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Guilty Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers

Patricia M. Wald†

Professor Schauer's focus on the effects of criminal justice norms on press coverage of reports or rumors of wrongdoing outside the courthouse is an intriguing topic which, candidly, I had never thought about before reading his paper.¹ Of course the newspapers flood us with stories of John Connally's involvement with the milk producers,² Clarence Thomas's stormy confirmation,³ President Bush's role in Iran-Contra,⁴ and Clark Clifford's seduction by BCCI.⁵ Like Professor Schauer, however, I come away ultimately unconvinced that the newsmaking and criminal justice spheres have that much to say to one another. On the whole, they are as much unlike as like one another, and where they may diverge, the justice norms are ill-suited for a public information system.

I. THE GROWING IRRELEVANCE OF THE REASONABLE DOUBT STANDARD

My opening gambit is that the reasonable doubt standard is essentially irrelevant to the everyday workings of the criminal justice system. The criminal justice system is a well-tempered clavichord, encompassing many different standards of proof governing different responses by police, prosecutors, and courts to different kinds and levels of evidence. "Beyond a reasonable doubt" is but

† Circuit Judge, United States Court of Appeals for the District of Columbia Circuit; L.L.B. 1951, Yale Law School.
¹ Frederick Schauer, Slightly Guilty, 1993 U Chi Legal F 83.
² See, for example, Scott Armstrong and John F. Berry, Nixon Attempted, Unsuccessfully, to Halt Prosecution of Connally, Wash Post A1 (Dec 28, 1979) (Connally was later acquitted of charges of accepting $10,000 from an association of milk producers in return for his effort to boost federal price support for milk).
³ See, for example, Ruth Marcus, Divided Committee Refuses to Endorse Judge Thomas, Wash Post A1 (Sept 28, 1991); Ruth Marcus, Thomas Opposition Grows Louder as Confirmation Hearings Approach, Wash Post A8 (Sept 7, 1991).
⁴ See, for example, Walter Pincus and George Lardner, Jr., Bush Stance, Iran-Contra Note at Odds, Wash Post A1 (Oct 31, 1992).
⁵ See, for example, Sharon Walsh, Prosecutors: Witness Links Clifford to BCCI, Wash Post C1 (Oct 31, 1992).
one of these standards. It may be a household phrase thanks to Perry Mason and Scott Turow, but it does not define how most important decisions are made in the criminal justice system. This growing irrelevance of the reasonable doubt standard is demonstrated at every phase of a criminal prosecution, from the initial encounter with a law enforcement officer, to plea bargaining, through the jury trial, and even into sentencing.

A. Police-Citizen Encounters

Take, for example, how a police-citizen encounter, which a police officer may initiate with no proof or even a "hunch" that the citizen is a wrongdoer, can escalate into arrest, indictment, conviction, and a long prison term. Under the Fourth Amendment's cryptic ban on "unreasonable searches and seizures," a police officer who harbors no suspicions about a citizen can nonetheless approach the citizen and ask for consent to search him and/or his luggage—on a crowded bus; on "trains, planes, and city streets," at the workplace, in a train station, bus or airport terminal, or even in his private train compartment. Appellate judges see literally hundreds of cases each year in which such a "consensual" encounter based on no tangible evidence at all produces in due time a "reasonable suspicion" that the citizen is engaged in or about to engage in criminal activity. This so-called "reasonable suspicion," in turn, permits the officer to detain the citizen for a reasonable time (reasonable varies with the circumstances, but can stretch as long as over an hour), interrogate him, and pat him down for

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8 See *Delgado*, 466 US at 216-17 (federal agents can question workers inside factory entrance).

9 See *Bostick*, 111 S Ct at 2386-88.

10 *United States v Savage*, 889 F2d 1113, 1117 (DC Cir 1989). Compare *United States v Battista*, 876 F2d 201, 204-06 (DC Cir 1989) (rousing person from bed in train compartment in early morning deemed an investigative detention requiring reasonable suspicion); *United States v Bloom*, 975 F2d 1447, 1455-56 (10th Cir 1992) (police-citizen encounter in private train compartment rose to level of investigative detention requiring reasonable suspicion when officers did not tell suspect he was free to leave).

11 *United States v Richards*, 500 F2d 1025, 1029 (9th Cir 1974).

A NORM GIVES WAY

weapons (including what we call a "groin grope"). In fact, the police response to a "reasonable suspicion" can go as far as forcing a suspect's car to a halt on the highway, approaching him with guns drawn, handcuffing him, and insisting that he enter the police car for questioning or, if he is in a bus or train terminal, forcing him to accompany the police to a nearby room for interrogation. Moreover, the reasonable suspicion itself can be based on factors as slight as the suspect fitting aspects of the notorious drug carrier profile, including looking nervous, travelling from a "source city," giving the ticket seller a phone number other than his own, paying cash for the ticket, buying a one-way ticket,

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15 Terry, 392 US at 17 n 13; United States v Rodney, 956 F2d 295, 297 (DC Cir 1992) (consent to search person includes consent to pat down genital area). But see Rodney, 956 F2d at 299 (Wald dissenting) (palpating genital area is so intimate and intrusive that it exceeds the scope of general consent to search).


18 Laing, 889 F2d at 285.

19 United States v Lego, 855 F2d 542, 545 (8th Cir 1988); United States v Rodriguez, 831 F2d 162, 166 (7th Cir 1987); Manbeck, 744 F2d at 377. Compare United States v Richardson, 949 F2d 861, 855-57 (6th Cir 1991) (placing person in squad car after he refused to consent to a search constituted a seizure and arrest).

20 United States v Torres, 949 F2d 606, 608 (2d Cir 1991) (officer's request to step inside a police office, without more, did not transform consensual encounter into seizure). Compare Florida v Royer, 460 US 491, 504-05 (1983) (opinion of White) ("stop" became illegal detention when officers requested suspect to accompany them to a police room and retained suspect's plane ticket and identification); United States v Glover, 957 F2d 1004, 1009 (2d Cir 1992) (failure to return suspect's identification and request to accompany officers to private office amounted to a seizure); United States v Espinosa-Guerra, 805 F2d 1502, 1507 n 17 (11th Cir 1986) (listing factors, including show of force and retention of suspect's ticket or identification, that were found to convert a request to go to a private area into a seizure).

21 See, for example, United States v Mejia, 720 F2d 1378, 1380 (5th Cir 1983) (identifying elements of the drug courier profile). This "profile," while often criticized, has withstood numerous legal challenges, including claims that it invites racial discrimination. See United States v Taylor, 917 F2d 1402 (6th Cir 1990), rev'd on other grounds, 956 F2d 572 (6th Cir 1992) (en banc), cert denied, 113 S Ct 404 (1992). See also Victor Merina, Joe Morgan's Suit Protests "Profile of Drug Dealer" That Led to Arrest, LA Times B6 (Aug 11, 1990) (baseball Hall of Famer Joe Morgan, singled out as possible companion of suspected black drug courier, thrown to ground in Los Angeles Airport by drug enforcement officer); Victor Merina, Morgan Awarded $540,000 by Jurors, LA Times B1 (Feb 15, 1991) (Morgan awarded damages for violation of his civil rights, but use of courier profile upheld).

22 United States v Nurse, 916 F2d 20, 24 (DC Cir 1990). Compare Mejia, 720 F2d at 1382 (acting "abnormally calm" is one factor that gives rise to reasonable suspicion).


24 Sokolow, 490 US at 3. See also Chin, 981 F2d at 1277 n 4 (failure to leave a call-back number).
making phone calls upon arriving at his destination,\textsuperscript{27} not checking luggage,\textsuperscript{28} or paradoxically being either first or last off the airplane.\textsuperscript{29}

The detention and body frisk justified by "reasonable suspicion," in turn, often produce the "probable cause" necessary for an arrest. Once the evidence rises to this level, the system's response can be—in human terms—drastic. The suspect can be handcuffed, taken into custody, fingerprinted, booked, given a police record, and detained until a preliminary hearing before a magistrate is held, a lapse that in some cases may take days.\textsuperscript{30} Where probable cause is accompanied by so-called "exigent circumstances" that excuse waiting for a warrant, the suspect's car or apartment may be searched inside out, including closed containers and luggage found therein.\textsuperscript{31} In some cases, his insides may even be viewed by x-ray or rectal examinations.\textsuperscript{32} Probable cause, like reasonable suspicion, is a fact-dependent concept; it can consist of an anonymous tip only the innocent parts of which are corroborated by police surveillance.\textsuperscript{33} It may depend on factors as slight as the observance of a

\textsuperscript{27} Sokolow, 490 US at 8-9; Florida v Royer, 460 US 491, 502 (1983); Chin, 981 F2d at 1277 n 4; United States v Parker, 936 F2d 950, 952 (7th Cir 1991).

\textsuperscript{28} Chin, 981 F2d at 1277 n 4.

\textsuperscript{29} United States v Hooper, 935 F2d 484, 487 (2d Cir 1991), cert denied, 112 S Ct 663 (1991).

\textsuperscript{30} United States v Craemer, 555 F2d 594, 595 (6th Cir 1977).

\textsuperscript{31} United States v Mendensall, 446 US 544, 547 n 1 (1980) (last person off); United States v Hooper, 935 F2d at 487 (same); Buffkins v Omaha, 922 F2d 465, 468 n 7 (8th Cir 1990) (first or last); United States v Waltzer, 682 F2d 370, 373 n 3 (2d Cir 1982) (first person off); United States v Moore, 675 F2d 802, 803 (6th Cir 1982) (same).

\textsuperscript{32} See County of Riverside v McLaughlin, 111 S Ct 1661, 1670 (1991) (to hold an arrested person more than forty-eight hours without a probable cause determination, the government must demonstrate "the existence of a bona fide emergency or other extraordinary circumstance").


\textsuperscript{34} Such intrusive examinations have most often been justified in cases of persons suspected of smuggling drugs in their alimentary canals or body cavities. See United States v Pino, 729 F2d 1357, 1359 (11th Cir 1984) (rectal examination of arriving international airline passenger suspected of drug smuggling is reasonable); United States v Montoya de Hernandez, 473 US 531, 535 (1985) (upholding, without discussion of reasonableness of search, drug smuggling conviction based on evidence obtained by rectal examination conducted pursuant to court order); United States v Oyekan, 786 F2d 832, 837-38 (8th Cir 1986) (strip search or x-ray of suspected drug smuggler reasonable); United States v Vega-Baruo, 729 F2d 1341, 1348-50 (11th Cir 1984) (x-ray of suspected drug smuggler reasonable); Mejia, 720 F2d at 1382 (same); United States v Ek, 676 F2d 379, 382-83 (9th Cir 1982) (same).

brief encounter in a high-crime area,\textsuperscript{34} giving contradictory explanations for holding someone else's checks,\textsuperscript{35} or appearing to hide a bulge in one's pocket.\textsuperscript{36} Even appearing nervous during a police interrogation can bear on probable cause.\textsuperscript{37}

Once probable cause leads to an arrest, a suspect may be detained until trial—usually months away—if the judge or magistrate determines, after a hearing, that "no [release] condition or combination of conditions will reasonably assure the . . . safety of any other person and the community."\textsuperscript{38} Federal law governing drug felonies has a rebuttable presumption in favor of detention, and the suspect has the initial burden of demonstrating that he is not dangerous.\textsuperscript{39} Currently 42 percent of those arrested for felonies in the federal system are detained for some period before trial.\textsuperscript{40}

Incidentally, the legal and constitutional justification for detaining accuseds before trial under our so-called "preventive detention" laws is the very same "harm of inaction" that Professor Schauer finds salient outside the criminal justice system, but does not seem to think exists within it.\textsuperscript{41} Preventive detention has been upheld by the Supreme Court on exactly that ground: the costs of letting certain "dangerous" suspects back on the streets can be disastrous to society at large.\textsuperscript{42} That "cost of inaction," which should be weighed against the harm to an unconvicted defendant of having his most basic liberty taken away, today trumps all Black-

\textsuperscript{34} See, for example, \textit{United States v Green}, 670 F2d 1148, 1151 (DC Cir 1981); \textit{United States v Trullo}, 809 F2d 108, 115 (1st Cir 1987) (an encounter that gave rise to a reasonable suspicion when it occurred in a drug-ridden neighborhood would not give rise to the same suspicion if it occurred in a suburban neighborhood).

\textsuperscript{35} \textit{United States ex rel Kirby v Sturges}, 510 F2d 397, 400-01 (7th Cir 1975). See also \textit{United States v Eruin}, 907 F2d 1534, 1540 (5th Cir 1990) (giving false explanation of activities and whereabouts); \textit{United States v Holzman}, 871 F2d 1496, 1503-04 (9th Cir 1989) (denying association with another with whom observed associating).


\textsuperscript{37} \textit{United States v Espinoza-Seanez}, 862 F2d 526, 533 (5th Cir 1988).

\textsuperscript{38} Bail Reform Act of 1984, 18 USC § 3142(e) (1990).

\textsuperscript{39} 18 USC § 3142(f)(1)(C) (1990).

\textsuperscript{40} Conversation with Jay Carver, Director, District of Columbia Pretrial Services Agency (Jan 4, 1993).

\textsuperscript{41} Schauer, 1993 U Chi Legal F at 90 (cited in note 1).

\textsuperscript{42} \textit{United States v Salerno}, 481 US 739, 750 (1987).
stonian maxims about letting ten guilty men go free, at least in the pretrial period.\textsuperscript{43}

One of the most interesting—and troubling—aspects of "consensual encounter" cases is that many citizens, when approached by police and asked for identification and an account of their activities, assume that they must answer. Under Supreme Court holdings, the police have no duty to tell a citizen, against whom there is no evidence at all, that she has a right not to answer questions or to go about her business and ignore the police.\textsuperscript{44} A police officer in a recent "consensual encounter" case testified that he approaches about sixty persons a week with no reasonable suspicion at all, and on average hits the jackpot with at least a few of these brief encounters.\textsuperscript{46} On the rare occasions when someone attempts to exercise her right to walk away,\textsuperscript{46} the consequences can be unfortunate.\textsuperscript{47} Although judges daily proclaim piously that a reasonable person in those circumstances should have known she had the right to keep going, I doubt that any judge is completely convinced of that. Several of our D.C. Circuit cases have referred to it as a convenient, albeit necessary, fiction.\textsuperscript{48}

The press, certainly in Washington, is very much aware of this variety of responses by the criminal justice system to different

\textsuperscript{43} A deputy attorney general recently issued a call for bail law reforms that would make it easier to hold suspects until trial. Robert F. Howe, Justice Official Calls for Shifts in Bail Laws, Wash Post B6 (Nov 25, 1992).

\textsuperscript{44} Florida v Bostick, 111 S Ct at 2387-88; California v Hodari D., 111 S Ct 1547, 1551 (1991); INS v Delgado, 466 US 210, 216 (1984); Brown v Texas, 443 US 47 (1979).

\textsuperscript{46} People v Jones, 545 NE2d 1332, 1359-60 (Ill App 1989) (Pincham dissenting).

\textsuperscript{47} See United States v Felder, 732 F Supp 204, 205 (D DC 1990) (detective testified that only three or four of over eighty bus and train passengers had refused to consent to be interviewed); United States v Wilson, 953 F2d 116, 122 (4th Cir 1991).

\textsuperscript{48} See, for example, United States v Tavolacci, 895 F2d 1423, 1424-25 (DC Cir 1990); United States v Winston, 892 F2d 112, 118 (DC Cir 1989).
measures of suspicion or evidence. Hardly a week goes by when there is not a story in the Washington Post or Washington Times about someone detained for weeks who later had the charges dropped or someone released when the corroboration never materialized for the arrest. Conversely, the same newspapers carry countless stories about outraged neighborhood associations complaining of the suspicious characters they report to the police who are never arrested or who, once arrested, are released to the streets rather than preventively detained. In all of these situations, the criminal law determines whether society, to protect itself, is entitled to take some action despite the lack of compelling proof—or proof beyond a reasonable doubt—that a suspect has actually done something wrong.

The press routinely writes about these decisions, which are not so different from the decisions that society and the press make in other arenas regarding whom to subject to the glare of adverse publicity, entrust with governance, or give support, respect, or adulation. There is indeed a certain symmetry in the dire-response correlation of law enforcement officers and journalists: No evidence? You can send up a trial balloon. A little evidence? You can probe for a short time and on the surface. Probability but no certainty? You can take control. Likelihood of danger to the community? You can put the suspect away. In short, the press is just as likely to take note of these far less stringent standards of proof as it is to address the reasonable doubt standard for conviction, if indeed the press looks to the criminal law for guidance at all.

A comparison of the number of police-citizen encounters, investigative stops on less than probable cause, and even arrests on

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See, for example, Veronica A. Holt, *The Tom Barnes Case: Crime and Unjust Punishment*, Wash Post C8 (Oct 25, 1992) (criticizing arrest and three-week detention of teenager on murder charge that was later dropped).

See, for example, Gabriel Escobar, *Ex-Boyfriend Is Arrested in P.G. Slaying*, Wash Post B1 (Nov 30, 1992) (family of slain teenager questions why police did not arrest her assailant two weeks earlier when the victim and her family complained to the police about him).

See, for example, Graciela Sevilla and Michael York, *D.C. Freed Suspect in Carjacking*, Wash Post A1 (Sept 10, 1992) (suspect in carjacking and murder had been released a week earlier after his arrest on felony drug charges); Gabriel Escobar, *James Gets Maximum Term in Anacostia Freeway Killing*, Wash Post B1 (June 30, 1992) (teenager faced three trials for killings committed in the month following his release from juvenile detention).

Under the District of Columbia's new bail law, roughly four of five criminal defendants brought before the District of Columbia Superior Court are released without bond within two weeks of their arrest. Nancy Lewis, *Bail Law's Results Mixed*, Wash Post D1 (Sept 4, 1992).
probable cause, to the number of jury trials in which doubt must be proved beyond a reasonable doubt leads inevitably to the conclusion that the system overwhelmingly operates on a less-than-reasonable-doubt standard. In one recent year, for example, ninety-five thousand people were arrested by federal authorities; only about six thousand were acquitted or convicted by a jury applying the reasonable doubt standard. It is my firm belief that the man and woman on the street, especially in the inner city, along with their favorite reporters, have a healthy sense of all this.

B. Pretrial Criminal Process

This less-than-reasonable-doubt standard that operates in police-citizen encounters continues into the pretrial process of plea bargaining, where the system accommodates alternative measurements for guilt beyond a reasonable doubt. In a system in which only one to five of every one hundred accused persons go to trial, the guilty plea is the mode by which the vast majority of the accused are convicted. A defendant typically pleads guilty to one crime or count of an indictment, thereby saving society the cost of a trial and the uncertainty of conviction; in return, he gets other

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54 Over 85 percent of all federal defendants plead guilty. 1990 U.S. Sentencing Commission Annual Report 60 (citing statistics for year ending Sept 30, 1991). See DOJ Sourcebook at 518 (cited in note 52) (Of 57,000 defendants in the federal court system in the year ending June 30, 1990, over 40,000 pleaded guilty; fewer than 1,700 were tried by a judge; just over 6,000 were tried by a jury; and roughly 8,000 had their charges dismissed. This means that only about one in ten federal defendants were tried by a jury. Of the 48,000 defendants whose cases were not dismissed, 40,000, or 83 percent, pleaded guilty.). See also 1991 Report at 397 (cited in note 53) (of 45,000 federal criminal cases resolved in 1989, 39,000, or 87 percent, involved guilty pleas); United States Department of Justice, Bureau of Justice Statistics, The Prevalence of Guilty Pleas 2 (1984) (analysis of guilty pleas based on felony arrests in selected jurisdictions revealed that there were eleven guilty pleas for every trial).

The percentage of guilty pleas is even higher in state courts. Of the roughly 667,000 defendants convicted of felonies in state courts in 1988, 91 percent pleaded guilty, while 4 percent were tried by a judge, and 5 percent by a jury. United States Department of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 1988 6 (1990). The number is undoubtedly higher for misdemeanors or other crimes for which the cost to the defendant of pleading guilty might be less than the cost of going to trial.
counts dropped and/or the government's cooperation in his request for a lenient sentence.

Rule 11 of the Federal Rules of Criminal Procedure requires that, before accepting a plea, the judge must inform the defendant of the consequences and ensure that he fully understands to what he is pleading and that he is not acting under threats or promises (apart from the plea agreement itself). But under existing law, the defendant need not admit his guilt; he may knowingly plead guilty for other reasons, for example, because he thinks he will be convicted anyway with a longer sentence or to save his family or his companions pain. It is common knowledge that guilty pleas are often carefully crafted bargains to give both sides something; they have little to do with proof of guilt beyond a reasonable doubt.

This is assumed to be true especially in high visibility cases involving official malfeasance. When a highly placed defendant is allowed to plead to a lesser offense and turn state's evidence for the prosecution in return for having the heaviest counts against him dropped, most newspaper writers or readers know the score. When Ivan Boesky was sentenced, for example, the judge remarked that his "offense cannot go unpunished. Its scope was too great, its influence too profound, its seriousness too substantial merely to forgive and forget." Yet, Boesky pled guilty to only one count of conspiring to file false stock reports; he received a three-year sentence, and agreed to give evidence against over a dozen other Wall Street insiders and brokerage firms. Similarly, Allen Fiers, formerly the head of the Central Intelligence Agency's ("CIA") Central American Task Force, pled guilty to two misdemeanor charges of withholding information from Congress, receiving only probation and one hundred hours of community service. In testifying at the trial of his boss, however, Fiers acknowledged that in fact he had committed much more serious violations by go-

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85 FRCrP 11.
87 In a compelling, if somewhat dated, study, Michael Finkelstein concluded that more than two-thirds of the marginal guilty plea defendants would not have been convicted had they contested their cases. Michael O. Finkelstein, A Statistical Analysis of Guilty Plea Practices in the Federal Courts, 89 Harv L Rev 293, 299 (1975). A growing number of scholars view plea bargaining as just that: a "bargain" related to the proof of the crime largely by both parties' inclusion in their calculations of the likelihood that the evidence will lead to a conviction. See, for example, Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J Legal Stud 289 (1983).
89 Id.
ing ahead with covert operations after Congress ordered him not to do so.\textsuperscript{60}

In some cases, individual suspects may not even be formally accused or asked to plead guilty if their corporate employer takes the blame. For example, the \textit{Washington Post} reported recently that although Rockwell International paid $18.5 million in fines and pled guilty to federal environmental violations at the Rocky Flats Nuclear Facility, none of its executives or employees were indicted, despite the reported strong sentiment among grand jurors to pursue the individuals.\textsuperscript{61} “He got off easy,” or “he copped a plea” sums up the public and the press reaction to many such cases, and indeed it is often the reality.

C. Criminal Jury Trials

What of the few cases that actually go on to a jury trial? Jury verdicts must, in theory, be based on proof beyond a reasonable doubt. Recent events suggest, however, that many factors other than proof affect the outcome. Juries are widely perceived as acting more like some kind of amorphous community conscience than as strict constructionists of the “beyond-a-reasonable-doubt” standard. Indeed, the press fosters this perception through its relentless pursuit of post-verdict stories into why jurors acted as they did. A rash of stories in the Washington, D.C. press recently produced numerous revelations of jurors who told their colleagues that they simply would not send another young black male to jail, no matter what the evidence showed.\textsuperscript{62} Other stories demonstrate how jurors compromise differences about the strength of the evidence among themselves by finding the defendant guilty on some but not

\textsuperscript{60} George Lardner, Jr., \textit{Fiers Sentenced to Probation in Iran-Contra Coverup}, Wash Post A9 (Feb 1, 1992); Walter Pincus and George Lardner, Jr., \textit{Covert CIA Operation Via Church Outlined}, Wash Post A4 (Aug 1, 1992). Fiers and five other officials, including former Defense Secretary Caspar W. Weinberger, were granted Christmas Eve pardons by President Bush. Walter Pincus, \textit{Bush Pardons Weinberger in Iran-Contra Affair}, Wash Post A1 (Dec 25, 1992).

\textsuperscript{61} See Thomas W. Lippman, \textit{Justice Dept. Defends Plea Bargain in Rocky Flats Case}, Wash Post A3 (Oct 1, 1992). This sentiment may have been shared by a House subcommittee, which has subpoenaed the prosecutors and Justice Department officials as part of its investigation into the plea arrangement. See id; Thomas W. Lippman, \textit{Memo Says Plutonium Is Not in Safe Storage}, Wash Post A3 (Oct 8, 1992). See also Sharon LaFraniere, \textit{The Grand Jury That Couldn’t}, Wash Post A1 (Nov 10, 1992).

all counts, again regardless of what the evidence showed. The D.C. Circuit had a case recently in which a juror reported that the sympathetic jury had considered letting a defendant out of a five-year mandatory minimum penalty that kicked in with possession of five grams of crack by preparing to find her guilty of possessing some, but not all, of the 5.25 grams of rock cocaine that were found in her pocketbook, although the evidence was the same as to each rock.

Judges’ instructions do not do much to illuminate the reasonable doubt standard. A reporter who conducted interviews with the Imelda Marcos jurors found that they completely failed to understand the instructions on the RICO count, and simply ignored that charge altogether. He described their reaction: “Jury instructions are like foreign movies without subtitles.” My first boss, Jerry Frank, wrote in 1950 that “were the full truth declared [as to what goes on in the jury room] it is doubtful whether more than one percent of verdicts could stand.” I think that is just as true today. Granted, the jury system is good overall and a worthwhile microcosm for deciding blameworthiness. But few judges—or reporters—believe that every jury slavishly and precisely follows the beyond-a-reasonable-doubt standard in deciding guilt or innocence. Because members of the press have worked so assiduously to deflate the myth of a norm-conforming jury, it is reasonable to assume that the press likewise does not consider the beyond-a-reasonable-doubt standard in their own profession.

In fairness, it is hard to criticize jurors for not following the reasonable doubt standard religiously, given that after two hundred years, the courts themselves are still not sure what it means. Although the Supreme Court held that the reasonable doubt standard was “indispensable to command the respect and confidence of the community in applications of the criminal law,” and “provide[s] concrete substance for the presumption of innocence,” the

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64 Brief for Appellant at 6, 8 and Exhibit A, United States v Wheeler, Crim No 91-3175 (DC Cir, Nov 10, 1992) (Affidavit of Lois R. Goodman, Counsel for Appellant).
66 United States v Farina, 184 F2d 18, 21 (2d Cir 1950) (Frank dissenting).
67 See In re Winship, 397 US 358, 369-70 (1970) (Harlan concurring) (vagueness of terms and impossibility of measuring intensity of human belief suggest that “beyond a reasonable doubt” and “preponderance” are not applied with precision).
68 Id at 364.
69 Id at 363.
same Court is still engaged in trying to articulate what reasonable doubt means. Just within the last few years, the Court had to chas-
tise a Louisiana court for telling the jury that reasonable doubt meant “grave uncertainty,” “actual substantial doubt,” or “moral certainty.” The Supreme Court said that the state court imposed a higher degree of doubt than was required, but failed to give a better—and certainly not a mathematical—formula. In many courts, lawyers still fight over whether it is acceptable to say reasonable doubt means “a doubt for which you can give a reason.” Opponents argue, not implausibly, that in other areas of life people make significant decisions for reasons they cannot artic-
ulate. In any case, jurors or judges may know a reasonable doubt when they see it, but they cannot define it very well, which further depreciates the reasonable doubt standard’s value as a model in other walks of life.

D. Criminal Sentencing

Finally, the prize exhibit of the criminal justice system’s lack of dedication to the reasonable doubt standard occurs at sentenc-
ing through the application of the Federal Sentencing Guidelines. These guidelines provide that a convicted offender’s sentence be based not only on the offense for which he was convicted by a rea-
sonable doubt or even his past criminal record of similar convic-
tions, but also on other “relevant conduct” of which he has not been convicted or often not even charged, and of which he may have been acquitted. This startling guideline norm, which not only permits but commands this result, has been upheld by the

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71 Id.
72 See, for example, *Adams v Aiken*, 965 F2d 1306, 1310 (4th Cir 1992); *United States v MacDonald*, 455 F2d 1259, 1262-63 (1st Cir 1972).
73 See United States v Vest, 639 F Supp 899, 904 (D Mass 1986), aff’d, 813 F2d 477 (1st Cir 1987) (finding it “characteristic of human experience that individuals usually—perhaps even always—act with mixed motives”). See also *Farina*, 184 F2d at 23-24 (Frank dissent-
ing) (even a judge or an administrative decisionmaker may find it difficult to give an explicit reason for conclusion).
74 United States Sentencing Commission, *Guidelines Manual* § 1B1.3 (Nov 1992) (“Guidelines”). This is consistent with the distinction throughout the Guidelines between “relevant conduct on the one hand, and the offense of conviction on the other.” *United States v Williams*, 891 F2d 921, 925 (DC Cir 1989) (emphasis in original).
75 See United States v Isom, 886 F2d 736, 738-39 (4th Cir 1989) (because acquittal demonstrates only lack of proof beyond a reasonable doubt, it does not necessarily establish a defendant’s innocence). Compare *United States v Castro-Cervantes*, 927 F2d 1079, 1082 (9th Cir 1990) (sentencing court may not consider charges against the defendant that were dropped pursuant to a plea agreement).
overwhelming majority of circuits that have considered constitutional challenges to it.  

To understand the significance of this guideline, consider a defendant indicted for two drug sales, one weighing one gram and one weighing five grams, both of which were part of one ongoing operation or, as the Guidelines put it, "the same course of conduct or common scheme or plan." Suppose the jury finds him guilty of the first and not guilty of the second, more serious charge. He will still be sentenced on the basis of both crimes—and given as much as five additional years in prison—if the judge (not the jury) finds by a preponderance of the evidence that he committed the second offense as well as the first, despite the jury verdict that he did not. There has been a fair amount of national publicity given to

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76 United States v Boney, 977 F2d 624, 636-37 (DC Cir 1992); United States v Averi, 922 F2d 765, 766 (11th Cir 1991); United States v Rodriguez-Gonzales, 899 F2d 177, 182 (2d Cir 1990); United States v Dawn, 897 F2d 1444, 1449-50 (8th Cir 1990); United States v Wilson, 900 F2d 1350, 1353-55 (9th Cir 1990); United States v Frederick, 897 F2d 490, 492-93 (10th Cir 1990); United States v McDowell, 888 F2d 285, 290-91 (3d Cir 1989); United States v Wright, 873 F2d 437, 441-42 (1st Cir 1989); United States v Urrego-Linares, 879 F2d 1234, 1237-38 (4th Cir 1989).

77 Guidelines at § 1B1.3(a) (cited in note 74). The most recent revision of this guideline, which became effective November 1, 1992, clarified that a finding of a "common scheme or plan" could be based on commonality of victims, commonality of offenders, commonality of purpose, or similarity of modus operandi. Id at Application Note 9(A). Even offenses that are not part of such a common scheme can be considered part of the "same course of conduct" based on the degree of similarity of the offenses, the time interval between the offenses, and the nature of the offenses. Id at Application Note 9(B). For example, failure to file income tax returns in three consecutive years would be considered part of the same course of conduct. Id. For a summary of the changes to this section, see United States Sentencing Commission, Guidelines Appendix C at 256-64.

78 This use of the preponderance standard in guidelines cases has been upheld in the overwhelming majority of circuits. See, for example, McDowell, 888 F2d at 290-91; Urrego-Linares, 879 F2d at 1237-38; Wright, 873 F2d at 441-42; United States v Restrepo, 946 F2d 654 (9th Cir 1991), cert denied, 112 S Ct 1564 (1992); United States v Guerra, 888 F2d 247, 251 (2d Cir 1989); United States v Casto, 889 F2d 562, 570 (5th Cir 1989); United States v Gooden, 892 F2d 725, 727-28 (8th Cir 1989); United States v Kirk, 894 F2d 1162, 1164 (10th Cir 1990); United States v Alston, 895 F2d 1362, 1372-73 (11th Cir 1990); United States v Chandler, 894 F2d 463 (DC Cir 1990); United States v Barrett, 890 F2d 855, 869 (6th Cir 1989); United States v White, 888 F2d 490, 499 (7th Cir 1989). See also McMillan v Pennsylvania, 477 US 79, 91-92 (1986) (Constitution permits a state court to apply a lesser standard than reasonable doubt in determining facts at sentencing). But see United States v Kikumura, 916 F2d 1084, 1099-1102 (3d Cir 1990) (clear and convincing standard necessary to support upward departure of great magnitude); United States v Fatico, 458 F Supp 388, 408 (E D NY 1978), aff'd, 603 F2d 1053 (2d Cir 1979) (opinion of Weinstein) (clear and convincing evidence required for factual issues that will have major impact on sentence).

79 This hypothetical became reality for one first-time defendant in the United States District Court for the District of Columbia. Judicial Discretion in Sentencing Sparks Debate, Chicago Trib 24C (Dec 29, 1991) (jury convicted accused cocaine dealer of selling 1.44 grams of crack and acquitted him of selling 5.63 grams of crack; judge sentenced him on the basis of both offenses).
this guideline;\textsuperscript{80} for some of us, it puts the final kibosh on any notion that guilt beyond a reasonable doubt is the hallmark of our criminal justice system. Not only is that standard confined to the fewer than 5 percent of defendants who go to trial, but even as to them it becomes totally irrelevant in a multiple-count indictment when the defendant is found guilty of any one of several related counts.

E. Evidence

Before I leave this part of my critique, let me mention another of Professor Schauer’s suggested differences between the criminal justice system and other decisionmaking that I do not believe holds up under scrutiny. Professor Schauer suggests that the so-called aggregation of “multiple low-probability conclusions” may justify an inference of wrongdoing in out-of-court settings but would be impermissible in the criminal trial setting.\textsuperscript{81} Not so. We call it “circumstantial evidence,” but it is basically the same thing. Aggregation of lots of facts, each individually innocent or of low probability, provides the proof of guilt in most non-eyewitness criminal cases. Proof of “a little bit about a lot of things” often adds up to a verdict of guilt beyond a reasonable doubt.

For example, constructive possession of drugs, which is defined as having the ability to exercise “dominion and control” over the drugs even though they are not on one’s physical person, comes up most often in a raid on a crack house where many persons are present and none admits they personally possessed the drugs. In such cases, prosecutors and courts depend upon a series of low probability factors that in isolation would not warrant a finding of possession but that, in the aggregate, may. Evidence of physical proximity to the drugs (the person and the drugs were in the same room), any gestures implying control (such as pointing to the place where the drugs were hidden), connection to a gun (with the inference that the gun was to protect the drugs), evasive action (trying to escape or hide the drugs), or even motive (she needed the money to feed her kids), can add up to a permissible finding of constructive possession.\textsuperscript{82} Aggregation of small, often low


\textsuperscript{81} Schauer, 1993 U Chi Legal F at 92 (cited in note 1).

\textsuperscript{82} See, for example, United States v Morris, 977 F2d 617, 620 (DC Cir 1992).
probability facts, none of which is guilt-conclusive, is the name of the game.

A second example of the criminal law's reliance on the aggregation of low probability factors is the admission against a defendant of so-called "other crimes" evidence. This doctrine has long put defendants between a rock and a hard place. The formal baseline in the Federal Rules of Evidence is that evidence of other crimes, even convictions, cannot be admitted to show that the defendant was the kind of person who would commit the crime at issue.83 While such an inference may make sense in common logic, it is considered too prejudicial to be allowed as a general proposition. The Rules of Evidence, however, have carved out a giant exception that allows such evidence to be admitted even when the prior bad conduct has not resulted in arrest or conviction. Rule 404(b) provides that evidence of other crimes, wrongs, or acts is admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake (provided that the judge rules under Rule 403 that it is more probative than prejudicial). According to the Comment on Rule 404(b), it has emerged as one of the most cited rules in the Rules of Evidence.84

You bet it has. It is almost routine in drug trafficking cases to include evidence of prior or subsequent sales or operations in which the defendant participated (even if never charged) in order to show the defendant's intent or knowledge of the instant drug operation.85 That kind of evidence must be influential to the jury, and there is no requirement that the occurrence of those other crimes be proved beyond a reasonable doubt.

Our civil law is similarly laced with instances in which evidence of past violations, never proven as such, can be admitted to show "pattern and practice," that is, that the past violation is part of an ongoing pattern.86 If Brock Adams, Bob Packwood, or Clar-

83 FRE 404(b).
84 FRE 404(b) Advisory Committee's Note on the 1991 Amendment.
85 See, for example, United States v Allen, 960 F2d 1055, 1058 (DC Cir 1992) (per curiam), cert denied, 113 S Ct 231 (1992) (evidence of other crimes relevant to determination of intent and knowledge); United States v Watson, 894 F2d 1345, 1349 (DC Cir 1990) (evidence of later incident relevant to determination of intent and knowledge); United States v Manner, 887 F2d 317, 321 (DC Cir 1989) (evidence of later drug sale relevant to determination of intent).
86 For example, a Title VII plaintiff can support a disparate treatment claim by showing a pattern and practice of discrimination, Palmer v Shultz, 815 F2d 84, 96 (DC Cir 1987), and a civil rights plaintiff can sue a law enforcement officer's superiors only upon a showing of a "pattern or practice" of police misconduct. Martin v Malhoyt, 830 F2d 237, 255 (DC Cir 1987). See also Barry v United States, 865 F2d 1317, 1325 (DC Cir 1989) (inquiring
ence Thomas had been tried in court, evidence of past conduct similar to that alleged in the press might well have been admissible.

Where does all of this take us on Professor Schauer's thesis? To me it says that, in the final analysis, the criminal justice system is not very different from other social systems in which important communal decisions must be made. Measured responses are allowed along a spectrum. Some coercion, inconvenience, and even stigma are warranted on a relatively low level of evidence of guilt. Sustained incarceration and grievous stigma require (at least in theory) an extremely high level of proof. In practice, of course, everyone realizes that the system does not always work this way; people can bargain their way out of overwhelming evidence of guilt if there is an accepted social value for their forgiveness, such as the continued survival of an overloaded court system or the valuable information they can offer to convict a "bigger fish." And after conviction, when the severity of punishment is determined, the decisionmaker is required to abandon the reasonable doubt standard altogether and punish on the basis of "relevant conduct" identified by the prosecutor for which the judge finds there is a preponderance of evidence—even if the jury has already found there is reasonable doubt about some or all of it.

The people inside the system—judges, lawyers, police—know all this; so does the press. I am not sure, then, why the reasonable doubt standard—familiar as it may be, courtesy of television and movies—is likely to infect or even inhibit reporters' decisions about when to expose, criticize, or condemn public figures. I would surmise the opposite: The press, recognizing the variety of coercive responses to far lesser levels of proof, would be encouraged in its efforts to bring probative evidence of wrongdoing to the public.

whether there was a "pattern or practice" of impermissible disclosures of grand jury materials that would justify civil contempt sanctions or injunctive relief; Giacobbi v Biermann, 780 F Supp 33, 40 (D DC 1992), aff'd, 1992 US App LEXIS 31343 (DC Cir) (pattern and practice of failing to meet statutory obligations can overcome presumption of nonreviewability of agency enforcement actions); Thorne v Alexander, 1992 US Dist LEXIS 1768 (D DC) (discussing pattern and practice claim under the Age Discrimination in Employment Act); Huskey v Quinlan, 785 F Supp 4 (D DC 1992) (pattern and practice claim under 42 USC § 1985, which outlaws racial discrimination).

See Howard Kurtz, Questions of Privacy: Is There Anyplace Left Where the Media Fear to Tread?, Wash Post D1 (Apr 23, 1992) (allegations of sexual harassment ended Adams's Senate career); Eric Pianin, Senate Inquiry on Packwood Signals Sea Change in Attitude, Wash Post A1 (Dec 7, 1992) (referring to alleged sexual misconduct of the three public figures).
II. THE SCANT EVIDENCE OF JOURNALIST RELIANCE ON CRIMINAL LAW NORMS

On an empirical note, I see little evidence that journalists look to the criminal law for guidance. Accordingly, I question how the reasonable doubt norm could inhibit reporters in any significant way. As Professor Schauer recognizes, journalists and investigative reporters have their own norms and ethics and, in the case of the Washington Post, even their own ombudsman.

Not long ago, the press featured extensive discussions about the ethics of publishing the name of the alleged rape victim in the Kennedy Smith imbroglio and about how much coverage to give either Gennifer Flowers or Jennifer Fitzgerald in the presidential campaigns. None of these discussions focused on legal concepts. Insofar as journalists look to legal norms, I would suppose the libel laws rather than the criminal laws most concern them. Indeed, most major papers have their own lawyers “vet” controversial copy. While the standard is high, there are still some libel verdicts upheld, and journalists and their publishers worry about them. In September, a state trial judge in Pennsylvania affirmed a $34 million verdict, the second highest ever, against the Philadelphia Inquirer for suggesting that a prosecutor crushed a murder investigation as a favor to a friend.

In all, my impression is that with major public figures, journalists are willing to go to the edge. For instance, recently newspapers were full of tidbits about former President Reagan’s alleged past involvement in the Iran-Contra affair in spite of the unlikelihood

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90 For public figures, actual malice or “reckless disregard” is the settled legal standard for libel, and a high one it is. New York Times Co. v Sullivan, 376 US 254 (1964). A few years ago, in Hustler v Falwell, 485 US 46 (1988), the Supreme Court declined to countenance a way around that high standard by refusing to permit a public figure to sue a magazine for the state-law tort of emotional distress. The Court found that “in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment.” 485 US at 53.

91 Judge Refuses to Overturn Libel Award, Wash Post A18 (Sept 11, 1992).
of successfully prosecuting him based on what we know, and assuming that we could constitutionally indict and try the ex-President for conduct in office. Similarly, a myriad of public figures have been identified, or at least speculated about, in relation to the so-called “October Surprise” of 1980 (the alleged deal between Republican campaigners and the Iranian government to postpone the release of the hostages until after Reagan took office), despite the fact that so far no one has found a smoking gun that would support an indictment of any of them.

But—Professor Schauer asks—do journalists react differently when their story threatens to take something away from a public figure? In my experience, when a Supreme Court (or even a lower court) nominee’s name first becomes public, there is often a rash of negative stories, many trial balloons. In the Thomas case, for instance, reports of possible wife mistreatment, conflicts of interest, EEOC maladministration, and involvement in pornography appeared—in the best as well as the worst of newspapers. Most of those stories had no follow-up after a vigorous response and no additional corroboration. A few charges, however, lingered into and beyond the confirmation hearings. Yet once the confirmation fight was over, what coverage remained focused on the issues of sexual harassment and the related area of pornography, and, of course, on the possible perjury committed during the hearings. It is not clear, however, that this decrease in publicity reflects any ethical reluctance to attack an incumbent; more likely, the press coverage diminished because no one was interested in rehashing old evidence. If something new did explode on the scene, however, it would be a bigger story—and a more deserving one—because of the very incumbency and power of the subject.


\[93\] See, for example, Ethan Bronner, Thomas Role at EEOC Lightning Rod for Controversy, Boston Globe 12 (July 2, 1991) (recounting criticism of Thomas's leadership of EEOC); Jim Dwyer, Lies Litter Path to Confirmation, Newsday 4 (Oct 16, 1991) (recounting speculation about Thomas's first marriage or possible drug abuse); Juan Williams, Smearing Thomas, Atlanta J and Const A11 (Oct 14, 1991) (decrying “blood-in-the-water response from reputable news operations” to stories of expense account abuse at EEOC, spouse abuse, and criticism of civil rights leaders); Michael Wines, Stark Conflict Marks Accounts Given by Thomas and Professor, NY Times B14 (Oct 10, 1991) (reporting on a witness's accounts of Thomas's interest in pornography).
Professor Schauer may be right that in the ordinary reader's mind, there is something less odious about denying someone a coveted place in public life than forcing someone to resign from public office, and the reader may want more solid evidence in the latter case. This notion of entitlements and vested interests with their accompanying procedures and burdens of proof needed before withdrawal has solid roots in our civil law; it is called due process. Someone may have a property or a liberty interest in not losing her job that she does not have in being hired in the first place. Our whole Civil Service Reform Act, which governs the law of adverse actions against federal employees, is built on that premise. In their own way, then, journalists and their readers may feel an instinctive need to follow some line of demarcation between what is fair game in going after a contender and in going after an incumbent (elections are, of course, an exception). People may be more interested in the wrongdoings of those in power than in those seeking it, and expect abuse to be documented on a higher level. The old saying that if "you shoot for the king, you had better not miss" seems to resonate with the public and may make reporters less comfortable taking potshots at incumbents than at challengers. But this dividing line—if it exists—is by no means decisive. One can debate interminably whether the press went easier during the 1992 presidential campaign on Bush than Clinton (probably no) or harder during the 1988 campaign on Dukakis than Bush (probably yes). The stench of Watergate permeated former President Nixon's last years; incumbency did him little good. In the final analysis, reporters should and do go for a story that plays out—whether or not its object is an incumbent and has any vested interest to lose.

I do have one counterpoint, however, that may come from living in Washington for most of my life. David Broder identified as a new beast "[a] hybrid creature, an androgynous binding of politician and journalist called the Washington Insider." Those in power have the most news to give, and the temptation to be "in-

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66 Civil Service Reform Act of 1978, Pub L No 95-454, 92 Stat 1111 (1978), codified as amended in Titles 5, 10, 15, 28, 31, 39, and 42 of the United States Code. There is, or was, one notorious exception to this distinction between gaining and retaining employment. A few years ago, in interpreting an 1866 civil rights law, the Supreme Court in Patterson v McLean Credit Union, 491 US 164, 176-77 (1989), held that it was a federal offense not to enter into an employment relationship with someone on race-discriminatory grounds, but the same did not apply to terminating the employment relationship on race-discriminatory grounds. That restrictive reading has since been overruled by the Civil Rights Act of 1991, Pub L No. 102-166, 105 Stat 1071 (1991), codified at 42 USC § 1981(b) (1991).

side the loop” can corrupt the journalistic temperament. Feeling the same way, I.F. Stone admirably refused to join press insiders. Nevertheless, no reporter covets the “You’ll never lunch in this town again” or “Your calls will no longer be answered” award of the week. Power wielders woo the press with deep background leaks, scoops, and in-depth interviews. To the extent that some kind of personal relationship is necessary to develop knowledgeable stories, that kind of intimacy may be inevitable and perhaps, on balance, even healthy. But some manipulation of the press plays on sheer vanity. People who want to lunch with movers and shakers can be cowed by even the most subtle threats of ostracism. This kind of “we happy few” identification by the press with the power elite can make for a much greater reluctance to toll the bell on someone in power than on someone scrapping for it. So, on balance, there may be some greater inhibition to attack one in power than one seeking it, but if so, it is based more on a pragmatic than a normative sense; that is, the consequences of an error on the reporter’s own credibility are greater. Once the reporter gets on the track of a solid story, though, the incentive to plug away is apt to be greater—deservedly so—if it involves someone in power with something to lose.

III. THE INFLUENCE OF THE PRESS ON PENDING TRIALS

Professor Schauer poses yet a third query: Does the pendency of an actual criminal trial accentuate the pressure on reporters to abandon stories that they might otherwise write because those stories risk biasing potential jurors and a fair trial for the public figure involved? I conclude again that reporters should not and, in most cases, do not pull their punches. The much-publicized prosecutions of former Washington, D.C. mayor Marion Barry and the attackers of Rodney King, as well as more generalized social science research, suggest that the dangers of press-manipulated trials have been overemphasized. The videotape of Barry smoking crack played interminably on all of the local television stations but did not result in his conviction on that charge; the controversial Rodney King tape also did not prevent an acquittal of the police officers. Thus, jurors on the whole have turned out to be fairly independent—and cagey.

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98 See Minow & Cate, 40 Am U L Rev at 659 n 181 (cited in note 63).
The justice system, however, tends to operate on a different, and perhaps counterproductive, theory—that it must weed out not just biased jurors, but all jurors exposed to prior publicity about the case. A century ago, Mark Twain said, “We have a criminal jury system which is superior to any other in the world; and its efficiency is only marred by the difficulty of finding twelve every day men who don’t know anything and can’t read.” A more recent commentator, referring to the mass disqualification in the Oliver North trial of jurors who had watched the televised Senate hearings, said “[t]he minuscule remainder eligible for jury service have either been understudies of Rip Van Winkle or congenitally somnolent in the world of government.”

Because judges can control—to some degree—statements made by the prosecutors and defense attorneys, but not, of course, by the press, our criminal justice system has evolved several techniques to control the damage from the assaults on community readers by an overzealous press. These techniques, which no one will claim are foolproof, include a change of venue where an entire community has been saturated with prejudicial publicity, a continuance until the turmoil dies down, and voir dire to weed out biased jurors. Finally, despite research suggesting that many, if not most, jury instructions are either misunderstood or ignored, the system relies on instructions to the jury not to consider any out-of-court evidence.

Jury bias can be a real danger. Studies show that in the case of an initially biased juror, jury deliberations are likely to exaggerate rather than diffuse that bias because the genuinely biased juror filters all evidence through his biased lens. The problem, however, is that current in-court controls too often emphasize exposure, not bias. In the Barry trial, for instance, prospective jurors were required to fill out a 22-page questionnaire on every newspaper or television program they had seen over the previous six months.

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100 Bruce Fein, Face-Off: Picking the Oliver North Jury, USA Today 8A (Feb 9, 1989).
101 See Minow & Cate, 40 Am U L Rev at 648-49 nn 105-09 (cited in note 63). Judge Learned Hand dismissed jury instructions as a “placebo,” United States v Delli Paoli, 229 F2d 319, 321 (2d Cir 1956), aff’d, 352 US 232 (1957), that required “a mental gymnastic which is beyond, not only [the jurors’] powers, but anybody’s else.” Nash v United States, 54 F2d 1006, 1007 (2d Cir 1932).
102 See id at 663, citing United States v Barry, 1990 US Dist LEXIS (D DC) (prospective juror questionnaire).
Some commentators on the jury system think the desirable goal is a representative jury, not one that has been selected to assure no prior knowledge of the case. Thus, instead of trying to screen out knowledgeable jurors who read newspapers and listen to television, we should try to include them in the mix and focus our energy on developing techniques to identify potential jurors who have already made up their minds beyond conversion by evidence. This of course would be a "Back to the Future" move; a return to the original concept of the jury as knowledgeable but unbiased community evaluators. But the alternative in our information-explosive age may be "extensive voir dire and challenges —permitting attorneys to de-select their way to a panel less representative of the community—[which] may prove a far greater threat to the fundamental fairness of the verdict than exposure to any media coverage."

Especially in trials that involve public figures and government malfeasance, we need smart and informed jurors who know how to process information and are used to reading and screening what they read. If that is the direction in which we ought to be moving, the best thing reporters can do for the system is to print whatever well-documented information they can get their hands on, regardless of whom it favors, and not to try to act, as Professor Schauer suggests they should, as a surrogate judge or defense counsel.

It goes without saying, of course, that even a criminal conviction does not mean the end of a political career. The voters decide that. Perhaps we overestimate the delegitimization function of the criminal justice system; far from being stigmatic, criminal convictions and similar travails are seen by some citizens as legitimizing. Marion Barry, having served six months, now occupies a seat on the D.C. City Council; Oliver North is reportedly contemplating running for the United States Senate; Alcee Hastings, acquitted by the criminal justice system, but impeached and found guilty by Congress, has been elected to the same institution that impeached


106 Minow & Cate, 40 Am U L Rev at 660 (cited in note 63).


him. And much of Hastings's voter appeal, according to the newspapers, is that he has been beaten up by "the system." As one Hastings supporter said, "It shows character. All the hits he took, and he's not running with his tail between his legs."10

Although I believe that the effect of the media on jurors is exaggerated, at least one panel of the D.C. Circuit has deemed its effect on witnesses to be substantial, even insurmountable. I refer to the Oliver North case in which the D.C. Circuit laid down stringent standards for showing that no grand jury or trial witness against North was affected in any way by viewing North's immunized testimony at the earlier televised Senate hearings on the Iran-Contra affair.11 On remand, the Independent Counsel dismissed the case because of the impossibility of meeting those standards.12 Whether the decision was right or wrong (I dissented and the Supreme Court denied certiorari), it represented, in my view, a quantum leap from prior decisions on the extent to which the use of immunized testimony is protected under the Fifth Amendment. It is important to remember that the Independent Counsel made no use of North's immunized testimony in preparing for or conducting the trial; indeed, it did its best to preserve its key witnesses' testimony before North appeared at the Senate hearing. Moreover, the trial judge admonished witnesses not to rely on anything they heard outside the courtroom. Yet the fact remained that the witnesses implicated in the Iran-Contra affair, including Robert McFarlane, who had already pled guilty, were purposely immersed in North's Senate testimony by their own lawyers and government colleagues as they prepared for trial. The majority of our panel held that this purposeful "use" of North's televised testimony by persons (or their counsel) under suspicion or even indictment was enough to violate North's Fifth Amendment right against self-incrimination and to vitiate the jury verdict of his guilt. It seems likely that this standard will make it practically im-

13 Haynes Johnson and Tracy Thompson, North Charges Dismissed at Request of Prosecutor, Wash Post A1 (Sept 17, 1991) (prosecutor determined that "the government [was] not likely, in the unique circumstances here presented, to be able to sustain a successful outcome").
possible for most public figures to be tried if they have given public-
lucly reported immunized testimony.

Regardless of whether that is a desirable result, it does seem to set a lower disqualification standard on the basis of exposure to publicity for witnesses than for jurors. While the standard for jurors is at least theoretically keyed to actual bias, the standard now in effect for witnesses automatically disqualifies them for prior exposure to immunized testimony, unless the prosecutor can show that “line for line” the witness—including an unfriendly one, himself under indictment—remembers every word of the defendant’s testimony on his own without being affected in any way by listening to the defendant’s publicized immunized testimony. The defendant’s alleged partners in crime are effectively given the tools to blow up the case.\textsuperscript{113} That in turn places a heavier responsibility on the press covering immunized hearings for the effects of their reporting on any later trial. A substantial risk exists that in major governmental malfeasance cases, widespread coverage of congressional hearings involving immunized testimony will effectively gut any possibility of future prosecution. Nonetheless, reporters have their jobs to do, and no one would suggest that they refrain from doing it. The benefits of press coverage continue to outweigh its risks.

IV. WHO IS FOLLOWING Whose LEAD?

As a last word, let me turn Professor Schauer’s question around: How much do judges base their own behavior on what reporters say about them? A preposterous question, perhaps, but several months ago one of my colleagues, Judge Laurence Silberman, attracted a flurry of press coverage by accusing certain reporters of a bias toward activist (liberal) judges and accusing some of those judges, in turn, of playing to that bias.\textsuperscript{114} Personally, I think the media playing field is more level than Judge Silberman suggests. The editorial pages of the Wall Street Journal and the Washington Times act as a healthy counterbalance to any liberal tendencies of other national papers in their court coverage. In fact, my impression is that the “conservative” judges are treated at least

\textsuperscript{113} See id (prosecutor dropped the North prosecution after Robert McFarlane testified that North’s televised testimony had heavily influenced McFarlane’s original testimony).

\textsuperscript{114} See, for example, Sandra Sanchez, Judicial Criticisms, USA Today 3A (June 15, 1992); Martin Tolchin, Press Is Condemned By a Federal Judge for Court Coverage, NY Times A13 (June 15, 1992); First Amendment: Does Media Coverage Influence the Outcome of Judicial Decisions?, ABA J 48 (Oct 1992).
as well by the New York Times and the Washington Post as their "liberal" counterparts are treated in the other newspapers. I was a little surprised, though, by how docilely the press reacted to Judge Silberman’s criticisms; it seemed to respond mainly that there was no proof that the named reporters favored judicial "activists," but implicitly conceded Judge Silberman’s thesis that if they did, it was deplorable.\footnote{See Tolchin, NY Times at A13 (cited in note 114) (New York Times editor defending fairness and accuracy of its court reporters).} Bruce Fein, in supporting Judge Silberman’s thesis, criticized an "obsess[ion] with results" rather than reasons in the reporting of certain journalists covering the courts.\footnote{Bruce Fein, Yes: The Press Loves Activists, ABA J 48 (Oct 1992).} Fein would prefer that reporters concentrate on appellate court rationales and principles of "constitutional or statutory interpretation that prevent judges from usurping legislative or executive prerogatives."\footnote{Id.}

I read this as criticism of the press for not buying into the now too-familiar debate on judicial activism and restraint, as those terms are defined by conservative jurists and writers. I believe, however, that the press is entitled to pick its own news, and norms, even if I do not always agree with them. It may indeed be that Americans are more interested in reading about the results of cases than about the rationales of prominent jurists. More fundamentally, it is not clear to me that individual reporters or newspapers are bound to be entirely neutral, or to adopt a "fairness doctrine" inside their own ranks. Certainly they do not do it for politicians. Why then for judges? Even if it were true that some judges do curry favor with powerful journalists, would not the remedy lie with the courts and not the press? Judges, not reporters, have life tenure and have pledged to uphold the Constitution against all enemies, foreign and domestic—including the press. Is not the theory behind the First Amendment that the public will choose which of the judges’ rationales it endorses, assuming there is opportunity for all points of view to be expressed? Surely conservatives have fora aplenty in Washington and elsewhere, including well-financed think tanks and national and regional newspapers sympathetic to their concerns and ever appreciative of their judicial spokespersons. At any rate, I raise the point only as one of contrast. Some judges worry whether they kowtow too much to the press, not whether the press kowtows too much to judges.
CONCLUSION

What, then, is the ideal relationship between the press and the criminal justice system? Certainly the journalist-investigator should not attempt to copy any theoretical reasonable doubt "norms" of the criminal justice system; its real norms are, as we have seen, quite varied, flexible, maneuverable, not always followed in practice, and certainly not geared to the reasonable doubt standard for 99.44 percent of cases. The norms of the criminal justice system are not so different from those that undergird other decisionmaking systems and have, on the whole, little guidance to impart to those other systems.

The journalist's job is to present reliable information relevant to public decisionmaking. Libel laws set outer boundaries on what journalists can report. Within those boundaries, the responsible journalist should weigh for herself what kind of information is relevant to public choices. Even that type of self-screening can, of course, get risky. Should the journalist report that the Cabinet officer's daughter is gay? Is it relevant to anything? Maybe not, but not because of any analogy to criminal law. Certainly I would not like to see the same reporter hesitate to report what informed sources are saying about that Cabinet officer's involvement in an international financial scandal, even if there is an official investigation underway or even if the officer is on trial for a related offense.

There are indications that, except perhaps in small towns or rural settings, what newspapers print is not controlling with jurors. Real juror bias does exist, though, and the criminal justice system still has a way to go in developing better techniques to ferret it out. That problem, however, should not be laid at the media's feet. A criminal trial serves a distinct function in our society: it imposes punishment and (usually) stigma on an individual for violating its laws. It makes no pretense of unearthing all the malfunctioning processes and misdeeds of others that contributed to the crime and that may be important for the public to know. That is the job of good reporting. Thus it may be that the twain should never meet, a conclusion to which Professor Schauer eventually comes as well, albeit by a different route.