they affected the verdict,[239] integrated decision-making—that counts a different outcome as a real possibility—could emerge.

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EXPERIMENTAL PSYCHOL. HUM. PERCEPTION & PERFORMANCE 349, 356 (1977) ("Even when told to do so, it is evidently extremely difficult to de-process so important a bit of information as the right answer, inadmissible evidence, or an act of aggression followed by mitigating circumstances."); *see also* John C. Anderson, et al., *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711, 730 (1993) ("Individuals tend to give higher relevance to negative factors (cues) when the outcome was negative and to give higher relevance to positive factors (cues) when the outcome was positive.").

234. Feduzi & Runde, *supra* note 230, at 270.

235. *See* Neal J. Roese, *Twisted Pair: Counterfactual Thinking and the Hindsight Bias*, *in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISIONMAKING 268 (Derek J. Koehler & Nigel Harvey eds., 2004) (explaining that, although hindsight bias is "resistant to debiasing," approaches involving considering alternatives have been effective because "if the occurring event cued its own causal chains, then considering the non-occurring event ought to accomplish the analogous result, thereby decreasing the bias"); *see also* Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1239 (1984) (finding that "the cognitive strategy of considering opposite possibilities promote[s] impartiality"). *See generally* Michelle R. Nario & Nyla R. Branscombe, *Comparison Processes in Hindsight and Causal Attribution*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1244 (1995); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000).

236. Smith v. Cain, 132 S. Ct. 627, 630 (2012).

237. *Id.*

238. *Id.*

239. *See* O'Neal v. McAninch, 513 U.S. 432, 434 (1995) ("We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it

### *B. Standards for Systemic Failures*

Finally, courts should pay particular attention to errors that relate to breaches of duty and symptoms of systemic failure.[240] Here, a quantitative approach, not in the probabilistic sense, but to draw bright lines, could supplement the holistic inquiry into error. For instance, certain objective markers of the adequacy of counsel—such as interviewing eyewitnesses and investigating exculpatory evidence—might help courts look past hindsight, despite the *Strickland* Court's resistance to listing any "mechanical rules."[241]

The distinction between structural and non-structural errors already recognizes that some flaws in the trial compromise fair adjudication to such an extent that no amount of certainty about outcome justifies affirmance. Types of error that pervade the trial but fall outside these categories also warrant closer scrutiny. Prejudice is presumed, for example, when the court commands joint representation over a defendant's objection.[242] The reasoning goes that an inquiry into a claim of harmless error would "require, unlike most cases, unguided speculation" and thus is not "susceptible of intelligent, evenhanded application."[243] Yet hindsight about the impact of ineffective assistance of counsel requires the same unguided speculation. As with counsel constrained by joint representation, incompetent counsel might *refrain* from doing things, and the effect of that restraint on "options, tactics, and decisions" will not be apparent from the record.[244]

Recent developments also suggest a potential hybrid category of semi-structural errors, with respect to which prejudice could be

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affected the verdict (i.e., as if it had a 'substantial and injurious effect or influence in determining the jury's verdict').''); *see also* Edwards, *supra* note 10, at 1194 (concluding that "serious doubt" about whether a trial without the error would have produced a different result requires reversal).

240. *See, e.g.*, Mitchell, *supra* note 56, at 1366 ("The overwhelming-evidence test ignores the argument that, even if conviction *appears* inevitable, there is a point at which an error becomes too great to condone as a matter of constitutional integrity and prosecutorial deterrence.").

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

242. Holloway v. Arkansas, 435 U.S. 475, 488 (1978).

243. *Id.* at 491.

244. *Id.* at 490–91.

presumed, though reversal would not be automatic. One reading of the *Lafler* and *Frye* extensions of the right to counsel is that clear violations of ex ante professional norms weigh more heavily than other errors. Some cases of ineffective assistance of counsel arise from strategic decisions or from generally inartful advocacy. But cases in which the deficient performance involves breaches of duty like the failure to communicate a plea offer, or neglecting to conduct pretrial mitigation investigation in a capital case, require an especially rigorous approach, one that expressly clears away hindsight blindness to improve accuracy.

A similar argument applies to breaches of a prosecutor's duty to disclose exculpatory evidence. As Judge Kozinski wrote in *Olsen*, prosecutors don't fulfill *Brady* obligations because "courts don't make them care."[245] If hindsight no longer shielded prosecutors from the consequences of withholding discovery, or defense lawyers from accountability for errors, they might care a great deal more about those requirements.[246]

Even guided speculation done as thoughtfully as possible, however, is currently out of the reach of most habeas courts, who face claims that are often procedurally defaulted.[247] State post-conviction review limits "the range of issues that can be raised on collateral attack" and also imposes "heightened burdens on defendants" because "finality interests are given greater prominence over concerns about wrongful convictions."[248] It is

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245. United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting); *see also id.* at 626 ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."); Rose v. Clark, 478 U.S. 570, 588–89 (1986) (Stevens, J., concurring) ("An automatic application of the harmless error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case.").

246. *See* Baer, *supra* note 75, at 5 ("[M]ost prosecutors and their offices remain fairly insulated from the prospect of liability.").

247. The layers that separate a habeas petitioner from error review were recently restated by the Supreme Court in *Davis v. Ayala*, in which the majority concluded that post-conviction relief is available only where both the trial court's error and the appellate court's decision that the error was harmless are so deeply inconsistent with established precedent that no fair-minded jurist could agree. *See* 135 S. Ct. 2187, 2197 (2015) (concerning the exclusion of defense counsel from *Batson* proceedings).

248. Findley & Scott, *supra* note 29, at 353.

harder still at the federal level, which involves "strict time limits and numerous procedural and substantive barriers" arising from the Antiterrorism and Effective Death Penalty Act of 1996.[249] Moreover, there is a circumstantial blind spot: Concealed evidence tends to stay that way, and ineffective assistance of counsel also requires some subsequent lawyer to uncover the evidence or strategy that prior counsel neglected.[250]

The acuteness of the hindsight blindness problem stems as well from the interaction between these three categories of error. The discovery process fails to level the informational playing field, subpar counsel cannot correct for that disadvantage in the adversarial process, and reviewing courts are reluctant to retry cases of claimed error. One could view all of these structural impediments as a reason not to revisit hindsight standards. But perhaps they suggest instead that the danger of overvaluing errors and raising the reversal rate is not that high. Especially in the rare cases where defendants have access to post-conviction fact development and successfully uncover systemic failures like *Brady* violations and inadequate representation, a more rigorous review is warranted, through a clearer lens than the current hindsight standard.

## *VII. Conclusion*

The undeniable existence of error in criminal adjudication—which is often connected to cognitive failings—calls for reconsideration of the mechanisms available to reviewing courts for error correction. The inability to clearly see how discovery violations, deficient counsel, or evidentiary flaws affected a trial determination precludes close scrutiny of systemic failings. Actual change to the underlying standards themselves seems unlikely. *Brady*, *Strickland*, and *Brecht* are all fairly entrenched precedents. It is a useful step, however, to illuminate the problem of cognitive bias in *applying* those standards. More rigorous and

249. *Id.*

250. *See, e.g.*, Garrett, *supra* note 5, at 111 n.206 ("[S]uppression of exculpatory evidence is difficult to uncover. Absent discovery of the police and prosecution files, even after exoneration potential *Brady* violations may not come to light.").

better-informed application could restore the role of reviewing courts as the safety valve in a process that has failed to correct itself. Precious few trials take place, and the ones that do occur also perform an important audit function for the criminal justice process. Trials expose investigative and prosecutorial tactics to both judicial and public review. Appellate reversals of convictions also send important messages about fair procedures. But if prosecutorial ethics, attorney performance, and evidentiary error remain behind a hindsight barrier and thus lie beyond the reach of reviewing courts, little will change despite empirical evidence of wrongful convictions and the most recent social science on accurate fact-finding.