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Framing the Prosecution

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The enormous value of Dan Simon's *In Doubt*[1] lies not just in its nuanced exploration of the challenges to accurate criminal fact finding but in its challenge to us to rethink trials themselves. Even as we endeavor to give criminal defendants the means and license to raise reasonable doubts, we need to think more about when and how those doubts can be allayed. Just because most jurisdictions have not come out of the first round of play – the one in which defendants get the tools to poke holes in the cases against them – doesn't mean it's premature to consider what should happen in the second period: What tools should we give jurors to assess the alleged holes – the "reasonableness" of an alleged doubt? And how can the prosecution try to mend them? These questions don't simply go to the fairness and, to use Dan's term, the diagnosticity of trials. They also, as I hope to show here, go to the role that criminal trials will play in a world with so few of them.

Metaphors are powerful tools for understanding complex phenomena – for "framing" them.[2] And the "framing" metaphor itself, with its resonance of intentionality and contingent perception, is a powerful tool for understanding and reformulating the criminal trial.[3] The thicket of procedural and evidentiary doctrines deployed in our trials is founded on the fear that the state will -- intentionally or insouciantly -- try to "frame" an innocent defendant. That, among other reasons, is why the state must proceed first and meet a heavy burden of proof. With the state's responsibility for assembling a case and putting it on, however, comes a troubling advantage of which we were long aware but that recent cognitive science literature[4] has driven home: having been presented with what seems like a nicely drawn picture of guilt – evidentiary pieces selected by the prosecutor, which coincidentally fit within a frame selected by her as well – the jury may not bother to look beyond it.

There is a broad consensus in the literature -- even if reality has yet to catch up – that we need to ensure that defendants have a fair opportunity to challenge this evidentiary frame, so that they can expose the cognitive biases that infected the cops' initial construction of the case and the prosecutors' later assembly of it. Understandably less thought, however, has been given to

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[1] Dan Simon, In Doubt: The Psychology of the Criminal Justice Process (2012).

[2] George Lakoff & Mark Johnson, Metaphors We Live By (2003 ed.).

[3] See Richard K. Sherwin, Law Frames, Historical Truth and Narrative Necessity in a Criminal Case, 47 Stan. L. Rev. 39 (1994).

[4] See Daniel Kahneman, Thinking Fast and Slow 362-74 (2011).

the risk that, in doing so, defendants will "frame" cops and prosecutors. No claim is made that this risk is of similar moral dimensions to the others. But, it has systemic implications worth worrying about.

Criminal trials are not the only, and may not even be the best, way to promote the competency and integrity of the police in the nearly 18,000 law enforcement agencies[5] and the over 2,300 prosecutors' offices[6] around the country. One could imagine a variety of non-adjudicatory mechanisms, both outside these institutions and within them, could do the same thing. From the outside, consulting firms could do random audits; inspector generals could poke around; state attorneys general – while generally lacking hierarchical control over county prosecutors -- could use habeas defense work as a basis for oversight; funders could look more carefully at how their money is spent; citizen commissions could have real informational gathering resources and powers . . . . The list goes on. From the inside, training, culture and office structure could be engaged to the same end. And mutual monitoring between police and prosecutors[7] could be fostered as well. Yet given political and institutional realities, it is hard to imagine any combination of these quality control measures doing the fine-grained work across all jurisdictions that we rely on the adversary process to do. At the same time, it's hard to even pretend that the adversary process is operating at full throttle in the vast majority of criminal cases -- the cases in which the adjudicative process consists only in a negotiated guilty plea and a sentence. So while trials may be the exception, they still provide the rule for police and prosecutorial conduct. And even as we look to the fairness of trials to defendants, we should be more attentive to the signals trials send and the incentives they create for cops and prosecutors.

Of course, trials aren't particularly good signals to police and prosecutors of the quality of their work. Even with most cases pleading out, the average trial will end in a guilty verdict. And if one considers all the choices made (or negligently foregone) in the course of an investigation and trial, the likelihood that one or more enforcers involved in the case made one or more, possibly cascading, mistakes is considerable, and the likelihood that a jury verdict will reflect that mistake, pretty small. Were enforcers to start thinking of trials as the only assessment of their work that matters, the insensitivity of this mechanism would surely promote overconfidence and sloth.[8] Still, even as we promote alternative, non-adjudicatory mechanisms, we can work to promote greater sensitivity.

These signals and incentives are the focus of this essay, which proposes a quiet reframing of trials as regulatory interventions into a sparsely regulated world.

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[5] Brian A. Reaves, Bureau of Justice Statistics, Census of State and Local Law Enforcement Agencies, 2008, at 2 (2011), http://www.bjs.gov/content/pub/pdf/csllea08.pdf

[6] Steven W. Perry, Bureau of Justice Statistics, Prosecutors in States Courts, 2005 (2006) (2,344 offices prosecuting felony cases in states courts of general jurisdiction). The federal system has prosecutors housed in Washington and in the offices of the 93 U.S. Attorneys around the country.

[7] Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749 (2003).

[8] Michael Farbiarz (whose cases probably involve thousands of decisions) raised this nice point.

Deconstructing the Investigative Frame

Consider the classic criminal trial drama: A few eyewitnesses will testify. Police officers will tell of having conducted a search or two, perhaps pursuant to their arrest of the defendant, and will authenticate physical evidence that they seized. An officer will tell of the defendant's post-arrest statements (since he probably waived his Miranda rights.) Perhaps someone from the police lab will attest to a "match" between biological material found at crime scene and the defendant. And maybe a co-conspirator will take the stand, in hopes of receiving (or maybe after already having received) sentencing leniency. This parade of prosecutorial witnesses remains pretty standard, and their testimony, pretty predictable. But at least to those who have kept abreast with developments in forensic and cognitive science, our understandings of how this evidence should be assessed have changed radically.

In part because the surveillance state so feared by privacy champions works far better on TV than in reality, eyewitnesses will continue to star in criminal trials for the foreseeable future. Notwithstanding fevered talk of omnipresent surveillance cameras, transit and vehicle tracking, and cellular tower triangulation, any wholesale rejection or even deep-discounting of eyewitness testimony would put all too many serious crimes beyond legal sanction.[9] Still, we have increasing concerns about the reliability of eyewitness testimony when it is based on fleeting, stressed, and cross-ethnic observations, and those concerns only grow when investigating authorities aren't careful in their recovery efforts.[10] Moreover, the possibility of investigator contamination when memories are retrieved and reconstructed is not limited to fleeting observations. While a workplace or accomplice witness might be justifiably more certain about whom he saw, he may have the same uncertainty or susceptibility to manipulation as to what he heard and saw, and when. And the manipulation can come at the witting or unwitting hands of prosecutors – during proffers or trial preparation -- as well as cops.[11] Nor are confessions and witness statements (from eyewitnesses and others) the only kinds of evidence that cops and prosecutors can taint. Physical evidence can be lost, contaminated, or otherwise mishandled by those that collect it, process it, and, to the extent someone bothers, tests its. Lab results can be mistaken, misleadingly presented, or just plain fabricated.[12] And we are increasingly aware of

[9] For an NIJ sponsored survey of, inter alia, police interest surveillance systems, see John Gordon IV, et al., Keeping Law Enforcement Connected: Information Technology Needs from State and Local Agencies, 11 (RAND 2012), available at http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1165.pdf

[10] See Gary L. Wells & Elizabeth Loftus, Eyewitness Memory for People and Events, in Handbook of Psychology, Forensic Psychology, vol. 11, ch. 25, 617, 617 (2013) (useful metaphor of "memory as trace evidence"). See Dan Simon, supra at 90-119 (collecting eyewitness literature).

[11] See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment,* 68 Ford. L. Rev. 917 (1999); also see Daniel C. Richman, Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels, 8 Fed. Sent. Rptr. 292 (1996); Bruce A. Green, "The Whole Truth?: How Rules of Evidence Make Lawyers Deceitful, 25 Loyola LA L. Rev. 699 (1992).

[12] NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* http://ag.ca.gov/meetings/tf/pdf/2009_NAS_report.pdf ; Michael R. Bromwich, Final Report of the Independent

how the selective process of case construction can fall victim to what Dan Simon has labeled "biased reasoning processes."[13]

That human activities are subject to human fallibility isn't news, I hope. The challenge, so nicely framed by Dan, however, is of the "limited diagnosticity" of an enterprise that relies on self-selected humans to collect and select data and on dragooned members of the public to assess it. Yet the challenges to diagnosticity go beyond that. Sure, criminal defendants are presumed innocent – a bedrock principle so celebrated by popular legal culture that it infects discussions where it should have little place.[14] Yet I don't think we give sufficient attention to the cognitive dissonance the presumption demands of jurors. In what other context do we set up a politically accountable bureaucracy (like the police or a prosecutor's office), ask citizens to take a political interest in its functioning, and then ask some of those same citizens to "presume" that the same bureaucrats have acted at a rate at or below chance in the particular case before them? No, I'm not claiming that jurors necessarily trust the police (I work near the Bronx after all[15]), nor that district attorneys necessarily have robust political accountability.[16] Indeed, in a country in which criminal justice is primarily a county-based enterprise, even the average citizen/juror's baseline views about police and prosecutorial sorting powers will surely be geographically specific. Nor am I embracing the idea that jury trials should be implicit case-crossing referendums on a police force's professionalism, though I'm not sure that would be such a bad thing, given how unaccountable police departments can be.[17] The point is simply to highlight the fundamental tension between the development of trust and legitimacy by local authorities[18] and the skepticism that we celebrate as the heart of our criminal trials.

Even if prosecutors didn't come before juries with a democratic wind at their backs, their ability to select and prepare their cases and their control over the order of proof could make even the most doubt-promoting investigation seem eminently reasonable and adequate. Insiders have always known that the seamless trial testimony that witnesses (especially police officers) give on direct examination is an artifact of specific trial preparation and general training. But we are all

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Investigator for the Houston Police Department Crime Laboratory and Property Room (2007), http://www.hpdlabinvestigation.org/

[13] Simon, supra, at 37.

[14] See Daniel C. Richman, Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz , 64, 85-86 in The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz (Michael Klarman, David Skeel & Carol Steiker, eds. 2012)(citing example from Clarence Thomas confirmation hearing).

[15] See Ailsa Chang, Cycle of Mistrust Leaves Crimes Unprosecuted in the Bronx, WNYC News, Aug. 22, 2012, http://www.wnyc.org/articles/wnyc-news/2012/aug/22/bronx-da-2/; see also William Glaberson, Faltering Courts, Mired in Delays, N.Y. Times, Apr. 13, 2013, at __ (noting that "Bronx jurors are famously skeptical of the police" and that, in 2011, "Bronx prosecutors won only 46 percent of their jury trials").

[16] See Daniel Richman, *Old Chief v. United States*: Stipulating Away Prosecutorial Accountability, 83 Va. L. Rev. 939, 963 (1997) (on limited electoral accountability of district attorneys).

[17] See David Alan Sklansky, Democracy and the Police (2007). It's hard to allude to the case-crossing referenda on police -- particularly in a Los Angeles conference -- without mentioning the OJ Simpson case.

[18] See Tom R. Tyler & Jeffrey Fagan, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities, 6 Ohio St. J. Crim. L. 231 (2008).

too inured to the charade we present jurors: the witnesses who appear months, even years, after an event and deliver personal narratives, prompted only by non-leading questions, that shed potent light on the transactions in dispute; the memories that are suddenly "refreshed" with a glance at a document, and the notion of an investigation without loose and dead ends. In the hands of a competent prosecutor, the case against the defendant, however cobbled together beforehand, unfurls like a testamentary scroll.

The deconstruction of the prosecution's case and the investigation that preceded it is thus not just a defense tactic[19] but a necessary part of the inquiry into reasonable doubt. While that standard is rooted in the distant world explored so nicely by Jim Whitman[20] (one long before the rise of professional criminal investigators), our current understanding of it offers a capacious analytical framework well suited to second-guessing the official story and exposing the choices made and foregone by those purporting to present a burnished story of guilt.[21] In addition to deconstructing the prosecution's case, a defendant will want to offer a counter-narrative, and "The cops jumped to conclusions" may be the best he can do.[22] Indeed, while several experienced practitioners at this Conference reported that this line of defense can alienate jurors, it may be a defendant's only possible entry in the contest for "relative plausibility" (as Ron Allen and Alex Stein nicely put it).[23]

The defendant, of course, will be the primary beneficiary if his lawyer can successfully deconstruct the prosecution's case. And society will avoid the unjust conviction of someone in its name. Yet trials are too rare and expensive, and alternative mechanisms of accountability all too limited, for us to ignore the contributions cutting across cases that trials can make to the regulation of a county or district's criminal justice system.

We can't pretend that trials are random audits. While a market-clearing price may not always be available in our guilty-plea driven system,[24] it usually is. On hearing that a criminal

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[19] See Guyora Binder & Robert Weisberg, Literary Criticisms of Law, 261-63 (2000); add cites

[20] James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale, 2008); see also Andrea Roth, Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence, (2013 SSRN draft)

21See Sherwin, supra note __, at 68 (describing strategy in which "[t]he defense attempts to attack the prosecutor's history, impeach the credibility of the state's witnesses, and deconstruct the linear narrative that the prosecutor offers, breaking it up until it is transformed into a nonsensical, incredible tale too full of inconsistencies and loose ends to withstand the onslaught of reasonable doubt."). Breaking the prosecutorial frame can also be a critical part of the defense case in a capital sentencing phase, see John M. Hagedorn & Bradley A. MacLean, Breaking the Frame: Responding to Gang Stereotyping in Capital Cases, 42 Univ. of Memphis L. Rev. 1027 (2012).

22See Sherwin, supra note __, at 55 ("The defense must buttress any uncertainty it induces with something stable, or risk sending the jurors scurrying for any scrap of certainty the prosecution offers. And to be sure, the prosecution will be offering certainty.").

23 Ronald J. Allen & Alex Stein, Evidence Probability, and the Burden of Proof, 54 Ariz. L. Rev. __ (2013) (forthcoming) (explaining how fact finders rely not on fancy probabilities but on a natural reasoning process that compares the relative plausibility of each side's explanation of the evidence), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245304

[24] See Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909 (1992). Thus, in the absence of good model, efforts to extrapolate data on investigative pathologies from exonerations in murder and

case went to trial almost anywhere in the US, one's first thought is to wonder why, and the answer is as likely to be about the sentencing consequences or the defendant's personal circumstances as about the closeness of the case or the weakness of the evidence. Still, just as (in part for lack of effective alternatives) we embrace the exclusionary rule for the incentives it gives the police to comply with the Constitution, so should we embrace trials as sites for identifying and punishing specific instances of shoddy police work, and perhaps even acknowledging jobs well done. As the "diagnosticity" of trials will inevitably go to investigations as well as guilt, we should embrace that duality as a feature, not a bug, of our criminal justice regime. Victims should not feel like they are on trial; police and prosecutors definitely should. And the Second Circuit quite rightly rebuked the prosecutor who, in rebuttal summation, urged the jury: "this is not a search for reasonable doubt. This is a search for truth."[25] Truth is indeed important. But reasonable doubt is the way we get there.[26]

Our first challenge in criminal trials is thus to ensure that the sources of doubt are properly aired. That means (1) giving defense counsel sufficient information about the conduct of the investigation so that they can critique and perhaps supplement it, and (2) making sure that counsel have the zeal, expertise, and resources to expose prosecutorial flaws to the jury and that judges have the patience to let them. Then we also (3) need to give jurors the tools to assess what doubts are reasonable.[27]

How can we accomplish these goals? A large part of the solution is conceptually straightforward, even as the political and institutional obstacles can be enormous: Defense counsel need to get adequate information not just about what the prosecutor included in her case but about what she left out. The amount of ink that been spilled on the inadequacies of the law governing prosecutorial disclosure and on the all-too-frequent failure of prosecutors to comply

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rape cases – where the felt need to pursue even a weak case may be greater – usually end up being exercises in rhetoric, not social science. For a nice effort to sort through the data, see Samuel R. Gross, How Many False Convictions Are There? How Many Exonerations Are There, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICA AND EUROPEANS CRIMINAL JUSTICE SYSTEMS,* C. R. HUFF & M. KILLIAS EDS. (ROUTLEDGE:MARCH 2013, IN PRESS) (available at SSRN)

[25] United States v. Williams, 690 F.3d 70, 77 (2d Cir. 2012).

[26] Id. The court explained:

> To say that "this is not a search for reasonable doubt" but "a search for truth" has the potential to distract the jury from the bedrock principles that "even if the jury strongly suspects that the government's version of events is true, it cannot vote to convict unless it finds that the government has actually proved each element of the charged crime beyond a reasonable doubt," and "that if the evidence is insufficient to permit [the jury] independently to 'find the truth,' its duty, in light of the presumption of innocence, is to acquit." [*United States v.*] *Shamsideen,* 511 F.3d [511 F.3d 340, 346–347 (2d Cir. 2008)]. The prosecution thus erred here by failing to frame the question for the jury "by reference not to a general search for truth but to the reasonable doubt standard that the law has long recognized as the best means to achieve the ultimate goals of truth and justice." *Id.* at 347.

[27] See Simon note __, at 195 (noting variation and inadequacy of "reasonable doubt" instructions across jurisdictions); see also State v. Stevenson, 298 P.3d 303 (Kan. 2013) (describing inelegant prosecutorial effort to distinguish between "beyond a reasonable doubt" and "beyond all doubt" during voir dire).

with their all-too-limited legal obligations is deservedly large,[28] and I'll not add to it here. Even the most liberal disclosure reform proposals, however, won't ensure that defense counsel gets what she needs. Given the resource asymmetries in an adversarial system in which talk of "equity at arms" conceals more than it protects, prosecutors also need to have the zeal and competence to find critical evidence in the first place. As anyone familiar with the *Brady* problem(s) in *Connick v. Thompson* knows, a constitutional disclosure obligation that looks to the forensic analyses that the prosecution has actually performed will be of little help when prosecutors are too lazy or inept to conduct tests that are as likely to help as to hurt their case, or when investigators are too lazy or inept to collect evidence in the first place.[29]

Another conceptually straightforward, but practically daunting, part of the solution: defense counsel need to be adequately funded and have sufficient expertise and zeal. More than fifty years after *Gideon v. Wainwright*, this goal remains distant.[30] Retrospective relief for defendants ill-served by counsel is virtually impossible to get, not just because of *Strickland v. Washington*'s demanding standard but because of evidence of even clearly inadequate performance is unlikely to surface. And ad hoc retrospective provision for what needs to be a critical ex ante assurance makes little sense, not just from a rights perspective, but from any reasonable perspective. There is no substitute for a well-funded and motivated public defender organization (or collection of such organizations) within a county or district, able to collect information about police practices and bring it to bear across cases. Even the most crime-control oriented should appreciate a system's need for zealous and skilled quality inspectors ready to take on the confirmation biases and tunnel vision of police and prosecutors,[31] but reliable institutional structures for such inspectors are rarely in place.

Of course, the basis for finding doubt must also get to juries.[32] This may seem obvious. Yet Supreme Court intervention was needed in *Holmes v. South Carolina*,[33] where state law

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[28] See, e.g., Cynthia E. Jones, A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence, 100 J. Crim. L. & Crim. 415 (2010); Daniel S. Medwed, Brady's Bunch of Flaws, 67 Wash. & Lee L. Rev. 1533 (2010); Janet Moore, Democracy and Criminal Discovery Reform after Connick and Garcetti, 77 Brooklyn L. Rev. __ (2012); Ellen Yaroshefsky, New Orleans Prosecutorial Disclosure in Practice after Connick v Thompson, Geo. J. Legal Ethics, 913, 919 (2012).

[29] See Jennifer E. Laurin, Prosecutorial Exceptionalism, Remedial Skepticism, and the Legacy of Connick v. Thompson, in National Police Accountability Project, Civil Rights Litigation Handbook, 29, __ (2011) (discussing how Connick's concession that a Brady violation occurred and most Justices' consequent inattention to that point, left unanswered Justice Scalia's plausible argument that no violation occurred when prosecutors failed to check whether Thompson's blood type matched that on the victim's pants), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934250. See also Jennifer E. Laurin, Way Forward, draft (get cite permission) at 26-27 (discussing inadequacies of police evidence collection).

[30] See Joel M. Schumm, National Indigent Defense Reform: The Solution Is Multifaceted (2012) (Report of ABA and NACDL committees). See also various symposia commemorating the fiftieth anniversary of Gideon v. Wainwright, e.g. 122 Yale L.J. Issue 8 (2013).

[31] See Jen Laurin, Way Forward at 39-40 (citing literature).

[32] While the focus here is on juries-- the usual fact finders in felony criminal trials -- the analysis here largely extends to bench trials as well. See Frederick Schauer, On the Supposed Jury-Dependence of Evidence Law, 155 U. Pa. L. Rev. 165, 187 (2006) ("even judges are often afflicted with the kinds of cognitive failings that juries are, and that many of the same reasons that exist for imposing second-order exclusionary (or other) rules on juries'

barred a defendant from introducing evidence of third-party guilt if the prosecution had "introduced forensic evidence that, if believed, strongly support[ed] a guilty verdict."[34] As the Court noted there, an evaluation of "the strength of only one party's evidence" allows no "logical conclusion [as to] the strength of contrary evidence offered by the other side to rebut or cast doubt."[35] Put differently, the "reasonableness" of the narrative frame proposed by the prosecution can hardly be assessed without reference to the dots just outside of it.

Holmes should not be expected to remove the temptation to construct judicial walls around the prosecution's case.[36] The trial structured around the prosecution narrative of the defendant's guilt can easily spin out of control when the defendant responds by pointing at someone else or simply persons unknown. As the Massachusetts Supreme Judicial Court explained: "[T]he admission of feeble third-party culprit evidence poses a risk of unfair prejudice to the Commonwealth, because it inevitably diverts jurors' attention away from the defendant on trial and onto the third party, and essentially requires the Commonwealth to prove beyond a reasonable doubt that the third-party culprit did not commit the crime."[37]

At the very least, however, we should ensure that courts are receptive to defense challenges to the adequacy of the police's investigation. The Massachusetts SJC explained the difference:

> While the inference to be drawn from third-party culprit evidence is simply that someone else committed the crime, the inference that may be drawn from an inadequate police investigation is that the evidence at trial may be inadequate or unreliable because the police failed to conduct the scientific tests or to pursue leads that a reasonable police investigation would have conducted or investigated, and these tests or investigation reasonably may have led to significant evidence of the defendant's guilt or innocence. A jury may find a reasonable doubt if they conclude that the investigation was careless,

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first order epistemological assessments also apply to the arguments for imposing second-order rules on the first-order epistemological assessments of judges.").

[33] 547 U.S. 319 (2006).

[34] Id. at 321.

[35] Id. at 331.

[36] See Birts v. State, 2012 Ark. 348 (2012); State v. Mitchell, 2010 Me. 73 (2010). The Missouri Supreme Court, for example, recently adhered to its "direct connection" rule:

> "To be admissible, evidence that another person had an opportunity or motive for committing the crime for which a defendant is being tried must tend to prove that the other person committed some act directly connecting him with the crime. The evidence must be of the kind that directly connects the other person with the *corpus delicti* and tends clearly to point to someone other than the accused as the guilty person. Disconnected and remote acts, outside the crime itself cannot be separately proved for such purpose; and evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible."

State v. Nash, 339 S.W.2d 500, 513 (2011) (quoting State v. Rousan, 961 S.W.2d 831, 848 (Mo. banc 1998)).

[37] Commonwealth v. Silva-Santiago, 453 Mass. 782, 800-01 (2009) (citations omitted);

incomplete, or so focused on the defendant that it ignored leads that may have suggested other culprits.[38]

As a matter of logic, this sort of proof might be on equal, or even lesser, footing with third-party culprit evidence on the issue of defendant's guilt. Save for cases of bad faith in which the police consciously disregard an investigative lead, it is not obvious that a potential "dot" known but not pursued should bear more on doubt than a "dot" indicative of non-guilt that the police didn't know of. Yet proof of investigative deficiencies is considerably more manageable as a practical matter. Since prosecutors are less likely to be completely blindsided (assuming they communicate with the cops), the risk of fabrication is lower.[39] Moreover, as the Massachusetts SJC later noted: "[B]ecause the Commonwealth may generally, on redirect examination, explain why particular leads were not followed, the risk of prejudice posed by [such alternative suspect] evidence is often lower than that associated with third-party culprit evidence."[40] Yet wariness about the framing power of the prosecution's case should counsel courts to be more receptive to both kinds of proof.

Attentiveness to the trial role as systemic regulatory device, however, does not mean that judges should completely abstain from regulating defense efforts to poke holes in the fabric of the prosecution's case. The concern isn't simply that court and jury time ought not be wasted by clock-running. Or that there's a difference between poking holes and blowing smoke. It is also to create a judicially patrolled space between what defense counsel knows and what he can use -- a space that counsel can't be counted on to create on her own. Here is where the dynamic aspects of disclosure and evidence come into play. While I realize it's an unsupported behavioral and predictive claim, I suspect that prosecutors might be more ready to memorialize and disclose investigative tracks, including roads not taken, to defense counsel if they had confidence that objectively silly lines of cross would not be pursued in court.

Take a recurring page from federal practice and consider a potential cooperator's first proffer session with the government: Odds are that he will initially minimize his culpability. After some eye-rolling and prodding by his lawyer or the government, perhaps he'll come clean in this session. Perhaps it will take another one before he does so. (Yes, I realize that assessments of "clean" are contestable.) When the government eventually calls him as a trial witness, it will need to disclose "material" exculpatory and impeachment material under *Brady* (even if not written down) and all memorized statements, but not non-*Brady* material that isn't written down.[41] To what extent should the prosecutor who worries that even the slightest inconsistency between the cooperator's initial statements and trial testimony will provide grist

[38] Commonwealth v. Silva-Santiago, 453 Mass. 782, 800-01 (2009) (citations omitted); see also United States v. Patrick, 248 F.3d 11, 21-22 (1st Cir. 2001) (drawing similar distinction).
[39] See Williams v. Florida, 399 U.S. 78 (1970) (justifying imposition of disclosure obligations on criminal defendants by pointing to "the ease with which an alibi can be fabricated").
[40] Commonwealth v. Bright, 463 Mass. 421, 439 (2012).
[41] See United States v, Rodriguez, 496 F.3d 221 (2d Cir. 2007). It should be noted that actual practices and expectations in this area seem to vary considerably across federal districts.

for tedious cross-examination take careful notes? A strict Baysian might want to assure the prosecutor that immaterial inconsistencies or natural narrative evolutions would be treated as such by the jury, and that she therefore needn't worry about disclosure: A savvy defense lawyer wouldn't bother to pursue the matter, and an inept one would find no profit in it. Indeed, weak impeachment of this might even strengthen the jury's assessment of the witness's credibility and the prosecution's case more generally.[42] Still, risk aversion and effort minimization combine to deter memorialization. Would judicial restriction of that cross remove this disincentive? I'm certainly not sure, but it would be worth a try, given the current dynamics, particularly on the federal side, where the luxury of a lighter caseload and the freedom that certain agents and prosecutors have to pursue sustained investigations reduces their (perceived) need to create aids to memory.[43] And I suspect (but cannot prove) that attention to such disincentives might similarly promote disclosure of other investigative matters. We regularly use evidentiary rules to create space for and foster socially valuable internal processes,[44] and the intervention here would be with respect to use at trial, not disclosure.

A call for more thoughtful judicial management of impeachment is not a call for a curtailment of cross-examination or defense evidence designed to make the police and prosecutors look bad. That project, after all, goes to the heart of "reasonable doubt." And defense efforts to explore investigative short-cuts, leads not pursued, and forensic tests not ordered should be welcomed. Judicial hostility to such efforts arises not simply from the desire to move a trial along but from the same habituation to routine and internalization of resource limitations that cause the investigative inadequacies in the first place. The notion that "we don't that type of thing in these types of cases" or "that never works" is as likely to be accepted by the judge -- who as a former prosecutor or defense lawyer is used to what is "normal" -- as by the investigators. But the relatively few trials we have provide occasions for questioning the "normal." And if we are to embrace the retail inquiry of a trial not just as a means of assessing a particular defendant's guilt but as an opportunity to audit investigative decision-making, judges should not shut down awkward questions about work undone.

Note that the last two paragraphs have contradictory implications for judicial gatekeeping. Yet such balancing is precisely what we pay trial judges the big bucks to do. Blindness to the effects of trial management on the cases that don't go to trial won't prevent them from occurring. And there is no escaping the normative: When defense counsel wants to inquire into the failure of investigators to search NSA electronic intercepts in a local burglary,

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[42] See James Liebman, et al, supra note __ (weak exculpatory evidence can strengthen jurors' assessment of the directly inculpatory case).

[43] See Sam Roberts, Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches, 74 Ford. L. Rev. 257, 268-69 (2005) (noting reluctance of federal agents and prosecutors to take notes of meetings with cooperators); also see Daniel Richman, Expanding the Evidentiary Frame for Cooperating Witnesses, 23 Cardozo L. Rev. 893 (2002).

[44] See Note, Josh Jones, Behind the Shield? Law Enforcement Agencies and the Self-Critical Analysis Privilege, 60 Wash & Lee L. Rev. 1609 (2003); also see Dan Kahan, The Economics—Micro-, Behavior, and Political—of "Subsequent Remedial Measures" Evidence, 110 Colum. L. Rev. 1116 (2010).

judicial responses ranging from eye-rolling to explicit signaling that the jury's time is being wasted are appropriate. When, in a case involving a line-up or photo array, counsel wants to ask about the failure to use sequential identification procedures,[45] judicial curtailment should be deemed an abuse of discretion. When the defendant wants to play all six hours of a videotaped interrogation,[46] reasonable minds might differ. Close calls should, of course, favor the defendant. As the Connecticut Supreme Court recently noted, even while conceding that "conducting a thorough, professional investigation is not an element of the government's case,"

> A defendant may, however, rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect. See *Commonwealth v. Bowden*, 379 Mass. 472, 485-86 (1980) (trial court improperly instructed jury not to consider evidence of investigators' failure to perform certain scientific tests when defendant's presentation at trial focused on raising inference that "police had contrived much of the case against him" and he emphasized that failure "in order to call into question the integrity of the police investigation") . . . .
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> State v. Collins, 299 Conn. 567, 600-601(2011).

If we are trying to promote correct jury valuation of defense evidence, we might also consider how defense counsel use proof or leads disclosed to them by prosecutors, pursuant to a constitutional, statutory, or institutional obligation. When defense counsel, either in her own case or on cross, introduces or alludes to, say, a statement or witness disclosed pretrial by the prosecution but not thus far introduced, one can imagine at least three possible jury assessments (or some combination thereof) when the jury doesn't realize where the proof came from. Two are: "If the prosecutor missed this, her investigation must have been pretty shoddy or one-sided," and "if the prosecutor knew about this and didn't tell us, our prior base-line confidence in government regularity needs to be recalculated." If they don't know from where defense counsel got the proof, jurors might easily misassess prosecutorial thoroughness or integrity. Of course, defense counsel might himself clarify the source of the evidence to prevent jurors from speculating in a third direction: that notwithstanding the absence of a burden, defense counsel looked hard for evidence to undercut the prosecution's case, and this and other such proof was the best he could find.[47] I'm not arguing for a particularly protocol governing disclosed evidence, simply that serious attention to the jury as diagnostician of reasonable doubt and assessor or investigative adequacy may require us to do more to clarify the source of evidence.

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[45] See Simon, supra note __, at 71-73 (comparing simultaneous to sequential lineups).

[46] See, e.g., People v. Willis, 2012 Mich. App. LEXIS 2194 (Ct of Appeals 2012) (defense counsel played 45 minutes worth of videotaped interrogation of alleged accomplice and failed to make clear how much more he wanted). [find other/better recent examples]

[47] See James S. Liebman, et al., The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence, 98 Iowa L. Rev. 577, 646 & n. 306 (2012) (on "weak evidence effect").

Ensuring that trial juries are given evidentiary grist for finding doubt will not be enough if we don't equip them to productively think about what doubts are reasonable. At the very least, juror doubts ought not be dispelled with gratuitous, even misleading, instructions.[48] Faced with defense arguments about forensic tests not pursued, some prosecutors are tempted to request "anti-CSI effect" instructions. The theory is that defendants should be prevented from tapping into the so-called "CSI effect," which supposedly leads jurors to expect real investigations to be as exhaustive and sophisticated as those on TV. It's not at all clear that there is a CSI effect for prosecutors to worry about.[49] Far clearer is the risk – recognized by some courts in recent years[50] -- that some variant of the anti-CSI instruction will relieve the prosecution of its burden of proof. The question is not whether the prosecution is legally required to use any particular investigative technique or conduct any particular forensic analysis. Rather it is whether, in the context of the case, the jury will take an authoritative judicial denial of any such legal obligation as a conclusive excusal of investigative inadequacies.

Here, again, a balance must be struck that might vary from jurisdiction to jurisdiction, even from county to county.[51] We certainly don't want the police to practice the law enforcement version of "defensive medicine," ordering unneeded expensive tests to satisfy unreasonable jury expectations. But where the adequacy of an investigation is hotly contested, even the most anodyne judicial expressions concerning the prosecution's investigative burden are fraught, and, particularly when their systemic effects are considered, ought to be deployed with more care.

Indeed, we need to think more generally about the mix of permitted argument, case-specific expert evidence and both tailored and general judicial instruction that juries need to properly assess the strength of the prosecution's case.[52] Doors hitherto closed on defense lines of attack are slowly starting to open, to various degrees in various jurisdictions. The Connecticut Supreme Court, for example, recently reversed itself and joined a growing number of courts

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[48] See, e.g. United States v. Ramirez, 714 F.3d 1134 (9th Cir. 2013) (error for trial judge to have instructed jury not to "speculate" as to why government had not called cooperating witness).

[49] See Tom Tyler, Viewing *CSI* and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction, 115 Yale L.J. 1050, 1053 (2006) ("While the *CSI* effect has been widely noted in the popular press, there is little objective evidence demonstrating that the effect exists. As is often the case with legal issues, the pace of public discussion has outstripped the ability of scholars to research the issue. Lacking any empirical data, discussions of the *CSI* effect have instead been based on the personal impressions of lawyers and legal scholars.")

[50] See Samba v. State, 206 Md. App. 508, 534 (Ct. Spec. App. 2012); Allen v. State, 204 Md. App. 701 (Ct. Spec. Appeals, 2012): Commonwealth v. Seng, 456 Mass. 490, 498-99 (2010); see also Wheeler v. United States, 930 A.2d 232 (D.C. Ct. of Appeals 2007) ("We hold that an instruction to the jury that the lack of fingerprint evidence cannot, as a matter of law, constitute reasonable doubt impermissibly invaded the jury's exclusive province to weigh the evidence as a whole against the standard of reasonable doubt, and requires reversal even under the high standard for plain error review.").

[51] The size and heterogeneous nature of the US judicial system challenges every evidence law generalization. Hence my utterly contestable "methodology" here: broad opining with minimal secondary support, coupled with citation of recent illustrative cases.

[52] See Mark Spottswood, The Hidden Structure of Fact-Finding, at 9 (draft), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226607

holding that qualified expert testimony on the reliability of eyewitness identifications does not "invade the province of the jury."[53] Cautionary instructions on eyewitness testimony will soon become more common,[54] as will (perhaps) cautionary instructions when police have failed to videotape an interrogation from which statements have been introduced.[55] We may even see expert testimony on how certain interrogation techniques combine with psychological factors to generate false confessions.[56]

One hardly wants to declare victory in battles that are far from over in so many jurisdictions. And, but for the fact that so few will read this piece, I would worry that the best could be the enemy of the good, particularly in a world where defendants and reformers bear the burden of persuasion. Still, at least in our insulated circles, we need to consider the trade-offs among these pedagogical measures. One doubts there is a single optimal mix for all jurisdictions. On the other hand, considerations of judicial management argue for appellate courts to make some choices. A fact-sensitive "totality of the circumstances" approach[57] that defers to trial court discretion on the appropriate mix of argument and instructions will, given the press of business, likely drive the problem under the rug, with most efforts, when contested, simply affirmed on appeal. And however much one applauds the readiness of more courts to allow expert testimony in these areas, such resource-intensive retail moves can offer only sporadic relief.

Having opened the door to a few educational experts, we thus need to think beyond them. (I distinguish "educational" experts from qualified "hard" forensic science experts testifying to DNA or other such testing). Resource concerns argue for top-down measures like pattern

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[53] State v. Guilbert, 306 Conn. 218 (2012); Commonwealth v. Silva-Santiago, 453 Mass. 782, 791 (2009) (eyewitness identification expert permitted to testify that police failure to follow five recommended procedures, including showing photographs sequentially); give sense of law in other states

[54] cites for eyewitness cautionary instructions

[55] See Andrew Taslitz, High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Confessions, 7 Nw. J. L. & Soc. Policy __ (2012), http://ssrn.com/abstract=2079164; also see State v. Lockhart, 298 Conn. 537 (2010) (declining to mandate recording policy and reviewing law in other jurisdictions); Commonwealth v. DiGiambattista, 442 Mass. 423, 447-48 (2004) (declining to create exclusionary rule for unrecorded confessions, but holding that "when the prosecution introduces evidence of a defendant's confession or statement that is the product of a custodial interrogation or an interrogation conducted at a place of detention (e.g., a police station), and there is not at least an audiotape recording of the complete interrogation, the defendant is entitled (on request) to a jury instruction advising that the State's highest court has expressed a preference that such interrogations be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before them, they should weigh evidence of the defendant's alleged statement with great caution and care").

[56] People v. Kowalski, 492 Mich. 106 (2012) (holding that trial court "did not abuse its discretion by excluding the expert testimony regarding the published literature on false confessions and police interrogations on the basis of its determination that the testimony was not reliable, even though the subject of the proposed testimony is beyond the common knowledge of the average juror," but also holding that the trial court "abused its discretion by excluding the proffered testimony regarding defendant's psychological characteristics because it failed to consider this evidence separately from the properly excluded general expert testimony").

[57] *Guilbert,* 306 Conn. at 293 (Zarella, J., concurring) (suggesting such an approach in case involving eyewitness identification expert).

instructions promulgated at wholesale level. While there is evidence that jurors don't fully absorb instructions,[58] those studies don't adequately consider that the relevant "treatment" is not just the giving of instructions but their deployment by counsel in argument (or their effective preclusion or weakening of certain counter-arguments).[59] The next goal will be to hard-wire what we have learned from experts into the trial process, to ensure that they are used more equitably and perhaps more sparingly. Indeed, the highest and best use of their expertise may be to inform investigations, not trials.

Defending the Case?

The focus so far – both in the developing case law and this essay – has been to ensure that defendants are given a fair chance to expand the tight evidentiary frame proffered by the prosecution: to show the pieces that don't fit and the ones that were crammed in. And that is the appropriate place to start. To be sure, the asymmetry of appellate relief – there being no appeal from acquittals – means that challenged restrictions on defense efforts will necessarily loom larger than restrictions on the prosecution in the reported cases. But notwithstanding the challenge of rigorous empirical proof, I'd be surprised if courtroom denizens of any jurisdiction had confidence that grist for reasonable doubt was regularly exposed and pursued, or that they thought that prosecutors were more likely than defense counsel to be disadvantaged by restrictive rulings and instructions.

It's not premature, however, to start thinking about how the prosecution should be allowed to respond to expansions of its evidentiary frame, and about the extent to which those responses can expand the frame yet further. There are several reasons to do so. First, judges who had a clearer sense of how and when prosecutors could explain away an alleged deficiency would surely be more receptive to defense challenges in the first place. (My underlying empirical assumption is that some combination of the umpirial ethic and the comfort of a spectator's seat leads most judges to prefer that the adversary system run its course, so long as it moves smoothly.) Second, whatever one's optimal ratio of false positives to false negatives,[60] there are at least some guilty defendants who one doesn't want walking free.[61] Finally, even if the radically unequal balance of power in American criminal justice systems (understandably) leads one to be unsympathetic to the prosecutor whose case is misleadingly tanked, the place of trials in the larger investigative ecosystem should make one worry about courtrooms where good police work gets pooled with bad in the minds of jurors. Resources are always finite and

[58] See Shari Seidman Diamond, Beth Murphy & Mary R. Rose, The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps, 106 Nw. U. L. Rev. 1537 (2012) (discussing studies suggesting jury inadequacies but finding, based on evidence from the deliberations in fifty real civil cases, that "juries in typical civil cases pay substantial attention to the instructions and that although they struggle, the juries develop a reasonable grasp of most of the law they are asked to apply.").

[59] See David Alan Sklansky, Evidentiary Instructions and the Jury as Other, 65 Stan. L. Rev. 434, 431-35 (2012) (design flaws of mock jury studies).

[60] See Alexander Volokh, n Guilty Men, 146 University of Pennsylvania Law Review 173 (1997)

[61] See Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEXAS TECH. L. REV. 65 (2008).

investigations will always be subject to the law of diminishing returns. Some cases may need to be brought even they will never be "slam dunks." Still, wide variations in the competence and zeal of investigations are inevitable and, certainly from a systemic approach, we should equip a jury to discern where its case falls in that spectrum, and to distinguish the good from the bad.

Some of this separation process is straightforward and barely noticed. The police officer cross-examined on his failure to talk to more people at the crime scene can, on redirect, explain that there weren't any. Where cross has suggested gaps in the chain of custody supporting a physical exhibit, a prosecutor can provide the links on redirect, call new witnesses, or wait until summation and suggest the absence of any reason to doubt evidentiary integrity. The prosecution witness impeached with prior inconsistent statements can be rehabilitated through the introduction of prior consistent statements or redirect examination that allows the witness to explain the inconsistency away.[62] The fuss defense counsel makes over the failure to obtain touch DNA results from a firearm can be met with testimony about the impossibility of doing so in this instance. Expert testimony might be permitted to explain away what defense counsel suggested was curious victim behavior in sexual and domestic violence cases.[63]

The process won't always be easy, however. We thus return to the Massachusetts Supreme Judicial Court's reference in *Commonwealth v. Bright* to the prosecution's freedom, on redirect to "explain why particular leads were not followed."[64] Sometimes trial courts will avoid the issue, conducting their own inquiry out of the jury's presence and then rejecting defense evidence of a disregarded tip as unduly speculative.[65] And when a prosecutor does offer an explanation, courts will likely give her some leeway, as the defendant was the one who opened the door (and the evidentiary frame). Yet what happens when the real reason a tip was not pursued was "I've had considerable experience with this kind of case in this neighborhood, and the tip just didn't make sense"? Or "word on the street is that the guy pointing the finger at [third party] regularly talked trash about [third party]"? A tough balance needs to be struck in these cases: Should the prosecution be hamstrung in its ability to respond to perfectly fair but answerable defense challenges, the jury won't be able to assess the reasonableness of the doubt

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[62] Cites See, e.g., Commonwealth v. Seng, 456 Mass. 490, 498-99 (2010) ("It is clear that the Commonwealth was entitled to rebut in some fashion the impression left by the defendant's cross-examination. While generally, "impeachment of a witness by prior inconsistent statements or omissions does not, standing alone, entitle the adverse party to introduce other prior statements made by the witness that are consistent with his trial testimony," . . . the Commonwealth is permitted to rehabilitate the witness by asking questions designed to explain or contradict the inconsistency even though prior consistent statements by the witness are implicated."). That the prior consistent statement may be admissible only on credibility and not for its truth (under a jurisdiction's hearsay rule) will often not bar its use, so long as the distinction is made clear. See United States v. Al-Moayad 545 F.3d 139, 168 (2d Cir. 2008) (finding reversible error where no such distinction drawn).

[63] Jennifer G. Long, Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions (2007) http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf

[64] See supra ___

[65] See, e.g. United States v. Patrick. 248 F.3d at 22-23 & n. 10 (trial court excluded detective's notation of an informant tip pointing to an alternative suspect).

that has been raised. On the other hand, allowing the prosecution to freely offer explanations of this sort raises grave concerns about the deployment of official authority.

Evidence doctrine has long tried – with various degrees of success across jurisdictions – to ensure that police officers don't throw their weight around on the witness stand. The New Jersey Supreme Court, in a case where a police officer expressed his opinion that an observed transaction was the drug sale, recently rejected the notion that "there is a category of testimony that lies between" "fact testimony, through which an officer is permitted to set forth what he or she perceived through one or more of the senses" and qualified expert testimony that "explain[s] the implications of observed behaviors that would otherwise fall outside the understanding of ordinary people on the jury."[66] Other courts have hewed to that line, for fear that the wide investigative knowledge of an officer will lead juries to be unduly deferential.[67] How the legitimate concerns articulated in these cases can accommodate explanations that go to an investigation's reasonableness needs far more thought. If trials are to be intensive inquiries into the adequacy of case construction, investigators need to be able to explain their decisions with reference to the expertise that, one hopes, they have.

It's worrisome enough if a police officer deploys his authority and expertise. But at least he's amenable to cross-examination, and lacks the status of the prosecutor in the courtroom -- the acknowledged representative of the "People," "the Commonwealth," or "the Government." So it's probably worse when a prosecutor "vouches" for a witness by, say, suggesting that a police officer's testimony should be believed because he'd get fired if he perjured himself. As the Ninth Circuit recently explained:

> even when grounded in an inference from the evidence, a prosecutorial statement may nevertheless be considered impermissible vouching if it "place[s] the prestige of the government behind the witness" by providing "personal assurances of a witness's veracity" . . . . Vouching of that sort is dangerous precisely because a jury "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of witnesses, instead of making the independent judgment of credibility to which the defendant is entitled" . . . It is up to the jury-and not the prosecutor-to determine the credibility of a witness' testimony.[68]

The Court went on to note: "In that respect we stress that the ethical bar is set higher for the prosecutor than for the criminal defense lawyer -- a proposition that has been clear for at least seven decades. . . . . Although to be sure no lawyer, either public or private, should lay his or her own credibility on the line by expressing his or her own opinion about a witness'

[66] State v. McLean, 205 N.J. 438, 460-62 (2011).
[67] See, e.g., United States v. York, 572 F.3d 415 (7th Cir. 2009); United States v. Garcia, 413 F.3d 201, 214-15 (2d Cir. 2005); United States v. Moore, 651 F.3d 30, 57-58 (D.C. Cir. 2011);
[68] United States v. Weatherspoon, 410 F.3d 1142, 1147 (9th Cir. 2005) (omitting cites).

believability, the difference is that a private lawyer's impropriety in that respect carries no implication of official governmental support."[69]

How then is the prosecution supposed to respond when defense counsel is permitted to introduce prior statements by the prosecutor's office, or perhaps even another office, that undercut the view of the fact that the prosecution now urges the jury to accept? While I don't know how often the question comes up, it's been posed a few times in the Second Circuit alone by cases reversing convictions based, in part, on a trial court's failure to admit the prior, allegedly undercutting claims.[70] In the cases I've found, the appellate court has found error in the trial court's failure to admit the prior prosecutorial statements. And one can cogently argue that juries should be alerted to public prosecutorial flip-flips on factual positions, as such reversals surely suggest the existence of some doubt.[71] Prosecutors really are (or should be) experts on their cases and one might infer a lot from their assessments. Or actions: Cynthia Jones recently suggested that juries be told about the government's intentional violation of its constitutional disclosure obligations (should such violations come to light) and be allowed to infer "consciousness of a weak case."[72] If courts are to become more hospitable to these lines of defense argument, however, we need to give equal thought to permissible answers that will clarify (if possible) the alleged inconsistency. This gets messy indeed. I don't doubt that a large prosecutor's office could spare an assistant to testify: "Our initial view of the case was X, but after considering the following we became convinced that the correct view was Y." Whether this is a tolerable expansion of the evidentiary frame is another matter. Unless courts plan to relax the prohibition on prosecutorial vouching – and I don't suggest any such thing – they need to recognize that opening the door to defendants on that score without keeping it open for prosecutors will come at the expense of either the truth-finding process or thoughtful prosecutorial decision making, or both.

One last thought as we consider smashing through the evidentiary frame to allow prosecutors to explain why the apparent holes in the case aren't; why the apparent weakness, isn't: The last decade has seen a growing literature on the cognitive distortions that may prevent police officers and prosecutors from seeing the deficiencies of their cases.[73] And may it continue

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[69] Weatherspoon, 410 F.3d. at 1148.

[70] United States v. White, 692 F.3d 235 (2d Cir. 2012) (charging decisions by Queens DA's Office as to other occupants of car with defendant now charged in federal case); United States v. Salerno, 937 F.2d 797, 812 (2d Cir. 1991); United States v. GAF, 928 F.2d 1253 (2d Cir. 1991) (superseded bill of particulars). I should disclose that this issue has been bugging me since I worked on the briefs for the government in *Salerno* and *GAF*. See also Bellamy v. State, 403 Md. 308 (2008) (prosecution proffer from an accomplice's plea hearing); Harris v. United States, 834 A.2d 106 (D.C. Ct. App. 2003); State v. Cardenas-Hernandez, 219 Wisc.2d 516 (1998) (prosecutor's statements in prior court proceedings).

[71] See Anne Bowen Poulin, Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight, 89 Cal. L. Rev. 1423 (2001);

[72] Cynthia E. Jones, supra note __, at 422.

[73] See Dan Simon, In Doubt, __; Daniel Richman, Prosecutors and Their Agents, Agents and Their Prosecutors, 103 Colum. L. Rev. 749, 804 (2003); see also Alafair Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 Wm. & M. L. Rev. 1587 (2006); The Multiple Dimensions of Tunnel Vision in Criminal

to grow, for this is a critical challenge that can be addressed only through a mix of legal doctrine, institutional design, culture,[74] and training. We need more work, however, on how – outside the those cases in which forensic evidence, rightly done, allows a more rigorous approach to probability[75] -- prosecutors can legitimately be convinced of guilt in a messy world of epistemological challenges and bureaucratic limitations. And while we're looking into this, we might want to consider the degree to which the responsible and professional prosecutor, being so convinced, can share the basis for her confidence before the jury.

How does a prosecutor signal a careful, thoughtful investigation? The weird "coincidence" in the trial testimony of two prosecution witnesses on some minor observation may be a misleading artifact of trial preparation, but all sorts of other coincidences that arise as the investigation actually unfolds are not. If one thinks about how an investigator (rightly or wrongly) comes to believe he has the right person, it's the time sequence of statements and the varying contexts in which they were made that do much of the work. The way an investigator (rightly or wrongly) comes to know a case is thus quite different from the way a jury (rightly or wrongly) comes to know a case. Should we embrace this difference or try to limit it? When I was a prosecutor, I was struck by the challenge of showing the jury precisely what it was that led me to credit a witness's (particularly a cooperator's) story. To what extent would jurors' disagnostic capabilities be improved by giving them a better sense -- as a matter of course -- of how the actual investigation unfolded?

As we might revisit (even if only to consider the costs of) restrictions we place on prosecutors' appeal to their own authority, so should we be even more open to appeals to legitimate sources of epistemic authority outside of prosecutorial offices. Jennifer Mnookin has sensibly suggested that the focus of forensic science testimony in court should be less on an expert's description of his methodology and more on the extent to which the method he deploys has been adequately validated by appropriate empirical testing.[76] Were we to adopt the salutary proposals of the National Academy of Science, establishing an independent oversight agency, clarifying best practices, and developing accreditation procedures for forensic laboratories around the country, a lab's high status within that regime would be sort of evidence that a jury should hear. Bolstering should still be limited. I certainly don't propose letting cops or cooperators freely testify as to their promotions or accolades (unless defense counsel is foolish enough to open the door). But giving forensic experts license to display merit badges would

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Cases, Keith A. Findley & Michael S. Scott, 2006 Wisc. L. Rev. 291; Keith A. Findley, Tunnel Vision, in Conviction of the Innocent: Lessons From Psychological Research (B. Cutler, ed. 2010), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604658

[74] For thoughts on how to instill an ethical prosecutorial culture, see James B. Comey, "The Way Things Are Really Done Around Here": Prosecutors and Ethical Culture (2013) (draft).

[75] See Liebman et al, Evidence of Things Not Seen, supra note __, at 633-38 (discussing "big" and "small" evidence," direct and circumstantial).

[76] Jennifer L. Mnookin, Of Black Boxes, Instruments, and Experts: Testing the Validity of Forensic Science, 5 Episteme 343, 344 (2008); see also Michael S. Pardo, Evidence Theory and the NAS Report on Forensic Science, 2010 Utah L. Rev. 367, 377-78.

surely promote institutional efforts to earn them. So would encouraging defense counsel to point out the absence of such badges.

By now, the wary reader doubtless worries that I'm pigheadedly overcompensating for the literature's focus on unjust convictions and exonerations and proposing to turn trials into inquests, all in the name of fairness to prosecutors, who really don't need help at all. In fact, I worry myself, and certainly recognize that we should take care when we use trial rules to create systemic incentives.[77] That said, extending Dan Simon's ideas about trials' diagnosticity for separating the guilty from the not guilty to a broader consideration of their capacity to sort the competent investigations from the incompetent offers promise without much risk. What I'd recruit to the project of giving jurors better tools for assessing what doubts are reasonable is less Evidence doctrine writ large than the common law of evidentiary rulings. Resetting their "mental dials,"[78] trial judges would be more receptive to efforts to breach and repair the prosecutorial frame.

Is this too big an "ask" of trial judges? Notwithstanding my general skepticism about criminal justice reforms at the trial level that rely on heroic efforts by hard-pressed trial judges (particularly given the heterogeneous composition and incentives of the US criminal trial bench[79]), I don't think the reframing of the trial embraced here is over-ambitious. Indeed, it's more susceptible to condemnation as pathetically ameliorist, or simply a theorization of the status quo. Courthouse cultures vary, as do the balances individual judges strike between moving cases along, deferring to party interest, and protecting the public.[80] Yet there is good reason to think that operationalizing "doubt" in terms of investigative adequacy makes life easier, rather than harder, for all members of the courtroom working group.

But what about judicial gatekeeping competence? Or jury competence? How good is either likely to be at assessing investigative adequacy? This challenge sounds like a fatal blow to the framing model, but it becomes glancing as soon as one takes our jury system as a given and asks how it can be most usefully be deployed. Even if one doesn't think jurors (or judges) particularly good at discerning whether an investigation was up to snuff, the claim here is simply that they are better at that than at conducting a retrospective historical inquiry on the basis of

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[77] One might make similar arguments for licensing prosecutors to expand the evidentiary frame with respect to character evidence. What about giving prosecutors an incentive – in the form of a proof "subsidy" that makes the jury more likely to convict – to prosecute repeat offenders? See Richman, Stipulating Away Prosecutorial Accountability, supra note _, at 979. Nonetheless, concerns about fairness and the need for cross-cutting incentives to look for evidence specific to the charged transaction, see John Leubsdorf, Evidence Law as a System of Incentives, 95 Iowa L. Rev. 1621 (2010), seem, to me at least, to vastly outweigh those arguments.

[78] Both this image and the broader point come from my colleague Jim Liebman.

[79] See Claire S.H. Lim, Preferences and Incentives of Appointed and Elected Public Officials: Evidence from State Trial Judges, Am. Econ. Rev. (forthcoming) (2012) (comparing sentencing variation among elected vs. appointed judges in Kansas), draft available on SSRN, http://www.economics.cornell.edu/csl228/appelec_AERfinal.pdf; Greg A. Caldeira, The Incentives of Trials Judges and the Administration of Justice, 3 Just. Sys. J. 163 (1977);

[80] Brian J. Ostrom, et al., The Mosaic of Institutional Culture and Performance: Trial Courts as Organizations (2005) (empirical study prepared for NIJ), available at https://www.ncjrs.gov/pdffiles1/nij/grants/212083.pdf

"primary sources" that have been raked through and even modified by adversarial parties. Far from being an "outside the box" contribution, the model embraced here is of the existing box and its capabilities.

Appellate courts can promote the model, at least at the margin. Because of asymmetric appellate rights, they would likely hear only defense claims about precluded challenges to the investigative process or, perhaps, inappropriate prosecutorial responses to, or preemptions of, those challenges. But over time, they too would get a sense of the range of experimentation on both sides. And should police and prosecutors respond to the possibility of more extensive audits by investing more responsibly in their investigations and clarifying the bases for those investment decisions, we will have achieved much.

Would evidence rulings be different, were judges to consider the reframing proposed here? I suspect they would. Frames matter. And recognizing that trials are generally as much about the prosecution as about the defendant, perhaps even more, would be a good start. So long as we ensure that both sides get a fair trial.