

# BEYOND LAW AND FACT: JURY EVALUATION OF LAW ENFORCEMENT

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## ABSTRACT

*Criminal trials today are as much about the adequacy and legitimacy of the defendant's accusers—police and prosecutors—as the alleged deeds of the accused. Yet we lack theory to conceptualize this reality, doctrine to set its parameters, and institutional mechanisms to adapt to it. The traditional framework used by courts and scholars to delineate the jury's role—along the continuum between “fact-finding” and “law-finding”—is inadequate to the task. Jury evaluations of law enforcement are more accurately conceptualized as enforcement-finding, a process that functions both in and outside that continuum. In considering enforcement-finding's justification and proper scope, history offers a useful analytical frame. Over time, the criminal jury's role has evolved within the surrounding criminal enforcement environment. Jury evaluation of law enforcement is an adaptation in that process; it arose, and persists, because the system needs it. This insight should inform our approach. Rather than resisting enforcement-finding, or mistaking it for something else, we should instead accept, accommodate, and even leverage it. Institutional design should balance potential hazards against systemic benefits. And doctrine should enable courts to openly and transparently balance the need for jury evaluation of law enforcement against potentially competing adjudicative values.*

## INTRODUCTION

Courts and scholars frame the jury's role along a continuum between fact and law.<sup>1</sup> At one end, the jury engages in “fact-finding,” ascertaining historical fact pertinent to guilt.<sup>2</sup> At the other, the jury is said to be “law-

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1 See generally Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 35–36 (2003); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999).

2 See, e.g., DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* (2012) (describing the pitfalls and challenges to a jury's accurate assessments of historical

finding”: assessing whether the defendant’s conduct, if legally prohibited, merits criminal sanction in the circumstances at hand.<sup>3</sup> And along the continuum, juries apply facts to law—determining whether the laws as set forth by the court apply to the defendant’s conduct.<sup>4</sup> This framework is a mainstay of much of the jury literature, and a guiding principle of evidentiary doctrine. Yet it misses a central function of today’s criminal jury: evaluating law enforcement.

Sometimes jury evaluation of law enforcement requires finding facts directly pertinent to guilt, as when, for instance, an eyewitness’s recollection or identification, or a defendant’s confession, may have been tainted by police interference. But sometimes the link between guilt and law enforcement conduct is more tenuous. An eyewitness identifies a photograph of a defendant as the perpetrator—why did the police initially select the defendant’s photograph to show the witness? Officers lawfully stop the defendant on the street, frisk him, and recover a gun—what caused them to stop the defendant in the first place? An accomplice testifies for the prosecution—to which crimes does the prosecutor require the accomplice to plead guilty, and which has she permitted to be overlooked?

These are the sorts of inquiries that pervade criminal trials. When permitted, they are framed as part of the jury’s fact-finding role, needed to establish the “background” of the investigation, “complete the story” of the crimes on trial, or test law enforcement witnesses’ credibility.<sup>5</sup> When precluded, they are cast as entreaties to “nullification”—impermissible attempts at a verdict contrary to law.<sup>6</sup> Scholars, too, frame jury evaluations of law enforcement in this way, distinguishing the fact-based from the nullificatory.<sup>7</sup>

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fact); George Fisher, *The Jury’s Rise as Lie Detector*, 107 *YALE L.J.* 575 (1997) (describing the evolution of the jury’s role in judging witness credibility).

3 See, e.g., Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 *U. CHI. L. REV.* 867 (1994); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 *WIS. L. REV.* 377; Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 *HARV. L. REV.* 582 (1939).

4 See *supra* note 1.

5 See *infra* notes 16–20 and accompanying text.

6 See *infra* notes 23–24 and accompanying text.

7 See, e.g., Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 *MINN. L. REV.* 1149, 1172–78 (1997) (categorizing acquittals based on improper police conduct as “nullification,” but arguing such nullification is lawful under contemporary rule-of-law theories); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677 (1995) (theorizing acquittals based on jurors’ perception of racially-motivated prosecutions as “nullification”); Paula L. Hannaford-Agor & Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 *CHI.-KENT L. REV.* 1249, 1272–75 (2003) (distinguishing police credibility from evidential strength); Marder, *supra* note 1, at 877, 891, 900–01 (describing as “nullification” a jury’s rejection of the state’s choice to prosecute a case of marginal seriousness, or of cases involving police misconduct); see also Nancy S. Marder, *The Interplay of Race and False Claims of Jury Nullification*, 32 *U. MICH. J.L. REFORM* 285, 304–05 (1999) (distinguishing verdicts based on assessments of police credibility from those based on “nullification”).

Yet jury evaluations of law enforcement do not always fall squarely in either category. Evaluating law enforcement goes beyond traditional fact-finding, both because it entails a normative judgment (did the police do or not do  $x$  and *should* they have done or not done  $x$ ?) and because the facts to be found may not pertain exclusively to the question of guilt.<sup>8</sup> At the same time, such evaluations do not always implicate “law”—at least, not in the traditional sense of constitutional, statutory, or common law. Those sources set floors for police and prosecutorial conduct, not standards by which juries evaluate it.<sup>9</sup> Nor does an acquittal based in part on law enforcement malfeasance necessarily constitute “nullification,” because in practice, it is often impossible to separate the strength of the evidence from the perceived competence and legitimacy of those who gather and present it.<sup>10</sup> Evaluations of law enforcement, in short, are neither entirely fact-finding, nor law-finding, nor even a combination of the two. They are what we might call *enforcement-finding*.

Enforcement-finding occurs when juries assess evidence of guilt together with the actions of those who gathered it;<sup>11</sup> when they ascertain not only what police and prosecutors have done, but whether those actions—legal or not<sup>12</sup>—are appropriate and desirable. Enforcement-finding can transform a jury’s focus from the alleged acts of the accused to those of the accusers. It is a phenomenon that permeates criminal adjudication—affecting not just trials, but plea bargaining, discovery, and even charging decisions. And yet, it remains under-examined.<sup>13</sup> We lack theory to conceptualize this jury role,

8 See *infra* Section I.B.

9 See *infra* Section I.B.

10 See *infra* Section I.B; subsection III.A.4.

11 A rich body of literature explores legitimacy’s role in harnessing citizens’ compliance with laws and deference to legal authority. Salient examples include TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 OR. L. REV. 391 (2000); 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, 234 (2008). The research raises under-examined questions as to legitimacy’s role in criminal adjudication. See *infra* note 13.

12 I refer here to unconstitutional conduct that has not resulted in evidentiary exclusion. For example, an illegal arrest and subsequent search, made in good-faith reliance on facts or circumstances later proven false or erroneous, will be admitted at trial and the jury will typically hear the circumstances of the arrest and search notwithstanding its illegality. See *United States v. Leon*, 468 U.S. 897 (1984). Or, to take another common example, evidence obtained unlawfully in respect to one person may nevertheless be admissible against another. See *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). I discuss how un-remedied constitutional violations influence jury evaluation of law enforcement, *infra* notes 130–39 and accompanying text.

13 As I discuss in Section I.A, some empirical work has touched on the dynamic, though only one study has addressed it head-on. See Amy Farrell et al., *Juror Perceptions of the Legitimacy of Legal Authorities and Decision Making in Criminal Cases*, 38 LAW & SOC. INQUIRY 773 (2013); *infra* notes 42–48 and accompanying text. My own prior work has discussed the ways in which jurors’ assessment of law enforcement may partly explain outcome disparities in federal and state prosecutions of street crime. *E.g.*, Lauren M. Ouziel,

doctrine to set its parameters, and institutional mechanisms to accommodate it.

This Article aims to fill those gaps, systematically re-conceptualizing the criminal jury's role and the criminal justice system's response to it. First, the Article explores enforcement-finding's processes and effects, and demonstrates the inadequacy of the law/fact framework to set enforcement-finding's proper scope. Second, it situates enforcement-finding in historical context, examining how it developed and why it persists. Finally, and from these accounts, the Article stakes its normative claim: enforcement-finding is a pervasive, inevitable, and needed feature of contemporary American criminal justice. Rather than camouflaging it as "fact-finding," or resisting it as "law-finding," we should engage and confront enforcement-finding in all its messy complexity. Enforcement-finding poses difficult judicial choices. It may require some institutional accommodations. But it also offers opportunities to enhance law enforcement accountability and adjudicative legitimacy.

Some clarifications are in order. My account does not encompass prosecutions of police, a small and atypical class of cases raising unique jury/law enforcement dynamics. Nor am I focused on jury judgments of Fourth Amendment reasonableness, a subject others have addressed.<sup>14</sup> My target is the bread-and-butter criminal trial—the robberies, thefts, drug deals, frauds, and other cases that make up the bulk of state and federal felony dockets—and the actions, constitutional or not, of police, agents, and prosecutors who investigate and charge them. It is also important to stress that my claim is

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*Legitimacy and Federal Criminal Enforcement Power*, 123 YALE L.J. 2236 (2014). In a recent piece, Anne Poulin argues that evidentiary doctrine should reject "the investigation narrative"—the story of how and why the prosecution's evidence came to be—while elsewhere, Dan Richman has argued that such evidence enables jurors to assess more critically the strength of the prosecution's case. Anne Bowen Poulin, *The Investigation Narrative: An Argument for Limiting Prosecution Evidence*, 101 IOWA L. REV. 683, 685 (2016); Daniel Richman, *Framing the Prosecution*, 87 S. CAL. L. REV. 673 (2014).

This Article expands the discussion beyond the empirical and doctrinal, to probe the criminal jury's role from a theoretical, historical, and structural perspective. What, exactly, does juror evaluation of law enforcement entail—is it fact-finding, law-finding, or something else? How, and why, did criminal trials become evaluations of law enforcement? And how do the answers to these questions illuminate the normative: What should be the criminal jury's role, and the justice system's response?

14 See, e.g., Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994) (arguing that criminal juries should adjudicate Fourth Amendment challenges by applying Fourth Amendment law, as instructed by the court, to the particular facts of the case); Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849 (2014) (arguing that judges should make the initial determination of admissibility of evidence under the Fourth Amendment, following which the jury should make the subsequent determination of whether to accept or reject that evidence under Fourth Amendment law); George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 150 (1993) (proposing jury panels to adjudicate pretrial motions to suppress evidence); cf. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (proposing that civil juries adjudicate and award damages for Fourth Amendment violations).

party-neutral. Embracing jury evaluation of law enforcement does not, as a general matter, favor the defense or the prosecution; its effect in a given case depends on the jury's perception of law enforcement's actions in the case at hand and, potentially, more broadly.<sup>15</sup> Finally, I do not seek to supplant existing theories of jury decisionmaking, or to discount the influence of other prevalent trial dynamics. Enforcement-finding is not the only, and not always the primary, focus of the criminal jury (though it can be in certain cases or categories of cases). But it is an important focus, and one that has received too little scholarly attention.

The Article proceeds as follows. Section I.A explores the extent, scope, and influence of enforcement-finding, drawing on trials and court rulings, observational studies, and empirical research. Section I.B exposes the poverty of the fact/law framework to set enforcement-finding's boundaries.

Part II places enforcement-finding in historical context. It situates the jury's role, and enforcement-finding's rise, within historic transformations in criminal law and enforcement. In so doing, it reveals enforcement-finding as a natural and necessary adaptation to these changes. Enforcement-finding arose, and persists, for good reason.

These insights should guide our approach. Rather than disguise or resist this phenomenon, we should acknowledge, accept, and accommodate it. Part III describes how. Institutional design should aim to minimize enforcement-finding's risks while leveraging its regulatory potential. And doctrine should enable transparency and balance—litigants and courts should openly concede enforcement-finding's probative value, balancing it against potentially competing concerns around fairness, accuracy, and efficiency.

## I. WHAT IS ENFORCEMENT-FINDING?

Enforcement-finding has become so ingrained in criminal adjudication we rarely pause to consider its processes or effects. As a result, we have not given due thought to what, exactly, it is, and how we ought to approach it. Courts and scholars too often mistake enforcement-finding for something else, or, recognizing it, apply a framework that doesn't quite fit.

This Part unravels enforcement-finding's processes, explores the depth of its influence, and exposes its insusceptibility to the fact/law framework. Subsection A.1 explores how tightly the phenomenon is woven into the fabric of criminal adjudication—from evidentiary doctrine to jury instructions to discovery to plea bargaining to charging decisions. Subsection A.2 mines the empirical data on jury evaluation of law enforcement, confirming the phenomenon is real, influential, and complex. Section B reveals the poverty of the fact/law framework to set enforcement-finding's proper boundaries.

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<sup>15</sup> See Ouziel, *supra* note 13 (discussing how positive citizen perceptions of federal law enforcement can strengthen federal prosecutors' hands as compared to their local counterparts).

*A. Enforcement-Finding in Practice*

## 1. Evidentiary Doctrine and the Courtroom Dynamic

How criminal cases are tried and bargained is, in large part, a reflection of litigants' and courts' beliefs about jury decisionmaking. Both evidentiary doctrine and adjudicative practice reflect an abiding and pervasive belief that jurors implicitly evaluate law enforcement—and consternation about how to handle it.

Start with the phenomenon's most ubiquitous manifestation in evidentiary doctrine: as the "background of the investigation" (or the "why the police did what they did") justification for admitting otherwise inadmissible evidence. After establishing the preliminaries, the prosecutor brings the officer to the point in time at which he has initiated some critical action with respect to the defendant: stopping him, or placing his photograph in an array shown to an eyewitness, or perhaps even arresting him. The inevitable next question ensues: *Why* did the police officer do this? The answers vary, but typically involve some explanation of what brought the defendant to the officer's attention. In the most contested example, it is the defendant's prior crimes;<sup>16</sup> or, somewhat less contested, his immediately preceding unlawful yet uncharged conduct,<sup>17</sup> or information the police officer received over the radio or from an informer regarding the crime and the description of the perpetrator.<sup>18</sup>

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16 See, e.g., *United States v. Rosse*, 418 F.2d 38, 40 (2d Cir. 1969) (holding that the defendant's prior crimes were relevant to explain the reason for the investigation and the method used by the postal inspectors to find who was guilty); *United States v. Eagle Thunder*, 873 F. Supp. 1362, 1375 (D.S.D. 1994) (finding evidence of the defendant's prior arrests admissible to show "why the officers stopped the vehicle and how they were able to identify both the vehicle and its occupants"); *Rodriguez v. United States*, 915 A.2d 380, 384–87 (D.C. 2007) (holding that evidence suggesting police officers recognized appellant from the victim's description based on "prior contacts" and knowing him "from the area" was admissible to explain why the officers included appellant's photograph in a photo array for purposes of identification).

17 See, e.g., *Green v. United States*, 440 A.2d 1005, 1007 (D.C. 1982) (holding that, in prosecution for marijuana possession, police officers' testimony that they saw defendant make two different marijuana sales prior to his arrest "plac[ed] in a context and [made] comprehensible to the jury the actions of the police in approaching, arresting, and searching appellant"); *People v. Fay*, 444 N.Y.S.2d 629, 631 (N.Y. App. Div. 1981) (finding that, in prosecution for gun possession, a police officer's testimony that he stopped the defendant because he matched the description given over the radio of the perpetrator of a robbery was admissible to explain reason for stop because "otherwise . . . the jury would speculate in 'filling in' the picture to conform with their common sense perception of reality when confronted by the defendant's claim that the gun was 'planted'").

18 See, e.g., *United States v. Trujillo*, 136 F.3d 1388, 1396 (10th Cir. 1998) (ruling an FBI agent's testimony of a witness's description of a bank robber was admissible as evidence of the focus of the investigation, not to prove the truth of the description); *United States v. Bowser*, 941 F.2d 1019, 1021 (10th Cir. 1991) (per curiam) (finding an officer's testimony that an informant told him the defendant had a gun and wanted to kill the officer admissible to explain the officer's aggressive conduct towards the defendant and

None of this evidence pertains to, or is admissible for purposes of, establishing guilt. Whether the police officer investigated *the right guy* depends on the other evidence in the case, whether it be the eyewitness's description of the perpetrator or identification of the defendant, or the physical or documentary evidence linking the defendant to the crime, or the testimony of the defendant's accomplice, or the defendant's own statements. Yet prosecutors routinely offer this type of evidence, and courts often admit it—a reflection of their intuition that juror assessment of reasonable doubt is tied up in assessments of law enforcement's conduct. And not merely conduct that implicates the reliability of the investigation (and thus the evidence obtained from it), but conduct that goes to the legitimacy of police-citizen interaction. As the District of Columbia Court of Appeals explained in a case involving the admission of evidence of a defendant's pre-arrest, uncharged crimes used to explain the arresting officers' states of mind:

It is unrealistic to expect the Government to truncate its case-in-chief by utilizing only bare bones testimony about an arrest team stopping a citizen merely because of the word from an officer far away. . . . [T]he Government is entitled to present a thorough set of facts, to refine its case-in-chief to rationally anticipate a factual issue that may create a reasonable doubt in the minds of jurors. The use of [such prior crimes] evidence can serve this purpose, as it illuminates the practical context of the arrest itself. In drug cases, [this] evidence (from the Government's standpoint) could ostensibly ward off the image of police officers stopping a citizen for no reason.<sup>19</sup>

This dynamic, the court observed, is commonplace: “The common law of this jurisdiction now abounds with affirmances in criminal appeals that are very similar to the instant case.”<sup>20</sup>

It is not just the government that seeks to draw attention to law enforcement officers' motivations. When those motivations are suspect—even while the officers' actions meet the constitutional threshold—savvy defense attorneys seize upon them.<sup>21</sup> Such is the dynamic wrought by the so-called objec-

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not offered for its truth); *People v. Hernandez*, 527 N.Y.S.2d 404, 407 (N.Y. App. Div. 1988) (holding, in prosecution for illegal possession of firearm, that the testimony of the defendant's neighbor that she had seen the defendant with a gun on prior occasions and had alerted police accordingly was admissible both to prove the defendant's dominion and control over the gun found in his girlfriend's car and “under the exception that permits the introduction of such evidence as background material when necessary to provide a ‘complete picture’ of the events and, as in this case, to prevent speculation, as to why the police stopped the defendant”).

19 *Durham v. United States*, 743 A.2d 196, 207 (D.C. 1999).

20 *Id.* at 206.

21 In the words of an experienced criminal defense attorney dispensing advice:

Another important issue to examine [before the jury] is the behavior of the police and prosecution. When the defendant has been beaten, harassed or abused by the police, these facts should be brought before the jury. . . . The fact that the police have offended community values—or even themselves broken the law—in a single-minded quest to arrest the defendant can be very persuasive,

tive approach to Fourth Amendment reasonableness.<sup>22</sup> Take the example of pretextual stops or arrests, the fruits of which are admissible so long as the stop or arrest was supported—even if not *in fact precipitated*—by adequate cause (for a stop, reasonable suspicion, and for an arrest, probable cause). In such cases, defense attorneys do their best to draw the jury’s attention to the officer’s subjective motivations in making the stop or arrest, while prosecutors scramble to keep those motivations at bay.<sup>23</sup> Courts struggle to find the proper balance.<sup>24</sup>

Search and seizure are not the only areas that offer opportunities to probe behind the scenes of the prosecution’s case. Law enforcement agents’ relationship with informants and cooperators is another well-trod ground of evidentiary battle, in which the defense seeks to highlight any improper (or simply questionable) behavior on the part of law enforcement, the prosecution attempts to scuttle the defense attack—by seeking to preclude or refute the evidence,<sup>25</sup> opting not to call vulnerable agents or informants to the

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especially where police actions are less acceptable to the jurors than those of the defendant.

Clay S. Conrad, *Jury Nullification: The Lawyer’s Challenge*, 24 CHAMPION 30, 36–37 (2000) (citing Brown, *supra* note 7, at 1172–78). For a discussion of how enforcement-finding is not in fact “nullification” as most commentators define that term, see *infra* subsection III.A.4.

22 Throughout Fourth Amendment doctrine, courts assess the legality of conduct by reference to an objectively reasonable officer rather than the subjective motivations of the officer in question. See, e.g., Whren v. United States, 517 U.S. 806, 814 (1996) (“[T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”).

23 As one defense attorney described the issue of pretextual stops:

In the courts, defense lawyers are struggling over such issues as . . . how to dismantle the testimony of police officers who are motivated by racial profiling issues to build their cases against the people that they stop . . . .

. . . .  
 . . . [O]ne of the primary tasks of a defense attorney in this area is determining how to impeach the police officer’s actions in terms of their protocols, their technique, and their credibility. Essentially, you must have some knowledge of how police work and function, and you cannot be afraid to call them liars, because they are only human, and they have motives like everyone else.

Terry H. Gilbert, *Overcoming the Challenges in Drug Crime Litigation: Considering the Long-Term Implications for the Client*, in DEFENSE STRATEGIES FOR DRUG CRIMES (Aspatore 2013), 2013 WL 5758089, at \*2–3.

24 See, e.g., People v. Douglas, 680 N.Y.S.2d 145 (N.Y. Sup. Ct. 1998) (allowing, in trial for unlawful gun possession, defense counsel to question officers as to observations that triggered the initial stop of the defendant, but ruling that prosecution was entitled to a jury instruction that lawfulness of stop was not a matter for jury to decide); People v. Wright, 645 N.Y.S.2d 275 (N.Y. Sup. Ct. 1996) (same).

25 See, e.g., United States v. Malpeso, 115 F.3d 155, 162–63 (2d Cir. 1997) (successfully precluding evidence of an FBI agent’s disclosure of confidential law enforcement information to informant on the ground that it would unfairly prejudice government); People v. Melendez, 439 N.Y.S.2d 923 (N.Y. App. Div. 1981) (holding that where cross-examination of the detective was designed to implicate informant as accomplice in the homicide, the



stand,<sup>26</sup> or both—and courts are left to ferret out the point at which prejudice becomes “unfair.”<sup>27</sup> Nor are attacks on informants confined to police and agents. In the hands of a deft defense attorney, cooperating witnesses and even uncharged accomplices are cast as undeserving beneficiaries of prosecutorial mercy; and reasonable doubt becomes partly an inquiry into prosecutorial judgment.<sup>28</sup>

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prosecution was entitled to clarify the reason why the detective initially suspected the informant and subsequently focused on the defendant), *rev'd*, 434 N.E.2d 1324 (N.Y. 1982).

26 A well-publicized example of this prosecutorial strategy arose in the “Africa Sting” case—the notorious Foreign Corrupt Practices Act prosecution in which federal agents engaged in improper conduct with the government’s main cooperating witness. A post-mortem by several counsel in the trial discusses the prosecution strategy and defense response:

In the weeks leading up to trial, we became convinced that, as a matter of trial strategy, the government would not call its star cooperating witness . . . [Or] its own lead case agent . . . [T]he government’s strategy . . . was to present a sanitized version of the sting operation through witnesses who were several steps removed from the operational decisions, thereby leaving us with little room to bring out evidence of the investigation’s shortcomings.

To countermand this strategy, we asked the government witnesses . . . a series of questions about strategic decisions relating to the [investigation]. If the answer was “I don’t know,” the next question was always “Well, who would know?” The answer was always the same: Agent Forvour. . . . [We] thought this strategy would at least raise questions in the minds of the jurors as to why the government never called [Forvour] . . . .

Eric Bruce et al., *Inside the “Africa Sting” Trial: Anatomy of a Failed Prosecution*, FCPA PROFESSOR (July 23, 2012), <http://www.fcprofessor.com/inside-the-africa-sting-trial-anatomy-of-a-failed-prosecution>. The attorneys eventually called the case agent, a risky move that may have paid off: the jury ultimately acquitted on some counts and hung on the remainder. *See id.* A second trial yielded a similar result, and the government ultimately dismissed the entire case. *Id.*

27 *See* FED. R. EVID. 403. *Malpeso* offers a ready illustration of inconsistencies that result among trial courts attempting to distinguish fair from unfair prejudice in the context of law enforcement misconduct or unprofessionalism. *See generally Malpeso*, 115 F.3d 155. In a series of related organized crime cases before different judges in the Eastern District of New York, two judges precluded evidence that an FBI agent leaked confidential law enforcement information to an informant who was a member of a rival organized crime family on the ground that it would unfairly prejudice the government, while a third admitted the evidence. *Id.* at 162–63, 163 n.3. In the trial in which the evidence was admitted, the jury acquitted, while in at least one trial in which the evidence was precluded, the jury convicted. *Id.* at 155, 162, 163 n.3. On appeal, the Second Circuit upheld preclusion of the evidence as within the trial court’s discretion, notwithstanding the fact that another court had reached a different conclusion. *Id.* at 163. Of course, the abuse of discretion standard permits divergence among trial courts across a range of evidentiary issues. But divergence is less principled when it comes to enforcement-finding, where trial courts lack a useful framework for assessing whether prejudice to the government (or the defense) is “fair.” *See generally infra* Section I.B.

28 The defense in the recent “Bridgewater” corruption trial—in which both accomplice testimony and the actions of uncharged participants featured prominently—is a recent and high-profile example of this oft-used strategy. *See* Corinne Ramey, *Defense Grills Star Witness*

Consider, too, the matter of investigatory competence. In a system in which law enforcement is the sole investigator of crimes, the question of guilt will often hinge on the jury's assessment of law enforcement's adequacy. And, because the vast majority of jurors have no personal experience with the task of investigating and gathering evidence in a criminal case, what constitutes "adequate" becomes contestable—and frequently contested. Defense attorneys point to leads unfollowed, witnesses unquestioned, tests not done.<sup>29</sup> Prosecutors elicit testimony designed to explain those decisions,<sup>30</sup> or seek to minimize their importance through jury instructions that the prosecution is "not on trial," and "investigative techniques are not your con-

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*in Bridge Trial*, WALL ST. J. (Sept. 28, 2016), <http://www.wsj.com/articles/witness-christie-associates-compared-their-jobs-to-fixers-in-pulp-fiction-1475079325> (reporting that the defense's "central argument" is that "[i]t was [the government's witness], and not [the defendant], who was actually in charge . . ."); Kate Zernike, *Bridge Case Verdict May Hinge on Officials Who Weren't Tried*, N.Y. TIMES (Oct. 31, 2016), <http://www.nytimes.com/2016/11/01/nyregion/bridgegate-case-chris-christie-deliberations.html> ("[W]ill jurors decide, in the memorable words of [one defendant's closing argument], that prosecutors went after a whale and ended up with a minnow?"); see also, e.g., Barry Tarlow, *RICO Report: Adventures of Sal and Willie: Stunning Acquittals Condemn Prosecutorial Abuse of Power*, 20 CHAMPION 39, 42 (1996). Tarlow noted that a successful defense strategy in a federal tax fraud case involving twenty-seven informant witnesses was to "denounc[e] the prosecution's monopolistic power to dictate disproportionately low sentences in exchange for informer testimony," and argue to the jury that "[t]here is something wrong when, in a democracy, . . . one man . . . not elected. . . , a young prosecutor in his thirties . . . has power over the life and death of so many human beings." *Id.* (internal quotation marks omitted) (citation omitted).

29 *E.g.*, *State v. Stringfellow*, 42 A.3d 27, 30 (Md. 2012) (noting the defense strategy of drawing the jury's attention to the state's failure to test the gun for the defendant's latent fingerprints); *Evans v. State*, 922 A.2d 620, 628 (Md. Ct. Spec. App. 2007) (describing the defense strategy of highlighting the absence of audio and video recordings of drug transactions, with defense counsel exhorting the jury that detectives "could have broken out a video camera, worn an audio" and insisting that "would have been a cross-check of reliability"); *People v. Slack*, No. 219218, 2001 WL 714812, at \*1 (Mich. Ct. App. Mar. 16, 2001) (*per curiam*) (noting how the detective "explained why his investigation did not include interviews with other witnesses and the failure to attempt to obtain fingerprints from the stolen vehicle"). In the words of a criminal defense attorney dispensing trial strategy advice:

In some cases, the police officers in a criminal defense case are the defendant's best witnesses and you can use them to develop your theme. . . . Sometimes the lack of findings by the investigating agency can strengthen your theme—the lack of fingerprints, a confession, or eyewitnesses. All these things can be brought out by you during cross-examination of police officers, or even calling the police yourself. It gives your case more credibility.

Andrew R. Miller, *Succeeding as a Criminal Defense Lawyer: Preparing Your Case Theory*, in TRIAL TECHNIQUES FOR CRIMINAL CASES (Aspatore 2010), 2010 WL 3252491, at \*12.

30 *See, e.g.*, *United States v. Cruz-Diaz*, 550 F.3d 169, 178–79 (1st Cir. 2008) (holding, in response to defense counsel's focus on the police officers' failure to gather fingerprint or DNA evidence from the robbery getaway car, that prosecution was entitled to elicit evidence of co-defendant's confession notwithstanding *Bruton* or *Crawford*, "to rebut [defendant]'s attempt to cast doubt on the integrity of the government's investigatory efforts").

cern.”<sup>31</sup> Courts vacillate in their approaches, both as to probes of investigatory adequacy and jury instructions on how to consider such evidence.<sup>32</sup>

The reality, though, is that law enforcement *is* on trial. As George Fisher has observed with respect to the O.J. Simpson trial, the overarching courtroom dynamic in that case was merely an amplified version of what takes place in criminal courtrooms every day:

[I]n the average case the prosecutor would be so anxious to preserve the illusion of police professionalism that she would leave such defense arguments [about how the police failed to look for certain physical evidence] unanswered rather than give the truthful, innocent, but devastating response that the cops just didn’t bother to do something. And defense lawyers, recognizing the prosecutor’s predicament, press the advantage. Rarely does a defense lawyer let an entire case go by without telling the jury how weighty is the power of the state that has been brought to bear against his lonely client.

. . . .

Almost every criminal trial presents a variation of [this] tactic[ ]. The defense hangs the cops around the prosecutor’s neck.<sup>33</sup>

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31 The Second Circuit, for instance, has upheld variants on the instruction that: There is no legal requirement that the government prove its case by any particular means. While you are to carefully consider the evidence presented by the government, you need not speculate as to why certain techniques were used or why others were not used. The government is not on trial, and law enforcement techniques are not your concern.

Your sole concern is to determine whether or not, based on the evidence or lack of evidence, the guilt of the defendant has been proven beyond a reasonable doubt.

United States v. Barcelo, No. 13-cr-38, 2014 WL 4058066, at \*13 (S.D.N.Y. Aug. 15, 2014) (quoting Transcript of Record at 1403:11–19, United States v. Barcelo, No. 1:13-cr-00038 (Feb. 29, 2014)); see United States v. Barcelo, 628 Fed. App’x 36 (2d Cir. 2015) (affirming the instructions).

32 On investigatory adequacy, compare cases cited *supra* note 29 with *United States v. Patrick*, 248 F.3d 11, 22–23, 22 n.10 (1st Cir. 2001), upholding the trial court’s exclusion of the detective’s failure to follow up on an informant tip pointing to an alternative suspect. On jury instructions, compare *Barcelo*, 2014 WL 4058066, at \*13, and *Evans*, 922 A.2d at 632, upholding an instruction that the defendant, not the government, is on trial, with *United States v. Pritchard*, 485 F. App’x 199, 201 (9th Cir. 2012), finding error in the trial court’s instruction to the jury that “[t]he investigation [of the government] is not on trial here; the defendants are,” and *Robinson v. State*, 84 A.3d 69, 79–81 (Md. 2014), without overruling *Evans*, limiting such instructions to instances where defense counsel has misstated the law or the state’s burden, or speculated as to what the unperformed investigative work would have shown.

33 George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 991–92 (1997). In addition to this defense tactic Fisher identifies a common prosecution tactic, also exemplified in the O.J. Simpson trial, of “hang[ing] the defendant’s silence around defense counsel’s neck.” *Id.* at 992 (discussing how prosecutors can “spin out [a] sinister account of the evidence and . . . wonder aloud what other explanation there might be, silently encouraging the jury to speculate about why the defendant did not step forward to explain”).

This reality infects not only the evidence and argument presented at trial, but the disclosures that precede it. Indeed, an entire class of *Brady* violations arises from prosecutors' efforts to mitigate (or avoid entirely) attacks on law enforcement's adequacy.<sup>34</sup>

It also infects pre-trial resolutions, perhaps even more than trials. Because while it is difficult to quantify enforcement-finding's effects on actual trial outcomes,<sup>35</sup> in a system dominated by non-trial outcomes such effects may be beside the point. For purposes of plea bargaining, it is prosecutors' and defense attorneys' *perception* of enforcement-finding's influence that matters most. As the foregoing discussion demonstrates, the perception on both sides is that the jury's evaluation of law enforcement can and does influence its evaluation of guilt.<sup>36</sup> And indeed, those who try and bargain criminal cases interpret verdicts as a product of this reality.<sup>37</sup> The price of a non-trial resolution, in short, can be heavily influenced by the parties' assessment of how the jury will evaluate law enforcement. As an observer of plea

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34 See, e.g., *United States v. Howell*, 231 F.3d 615, 625 (9th Cir. 2000) (holding that undisclosed errors in police reports that, if corrected, would have tended to inculpate the defendant were nevertheless exculpatory in that such errors were "evidence of a flawed police investigation" that would have presented the defense "the opportunity to attack the thoroughness, and even good faith, of the investigation," a fact the government acknowledged in its brief); *United States v. Aguilar*, 831 F. Supp. 2d 1180, 1203 (C.D. Cal. 2011) (noting the prosecution's admission that, in failing to disclose agent's grand jury testimony, it sought to avoid utilizing a particular witness in order "to limit the [Defendants'] ability to introduce [a] type of defense" that would "put the investigation on trial . . . ." (alterations in original) (citation omitted)); see also *Kyles v. Whitley*, 514 U.S. 419, 445-47 (1995) (deciding that contradictory statements made by the state's key witness to police constituted material, exculpatory information because by examining police's knowledge of the inconsistencies, defense could have "attacked the reliability of the investigation"); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such [evidence] in assessing a possible *Brady* violation.").

35 Verdicts come without formal explanations, and, as noted *infra* note 61, empirical study of the causes of trial outcomes is notoriously difficult. It is for this reason that most empirical work focuses on juror pre-deliberation views, first votes, or juror-judge disagreement as opposed to the causes of acquittals, non-verdicts, or mixed verdicts. See *infra* note 42.

36 See *supra* notes 16-31, 34 and accompanying text.

37 See, e.g., Chris Herring, *Bronx Acquittals Set Record*, WALL ST. J. (May 4, 2010), <http://online.wsj.com/news/articles/SB10001424052748704608104575221271762806324> (quoting a Bronx defense attorney's assessment that "[t]he Bronx has a healthy mistrust for the police and that has a part in why there are so many acquittals"); Dan Morrison, *Odds on Rumble in the Bronx*, NEWSDAY, Mar. 22, 1996, at A26 (noting that former Bronx District Attorney Mario Merola attributed the low trial conviction rate in part to minority communities' distrust of police); John Simerman, *Orleans Parish Conviction Rates in Jury Trials Hold Steady, and Relatively Low*, TIMES-PICTAYUNE (Jan. 16, 2012), [http://www.nola.com/crime/index.ssf/2012/01/orleans\\_parish\\_conviction\\_rate.html](http://www.nola.com/crime/index.ssf/2012/01/orleans_parish_conviction_rate.html) (reporting that observers in the system attribute New Orleans' perennially low criminal trial conviction rate to jurors' mistrust of police testimony).

bargaining in the Chicago criminal courts in the early 2000s described the plea bargaining process there:

“[D]iscovery” consists mostly of police reports regarding the alleged [crime]. Before the next court date, the defense lawyers will study the reports for inconsistencies and omissions. A glaring error can cause a lawyer to advise his client to gamble on a trial; a minor flaw can at least be brought up in plea discussions when trying to extract a markdown from the state. Even an airtight police report helps the defense lawyer: he can use it to persuade his client to wave the white flag and grab the state’s best offer.<sup>38</sup>

Criminal trials may be vanishing, but their outcomes—or, more to the point, defense lawyers’ and prosecutors’ interpretations of them—still exert a powerful influence on plea bargaining,<sup>39</sup> not to mention on prosecutors’ decisions to dismiss or to decline charging in the first place.<sup>40</sup>

## 2. The Empirical Perspective

Few empirical studies have sought to ascertain the extent and scope of jury evaluation of law enforcement, and how such evaluations affect decision-making and outcomes. This is no doubt in part due to scholars’ reliance on the traditional fact/law framework. Because we haven’t identified and

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38 STEVE BOGIRA, *COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE* 35–36 (2005).

39 See, e.g., Gilbert, *supra* note 23, at \*3 (“[O]ne of the primary tasks of a defense attorney . . . is determining how to impeach the police officer’s actions in terms of their protocols, their technique, and their credibility . . . . [G]o after law enforcement aggressively. If you are able to find some holes in their case and raise some appealable issues to give yourself some increased leverage, then you may be able to get a better plea bargain for your client.”).

40 Empirical proof of enforcement-finding’s effect on dismissal and charging patterns is elusive, not least due to the paucity of data on charging and dismissal patterns generally. One can point to jurisdictions with notoriously poor police-community relations and low conviction rates—the Bronx, New Orleans, or Philadelphia, for example—as circumstantial evidence. Such outcomes are also, of course, reflections of other pathologies, including court delays, witness non-appearance, and overloaded prosecutorial dockets.

Every so often, though, enforcement-finding’s repercussions surface. They did so recently in Florida, for example, where discovery of a series of racist emails and videos sent by local police officers in Miami Beach and Fort Lauderdale, respectively, prompted prosecutors to reopen concluded cases and dismiss pending ones in which the officers were implicated. See Mike Clary & Tonya Alanez, *Prosecutors Dismiss Cases Linked to Racist Ex-Fort Lauderdale Cops*, SUN SENTINEL (Apr. 10, 2015), <http://www.sun-sentinel.com/local/broward/fl-racist-cops-case-dismissals-20150409-story.html>; Frances Robles, *Racist Police Emails Put Florida Cases in Doubt*, N.Y. TIMES (May 15, 2015), <http://www.nytimes.com/2015/05/16/us/miami-prosecutor-reviews-cases-of-police-officers-who-sent-racist-emails.html>. Notably, none of the emails and videos concerned the cases themselves—rather, they were extraneous communications that, in prosecutors’ views, would be relevant to any case in which the officers testified, particularly those involving minority defendants. In the case of the Fort Lauderdale officers, prosecutors ultimately declined to prosecute twelve felony cases (at last count) in which the implicated officers would have been witnesses. See *id.*

accounted for enforcement-finding as a conceptually distinct process,<sup>41</sup> it tends to lurk in the background rather than the forefront of most jury studies. Yet recent empirical inroads in this area are promising, and at the very least confirm litigants' and judges' intuitions to be well-founded. The nascent empirical work also sketches a picture of enforcement-finding's multi-layered, intricate processes. Embedded in jury evaluations of law enforcement are, among other things, perceptions of police legitimacy in general; perceptions of testifying officers' credibility in particular; perceptions of law enforcement motives; and jurors' race.

Utilizing the largest dataset of juror decisionmaking in actual (non-mock) criminal trials in recent times—from over 200 felony trials in four large urban jurisdictions—one group of researchers found a significant correlation between jurors' trust in police and their pre-deliberation predispositions and first votes.<sup>42</sup> Holding certain other juror characteristics and case-specific variables constant, the study authors found that jurors reporting a high level of trust and confidence in police had a 75% likelihood of favoring the prosecution prior to deliberations, while jurors reporting no trust and confidence in the police had just a 47% pre-deliberation probability of favoring the prosecution.<sup>43</sup> More remarkably, jurors' assessment of police witnesses' believability<sup>44</sup> had a greater correlation with first votes than most other juror assessments, including as to fairness of the law and consequences to the defendant. In fact, the only factors that had a greater correlation with juror first votes were the judge's assessment of the strength of the evidence—which invariably reflected her assessment of the believability of police witnesses, among other evidence—and the jurors' race.<sup>45</sup>

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41 See *infra* Section I.B.

42 See Farrell et al., *supra* note 13, at 779, 783–88. The study relied on data collected in 2003 by the National Center for State Courts, which queried nearly 2000 jurors who had collectively served on 210 separate, non-capital felony cases in four different urban jurisdictions: Washington, D.C.; Bronx, New York; Los Angeles County, California; and Maricopa County, Arizona. *Id.* at 778–79, 783. Following the trial, jurors were asked a series of questions regarding their views on the law, the evidence, law enforcement (primarily the police), and the courts. Questionnaires were administered post-trial out of concern for confidentiality and the defendants' fair trial right. See *id.* at 779 n.3. The study, as well as another of the same dataset, focused on jurors' first votes rather than final votes presumably to control for the effect of group dynamics on jurors' decisionmaking. See Stephen P. Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371, 373–74 (2004).

43 Farrell et al., *supra* note 13, at 786.

44 The extent to which jurors believed the police was a control variable in the study, allowing the researchers to assess the effect of jurors' perceptions of police legitimacy independent of their opinions about the particular police witnesses in the case. *Id.* at 780. The study did not seek to ascertain the existence or degree of a causal relationship between jurors' trust in police and their belief of police testimony, though it did find that police believability mediated the effects of juror trust and confidence in police on pre-deliberation predisposition and first votes. *Id.* at 784–87.

45 *Id.* at 490 tbl.4.

Yet, as that study further revealed, race is itself deeply entangled with both trust and believability. The profound racial gap in perceptions of police legitimacy (documented both in the study and elsewhere)<sup>46</sup> may account, in large part, for the profound racial disparities in jurors' predispositions and first votes. Black jurors, who on the whole were more predisposed to acquit and more likely to vote to acquit than white jurors, were also on the whole more police-sensitive: the correlations between black jurors' trust in police and both their predisposition and first votes was greater than for whites.<sup>47</sup> Additionally, the racial gap in predisposition and first votes narrowed significantly as black jurors' trust and confidence in police rose.<sup>48</sup> Perhaps most notable was the magnitude of the police's effect on black jurors' verdict predispositions: a black juror with low trust and confidence in the police had only a 36% probability of favoring the prosecution, while a black juror with high trust and confidence in the police had a 70% chance of favoring the prosecution.<sup>49</sup>

Another study of the same juror dataset highlighted different aspects of the police/juror dynamic.<sup>50</sup> Assessing the interplay of attitudinal factors and race, researchers found that assessment of police believability consistently ranked as the factor most correlated with first votes—exceeding both race (the jurors' and the defendants') and other attitudinal factors.<sup>51</sup> Notably,

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46 See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 71 (1997) (“Large numbers of blacks are convinced that, in general, law enforcement authorities value the safety and well-being of whites more than that of blacks.”); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 458–63, 482, 499 (2000); Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129, 151–52 (2000) (demonstrating that blacks in low-income, high-crime neighborhoods perceived themselves as receiving inferior treatment by police as compared to both blacks and whites in higher-income, lower-crime neighborhoods). The rise of the Black Lives Matter movement is the most recent manifestation of a longstanding, well-documented disaffection between the black community and the police.

47 See Farrell et al., *supra* note 13, at 789.

48 See *id.* The example the authors offer explains it best:

[W]hen white jurors have little trust and confidence in the police . . . , there is a 71 percent probability that they will favor the prosecution. For black jurors at the same low level of trust and confidence in the police . . . , there is only a 36 percent probability that they will favor the prosecution, a 35-point gap between white and black probabilities of favoring the prosecution. When white jurors have high trust and confidence in the police . . . , there is an 89 percent probability that they will favor the prosecution. At the same high level of trust for black jurors, there is a 70 percent probability that they will favor the prosecution. While black and white jurors do not have identical levels of favoring the prosecution even at high levels of police trust, the racial gap has narrowed from a 35-point to a 19-point difference.

*Id.*

49 *Id.*

50 See Garvey et al., *supra* note 42.

51 *Id.* at 381 tbl.4. Where race of jurors and defendants was factored into the models, the only statistically significant predictors of juror first votes in favor of the prosecution were: (i) race, but only for black jurors adjudicating minority defendants (beta  $-0.378$ ); (ii)

for victimless crimes (the large majority of which were narcotics offenses), jurors' assessments of police believability was the *only* statistically significant attitudinal factor once jurors' and defendants' race was taken into account.<sup>52</sup>

Finally, another study, though not of juries, offers important insights into the importance of law enforcement motives to citizens' willingness to acquit. In a series of experiments designed to test the strength of the exclusionary rule's twin rationales (judicial integrity and police deterrence), participants were given investigative scenarios and asked if they would exclude the seized evidence knowing exclusion would result in acquittal.<sup>53</sup> The scenarios were then manipulated to test the relationship between willingness to exclude and police officers' underlying motives in effectuating the seizure.<sup>54</sup> The study participants were statistically more willing to exclude—and thus, to acquit—when the officers' decisions to stop, search, or arrest were motivated by race or corruption.<sup>55</sup> Effectively, malevolent motives on the part of law enforcement increased willingness to acquit.

Though each of these studies is quite recent, the phenomenon is not. In fact, it was empirically documented as early as sixty years ago. *The American Jury* earned its fame, and lasting impact, for its study of the possible sources of juror-judge disagreement on verdicts.<sup>56</sup> Yet in the process, the authors made important—yet relatively unnoticed—observations about the ways in which jurors assessed law enforcement. Judges, the authors reported, observed that jurors' verdicts sometimes reflected dissatisfaction with even lawful police behavior. Thus, juries were reported to have hung or acquitted

legal fairness (beta .281); (iii) harshness of consequences to the defendant (beta  $-.404$ ); and (iv) believability of police testimony (beta .887).

52 *Id.* at 382–85, 384 tbl.5. For victimless crimes, among the statistically significant predictors of a first vote in favor of conviction were police believability (beta 1.358); race (black juror-minority defendant only, beta  $-.606$ ); and age of juror (beta .126). *Id.* at 384 tbl.5. Of victimless cases in the sample, 73% were narcotics offenses. *Id.* at 383. The study authors also assessed each jurisdiction separately. There, too, police believability remained a statistically significant predictor of first votes. *Id.* at 385–95.

53 See Kenworthy Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 155–65 (2012).

54 *Id.*

55 *Id.* In the first experiment, where desire to exclude was measured on a six-point Likert-type ascending scale (higher numbers reflect greater desire to exclude), the mean desire to exclude for a racially-motivated seizure was 4.8, the mean desire to exclude for corrupt seizure was 4.4, and the mean desire to exclude for a good-faith blunder was 4.0. *Id.* at 155–56. In the second experiment, measured on a ten-point Likert-type ascending scale, the mean desire to exclude for a racially-motivated seizure was 8.1, while the mean desire to exclude for a good-faith blunder was 7.0. *Id.* at 158.

56 HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 11 (1966). This was the study's aim, and it became known primarily for the authors' "liberation hypothesis," the theory that in close cases, jurors more often than judges are "liberated" to consider extra-evidentiary factors, such as sentiments about the law or the defendant. See, e.g., Amy Farrell & Daniel Givelber, *Liberation Reconsidered: Understanding Why Judges and Juries Disagree About Guilt*, 100 J. CRIM. L. & CRIMINOLOGY 1549 (2010) (discussing courts' and scholars' focus on the study's liberation hypothesis).



in instances where the police had engaged in overzealous targeting (notwithstanding that the conduct fell short of entrapment) or arrest (notwithstanding the existence of legal grounds for arrest).<sup>57</sup> And though the study was conducted in the decade before *Miranda*, juries sometimes imposed their own requirements on police interrogation.<sup>58</sup> The passage of time since Kalven and Zeisel's study has likely only exacerbated the phenomenon they observed.<sup>59</sup>

For a phenomenon so deeply rooted in the fabric of criminal litigation, the dearth of empirical work is unfortunate. The recent scholarly attention to this area is heartening, and much remains to be studied, including the interplay of trial events with jurors' pre-trial perceptions of legitimacy, the relationship between pre-trial perceptions of police and belief in police testimony, and the effect of jury evaluations on deliberation and verdicts.<sup>60</sup> And, as with all empirical work on juries, these recent studies must be approached with caution.<sup>61</sup>

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57 KALVEN & ZEISEL, *supra* note 56, at 321–22.

58 Kalven and Zeisel found one judge's comment illustrative of this observed dynamic:

Principal witnesses were [State] Bureau of Investigation men. They may not have been as careful as they should have been in advising defendant of his rights, and letting him see an attorney speedily. I admitted a statement obtained from him, over objection, but enough was presented to jury to give impression that there might have been an attempt to railroad him, so to speak. Attempt was not bad, but there was a little odor.

*Id.* at 320 (alteration in original) (citation omitted).

59 Police departments today are bigger, and the law enforcement role in investigations and case preparation greater, than was the case in the 1950s. Compare NICHOLAS DEB. KATZENBACH, THE PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 106 (1967), with FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2013, at tbl.70, [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-70/table\\_70\\_full\\_time\\_law\\_enforcement\\_employees\\_by\\_region\\_and\\_geographic\\_division\\_by\\_rate\\_2013.xls](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-70/table_70_full_time_law_enforcement_employees_by_region_and_geographic_division_by_rate_2013.xls) (showing national rate of law enforcement personnel, per 1000 citizens, as 1.7 in 1967 and 2.8 in 2013). And though the study antedated *Mapp v. Ohio*, 367 U.S. 643 (1961), which imposed the exclusionary rule on state courts, *Mapp* may not have had an appreciable effect on Kalven & Zeisel's observations, at least relative to today. First, a majority of sampled cases (59.2%) were in jurisdictions that had already adopted the exclusionary rule. See KALVEN & ZEISEL, *supra* note 56, at 37–38 (listing states in sample); E.H. Schopler, Annotation, *Modern Status of Rule Governing Admissibility of Evidence Obtained by Unlawful Search and Seizure*, 50 A.L.R.2d 531, § 2[a] (1956) (compiling listing of states that had adopted the exclusionary rule). Second, the exclusionary remedy today is infrequently imposed even in circumstances involving unconstitutional police conduct. See *infra* notes 137–38 and accompanying text.

60 The dataset from the National Center for State Courts does not allow for those analyses; more data collection is required. For information on the datasets, see Paula L. Hannaford-Agor et al., Nat'l Archive of Criminal Justice Data, *Evaluation of Hung Juries in Bronx County, New York, Los Angeles County, California, Maricopa County, Arizona, and Washington, DC, 2000–2001* (ICPSR Study No. 3689, 2003), <http://doi.org/10.3886/ICPSR03689.v1>.

61 Post-trial investigations of jurors' pre-trial attitudes cannot control for the effects of the trial. See Farrell et al., *supra* note 13, at 794 (noting that in studies of real juries,

At least for now, though, this much we know: enforcement-finding is real, influential, and complex. Courts' and litigants' attention to it, then, is neither surprising nor overblown. The question is whether we are attending to enforcement-finding appropriately in light of how it operates, why it exists, and the functions it serves.

### B. *The Conceptual Gap*

The answer, in short, is no. Though enforcement-finding permeates criminal adjudication, we lack a coherent and appropriate approach to it. As the foregoing discussion and case examples illustrate, courts—both state and federal—are all over the map. Some encourage juror skepticism of law enforcement, liberally admitting evidence and argument to that end.<sup>62</sup> Others consider juror evaluation of law enforcement an unfortunate reality, permitting evidence and argument that bears on it with resignation.<sup>63</sup> Still others resist it, imploring the parties and the jury to keep their focus on the acts of the defendant rather than those of police and prosecutors.<sup>64</sup> Even within the same jurisdiction, approaches to enforcement-finding vary.<sup>65</sup> And these are just the rulings we know about. The “dataset” of evidentiary rulings in criminal cases is necessarily limited by a combination of appellate asymmetry (defendants regularly appeal convictions while the prosecution may not appeal acquittals) and a dearth of published evidentiary rulings by trial courts.<sup>66</sup>

The rulings we can see, though, reveal a framing problem at the heart of these inconsistencies. Courts approach admissibility as a question of law ver-

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defendants' rights prevent researchers from posing pre-trial questions to jurors, thus obscuring the extent to which jurors' post-trial responses were influenced by the trial itself). For that matter, it is impossible even to identify, let alone control for, every variable potentially influencing juror decisionmaking. *See, e.g.*, John R. Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 LAW & HUM. BEHAV. 89, 90 (1980) (discussing the difficulties of accounting for and isolating variables in jury research). Indeed, jurors themselves may be unaware of the factors influencing their reasoning and the extent of that influence. *See* Hannaford-Agor & Hans, *supra* note 7, at 1264 (“Indeed, some psychologists would argue that it is unlikely that the majority of jurors would be able to say with any certainty which specific factors led them to their decision.” (citing RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF HUMAN JUDGMENT (1980))).

62 *See, e.g., supra* note 34 (discussing cases).

63 *See, e.g., supra* notes 19–20 (discussing *Durham v. United States*).

64 *See, e.g., supra* note 31 (discussing *United States v. Barcelo*).

65 *See, e.g., supra* note 32 (noting the needle-threading among Maryland's courts on the “specific investigative techniques” instruction). *Compare* *People v. Hernandez*, 527 N.Y.S.2d 404 (N.Y. App. Div. 1988), discussed *supra* note 18, *with* *People v. Wright*, 645 N.Y.S.2d 275 (N.Y. Sup. Ct. 1996), discussed *supra* note 24 (two New York cases reaching different conclusions on the permissible purpose of evidence as to police motivation for stopping a defendant).

66 As a result, the “dataset” skews heavily towards rulings that benefit the prosecution and curtail the defense. This is particularly the case in state courts, where published trial court opinions are exceedingly rare.

sus fact. Thus, evaluations of law enforcement categorized as within the jury's fact-finding role—that is, evaluations that bear on guilt, such as a testifying officer's credibility, or law enforcement conduct that impacts the reliability of evidence—are generally permissible; while evaluations categorized as within the jury's (now prohibited) law-finding role—that is, evaluations that bear on the lawfulness or desirability of law enforcers' conduct—are not.<sup>67</sup> Scholars subscribe to the framework, too. While many diverge from courts on the question of law-finding's *permissibility* in the context of undesirable law enforcement conduct, none challenge the framework itself.<sup>68</sup>

This acquiescence to the law/fact framework is understandable; as frameworks go, it is intuitively appealing. But it is also surprisingly unhelpful, because when it comes to evaluating law enforcement, the distinction between “law” and “fact” is never so neat. This is not merely because juries both find facts and apply them to law. To the contrary, when it comes to evaluating law enforcement, facts typically aren't applied to law—at least, not in the traditional sense of “law” as instructed by the trial court.<sup>69</sup> Instead, the inutility of the fact/law distinction arises for three reasons unique to the enforcement-finding task.

*First*, a law enforcement officer's credibility is, in practice, often linked with jurors' normative assessments of the officer's conduct. Take, for example, a police officer's decision to approach or stop a defendant. While the basis for that decision is not generally an issue the jury need decide, neither can credibility be determined in a vacuum. If the defendant was stopped nominally because he failed to signal upon making a turn, but primarily because, as a black motorist in an expensive car he seemed “suspicious,” one would be hard-pressed to find a police officer who would admit as much on the witness stand (or even privately to the prosecutor in the first instance). If he did, the officer's testimony would be *credible* in the sense of not appearing fabricated; yet his motivations would render him untrustworthy.<sup>70</sup>

This is why it is often difficult to separate (though courts sometimes try) questions of conduct from credibility.<sup>71</sup> The normative desirability of the

67 See, e.g., *United States v. Sanders*, 196 F.3d 910, 914 (8th Cir. 1999). The court upheld the district court's instruction to jury—in police stop of a car based ostensibly on a broken tail light where evidence of the broken tail light was questionable—that “as a matter of law . . . the stop of the defendant's vehicle, the subsequent search of the container in which the gun was found, and the seizure of the gun and items found in the cab were all lawful acts of the law enforcement officer performing law enforcement duties.” *Id.* (internal quotation marks omitted) (citation omitted); see also *Wright*, 645 N.Y.S.2d at 276 (permitting defense questioning of officers as to basis for their approaching defendant on theory that such inquiry goes to credibility of officers, while instructing the jury that lawfulness of the stop was not a matter for the jury to decide).

68 See *supra* note 7.

69 See *infra* notes 74–76 and accompanying text.

70 See *supra* notes 16–20 and accompanying text. Indeed, this reality explains Broward County prosecutors' decision to dismiss cases in which lawful stops were nevertheless the product of potentially suspect motivations. See *supra* note 40.

71 See, e.g., *Wright*, 645 N.Y.S.2d at 276.

underlying conduct influences the likelihood of the officer's truthful recounting of it. Why lie, after all, if there is nothing to hide? By the same token, why hide facts unless they are unfavorable? The political economy of the criminal jury trial—and the role enforcement-finding plays in it—imposes pressures on prosecutors to validate police action, even when judges might otherwise limit defense attacks on it. And when police action falls short of a jury's perceived expectations, it gives rise to a temptation to lie.<sup>72</sup>

*Second*, the “law” governing law enforcement conduct occupies a fundamentally different position, with respect to the jury's role, from the “law” governing the defendant's conduct. In acquitting (or partially acquitting) a defendant whose proven conduct a legislature has defined as criminal, a jury necessarily rejects or refines that legislation, at least as applied in the circumstances at hand. By contrast, in evaluating the actions of those who have investigated and charged the defendant, and in acquitting (or partially acquitting) a defendant based, in part, on those law enforcement actions, a jury does not necessarily reject or refine the *law* governing the defendant's actions. Rather, it rejects the means by which the law was enforced.<sup>73</sup> Nor does the jury reject or refine the law governing police behavior. That law—almost entirely judge-made<sup>74</sup>—merely sets the floor of permissible law enforcement conduct, and imposes remedies for transgression.<sup>75</sup> It imposes no rules as to the weight a jury should accord admitted evidence, nor does it obligate the jury to accept the methods or processes by which the evidence was obtained.

Research indicates that citizens evaluate police based on metrics outside the rubric of constitutional rights—for instance, perceptions of fairness (whether the police have acted neutrally, consistently, and transparently), treatment (whether the police have treated citizens with dignity, respect, and politeness), and benevolence (whether the officers' motivations are sincere, benevolent, and well-intentioned).<sup>76</sup> Put differently, what police and prose-

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72 See Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1045–48 (1996) (recounting empirical data on police perjury in suppression hearings and postulating its causes). While the “testilying” dynamic has been explored principally with respect to suppression hearings, the same precipitating dynamic exists at trial. The pre-trial pressures on police and prosecutors to guard against the exclusion of evidence become, at the trial stage, a related (but distinct) pressure to present the jury with a picture of admirable police work.

73 For a more detailed discussion of how enforcement-finding differs from nullification, see *infra* subsection III.A.4.

74 See generally Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

75 See Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865, 1867 (2013) (“Much of [constitutional criminal procedure] specifies remedies for rule transgression. It is, in other words, primarily about redressing the illegitimate exercise of power.”); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

76 See Meares, *supra* note 75, at 1875–76. The social science evidence Meares discusses pertains primarily to citizens' evaluations of their own interactions with law enforcement.

cutors *may* do is a separate inquiry from what they *should* do. A jury may assess the latter without rejecting or refining a court's assessment of the former.<sup>77</sup>

*Third*, any fact-finding about law enforcement—whether it bears primarily on guilt or on the propriety of law enforcement's conduct—entails more than simply a determination of what happened. It implicates a normative judgment. If the police did (or did not do) *x*, *should* they have done (or not done) *x*?<sup>78</sup> What are the implications of police action (or inaction) for the other evidence in the case? What are the implications for the jury's trust and confidence in the prosecution's case, and for reasonable doubt? These sorts of questions do not implicate the validity or desirability of laws, but nor are they limited to ascertaining historical fact.

If we were to visualize the fact/law continuum as a paved path, enforcement-finding is its unmarked companion trail; it weaves in and out of the paved path, and beyond it. It is little wonder that, in practice, the law/fact framework can operate as a judicial straightjacket rather than an aid: courts categorize (or miscategorize) evidence or argument as needed to support their rulings on admissibility, rather than the other way around.<sup>79</sup> Distinguishing evidence pertinent to guilt from that pertinent to law enforcement conduct, categorizing the focus on law enforcement motivations as alternatively "completing" the factual story (if courts wish to allow it) or appealing to "nullification" (if they don't), are analyses that all traffic in a false dichotomy. In practice, enforcement-finding is intrinsic to reasonable doubt even while it asks jurors to think beyond it.

In short, the framework used to set enforcement-finding's proper scope is not equipped for the task. Rather than trying to distinguish between "fact" and "law," we should ask a more foundational question: What is the jury's institutional function, and does enforcement-finding serve it? Such an inquiry requires placing the jury's role, and enforcement-finding, in histori-

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We might suppose, though it has yet to be proven, that jurors use similar metrics to assess law enforcement treatment of suspects and defendants.

77 For a discussion of how enforcement-finding by juries compliments rather than undermines the judicial function in constitutional criminal procedure, see *infra* subsection III.A.4.

78 Note this is different from the normative inquiry of law-finding, in which the jury asks whether the defendant's conduct, though clearly undesirable, merits legal sanction. When evaluating law enforcement conduct, the jury focuses on whether the conduct is desirable notwithstanding its legality.

79 See, e.g., *Durham v. United States*, 743 A.2d 196, 207 (D.C. 1999), discussed *supra* note 19 and accompanying text (describing motivations behind officer's decision to stop defendant as admissible "to present a thorough set of facts, to refine [the prosecution's] case-in-chief to rationally anticipate a factual issue that may create a reasonable doubt in the minds of jurors," while acknowledging several sentences later that the purpose of *Toliver* evidence is to "ward off the image of police officers stopping a citizen for no reason"); *People v. Wright*, 645 N.Y.S.2d 275 (N.Y. Sup. Ct. 1996), discussed *supra* note 24 (admitting evidence of officer's motivations in stopping defendant as relevant to "credibility," while curtailing defense efforts to question those motivations as entreaties to "nullification").

cal context. It wasn't, after all, always the case that juries decided facts while judges decided law.<sup>80</sup> It wasn't even always the case that juries actually decided facts.<sup>81</sup> And it wasn't always the case that juries evaluated law enforcement.<sup>82</sup> To the contrary, "law enforcement," as we know it, is a fairly recent phenomenon. To set enforcement-finding's boundaries, we must first understand why and how it grew so sizably in the first place. The next Part undertakes that task.

## II. ENFORCEMENT-FINDING'S RISE

From the Founding to the present day, criminal law and its enforcement underwent radical transformation. So did juries. This Part charts these transformations and their interrelationship, revealing two key insights. First, the jury's role is dynamic. It evolves in relation to the criminal enforcement environment in which it functions. Second, enforcement-finding is an adaptation in that evolutionary process. In these respects, enforcement-finding is both inevitable and necessary.

Two caveats are in order. First, the history offered here is neither detailed nor new. My contribution is context. By examining the jury's role in relation to changes in criminal law and enforcement, I expose enforcement-finding as an ingrained and even desirable feature, rather than a flaw, of contemporary criminal adjudication.

Second, broad themes in criminal justice are inherently problematic, because American criminal justice is, and has always been, distinctly local. For every trend here described there are jurisdictions that bucked it; for every broad categorization there will be cases that do not fit. Those seeking more fine-grained analyses will find them in the many sources cited in this Part. The aim here is to digest and extract from these richly detailed sources insights into the criminal jury's enforcement-finding role.

The Part proceeds as follows. Section A focuses on four principal changes in criminal law and enforcement: the mitigation of punishment; codification and the growth of criminal statutes; the rise of professionalized criminal enforcement; and the adoption and subsequent contraction of the exclusionary rule. Section B considers three major transformations within criminal adjudication: the allocation of law-finding and fact-finding authority; the duration and frequency of trials; and the jury's composition and vicinage. Together, these Sections demonstrate that shifts in criminal law and enforcement, along with (in some respects subsequent) adjudicative changes, created the space in which enforcement-finding organically took root.

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80 See *infra* subsection II.B.1.

81 See *infra* notes 146–85 and accompanying text.

82 See *generally infra* Section II.A.

### A. *Transformations in Criminal Law and Enforcement*

#### 1. Mitigation of Punishment and the Growth of Statutes

Scholars lament the decline of the law-finding jury in America.<sup>83</sup> But that jury was a product of its time: an era in which criminal law was largely judge-made and exceedingly punitive in relation to prevailing norms.<sup>84</sup> Early American juries' focus on punishment was natural under the circumstances.<sup>85</sup> Over the course of America's first century, those circumstances would change—and with them, the jury's role.

Beginning with the abolition movement's epicenter, Quaker Pennsylvania, in 1786 and soon extending to Virginia, New York, and beyond, the new states began to reduce the number and scope of capital crimes, and to enact criminal laws that offered more nuanced degrees of guilt and punish-

83 See, e.g., JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (1994); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1190 (1991) (describing today's jury as "a shadow of its former self"); Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 *IND. L.J.* 397 (2009).

84 Death was the sentence for many felonies, including murder, robbery, rape, burglary, even counterfeiting and horse-thievery. LOUIS P. MASUR, *RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865*, at 71 (1989); *THE DEATH PENALTY IN AMERICA* 6 (Hugo Adam Bedau ed., 2d. ed. 1968). On the prevalence of corporal punishment, see William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42 *N.Y.U. L. REV.* 450, 461 (1967) (describing a 1793 address by Massachusetts Governor John Hancock on the need to reform "the infamous punishments of cropping [ears] and branding, as well as that of the public whipping post, so frequently administered in this Government . . . . It is an indignity to human nature, and can have but little tendency to reclaim the sufferer" (alteration in original) (quoting Governor John Hancock, Address to a Joint Session of the Massachusetts Legislature (Jan. 31, 1793), reprinted in EDWIN POWERS, *CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 1620–1692*, at 192–93 (1966))). As the quotation illustrates, these penalties had become increasingly out of step with prevailing norms in America around the time of the Revolution. See MASUR, *supra*, at 4; David Brion Davis, *The Movement to Abolish Capital Punishment in America, 1787–1861*, 63 *AM. HIST. REV.* 23, 26 (1957) (noting early Americans' "considerable interest in constructing a rational and humane system of penal law"); Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 *U. PA. L. REV.* 1099, 1099 (1953) (describing a post-Revolutionary momentum in favor of limiting capital punishment).

85 Michael Jonathan Millender, *The Transformation of the American Criminal Trial, 1790–1875*, at 30–32, 72 (Nov. 1996) (unpublished Ph.D. dissertation, Princeton University) (concluding, in painstaking study of early American trial transcripts, that the parties' arguments were primarily addressed not to credibility determinations and truth-seeking but rather punishment, with defense counsel "pos[ing] the judicious application of punishment as the problem at the heart of the trial"). Early American juries were widely known to return verdicts of manslaughter even in the face of overwhelming evidence that the defendant intended to kill, solely as a means of averting a sentence of death. See Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 *B.U. L. REV.* 32, 32–35 (1974) (offering rich historical evidence of widespread juror reluctance to convict in capital cases); see also Knowlton, *supra* note 84, at 1102.

ment.<sup>86</sup> Second-degree murder was developed around this time, largely as a concession to capital-averse juries.<sup>87</sup> The use of more graduated crime and punishment soon extended beyond homicide, to crimes such as robbery, rape, theft, and burglary.<sup>88</sup>

This capital reform movement, which had been achieved mostly by way of statutory enactment and revision, portended a much larger shift in penal law over the middle decades of the nineteenth century: from pre-existing, natural law to be “found” by courts, to positive, legislatively-defined law.<sup>89</sup> New York led the way with its draft Penal Code, and other states soon followed.<sup>90</sup> As in other legal fields, the move towards statutory law would be neither swift nor tidy; but by century’s end, it had wrought pervasive and lasting changes on the jurisdictions it visited.<sup>91</sup>

In the hands of legislators, criminal law became a tool of policy. The Industrial Revolution, European immigration, and the rise of urban populations fueled a need (both real and perceived) for greater social and eco-

86 DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 57 (1992); RAYMOND T. BYE, *CAPITAL PUNISHMENT IN THE UNITED STATES* 5–6 (1919).

87 See *THE DEATH PENALTY IN AMERICA*, *supra* note 84, at 24–25; Davis, *supra* note 84, at 26–27.

88 See Michael H. Hoffheimer, *The Rise and Fall of Lesser Included Offenses*, 36 *RUTGERS L.J.* 351, 381–83 (2005) (noting that lesser included offenses under the common law, and later by statute in the form of offense degrees, proliferated beginning in the 1800s, and illustrating the trend by way of New York’s 1829 criminal code, which provided for four degrees of manslaughter, four degrees of arson, three degrees of burglary, four degrees of forgery, and two degrees of robbery).

89 MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 15–16 (1977) (observing the shift in views of the criminal law from natural to positive law, and the corresponding demand that positive law be enacted by the people, through their elected representatives, rather than the courts); see also Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler’s Predecessors*, 78 *COLUM. L. REV.* 1098, 1131–32 (1978).

90 See CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTE-BELLUM LEGAL REFORM* (1981); Kadish, *supra* note 89, at 1137. New York’s code was enacted in 1881, sixteen years after it had first been submitted to the legislature. In that period, other states enacted codes that drew upon New York’s draft. *Id.*

91 The nineteenth-century movement to codify criminal law did not yield criminal codes in every (or even most) states. See generally COOK, *supra* note 90, at 209 (noting that while the mid-nineteenth century movement for complete codification failed to take root, partial codification was “epidemic” by the early twentieth century (quoting Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 *ST. LOUIS U. L.J.* 351, 351 (1969))). Thus, even apart from wholesale statutory revisions of the criminal common law, the nineteenth century saw an increasingly widespread use of statutes to define criminal conduct, particularly in the spheres of economic and social welfare. See *Morissette v. United States*, 342 U.S. 246, 253–54 (1952) (noting a “century-old but accelerating tendency” of legislatures to criminalize public welfare offenses under a strict-liability regime); Darryl K. Brown, *Criminal Law’s Unfortunate Triumph over Administrative Law*, 7 *J.L. ECON. & POL’Y* 657, 661–62 (2011) (noting widespread practice among nineteenth-century state and local governments to criminalize public order, economic, and social welfare offenses).



conomic control,<sup>92</sup> and legislatures increasingly turned to criminal law as a means of achieving it. A glimpse at New York's Penal Code, enacted in 1881 and replicated by a number of states, gives a sense of the breadth and scope of the criminal sanction, which extended to, among other things, overloading passenger vessels, mismanagement of steamboats, trade mark infringements, public intoxication, keeping of disorderly or bawdy houses, and running gambling establishments.<sup>93</sup> By the early twentieth century, the criminal law had expanded its function beyond societal condemnation, to the regulation of economic and social activity.<sup>94</sup>

These transformations served naturally to minimize the jury's law-finding role.<sup>95</sup> First, the advent of a more graduated and humane criminal law gave juries more verdict options, allowing them to render a verdict according to conscience within the dictates of law. Second, codification (or "statutorization") filled criminal law's interstices. Statutes defined crimes by specific elements, and further elucidated the meaning of terms encompassed in those elements: "willfully," "knowingly," and "maliciously" were not left to jurors' own devising, but were defined for them.<sup>96</sup>

But where one jury role ebbed, another ascended. The growth of criminal statutes in part precipitated the rise of professionalized criminal enforcement. It also rendered enforcement discretionary. Criminal law had become a wide-ranging, pervasive regulatory tool that could, practically speaking, be enforced only sporadically. As will be shown, these two developments set the stage for enforcement-finding's rise.

92 See ERIC H. MONKKONEN, *POLICE IN URBAN AMERICA, 1860–1920*, at 1 (1981) ("As the United States industrialized in the nineteenth century, Americans experienced physical uncertainty and insecurity we would find intolerable today. Steamboats blew up. People drowned in shallow water, unable to swim. Trains regularly mutilated and killed pedestrians. Children got run over by wagons." (footnote omitted)).

93 See COMMISSIONERS OF THE CODE, *DRAFT OF A PENAL CODE FOR NEW YORK* §§ 406, 408, 410, 414, 725, 367, 368, 392 (1864) (codified as Act of July 26, 1881, ch. 676, 1881 N.Y. Laws vol. 3, at 1).

94 Vice had long been a target of criminal law in America, particularly in Puritan New England. See Nelson, *supra* note 84, at 452–53 (discussing colonial prosecutions of fornication and Sabbath-breaking). But after ebbing somewhat in the post-Revolutionary years, see *id.* at 455–58, the breadth and scope of vice criminalization and prosecution increased in the nineteenth century, a reflection of the rising temperance movement and fear—in the North, of the rising population of European immigrants, and in the antebellum South, of the large population of newly-freed blacks. The temperance movement was, in fact, in large part a manifestation of those fears. See generally DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010) (charting Prohibition's origins in racism, classism, and anti-immigrant bias).

95 For a more detailed discussion of the shift away from jury law-finding, and the attendant rise of jury fact-finding, see *infra* subsection II.B.1.

96 See, e.g., COMMISSIONERS OF THE CODE, *DRAFT OF A PENAL CODE FOR NEW YORK* §§ 763, 766, 767 (1864) (codified as Act of July 26, 1881, ch. 676, 1881 N.Y. Laws vol. 3, at 1).

## 2. The Expansion of Professionalized Criminal Enforcement

In the late eighteenth and early nineteenth centuries, when criminal law was still primarily a means of sanctioning wrongs to specific victims, it was primarily those victims (and sometimes community members) that enforced it.<sup>97</sup> As the criminal law extended to include more victimless conduct, private and communal enforcement no longer sufficed. At the same time, rapid urbanization and industrialization fueled public perceptions of a need for greater social and crime control. These developments, among others, fueled the rise of professionalized criminal enforcement.<sup>98</sup>

With respect to policing, the transformation was sweeping. In a span of just fifty years, most cities in America had moved from a tiny, constable-watch system comprised of part-time volunteers to a larger, uniformed and salaried, military-style police department, firmly under the auspices of city government.<sup>99</sup> The experience in New York provides a useful illustration. As the nineteenth century began, New York's organized security force comprised a sum total of sixteen constables, approximately forty marshals, and seventy-two night watchmen who worked on a volunteer or fee basis.<sup>100</sup> In 1845, the New York City Council enacted a bill providing for the creation of a professional police force modeled largely after Robert Peel's recently formed Metropolitan Police Force in London.<sup>101</sup> By 1869, New York's Metropolitan

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97 See Nelson, *supra* note 84, at 468 (explaining that offenses against property and against morals accounted for nearly 80% of all criminal prosecutions in pre-Revolutionary Middlesex, Massachusetts, the former of which were prosecuted by victims and the latter by community members); Sam Bass Warner, *Investigating the Law of Arrest*, 31 J. CRIM. L. & CRIMINOLOGY 111, 112 (1940) (describing use of the "hue and cry" in eighteenth- and early nineteenth-century Britain and America, in which crime victims and their neighbors were responsible for investigating crime and locating and arresting suspects).

98 Historians disagree about the precipitants of professionalized policing. Various theories have been offered, including rising urban crime, the increase and severity of urban riots, a perceived breakdown in social order wrought by rising European immigration, and structural changes that bureaucratized and "rationalized" urban governance. See generally MONKKONEN, *supra* note 92, at 49–64 (reviewing historical literature and positing a bureaucratization/rationalization theory). Professionalized policing was likely a product of some or all of these precipitants, as well as of the transformation of the criminal law, which was, as noted, itself partly a reaction to the perceived breakdown in social order. The mid- to late nineteenth-century displacement of private prosecutors by a system of nearly exclusive public prosecution was likewise precipitated by a number of factors. See *infra* notes 114–20 and accompanying text.

99 MONKKONEN, *supra* note 92, at 40, 42 (describing the varying pace of American cities' transition from constable-watched to professionalized, uniformed police departments); *id.* at 164–68 (charting the dates of American cities' adoption of uniformed police forces).

100 JAMES F. RICHARDSON, *THE NEW YORK POLICE: COLONIAL TIMES TO 1901*, at 17, 19 (1970).

101 *Id.* at 49. Peel, the British Home Secretary, created a police force linked to the national government. American cities adopted a far more decentralized version, in which police departments were linked to their municipal government. This served to localize and politicize American policing and, in the era of urban political machines, to corrupt it.

Police Department employed 2000 uniformed, salaried patrolmen at a total cost of \$2.8 million.<sup>102</sup>

What did these early police forces do? They patrolled.<sup>103</sup> They made arrests, mostly for the low-level regulatory and vice offenses for which victims and other members of the community would not patrol.<sup>104</sup> They functioned in part to control the “dangerous classes”—not only criminals, but immigrants, vagrants, drunks, and the destitute.<sup>105</sup> This control was exerted not primarily through arrests, but more often as a form of social welfare, by offering lodging and sometimes food to the homeless.<sup>106</sup> And most notably, they abused power: the first professionalized police forces in America were notoriously corrupt, inept, and brutal.<sup>107</sup>

What early police forces did not much do was build prosecutable felony cases.<sup>108</sup> This was so for a number of reasons. First, early police departments lacked the necessary manpower to investigate and prosecute crimes. American cities’ first modern police forces, while greater in numbers and organizational strength relative to the systems that preceded them, were still quite small relative to the cities they policed and the crime in those cities.<sup>109</sup> Second, they lacked the will. The mandate of early police forces was to prevent crime (or at least regulate it) through patrol, not to investigate and prosecute

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SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM* 7–8 (1977).

102 RICHARDSON, *supra* note 100, at 152–53.

103 WALKER, *supra* note 101, at 13. Or, as Walker notes, they shirked patrol duties, preferring the barbershop or saloon over walking the beat. *Id.*

104 *Id.* at 15 (estimating that roughly 60 to 80% of arrests by police officers in the later nineteenth century “were for drunkenness and disorderly conduct”); *see also* LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910*, at 75 (1981).

105 MONKKONEN, *supra* note 92, at 86–87.

106 *Id.*

107 SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 53–64 (2d ed. 1998) (describing the nineteenth century as an “era of incivility, ignorance, brutality and graft” (quoting August Vollmer & Albert Schneider, *The School for Police as Planned at Berkeley*, 7 J. AM. INST. CRIM. L. & CRIMINOLOGY 877 (1917))).

108 A similar claim could be made of today’s “broken windows” policing, which focuses mostly on the prevention of crime through arrests for low-level offenses. *See generally* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>. But even in police departments heavily invested in broken windows policing (New York, for instance), police still engage expansively in the investigation, arrest, and prosecution of felony offenders. This was not the case a century ago. Anthony A. Braga et al., Harvard Kennedy Sch. & Nat’l Inst. of Justice Exec. Session on Policing & Pub. Safety, *New Perspectives in Policing: Moving the Work of Criminal Investigators Towards Crime Control 2* (Mar. 2011).

109 *See* FRIEDMAN & PERCIVAL, *supra* note 104, at 76–77; WALKER, *supra* note 101, at 20–21.

past crimes.<sup>110</sup> Third, they often lacked the impetus. The advent of modernized policing did not immediately obviate citizen arrest; to the contrary, police arrests were mostly in the arenas not already enforced by citizens: vice and public disorder.<sup>111</sup> Even in those arenas, police frequently looked the other way, a reflection of community disaffection with the laws, ward leaders' payments, or both.<sup>112</sup> In fact, as Eric Monkkonen has shown, the advent of professionalized policing actually served to *lower* overall arrest rates, which would not begin to climb again until the 1920s.<sup>113</sup>

The establishment of professionalized police forces did not immediately transform criminal adjudication; that would occur later, when police forces took on a greater investigatory and prosecutorial role. But as professionalized policing took hold, so, too, did public perceptions of it. By the nineteenth century's close, the seeds of citizen distrust in police had been firmly planted.

The face of prosecution likewise changed over the same time period. Public prosecutors had existed in America since its earliest days,<sup>114</sup> but at the outset of the nineteenth century, they continued, in many jurisdictions, to play largely supporting roles. It was victims or their kin that primarily enforced the law, either through the aid of private counsel or on their own.<sup>115</sup> The rise of public prosecutors and displacement of private prosecutors was in many ways a function of the same forces behind codification and professionalized policing: the remaking of criminal law as a tool of regulation

110 FRIEDMAN & PERCIVAL, *supra* note 104, at 80; MONKKONEN, *supra* note 92, at 31 (describing the focus of early police departments as "the orderly functioning of cities, a small part of which was catching criminals"); WALKER, *supra* note 101, at 19.

111 See *supra* note 104 and accompanying text; see also ROGER LANE, *POLICING THE CITY: BOSTON 1822-1885*, at 129-30 (1967) ("Responsibility for enforcement in any case belonged with the courts and individual complainants."). Alderman Thomas Amory quipped in 1863 that "[i]t is the duty of the police officer to serve . . . warrants, when directed to him. It is nowhere made his duty to initiate prosecutions." *Id.*; see also FRIEDMAN & PERCIVAL, *supra* note 104, at 81, 86 (calculating that only 6% of police arrests in Oakland, California, between 1872 and 1910 were for felony crimes, and noting that crimes involving victims were only handled by police if a victim complained).

112 FRIEDMAN & PERCIVAL, *supra* note 104, at 94. In Massachusetts, whose puritanical roots inspired a far more robust temperance movement than elsewhere, the problems of non-enforcement of liquor laws in Boston led the governor to create a state constabulary—effectively, the nation's first state police force—to enforce the state's prohibition law. LANE, *supra* note 111, at 136-37. Some of the state constable's cases were brought before juries, who were notoriously unreceptive to prohibition. *Id.* at 138.

113 MONKKONEN, *supra* note 92, at 65-85.

114 Abraham S. Goldstein, *History of the Public Prosecutor*, in 3 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1286, 1286-88 (Sanford H. Kadish ed., 1983).

115 See BODENHAMER, *supra* note 86, at 63; MIKE McCONVILLE & CHESTER L. MIRSKY, *JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY* 28 (2005) ("[T]he mainspring of the criminal justice system in the first half of nineteenth century New York was the private prosecutor. It was the private prosecutor—the victim or someone acting on his or her behalf—who initiated the overwhelming majority of complaints and in whose name complaints were launched."); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800-1880*, at 114 (1989).

and social control, and public dissatisfaction with existing mechanisms of criminal enforcement.<sup>116</sup> As Allen Steinberg has richly documented, the movement from private to public prosecution that swept Philadelphia in the middle decades of the nineteenth century was one aspect of a larger transformation that moved criminal enforcement out of the hands of “ordinary citizens and neighborhood politicians” and under the control of salaried municipal officials.<sup>117</sup>

By the latter half of the nineteenth century, prosecution had moved to a mostly (and in a number of places, entirely) public model.<sup>118</sup> No longer was prosecution the prerogative of complainants; it was now firmly in the hands of less partial state actors tasked with administering “justice.” The shift portended a larger transformation in criminal adjudication: from an adversarial contest between interested parties to a quasi-administrative inquest. Power and discretion were reallocated. Public prosecutors displaced magistrates and grand juries as the system’s gatekeepers. Soon, through the rise of plea bargaining, they also displaced petit juries as the system’s primary adjudicators.<sup>119</sup> By the nineteenth century’s close, public prosecutors decided who would be charged; the crimes with which they would be charged; and, in all but a small number of those cases, the negotiated outcome.

The rise of public prosecution (and the attendant rise of plea bargaining<sup>120</sup>) had lasting and significant effects on the criminal jury’s role. First, it shifted the focus of the jury’s discretionary authority. In hearing every case for which a grand jury or magistrate had found probable cause (a rather low standard), criminal juries had to evaluate both reasonable doubt and the appropriateness of the criminal sanction. Now, criminal juries heard only cases the prosecutor saw fit to bring—effectively putting at issue *the prosecutor’s determination* of those factors. Second, it changed the jury’s core function. Where once juries decided the outcome of most criminal disputes, now they served primarily as outside checks—auditors, effectively—in an administrative scheme.<sup>121</sup> Most importantly, public prosecution enlarged the parameters of that audit. More and more, juries assessed not only the actions of the accused, but also those of the accusers.

116 Goldstein, *supra* note 114, at 1287–88.

117 STEINBERG, *supra* note 115, at 224.

118 BODENHAMER, *supra* note 86, at 68; *see also* Goldstein, *supra* note 114, at 1288.

119 *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 13 *LAW & SOC’Y REV.* 211, 223 (1979).

120 The cause of plea bargaining’s rise is the subject of a rich and ongoing debate. *See* McCONVILLE & MIRSKY, *supra* note 115, at 1–9 (summarizing the literature). In tying plea bargaining to the rise of public prosecutors, I do not advance so simplistic a claim as that the latter caused the former. Rather, my point is that each of these moves—from private to public prosecution, trials to plea bargaining, adjudication to administration—were interrelated, as well as related to the social, economic, and political shifts then underway. For a wonderfully complex synthesis of these varying causes and their interrelationships, *see generally id.*

121 *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2149 (1998).

### 3. Police Investigation and the Adoption and Contraction of the Exclusionary Rule

By the early twentieth century, the police had become central to the prosecution of felony crimes. Municipal police forces expanded, both in size and scope, and new law enforcement agencies (federal and state) were born.<sup>122</sup> As police forces grew, so did citizens' expectations of them. Technology contributed heavily to this shift: the two-way radio and, later, telephone allowed immediate reporting of crime, and the automobile enabled timely response to it.<sup>123</sup> Reliance on foot patrol receded, and, with it, the focus on public order.<sup>124</sup> Attention turned to detecting crime and apprehending suspects.<sup>125</sup>

The shift redefined the relationship between citizens and police. Police now functioned as interrogators, searchers, invaders of homes and persons. In a system devoid of regulation, abuses were common; this was the era of the "third degree."<sup>126</sup> Police forces also increasingly bore arms, a development that further aggrandized police power relative to citizens.<sup>127</sup>

By the second and third decades of the twentieth century, public attention fixated on the problems of policing. Police commissions sprung up across the nation, each varying in approach and format but all directed to a singular end: systemic police reform.<sup>128</sup> The potential effect of police misconduct on criminal juries began to be noticed, as an article in the 1937 volume of the *Harvard Law Review* illustrates:

[Anyone] who wishes to know why we have no better success with the prevention of crime in the United States may stop with these two facts.

On the one side he will see the stupid habit of police terrorism, which, failing utterly to dissuade the criminal[s], simply tends to discredit really good detective work whenever it is performed. On the other side he will see police officers apparently perjuring themselves in one another's support and thus destroying the confidence of the public and of juries in police testimony everywhere else. Behind the stenographic record of that evidence every intelligent man can read a long tale of acquittals, hung juries, cases nolle prossed because of the impossibility of conviction; and behind that tale again he can read a longer list of criminals left to roam and to multiply their kind because the good work that American police are capable of is so often

122 See MONKKONEN, *supra* note 92, at 144; WALKER, *supra* note 101, at 144–45.

123 See WALKER, *supra* note 101, at 137.

124 See MONKKONEN, *supra* note 92, at 145, 147; WALKER, *supra* note 101, at 136.

125 See MONKKONEN, *supra* note 92, at 147; WALKER, *supra* note 101, at 135.

126 See Zechariah Chafee, Jr. et al., *The Third Degree: Report to the National Commission on Law Observance and Enforcement*, in NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 13, 13–261 (1931).

127 See WALKER, *supra* note 107, at 63.

128 See Walker, *supra* note 101, at 130–31. The most famous of these was the Wickersham Commission, created by President Hoover in 1929 to review the entire criminal justice system. Of the fourteen reports it produced, it was the Commission's indictment of police forces that drew the most attention. *Id.* at 132.

hindered or destroyed by the suspicions that flow from police stupidity and brutality.<sup>129</sup>

When commission-led reform efforts failed to bear fruit, lawmakers and courts soon got into the mix. In 1914 the Supreme Court adopted the federal exclusionary rule.<sup>130</sup> By mid-century, more than half the states in the nation had enacted exclusionary rules of their own.<sup>131</sup> By the time Earl Warren began, in 1961, to rewrite the rules of policing—starting with *Mapp v. Ohio*—public sentiment firmly favored more regulation of police.<sup>132</sup> As Corinna Lain has shown, the Warren Court’s aggressive regulation of policing was less a “revolution” than an adaption of doctrine to prevailing majoritarian views—at least outside the South.<sup>133</sup>

These doctrinal developments occupied a special place in the public consciousness. The Warren Court’s criminal procedure cases generated intense public interest; the cases were publicized, debated, and commented upon widely in the media and the political sphere.<sup>134</sup> Americans quickly became familiar with the rights afforded suspects in interactions with law enforcement. The right to remain silent; to a lawyer upon police questioning; to be free in most circumstances from warrantless searches and seizures; to be free from arrest absent probable cause—these became, to borrow Carol Steiker’s term, “constitutional norms”: rules the public expected the police to follow.<sup>135</sup>

Some of those rules worked their way into jury trials. More and more, juries were asked to find facts implicating them: whether the police coerced a defendant’s statements, for instance, or suggested an eyewitness’s identification. In the main, though, the new procedural rules did not substantially

129 Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 594 (1937) (quoting Editorial, N.Y. HERALD TRIB., July 20, 1932, at 14).

130 See *Weeks v. United States*, 232 U.S. 383 (1914).

131 Corinna Barrett Lain, *Counter-majoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1381 (2004) (“By the time the Court decided *Mapp v. Ohio* in 1961, a solid half of the states had already adopted the exclusionary rule, with the trend among them unmistakably in favor of the Court’s decision. Indeed, no state to consider the exclusionary rule after 1949 rejected it . . . while most of those adopting it used majoritarian politics to effectuate the change.” (footnotes omitted)).

132 See *id.* at 1382.

133 *Id.* at 1368–69 (“*Mapp v. Ohio* reflected an emerging national consensus about the exclusionary rule . . . *Miranda v. Arizona* . . . too was a product of its time and well within the parameters of publicly acceptable responses to the problem of coercive interrogation.”).

134 See *id.* at 1383 n.121 (describing national press coverage of *Mapp*); *id.* at 1390 (describing the “canoniz[ation] by popular culture” of the right to counsel afforded indigent defendants in *Gideon v. Wainwright*, 372 U.S. 335 (1963)); *id.* at 1404–07, 1416–17 (describing national press coverage on the issue of coercive police interrogation and the Supreme Court’s response to it, and observing that the *Miranda* warnings became “so famous, anyone who watches television can recite them”).

135 See generally Steiker, *supra* note 75.

impact jury trials. Nor was that their intended effect; to the contrary, the exclusionary rule was designed to *prevent* juries from hearing evidence tainted by police misconduct.<sup>136</sup>

This soon changed, as any student of criminal procedure knows well. Of principal importance to the criminal jury, though, is the *way* it changed. As Steiker has so incisively demonstrated, the Burger and Rehnquist Courts' contraction of the exclusionary rule was one-dimensional: by constructing doctrinal escape hatches from exclusion—for instance, standing, good faith, and inevitable discovery<sup>137</sup>—it curtailed the remedy for constitutional violations while leaving the boundaries of constitutional conduct firmly intact. This method, Steiker has posited, gave rise to “acoustic separation,” a phenomenon in which rules governing conduct and rules governing the sanction for that conduct diverge to such an extent that the audience for each set of rules functions in an essentially separate legal regime, akin to a sound-proof chamber.<sup>138</sup> That is, the public hears the boundary of proper police conduct, while the police hear what happens if they step outside the line. When the two sets of rules are discordant—when police misconduct has no legal sanction—the police and public operate under entirely different conceptions of what “the law” of policing requires.

Steiker's insights carry a number of implications, foremost of which, for Steiker, are those for police behavior and public misperceptions of it.<sup>139</sup> Yet there has been another important—and unnoted—consequence of “acoustic separation” in constitutional criminal procedure: its effect on jury trials. By retaining constitutional norms while limiting the exclusionary sanction, the Court has increasingly made way for admission of evidence that jurors believe (or at the least suspect) has been improperly obtained. The effect is exacerbated by savvy defense attorneys, who draw the jury's attention to police investigatory tactics, as well as by the police themselves, who, as Steiker points out, are incentivized to conduct themselves in accordance with the rules of constitutional sanction rather than the rules of constitutional conduct.

Criminal trials in the late twentieth century, in other words, became portals between the two acoustically separated chambers. Of course, the effect

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136 See generally Lawrence Crocker, *Can the Exclusionary Rule be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 313–16 (1993) (discussing background on the purpose and development of the exclusionary rule).

137 Other such exclusionary escape valves include the “sufficiently attenuated” exception to the “fruit of the poisonous tree” doctrine; harmless error; the use of unconstitutionally-obtained evidence for impeachment; and limitations on federal habeas review of state criminal convictions. Steiker, *supra* note 75, at 2469.

138 *Id.* at 2469–70. Steiker borrows the term from Meir Dan-Cohen, who in turn drew from Jeremy Bentham. See *id.* at 2469 (citing Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984)). Dan-Cohen used the construct to describe divergence between “conduct rules” and “decision rules” in substantive criminal law. Dan-Cohen, *supra*, at 626.

139 Police, Steiker argues, are likely to ignore conduct rules and act in accordance with the far more permissive decision rules, while the public assumes (incorrectly) that the police are behaving lawfully. See Steiker, *supra* note 75, at 2469.



of this development is impossible to measure empirically; we have no reliable data as to the frequency of either constitutional violations by police or courts' application of the exclusionary rule.<sup>140</sup> But just as we can observe the rule's influence on police,<sup>141</sup> so, too, can we feel its effects on criminal trials.<sup>142</sup> The Warren Court recalibrated the public's (and thus the jury's) expectations of policing—expectations not dampened by subsequent remedial limitations. As with the developments that had come before—punishment's mitigation, criminal law's "statutorization" and broadening scope, the rise of professional police and prosecutors—this development marked the latest chapter in a recurring story.

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It is a story of responsive change. When prescribed penalties diverged from community norms, juries aligned them. When criminal laws became tools of state regulation, and arrest and prosecution the discretionary use of those tools, the jury naturally focused on the exercise of that discretion. And as external regulation of law enforcement actors grew and then ebbed, the jury bridged that chasm.

But the story is not merely about response to external change. It is also about internal change, to criminal adjudication and to juries themselves. The next Section discusses these internal changes, their relationship to external forces, and their impact on the jury's role.

### B. *Transformations in Criminal Adjudication*

Criminal adjudication in the United States has undergone many shifts, but three in particular influenced enforcement-finding. These include shifts in the allocation of the law- and fact-finding functions; the duration and frequency of trials; and the jury's composition and vicinage. This Section charts these changes and their relationship with the external transformations discussed in Section A.

#### 1. The Decline of Law-Finding and Rise of Fact-Finding

The decline of the criminal jury's "law-finding" function is well-documented.<sup>143</sup> There has been less scholarly focus on its causes, and less still on

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140 Scholars attempting to study the effect of the rule on police behavior have pointed to the absence of such data. See generally Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365 (2008) (discussing data limitations and scholars' attempts to empirically test the rule's effect on police).

141 See *id.* at 1372 (noting the rule's observable, though unmeasurable, effects on policing).

142 See generally *supra* Section I.A (discussing observable evidence of jury evaluation of law enforcement).

143 The Supreme Court formally declared an end to the jury's authority to decide the law in *Sparf v. United States*, 156 U.S. 51, 102 (1895). The literature on *Sparf*, and the history of jury nullification more broadly, is voluminous. For some examples, see generally Abramson, *supra* note 83; David C. Brody, *Sparf and Dougherty Revisited: Why the Court*

the simultaneous (and, I argue, concomitant) rise of jury fact-finding. Yet together, as I show, these changes both reflected the need for enforcement-finding and enabled its growth.

At the outset, it is worth highlighting that the jury's historical right to make law is perhaps more equivocal than the standard accounts would have it. Some historical accounts show that both the practice and right of juries to declare law varied across the colonies and early states, as well as between civil and criminal trials.<sup>144</sup> Nevertheless, it is fair to say that criminal juries in a number of colonies and early states possessed far more authority to find law than exists today. The criminal jury's authority to make law declined over the course of the nineteenth century as courts (both state and federal) gradually limited the jury's role, a process that culminated in the Supreme Court's 1895 decision in *Sparf*.<sup>145</sup>

Far less attention has been paid to the criminal jury's fact-finding role.<sup>146</sup> Yet its transformation has changed the criminal trial as much as—if not more than—jury law-finding's decline. For the eighteenth and much of the nineteenth century, the criminal jury's part in ascertaining historical fact was a nominal one, at least relative to today. It was trial judges who played the starring role. Judges advised the jury as to the credibility of witnesses, the weight of the evidence, and the persuasiveness of argument—advice juries were believed to routinely follow.<sup>147</sup> At the close of trial, judges summarized

*Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89 (1995); Harrington, *supra* note 3.

144 See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 122 (1998) (finding the historical record inadequate to determine the extent of colonial criminal juries' law-finding authority, but arguing that some data calls the standard account into question, particularly in Massachusetts, Georgia, and Maryland); William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1004 (2010) (finding that the colonies of New England and the colony of Virginia permitted civil and criminal juries to make law, while the colonies of New York, Pennsylvania, and North and South Carolina did not).

145 See Alschuler & Deiss, *supra* note 3, at 910.

146 The few exceptions include Fisher, *supra* note 2, at 624–56 (focusing particularly on the jury's changing role in determining the credibility of witnesses), and Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595, 595 (1985) (focusing on the demise of trial judges' commentary on the evidence). Others have incidentally documented the fact-finding process in nineteenth-century criminal trials as part of studies on other subjects. See, e.g., McCONVILLE & MIRSKY, *supra* note 115, at 149–52 (documenting mid-nineteenth-century criminal trials in New York City as part of a study of plea bargaining's rise); see also FRIEDMAN & PERCIVAL, *supra* note 104 (same in Alameda County, California); Milender, *supra* note 85, at 4–5.

147 See McCONVILLE & MIRSKY, *supra* note 115, at 141; Krasity, *supra* note 146, at 618 (discussing widespread belief among nineteenth-century American jurists and legislators that judicial evaluation of evidence heavily influenced the jury); cf. John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 285 (1978) (discussing how juries in seventeenth-century London “routinely follow[ed] the judge's lead” in evaluating the evidence, so much so “that it is difficult to characterize the jury as [having] function[ed] autonomously”).

and imparted their opinion on the evidence and the believability of witnesses.<sup>148</sup> When juries hung, judges directed a verdict.<sup>149</sup> Sometimes, before giving the case to the jury, judges simply instructed the jury as to the verdict that should be rendered.<sup>150</sup>

Limitations on the jury's fact-finding power were not merely a function of the judicial role. Evidentiary doctrines also played a part. The testimonial right for defendants,<sup>151</sup> limitations on the use of circumstantial evidence,<sup>152</sup> mandatory rules for evaluating witness testimony,<sup>153</sup> and the standard of proof (requiring proof to a moral certainty rather than beyond a reasonable doubt)<sup>154</sup> all impoverished the jury's contribution to the fact-finding task. So, too, did practical constraints. In the days of pre-automotive transport, for instance, the challenges of witness travel led to frequent reliance on stipulations in lieu of live testimony.<sup>155</sup>

Yet over the course of the nineteenth century, as the criminal jury's law-finding role slowly declined, its fact-finding role grew. States began to prohibit judicial evaluation of evidence, finding it an infringement on the jury's role.<sup>156</sup> The evolution of evidentiary doctrine fortified the jury's fact-finding

148 McCONVILLE & MIRSKY, *supra* note 115, at 141; Krasity, *supra* note 146; *see also* Millender, *supra* note 85, at 239, 282–88.

149 McCONVILLE & MIRSKY, *supra* note 115, at 141–52; Millender, *supra* note 85, at 235.

150 McCONVILLE & MIRSKY, *supra* note 115, at 141–52 (describing the common judicial practice, in New York trial courts, of advising the jury of the appropriate outcome). So ingrained was the practice that as late as 1930 the United States Supreme Court listed it as one of the three “essential elements” of criminal trials inherited from the common law, along with a jury of twelve and unanimity:

[A] trial by jury as understood and applied at common law . . . includes all the essential elements as they were recognized in this country and England when the Constitution was adopted . . . [among them] that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law *and advise them in respect of the facts* . . . .

Patton v. United States, 281 U.S. 276, 288 (1930) (emphasis added).

151 Fisher, *supra* note 2, at 662–68 (documenting the gradual movement across states in the second half of the nineteenth century to give defendants a testimonial right).

152 *See* Millender, *supra* note 85, at 82.

153 These included, for instance, the rule requiring jurors to reject in its entirety the testimony of a witness found to have lied about a single point. *See* Fisher, *supra* note 2, at 655–56 (noting this rule remained in practice in the parts of the United States for much of the nineteenth century, and in some jurisdictions even into the twentieth century).

154 *See* Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1180–95 (2003) (describing the evolution from the moral certainty standard to the reasonable doubt standard over the course of the late eighteenth to mid-nineteenth centuries).

155 *See* Millender, *supra* note 85, at 261.

156 Krasity, *supra* note 146, at 597, 622 app. A. While a small number of states and the federal system have not formally amended the traditional common-law rule permitting judicial commentary on the evidence, in practice such commentary is exceedingly rare, and risks reversal. *See* Fisher, *supra* note 2, at 577 n.2; *see also* United States v. Mundy, 539 F.3d 154, 158–59 (2d Cir. 2008) (“For good reason, th[e] practice [of judges’ summarizing the evidence] has fallen into widespread disfavor, absent special circumstances. Judges

role: interested witnesses were permitted to testify, as were criminal defendants;<sup>157</sup> circumstantial evidence gained acceptance;<sup>158</sup> witness credibility became the jury's exclusive province.<sup>159</sup> And reasonable doubt served to focus jurors' inquiries more acutely on the evidence presented and less on jurors' personal moral beliefs.<sup>160</sup>

An 1869 decision of the Supreme Court of New Hampshire in a simple theft case captures the massive changes then underway in the roles of jury and judge in criminal trials, and highlights the interconnectedness of law-finding's decline with fact-finding's rise:

[Historically, t]he line between law and fact was not drawn as it is now being drawn in this State. The attention of the bar, court, and jury was seldom called to the distinction. . . .

. . . .

. . . We are now contending with those difficulties. The law is burdened and obscured by a great mass of common opinion, general understanding, practice, precedent, and authority . . . that has passed for law, but is in truth not law, but fact, coming down to us largely by descent from the ancient custom of the judge giving the jury his opinion of the evidence. To clear the law of this encumbrance, revive elementary principles strictly legal in their nature, separate the province of the court from the province of the jury, and maintain the latter in its entirety, is a duty put upon us . . . [following the New Hampshire Supreme Court's 1843 decision holding that] the jury are not the judges of the law in criminal cases.<sup>161</sup>

Why did the jury's law-finding authority decline, and its fact-finding power grow? Few have considered these questions in tandem.<sup>162</sup> The decline of jury law-finding has been attributed to, variously, a judicial power-

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cannot marshal the evidence without exercising their own judgment on how evidence should be described, which aspects should be stressed, which aspects ignored. In doing so, courts inescapably influence the jury on decisions which should be in the jury's sole province. . . . Today, marshaling of evidence is rarely practiced in federal court." (footnote omitted) (first citing *United States v. Kahaner*, 317 F.2d 459, 479–80 & n.12 (2d Cir. 1963); and then citing 21A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* §§ 5081, 5082.4 (2d ed. 2016))).

157 *Fisher*, *supra* note 2, at 662–68.

158 *Millender*, *supra* note 85, at 82–92 (charting the gradual acceptance by eighteenth- and early nineteenth-century trial courts of circumstantial evidence).

159 *See Fisher*, *supra* note 2, at 581.

160 *See Sheppard*, *supra* note 154, at 1201 ("What distinguished reasonable doubt from all other doubts was precisely that a reasonable person would form the doubt based not on general preoccupations relating to human affairs but upon a consideration limited to the evidence presented in the case at hand.").

161 *State v. Hodge*, 50 N.H. 510, 520, 522 (N.H. 1869).

162 *Cf. Note*, *The Changing Role of the Jury in the Nineteenth Century*, 74 *YALE L.J.* 170 (1964) (examining the effort, in Massachusetts, to separate the roles of judge and jury through the law/fact distinction, but finding the effort to have been a failure, with judges reclaiming the fact-finding mantle by the nineteenth century's close).

grab;<sup>163</sup> an aspect of the larger transition to positive law in the American legal system;<sup>164</sup> and part of the Reconstruction effort to stamp out lawlessness in southern state courts.<sup>165</sup> The rise of jury fact-finding has been scarcely studied at all. George Fisher's study of the jury's role in assessing witness credibility comes closest. He ascribes that particular change to the demise of public faith in the truthfulness of sworn testimony, and the resultant turn to juries as an alternative source of public confidence in trial outcomes.<sup>166</sup>

All of these explanations are valid, but none accounts for attendant transformations in criminal law and its enforcement, or the connection between the law-finding and fact-finding shifts. Taking these into account offers a different perspective.<sup>167</sup> As criminal law became a means of pervasive, legislatively imposed regulation, and as its enforcement moved from the hands of private litigants to public actors, the potential for state abuses rose. But unlike the perceived abuses of the eighteenth and early nineteenth centuries, which concerned laws themselves—that is, prescribed penalties discordant with popular views—these abuses concerned the *enforcement* of laws.<sup>168</sup> To reign in enforcement abuses, juries needed unfettered authority to evaluate the evidence presented by the enforcers. Judges, who might have been predisposed to the public prosecutors they saw each day, and who were accustomed to the nature of proof in criminal cases, were comparatively poor arbiters when it came to evaluating law enforcement.<sup>169</sup>

In this respect, the criminal jury's movement from law-finding to fact-finding aligned with shifts in criminal enforcement then underway. As with those shifts, it fueled enforcement-finding's rise. It also reflected a perceived need. Criminal law and enforcement were undergoing massive change; criminal adjudication needed to adapt.

163 Harrington, *supra* note 3, at 379–80. For the classic argument, see Howe, *supra* note 3.

164 See ABRAMSON, *supra* note 83; FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 41 (1985); Alschuler & Deiss, *supra* note 3, at 915. Rachel Barkow has located more acutely the shift in positive law's precipitation of the administrative state. See Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1340–45 (2008).

165 See generally Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133 (2011).

166 Fisher, *supra* note 2, at 704–07.

167 This perspective is admittedly criminal-centric; but then, so was the move from law-finding to fact-finding, which came first to criminal cases.

168 On the distinction, from a state-abuse perspective, between statutory breadth and discretionary enforcement of broad statutes, see Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008).

169 Cf. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.” (citing *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968))).

## 2. Trial Process

Over the latter decades of the nineteenth century, criminal trial processes underwent sweeping transformation. This shift did not fuel enforcement-finding so much as it exacerbated its effects, particularly on untried cases.

In early America, criminal jury trials were, for the most part, commonplace and rote affairs.<sup>170</sup> An impaneled jury would typically sit for the day and hear not just one, but a number of trials.<sup>171</sup> In the absence of counsel—as was not uncommon, both for defendants and prosecuting victims—the parties themselves called witnesses (who spoke on their own, without prompts and questions), and put on other evidence.<sup>172</sup> Juries usually deliberated quickly, if at all; often, they issued a verdict without ever leaving the jury box.<sup>173</sup>

This mode of adjudication was well-suited to the law-finding criminal jury. Jury trials created a “common law” of jury verdicts. And because jury trials predominated, the common law of jury verdicts became, effectively, the criminal law on the ground. Comparatively, early American jury trials were decidedly not well suited to jury fact-finding. Hurried presentations of evidence made for poor examination and analysis. The dearth of counsel impoverished the adversarial questioning so critical to jury fact-finding. It also necessarily aggrandized the judge’s role and, accordingly, tacitly encouraged jury deference to judicial opinion on the facts.

In the mid-nineteenth century, as criminal law and enforcement transformed, so, too, did jury trials. First, there were fewer of them. By the last decades of the nineteenth century, in most jurisdictions cases disposed of by plea bargain well surpassed those disposed of by trial.<sup>174</sup> Second, trials became longer and more complicated. Defense counsel became more com-

170 For a broad, descriptive account of criminal trials in Britain around the same time—which, by some accounts, were similar in processes and procedures to those in the new American states—see Langbein, *supra* note 147.

171 FRIEDMAN & PERCIVAL, *supra* note 104, at 194; Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 345–46 (1982) (noting that trials in nineteenth-century New Haven involved “the same judge and jury . . . handl[ing] several cases in a one or two-day period; trial, deliberation and sentencing could all occur within the span of an hour or two”).

172 FRIEDMAN & PERCIVAL, *supra* note 104, at 194; LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 237–38 (1993) (“Most . . . ‘trials’ were short; most of the defendants had no lawyer . . . and there was not much quibbling about niceties of evidence.”).

173 McCONVILLE & MIRSKY, *supra* note 115, at 149 (stating that a study of trials in New York City courts from 1800 to 1845 found that the jury rendered verdict without retiring to deliberate in 64% of recorded cases).

174 See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6 (1979) (“[P]lea bargaining became a dominant method of resolving criminal cases at the end of the nineteenth century and beginning of the twentieth . . .”).

mon, along with new procedural protections for criminal defendants.<sup>175</sup> A more robust adversarial system encouraged more vigorous presentation of evidence, along with more exacting jury analysis of it.

These changes significantly affected the jury's role. With the majority of cases now adjudicated by plea, the common law of jury verdicts no longer served as the criminal law on the ground. Instead, it became a facet of the "law" of plea bargaining. Along with other considerations, and more than any of them, the parties' assessment of the likely trial outcome set the terms of the negotiated plea.<sup>176</sup> In this way, individual jury verdicts gained outsized power.

The nature of jury verdict "law" changed, too: it became a common law of proof. This was a product both of plea bargaining, which tended to steer incontrovertible cases to pre-trial disposition, and the prohibition on jury law-finding, which focused trials more intensely on the strength and nature of the proof. By at least the third or fourth decade of the twentieth century, proof was found, compiled, and presented almost entirely by public police and prosecutors. Assessing it, then, meant assessing them.

### 3. Jury Composition and Vicinage

Beginning in the mid-nineteenth century and accelerating in the twentieth century, jury venires became increasingly representative of the communities most affected by crime—a result of states' amendments to vicinage requirements, the geographic narrowing of jury districts, and the reduction of juror eligibility requirements. These developments fueled enforcement-finding's rise.

Start with vicinage. For the colonies and early states, jury vicinage requirements were designed to protect criminal defendants from judgment by a *foreign* sovereign—England, and, following the Revolution, another state.<sup>177</sup> Thus, in the colonies and early states, criminal juries were not necessarily drawn from the local community in which the crime took place, or even in the defendant's residence. Practices varied widely, a factor that contributed to the federal Bill of Rights drafters' decision to adopt a specific geographic demarcation (district or state) in lieu of the highly variant con-

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175 See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 920 & n.25 (2006).

176 See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2498–2504 (2004); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1925–26 (1992).

177 See William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 67 (1944) (“[T]he indefinite vicinage provisions found in some of the early [state] constitutions were intended to guard against transportation out of the state or to some distant place for trial.”); see also Nelson, *supra* note 144, at 1007 (defining the importance of “local” by reference to the people of the colony, as opposed to Parliament in England).

cept of “vicinage.”<sup>178</sup> While a number of state constitutions in early America guaranteed criminal defendants the right to a jury of the “vicinage,” few interpreted that term as something other than the state.<sup>179</sup>

Over time, as the states grew in population and the nation expanded westward, vicinage became a local concept. Increasingly, states joining the Union adopted constitutional provisions requiring that juries be selected from the county of the alleged crime.<sup>180</sup> In other states, legislatures amended constitutions to align “vicinage” with “county” or a similar narrowly-drawn geographic boundary.<sup>181</sup> In still others, legislatures enacted statutes specifying the counties in which a defendant could be tried (typically, the county in which the crime occurred, the victim was harmed, the defendant resided, or some combination of these).<sup>182</sup>

Meanwhile, as jurors increasingly were drawn from their local county, counties became more local. As the population in and around cities exploded, counties subdivided, covering an increasingly smaller territory.<sup>183</sup>

As a result of both these forces, and contrary to impression,<sup>184</sup> jury venires became *more* local, not less. They also became more diverse. The “blue ribbon” jury of property-owning, educated white men of the early Republic gave way, over the course of the nineteenth century, to a more

178 See Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 822–23 (1976) (describing how James Madison noted the difficulty of obtaining lawmakers’ agreement on the meaning of “vicinage,” because “[t]he truth is that in most of the States the practice is different . . . . In some States, jurors are drawn from the whole body of the community indiscriminately; in others, from large districts comprehending a number of Counties; and in a few only from a single County” (quoting V.G. HUNT, *THE WRITINGS OF JAMES MADISON 1787–1790*, at 424 (1904))).

179 Blume, *supra* note 177, at 67 (noting that in the states that adopted their constitutions “prior to 1800, a jury of the county or other small vicinage was not generally thought to be of sufficient importance to have constitutional protection,” and “the indefinite vicinage provisions found in some of the early constitutions were intended to guard against transportation out of the state or to some distant place for trial”).

180 See *id.* at 77.

181 *Id.* at 78–79.

182 See *generally id.* (describing various state venue statutes and challenges to them in the nineteenth and early twentieth centuries). These statutes were directed technically to venue, but necessarily influenced the geographic locus from which the jury was selected. While defendants challenged these statutes as violating the common-law “right” to be tried in the country in which the crime occurred, as Blume demonstrates, neither venue nor vicinage was ever so narrowly construed in the colonies or early states. *Id.* at 89.

183 See *Atlas of Historical County Boundaries*, THE NEWBERRY LIBRARY, <http://publications.newberry.org/ahcbp/> (last visited Oct. 20, 2016). The comprehensive interactive online database allows users to, among other things, see visuals of county boundaries in each state, as compared to present-day boundaries. It also provides a useful nation-wide animation of county subdivision over time. See *id.*

184 See William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1995–96 (2008) (positing that jury pools have become progressively less localized since the Gilded Age, but acknowledging an absence of data supporting the claim).



diversified mix of jurors.<sup>185</sup> Race, gender, education, and socio-economic status were just some of the categories in which venires (and, indirectly, juries) diversified. This was not true everywhere—particularly in the South for much of the nineteenth and twentieth centuries, where systematic exclusion of blacks from both venires and petit juries ultimately required federal legislative and judicial intervention.<sup>186</sup> But by the latter half of the twentieth century, and particularly in jurisdictions drawn along city lines—for instance, Boston, Baltimore, Philadelphia, Washington, D.C., New Orleans, San Francisco, and the five boroughs of New York, to name just a few of the biggest such urban jurisdictions<sup>187</sup>—jury venires looked more like the city’s list of registered voters, if not its residents.<sup>188</sup>

These shifts fueled enforcement-finding. As criminal enforcement professionalized, localities were (and remained) its predominant administrators. And as juries increasingly assessed the work of those front-line administrators—police and prosecutors—jury demographics took on new significance. In the main, prosecutorial elections had done little to engender real prosecutorial accountability, a dynamic that persists today.<sup>189</sup> And police departments, notwithstanding their accountability to elected officials, remained for the most part impervious to public assessment. But as juries began, in many of the nation’s largest cities, to reflect the local electorate—and even, at times, the communities most affected by crime and policing<sup>190</sup>—police and prosecutors faced an accounting in the courtroom unlike that at the ballot box or in city hall.

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185 See generally Alschuler & Deiss, *supra* note 3, at 877 (chronicling the changes in jury eligibility from the time of the Founding, when “[e]very state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers; three states permitted only whites to serve; and one state, Maryland, disqualified atheists,” through the relaxation of those requirements over the course of the nineteenth and twentieth centuries).

186 *Id.* at 882–97.

187 See *List of Consolidated City-Counties*, NAT’L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/list-of-consolidated-city-county-governments> (last visited Oct. 20, 2016) (listing forty such jurisdictions).

188 The criticism of voter lists as under-representative of minorities, see, e.g., Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 712–13 (1993), is well-founded. Yet it was only fairly recently that jury eligibility even accorded with voting rights. See Alschuler & Deiss, *supra* note 3, at 878–79. Thus, while the movement to expand juror eligibility still falls short of achieving adequate minority representation, what it at least did achieve was an alignment between the voting public and the jury venire. This served to make criminal prosecutions democratically accountable in a way they had not been previously.

189 See generally Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

190 See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1112–13 (2005) (discussing salutary democratic benefits of minorities’ over-representation on juries, and positing that, in a jurisdiction that is 35% African-American, random selection will yield a third of juries with five to six African Americans, and 8% with seven to eight African Americans); see also DANIEL GIVELBER & AMY FARRELL, *NOT GUILTY* 124 (2012) (ana-

The dynamic was not entirely fortuitous. In the mid-twentieth century in particular, it profited from a broader judicial push to regulate law enforcement and make it more democratically accountable. The decisions that constitutionalized and imposed on the states a right to a jury trial in felony cases,<sup>191</sup> a right to a jury selected “from a fair cross section of the community,”<sup>192</sup> and a right to be free from race-based peremptory challenges<sup>193</sup> were, like other decisions in the constitutional criminal procedure “revolution,” inspired by, and directed at, two principal (and related) problems: law enforcement abuses and institutionalized racism. *Duncan v. Louisiana* extended the Sixth Amendment’s jury trial right to the states in a case involving an egregious abuse of police and prosecutorial discretion.<sup>194</sup> *Taylor v. Louisiana* spoke directly to the links between juror eligibility, political accountability, and the criminal justice system’s legitimacy.<sup>195</sup> And *Batson v. Kentucky*<sup>196</sup> held that race-based peremptory strikes violate “the protection that a trial by jury is intended to secure,” protection guaranteed through “a body . . . composed of the peers or equals of the person whose rights it is

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lyzing racial diversity of juries in a random sampling of criminal cases from four jurisdictions—Los Angeles, California, Maricopa, Arizona, Bronx, New York, and Washington, D.C.—and noting that “there were more juries (thirty-four) with no White members than there were juries that had no Black members,” and furthermore that a minority of juries (37%) “were more than half-White”).

191 *Duncan v. Louisiana*, 391 U.S. 145 (1968).

192 *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

193 *Batson v. Kentucky*, 476 U.S. 79 (1986).

194 Grant Duncan, an African American, was charged with battery after allegedly slapping a white boy while attempting to break up a confrontation between two black and four white boys arising from the court-ordered desegregation of Louisiana’s schools. *Duncan*, 391 U.S. at 147. As a federal district court observed in enjoining further prosecution following the Supreme Court’s decision:

*De minimus* “batteries” of this kind occur repeatedly in Plaquemines Parish and elsewhere and do not become the subject of criminal proceedings. The factors bearing on the questions of harassment, considered together with the nature of the conduct on which the charge is based, convince the court that the charge against Duncan would not have been prosecuted, and certainly not re-prosecuted, were it not for the civil rights context out of which the case arose, for Duncan’s selection of civil rights attorneys to represent him, and for the vigor of his defense.

*Duncan v. Perez*, 321 F. Supp. 181, 184 (E.D. La. 1970), *aff’d*, 445 F.2d 557 (5th Cir. 1971).

195 419 U.S. at 527, 530 (“[O]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government’ . . . . The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. . . . Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.” (first quoting *Glasser v. United States*, 315 U.S. 60, 85 (1942); and then citing *Duncan*, 391 U.S. at 155–56)).

196 476 U.S. 79 (1986).

selected or summoned to determine' . . . [thereby] safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge."<sup>197</sup>

The diversification of jury venires (and, indirectly, of juries) was thus part of a deliberate effort to regulate law enforcement and make it more democratically accountable. This is not to say that this was diversification's sole aim, but rather that we should consider the jury diversification cases within the framework of that larger doctrinal project. As with the intentioned aspects of the shift from jury law-finding to fact-finding,<sup>198</sup> those of jury diversification both reflected the need for enforcement-finding and fueled its expansion.

### III. ACCOMMODATING ENFORCEMENT-FINDING

As criminal law and its enforcement have evolved over the last three centuries, the criminal jury has evolved with it. The criminal jury's role, in other words, accounts for the enforcement environment in which it functions. Enforcement-finding arose, and persists, as a natural response to an enforcement environment characterized by a broad and pervasive penal scheme, enormous enforcement discretion, and minimal outside regulation of enforcement methods. And enforcement-finding has been buoyed by adjudicative changes—in the allocation of authority between judge and jury, trial process, and the diversification and localization of venires—that reflect, in some respects, those same transformations in enforcement.

So contextualized, enforcement-finding is not a problem to be resisted. It is, instead, a natural and inevitable feature of our system, to be accepted, accommodated, and even embraced. This is not to eschew constraints. To the contrary, accommodating enforcement-finding requires setting boundaries. But it changes how we map them. Rather than attempting to draw lines between “fact” and “law,” we must instead seek to balance enforcement-finding's benefits against its potential harms.

This Part begins that effort, sketching an agenda for doctrine and institutional design. Institutional design should seek to minimize enforcement-finding's risks while leveraging its potential systemic benefits. Doctrine should balance enforcement-finding's value against other potentially competing adjudicative values, such as accuracy and fairness. Section A works towards the first goal, and Section B the second.

#### A. *Institutional Design: Minimizing Risk, Leveraging Potential*

Enforcement-finding raises four primary concerns. The first is competence. We might worry, particularly based on what we know from studies of juror decisionmaking, that jurors may simply get it wrong—overlooking serious investigative deficiencies on the one hand and disapproving perfectly rea-

197 *Id.* at 86 (first quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880); and then citing *Duncan*, 391 U.S. at 156).

198 *See supra* subsection II.B.1.

sonable conduct on the other. The second is the effect on juror selection and, more specifically, on the racial composition of juries. If prosecutors seek to strike those admittedly more skeptical of law enforcement, the data indicates that such a move would disproportionately exclude black jurors from criminal juries.<sup>199</sup> The third is utility. Criminal trials are rare, and verdicts—to the extent they are communicated to law enforcement at all—are black boxes. As regulatory mechanisms go, we might think criminal trials among the least effective. Finally, there are the accountability and rule-of-law concerns that accompany any robust interpretation of jury authority.

These concerns are valid. But to some degree, they obscure both the reality and the goal. The reality is that jurors *already* evaluate law enforcement, both explicitly and implicitly, in ways that consciously or unconsciously influence perceptions of the evidence.<sup>200</sup> Given this reality, the inability of existing frameworks to balance it,<sup>201</sup> and the criminal enforcement environment that created and maintains it,<sup>202</sup> debating the desirability and efficacy of enforcement-finding is somewhat beside the point. Even if one thinks jury evaluation of law enforcement is a really bad idea, there is no realistic means of extinguishing it. Indeed, and as I hope the following discussion will demonstrate, it is in trying to extinguish it that we risk further undermining jury competence, minority representation on juries, regulatory efficacy, and democratic accountability. We should instead enlist institutional mechanisms that help minimize these risks while leveraging enforcement-finding's potential.

## 1. Competence

Jury research over the last several decades has shed some light on juries' analytical strengths and weaknesses. Among other things, we know jury decisionmaking may be compromised by intrinsic human biases and cognition deficits.<sup>203</sup> We know that demographic characteristics, particularly race, age, and geographic region of residence, play some role in juror decisionmaking—though the precise mechanisms of this role (including its potential as a causal explanation) have yet to be worked out.<sup>204</sup> And we know that the adversarial trial process itself can sometimes exacerbate these biases and defi-

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199 See *supra* notes 42–52 and accompanying text (discussing the interplay of race and juror perceptions of law enforcement).

200 See *supra* Section I.A.

201 See *supra* Section I.B.

202 See *supra* Part II.

203 See generally DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* (2012) (collecting studies on the impact of human biases on jury decisionmaking).

204 See *id.*; see also Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 *CHI-KENT L. REV.* 997 (2003) (collecting studies on how demographic characteristics impact jury decisionmaking).

cits, raising the risk that jurors will miscalculate the significance and reliability of particular pieces of the evidentiary puzzle.<sup>205</sup>

Yet if anything, this research illuminates enforcement-finding's potential to improve jury competence. Among other things, it shows us how the decisions and actions of law enforcement agents can shape, in ways both pervasive and invisible, the evidence the jury sees and how the jury perceives it. Thus, providing greater leeway in probing investigatory competence will enhance jurors' capacity to evaluate and interpret the evidence.<sup>206</sup> Nor should we dismiss the jury's ability to assess the appropriateness and legitimacy of law enforcement action. To the contrary, a body of citizens who both depend on and are subject to law enforcement is perhaps the ideal institution to make these evaluations, at least in the adjudicative context.<sup>207</sup> Indeed, jurors already implicitly do this, and courts (sometimes) permit it, albeit under the guise of presenting a "more thorough" or "complete" set of facts.<sup>208</sup> Such forays into law enforcement legitimacy would be far better served if conducted openly, allowing the parties and court to explain to the jury precisely why such evidence is being offered, and how it should be considered.

In this way, jury instructions could enhance juror competence. When, for instance, jurors hear the police stopped the defendant because they had seen him selling drugs before, they should be instructed that the prior uncharged drug-selling is being offered only so that they may assess the appropriateness of the police officer's lawful decision to stop the defendant. When jurors hear that the police pulled over a car with four African-American occupants for driving five miles per hour over the posted speed limit, they should be instructed both that the stop was lawful, and that they may consider its circumstances in their overall assessment of the investigation. Instructions dismissing juror competence to evaluate law enforcement—such as the instruction that the prosecution is "not on trial," or that particular investigative techniques or the lawfulness of police or prosecutorial action, are not the jury's concern—diminish rather than enhance jury capacity.<sup>209</sup> We could, instead, consider alternative instructions designed to help jurors distinguish between appropriate evaluation of law enforcement—that is, eval-

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205 See SIMON, *supra* 2; Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 705–08 (2014).

206 See Richman, *supra* note 13, at 698.

207 It is important to distinguish lawfulness from legitimacy: I do not propose that we substitute the jury's for the court's judgment in constitutional determinations. For such proposals, see *supra* note 14; for my argument against them, see *infra* subsection III.A.4. I merely suggest that, once the court has determined action to be constitutional, the jury may assess whether that action was also appropriate and legitimate.

208 See *supra* subsection I.A.1.

209 It is certainly true, for instance, that the *lawfulness* of police conduct is not before the jury. But the appropriateness and legitimacy (or "rightfulness," to borrow Meares's term) of police conduct is, and such an instruction obscures the distinction. See *generally supra* notes 74–76 and accompanying text.

uation that goes towards reasonable doubt—and impermissible nullification.<sup>210</sup>

Of course, like all jury assessments, those of law enforcement will be informed by jurors' own experiences and biases, and will be subject to the dynamics of group decisionmaking.<sup>211</sup> But unless we are prepared to reject the jury as a decisionmaking body in criminal cases, we should not categorically cordon off evaluations of law enforcement from the jury's domain. To be sure, there are times when the circumstances will counsel in favor of such limits.<sup>212</sup> But the decision should be case- and circumstance-specific, mindful always of the cost of separating evidence from the critical question of how it came to be.

It is also worth considering the alternative. Limiting probes of investigatory adequacy has a flattening effect: to the uninformed, evidence resulting from methodical and thorough investigation appears no more reliable than evidence produced through carelessness and haste. Telling juries that they may not consider the lawfulness of police action does not tell juries what they can consider, or how they should consider it—leaving jurors to speculate (perhaps incorrectly) on law enforcement's motivation or strategy, or, if evidence pertinent to law enforcement's motivation was offered, on why it was put before them in the first place. Eschewing or ignoring enforcement-finding, in other words, entails greater risk to jury competence than embracing it.

Nor should we think that the jury's evaluative role, if limited, will be performed by more able institutional actors. Trial judges operate in the universe of laws: they determine whether a set of facts meets the legal floor. Evaluating law enforcement is a more normative task.<sup>213</sup> To be fair and balanced, normative assessments are best undertaken by a body of persons comprising a range of normative beliefs.<sup>214</sup> Law enforcement itself, moreover, is poorly situated to evaluate its own actions and performance; indeed, research has shown the variety of psychological mechanisms that handicap effective

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210 Consider, for instance, the following jury instruction, proposed by George Fisher:

Members of the jury, your job in this case is to decide the defendant's guilt or innocence. The lawfulness of Officer Johnson's stop of the defendant's car is not before you. Officer Johnson's actions were the subject of a separate proceeding at which I decided whether the government should be punished because of those actions. You are not to second-guess my judgment. You may consider the propriety of Officer Johnson's actions only if doing so helps you decide the defendant's guilt or innocence.

E-mail from George Fisher, Professor, Stanford Law Sch., to author (June 18, 2016) (on file with author). For more on distinguishing enforcement-finding from nullification, see *infra* subsection III.A.4.

211 See Garvey et al., *supra* note 42.

212 See generally *infra* Section III.B (arguing in favor of a more transparent balancing approach on questions of admissibility).

213 See *supra* Section I.B; see also *infra* subsection III.A.4.

214 See *supra* Section I.B.

self-assessment in the investigative context.<sup>215</sup> While other potential auditors—citizen review panels, internal review boards, government commissions—offer expertise and systemic context, their mandate is to ferret out wrongdoing. But the space between laudable and reprehensible police work is vast, and much of it unbounded by law or rules.<sup>216</sup> It is there the criminal jury offers value: a body of citizens comprising varying experiences, beliefs, and norms, bringing to the task a layman’s perspective and forging from it a literal “common” sense.

## 2. Jury Composition

Of course, this description of the jury could rightly be criticized as aspirational: a variety of factors in venire and petit jury selection can leave our petit juries less reflective—racially, ideologically, and experientially, to name but a few categories—of the larger community from which they are drawn.<sup>217</sup> Enforcement-finding is both a casualty of and contributor to under-representative juries. Because minorities, and African Americans in particular, have lower trust and confidence in law enforcement,<sup>218</sup> their under-inclusion impedes community-reflective enforcement-finding. At the same time, recognizing trials as evaluations of law enforcement exacerbates minority under-inclusion, because potential jurors voicing distrust in police will be excused either through for-cause or peremptory strikes.<sup>219</sup>

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215 See generally SIMON, *supra* note 2.

216 See Debra Livingston, *The Unfulfilled Promise of Citizen Review*, 1 OHIO ST. J. CRIM. L. 653, 661–69 (2004) (discussing the importance of remedying minor police misconduct and the challenges of doing so through standard rule enforcement methods).

217 These include reliance on underinclusive methods to compile venire lists (such as voter or drivers’ registration lists), see King, *supra* note 188, at 712–14, peremptory strikes, see *id.* at 718, and self-selection (or, more accurately, “deselection”) bias among potential jurors who harbor negative feelings about police legitimacy, see Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 771–74 (2014).

218 See, e.g., KENNEDY, *supra* note 46, at 71 (“Large numbers of blacks are convinced that, in general, law enforcement authorities value the safety and well-being of whites more than that of blacks.”); Fagan & Davies, *supra* note 46, at 458–63, 482, 499; Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 532–34 (2003); Weitzer, *supra* note 46, at 151–52.

219 One anecdote from a New York City trial judge, relayed to Professor Jeffrey Fagan, crystallizes the problem. The judge noticed that in her experience, distrust of police seemed to result in the disproportionate exclusion of minorities from criminal trials. The judge relayed that each time she informed members of the venire that they would hear testimony and evidence presented by members of the New York City Police Department and asked the potential jurors whether, in light of the expected involvement by the NYPD, they could be fair, she noticed that a majority of blacks and Latinos in the venire responded in the negative—at which point she felt she had no choice but to excuse them for cause. E-mail from Jeffrey Fagan, Professor, Columbia Law Sch., to author (June 16, 2015) (on file with author).

The dynamic is troublesome—all the more so given enforcement-finding’s potential impact on case outcomes.<sup>220</sup> But we would be wrong to conclude that the way out is through a wholesale rejection of the jury’s evaluative role. Contemporary criminal trials are, at least to a degree, necessarily and inevitably trials of law enforcement.<sup>221</sup> Recognizing and accepting this natural jury role is unlikely to worsen the dynamic of under-representative juries. To the contrary, it might refocus our attention on more fruitful fixes, such as to the rules around jury selection. For instance, we might redouble efforts to compile broader venire lists. We might consider placing limits on voir dire into law enforcement biases, for example by permitting inquiries into jurors’ capacity to be fair but curtailing lengthy forays geared towards peremptory strikes. Or we might, as some have advocated, prohibit peremptory strikes altogether.<sup>222</sup>

None of these potential responses, or others, will eliminate intra-jury and jurisdictional variation in perceptions of law enforcement, and resulting disparities in jury evaluations. But uniformity ought not be a prerequisite (or a goal) of enforcement-finding. Variation is endemic to our criminal justice system; it exists across institutional decisionmakers (police, prosecutors, juries, and judges) and has, at least thus far, eluded efforts to eradicate it.<sup>223</sup> We might recoil at the notion of adjudicative disparities, but it is what these disparities may reflect—about police-community relations, trust in law enforcement, and trust in the system more generally—that make them worthy of our deepest and most sustained attention.<sup>224</sup>

At the same time, there is reason to be optimistic about enforcement-finding’s potential to mitigate latent biases. Drawing greater attention to the evidentiary backstory—to how the evidence was gathered and how it is presented—might begin to unravel jurors’ ingrained perceptions about law enforcement. For those who enter the jury box somewhat distrustful of the police, the details of a thorough and impartial investigation will be illuminating. For those who enter accepting evidence at face value, hearing about mistakes, poor investigatory decisions, or questionable motives will give pause. This sort of de-conditioning is, after all, what we hope a trial will do. Jurors do not interpret evidence as “blank slates,” nor should they. But we might suspect an inverse relationship between the amount of evidentiary

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220 See generally *supra* Part I.

221 See generally *supra* Part II.

222 See KENNEDY, *supra* note 46 (arguing in favor of abolishing peremptory strikes because of their disparate (even if unintentional) exclusion of blacks from juries).

223 See, e.g., Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055 (2006) (discussing the challenges of reining in variation in prosecutorial decisionmaking); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) (explaining that the Sentencing Reform Act failed to eradicate sentencing disparities because it merely transferred the disparities’ source—discretion—from judges to prosecutors).

224 On the need to attend to the legitimacy-based sources of federal-state outcome disparities, see Ouziel, *supra* note 13.



backstory jurors receive and the influence of their pre-existing ideologies, biases, and experiences. It is an inverse relationship worth nurturing.

### 3. Utility

Embracing jury evaluations of law enforcement is all good and well, we might say, but to what end? Trials are rare. So, too, in many jurisdictions, are jurors inclined towards critically assessing the work of law enforcement.<sup>225</sup> With few exceptions, jury verdicts are not systematically compiled and reported. Moreover, individual verdicts don't always (or perhaps even often) get communicated to the law enforcement officers who built the case.<sup>226</sup> Even when they do, the opacity of verdicts leaves parties to interpret them in line with their institutional interests. Thus, when a mostly African-American jury acquits an African-American defendant in a case replete with shoddy police work undertaken by detectives with questionable motives (à la O.J. Simpson), police and prosecutors may rationalize the acquittal as a product of race—discounting the substantial shortcomings of their work, as well as the effects of police legitimacy (and its absence) on racial influences.<sup>227</sup>

If we frame enforcement-finding as a regulatory project, we would be right to reject it as ineffective. But regulatory efficacy has never been a prerequisite of jury authority. We should acknowledge, accept, and attend to enforcement-finding not because it is an antidote for the system's ills, but simply because it *is*: as long as police and public prosecutors enforce our criminal laws, juries naturally will (as they should) judge them. Acceptance of enforcement-finding need not—and should not—displace or distract us from improving existing regulatory mechanisms. Internal review boards should be supported, citizen review panels strengthened, federal, state, and local commissions appointed, more case data gathered and analyzed. And we should continue to talk about both the potential and limits of constitutional doctrine to shape police and prosecutors' behavior.

At the same time, we can recognize, and seek to leverage, enforcement-finding's regulatory potential. One benefit flows almost automatically from accepting the jury's evaluative role: fairer discovery practices. Embracing enforcement-finding admits—indeed, proclaims—the materiality of law enforcement action. In so doing, it reduces the all-too-frequent temptation of prosecutors to convince themselves otherwise.<sup>228</sup> This does not, of course, solve deliberate discovery violations; prosecutors bent on violating the rules will do so regardless of how those rules are framed. Far more common, though, are the reckless violations that result when “materiality” is too nar-

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225 See *supra* Section I.A.

226 See *infra* note 229.

227 See *supra* notes 46–48 and accompanying text; see also ARMANDA COOLEY ET AL., MADAM FOREMAN: A RUSH TO JUDGMENT? 181–92 (1995) (recounting the discussion by jurors in the O.J. Simpson trial denying that race played a part in verdict, and indicating throughout that investigative errors played the largest role in deliberations and the verdict).

228 See generally *supra* note 53 and accompanying text.

rowly conceived. If acceptance of enforcement-finding does nothing more than curtail these errors, it will have served a pressing regulatory need.

We can also imagine what enforcement-finding might accomplish with a little institutional tweaking. Criminal trials today are missed opportunities to facilitate communication and feedback between citizens and law enforcement. Institutionalizing data collection on jury verdicts, disseminating that data to prosecutors and law enforcement agents, encouraging more direct feedback between jurors and law enforcement (or communication through impartial third parties, such as researchers or designated court officials)—these and other mechanisms are well worth deeper consideration. None are particularly radical. Judges often talk to jurors post-verdict, and sometimes relay their conversations to prosecutors; and prosecutors sometimes speak directly to jurors.<sup>229</sup> Some courts and prosecutors' offices already keep and disseminate verdict data.<sup>230</sup> And at least in the capital context, both the utility and feasibility of third-party juror interviews has been proven.<sup>231</sup> We could draw on these already-employed devices, enlarging and institutionalizing them far more broadly than we do.

Institutionalizing post-trial juror-litigant communication also helps jurors. Because it is not just litigants and the public that wants (and needs) juror feedback; jurors themselves so often want to give it, as has been illustrated in the countless books written and interviews given by former jurors, and even by juror attempts to communicate more than a verdict form allows.<sup>232</sup> In this way, juror feedback reduces enforcement-finding's poten-

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229 That prosecutors don't speak to jurors more often is at least partly a function of a protective instinct around convictions and even mixed verdicts. Speaking to jurors risks opening a Pandora's box of information a defense attorney might use in an attempt to impeach the verdict (and which prosecutors will accordingly be required to disclose). Yet this fear is misplaced. First, the law creates an enormously high barrier to defendants seeking to reverse convictions on account of jury improprieties; the risk that reversal-warranting improprieties actually occurred in a given case is miniscule. See, e.g., *Tanner v. United States*, 483 U.S. 107 (1987); see also FED. R. EVID. 606(b) (prohibiting juror testimony to impeach verdict except insofar as it relates to extraneous improper influences). Second, if a conviction *was* obtained as a result of such impropriety, the interests of justice demand it be outed in any event.

230 See, e.g., *Data Dissemination Policy*, WASH. CTS., (Sept. 6, 2013) <https://www.courts.wa.gov/datadis/?fa=datadis.policyDiss>.

231 The Capital Jury Project, a decades-long study funded by the National Science Foundation, has administered and analyzed post-trial interviews with over 1100 jurors in more than 350 capital trials across 14 states, generating over 78 articles and books on jury decisionmaking in capital cases. See *What Is the Capital Jury Project?*, U. AT ALBANY SCH. OF CRIM. JUST. (last visited Nov. 10, 2016), <http://www.albany.edu/scj/13189.php>; see also Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233, 1233–36 (1995) (discussing benefits of study and of post-trial juror interviews more generally).

232 A recent example occurred during the verdict in *S.E.C. v. Stoker*, 865 F. Supp. 2d 457 (2012), a civil enforcement action arising out of the 2008 financial crisis. Along with its verdict exonerating the defendant, the jury issued a formal statement to the prosecutors advising that the verdict should not impede the government's efforts to investigate and

tial risk to accurate adjudication (and to the rule-of-law concerns discussed below). If a jury thinks the evidence insufficient for conviction but fears acquitting would penalize a good-faith and valiant law enforcement effort, formal post-verdict communication would assuage that fear.<sup>233</sup> Conversely, if a jury believed the defendant's guilt had been proven but by way of undesirable tactics, it would not be faced with a stark choice of implicitly approving the prosecution's case by convicting, or implicitly disapproving it by acquitting; instead, it could convict while formally voicing its disapproval.

#### 4. Democratic Accountability

Some may criticize this project (or, depending on one's bent, praise it) as engendering "nullification." Others may think it does not go far enough: Why not have the jury find the "law" of policing? Isn't Fourth Amendment reasonableness, after all, what enforcement-finding is about?

Answering the latter critique helps explain why the former is misplaced. Jury evaluations of law enforcement will, as discussed, inevitably vary across juries and jurisdictions.<sup>234</sup> Variation impoverishes law's power and utility. This is particularly so when it comes to the laws governing police conduct. It is in part for this reason that the Court has developed a strong preference for bright-line rules in constitutional criminal procedure.<sup>235</sup> Where the Court has chosen to draw the lines may be criticized,<sup>236</sup> but as aspirational goals, clarity and uniformity are hard to quibble with.

At the same time, these goals have costs. In the policing context, clarity and uniformity are best achieved by, for instance, assessing probable cause from an *ex ante* perspective (that is, without regard to the challenged search

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charge wrongdoers in the financial industry. See Peter Lattman, *S.E.C. Gets Encouragement From Jury That Ruled Against It*, N.Y. TIMES (Aug. 3, 2012), [http://dealbook.nytimes.com/2012/08/03/s-e-c-gets-encouragement-from-jury-that-ruled-against-it/?\\_r=0](http://dealbook.nytimes.com/2012/08/03/s-e-c-gets-encouragement-from-jury-that-ruled-against-it/?_r=0). The foreman later explained that the jury issued the statement because it feared the verdict, standing alone, would be misinterpreted by the government. See *id.* (describing how the jury "was left with an uneasy feeling that the verdict inadequately described its feelings about Citigroup's conduct," and feared it would inadvertently discourage prosecutors from investigating and prosecuting financial crimes).

233 This is precisely what happened in *Stoker*. See *supra* note 232.

234 See *supra* notes 223–24 and accompanying text.

235 See, e.g., *California v. Acevedo*, 500 U.S. 565, 577 (1991) (discussing the need for constitutional criminal procedure to provide "clear and unequivocal guidelines to the law enforcement profession" (internal quotations marks omitted) (quoting *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990))); *Fare v. Michael C.*, 442 U.S. 707, 718 (1979) (discussing how *Miranda's* bright-line rule enables police and prosecutors to know in advance and with specificity what they may do in custodial interrogations).

236 See, e.g., *Acevedo*, 500 U.S. at 598 (Stevens, J., dissenting) ("[T]he Court has certainly erred if it believes that, by erasing one line and drawing another, it has drawn a clearer boundary.").

or seizure's fruits), and analyzing reasonableness objectively rather than subjectively.<sup>237</sup> Yet these analyses necessarily shortchange policing realities.

This is why we need judges to set clear and uniform limits on police and prosecutor authority, and we need juries to evaluate whether legally-exercised authority was put to good use. While the judge's function must sometimes ignore the realities of a given situation, the jury's function necessarily embraces them. Because jurors are tasked with determining guilt, they evaluate law enforcement's conduct within that context; in so doing, they balance that conduct against the alleged harms it either sought to, or did, prevent.

To put the point more concretely: imagine three police stops of African-American motorists driving five miles per hour over the speed limit. The first is carried out in an effort to identify the target of a homicide investigation, and it results (in addition to the identification) in the recovery of a bag of marijuana. The other two are carried out because, according to police testimony, the drivers looked vaguely "suspicious." The second stop also yields a bag of marijuana; the third, a dead body in the trunk. Because the drivers were speeding, all three stops are lawful. Yet from a normative perspective, they are qualitatively different. The first is good policing. The second two raise significant concerns, but each involves a different calculus. We are probably willing to overlook our concerns when it comes to a dead body; less so for a bag of marijuana. Also, our concerns about the officers' motives might lead us to question the reliability of the evidence itself. Depending on the officers' testimonies and demeanors, and the extent of corroboration, we might reasonably doubt the prosecution's narrative of the marijuana's discovery and seizure. Yet it would be unreasonable doubt—indeed, it would be absurd—to imagine officers, however questionable their motives, stopping a car and planting a dead body in the trunk.

This is the sort of evidence-specific, normative calculus that juries are best suited to perform. And it is precisely evidence's place in the calculus—balanced against, and interwoven with, law enforcement conduct and alleged crime—that separates enforcement-finding from nullification. Nullification presumes an irreconcilable divide between the evidence and the jury's verdict.<sup>238</sup> Enforcement-finding admits of a far messier reality.<sup>239</sup>

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237 See Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 266 (1993) (discussing the objective approach to reasonableness across Fourth Amendment doctrine).

238 Those who define as "nullification" acquittals based (in part) on the undesirable exercise of law enforcement discretion frame the scenario as one of undisputed factual and legal guilt. See, e.g., Brown, *supra* note 7, at 1172–78; Butler, *supra* note 7; Hannaford-Agor & Hans, *supra* note 7, at 1254 ("Common to most definitions of jury nullification is that juries . . . acquit the defendant although the jurors believe that the defendant is guilty under the law."). Yet in practice, undesirable or even questionable law enforcement conduct inevitably complicates the evidentiary picture.

239 See generally *supra* Section I.B; see also Hannaford-Agor & Hans, *supra* note 7, at 1274–76 (discussing a study seeking to isolate nullification as a potential ground for acquittal, which found jurors equivocal about evidential strength, and police credibility in particular, in cases they rated low on the scale of "legal fairness" or "outcome fairness").

Even if enforcement-finding does not raise rule-of-law concerns to the same extent as nullification, it does raise concerns about accountability. Returning to the scenario of the three motorists, we might suppose that once a prosecutor has elected to pursue the second motorist, the jury should not question that exercise of discretion. The prosecutor (or more accurately, her boss), is, after all, democratically-elected—or, as in the federal system, at least appointed by a democratically-elected official. The jury is not.

In an ideal world, democratically-accountable prosecutors' normative judgments may be preferable to undemocratically-accountable juries. But we don't live in an ideal world. In the world in which we do live, prosecutorial accountability is severely limited,<sup>240</sup> and prosecutorial decisions are the product of multiple and sometimes conflicting (and undesirable) influences.<sup>241</sup> Criminal juries, meanwhile, are increasingly representative of the voting public—and in some jurisdictions, can sometimes be over-representative of the demographic groups most affected by crime and policing.<sup>242</sup> Sometimes, democratic accountability can be bolstered by undemocratic institutions.<sup>243</sup> When that's the case, it makes little sense to handicap that process in the name of democratic principle.

### B. *Doctrine: Towards Transparency and Balance*

Earlier I claimed that concerns about enforcement finding's implications for juror competence, minority representation, utility, and accountability obscured both the reality and the goal. The reality, as I have argued, is that juries already evaluate law enforcement.<sup>244</sup> Futile efforts at limiting this natural jury function will, if anything, only exacerbate these concerns. The goal, then, should be apparent. Rather than trying to limit enforcement-finding, we should assimilate it within criminal adjudication's larger aims—such as fairness, accuracy, and above all, transparency. Thus, for each enforcement-finding issue that arises, courts should balance the need for jury evaluation of law enforcement against other potentially competing adjudicative values.

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240 See Wright, *supra* note 189.

241 See, e.g., Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 966–67 (1997) (“Much work remains to be done in exploring the personal ideologies of prosecutors, the influence of long-term economic self-interest, and the psychological aspects of prosecutors’ self-selection.” (footnotes omitted)); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1884–85 (2000) (exploring manifestations of the gap between the public’s interest in going after the most culpable criminals and prosecutors’ interest in securing trial experience).

242 See *supra* notes 189–90 and accompanying text.

243 Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 30–33 (2010) (advancing a theory of non-sovereign institutions as an aid to democratic processes, using the jury as an example); see also Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113 (2012) (arguing that functional, structural, and political breakdowns can sometimes render unelected institutions, such as the Supreme Court, more politically responsive than elected ones).

244 See *supra* Section I.A.

It is an immense order, not because it requires large wholesale change, but, to the contrary, because it demands such nuanced and case-specific care. The potential issues are endless. How, for instance, should we handle law enforcement policies that, while lawful, may rankle? Jurors should know an officer has dutifully followed his directives, and should assess the desirability of those directives—yet we do not want to turn trials into policy referenda. How should we handle the matter of extra-adjudicative events that may bleed into jurors' evaluations of law enforcement in a particular case? In the immediate aftermath of a controversial police shooting, for instance, should jurors be instructed to put that event out of their minds, focusing only on the actions of the individual officers in the case before them? Or should we let the chips fall as they may, so to speak?

Or consider the earlier-mentioned car-stop scenario: Should the prosecution be permitted to elicit the officers' intent to identify the defendant as a target in a homicide investigation, even if the homicide is not among the charges, and even if the defense has not opened the door to the officers' motivations by questioning the circumstances of the stop? "No" might seem the obvious answer. But what if the trial is in a jurisdiction known for high levels of distrust in police—a place where the proverbial door has opened without defense counsel so much as laying a finger on the knob? Should the court forge a middle ground, allowing some explication of the officers' action while concealing the precise conduct that led to it? Or should the prosecution, and the police officers, be left to contend with the skepticism they (at least in an institutional sense) helped create?

These are intensely normative questions. They have no easy answers, nor do the countless other questions that will—and more to the point, already do—arise in criminal courtrooms every day. The key is to acknowledge we are asking them. When courts differentiate between "fact" and "law" in the enforcement-finding context, when they admit one piece of evidence as going to "credibility" while excluding another as inviting "nullification," they are really making normative judgments about the extent and scope of enforcement-finding that should occur. Better, then, to admit that—to engage the normative inquiry openly and forthrightly. Admitting of enforcement-finding's normative commitments will allow courts to confront those commitments, grapple with them, and temper them with commitments to other adjudicative values, such as accuracy, fairness, and efficiency. And over time, these efforts will yield an enforcement-finding doctrine: a collective judicial assessment of the circumstances in which enforcement-finding's probative value is substantially outweighed by the danger of unfair prejudice, undue delay, or other competing concerns.<sup>245</sup> Given Rule 403's preference for inclusion, such circumstances should be rare.

For an illustration of what such a transparent balancing approach would mean, consider one of the cases discussed earlier in this Article. In a series of

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<sup>245</sup> See FED. R. EVID. 403 (requiring that relevant evidence be admitted unless its probative value is substantially outweighed by, among other things, the risk of unfair prejudice or undue delay).

trials in the Eastern District of New York arising from a “war” between Brooklyn’s two reigning organized crime families, an FBI agent provided confidential FBI intelligence to an informant from one of the families—an egregious flouting of FBI protocol.<sup>246</sup> In the absence of an evidentiary framework that admits the value of such evidence to the jury’s evaluative task, the defense was left to construct a convoluted, factually unsupported, and disingenuous theory of admissibility: the improper leaks were part of a “coup” orchestrated by the FBI agent and his informant, and thus the defendants’ responsive acts of violence were a means of self-protection rather than racketeering.<sup>247</sup> In seeking to preclude this evidence, the government was slightly more forthcoming: the defendants’ true purpose in offering the evidence was to impugn the conduct of the FBI and U.S. Attorney’s Office, the government argued, thereby discrediting the prosecution and obtaining “an acquittal based upon jury nullification.”<sup>248</sup>

The government, of course, could afford to be more forthcoming: the law/fact dichotomy frames this defense strategy as unpermitted “nullification.” Both the district court and court of appeals subscribed to that view, precluding the evidence given the specious theory of relevance and the risk that admitting it would “needlessly delay[ ] the trial” and lead the jury to “improperly discredit the government’s case.”<sup>249</sup>

The courts had engaged in the same doctrinal subterfuge as the litigants. A strategy of discrediting the law enforcement agents who built the case and the prosecutors who charged it can hardly be described as an entreaty to jury lawlessness. The risk of the jury discrediting the government’s case, while prejudicial, is not necessarily unfairly so. And the additional time spent hearing this evidence (and the prosecution’s response to it) is not so obviously “needless.”<sup>250</sup>

Indeed, whether prejudice was unfair and delay undue were genuine questions, at the heart of which lay an inquiry left unaddressed: To what extent did the actions of one agent taint the work of the entire law enforcement team? This was the evidence’s true probative potential. It would enable the jury to assess whether the investigation, or at the least the investigators, had been compromised. To balance this value against competing dangers, the courts needed to probe more deeply. Which members of the team knew of the leaks? How long did they know? How did the leaks (and the informant’s use of them) affect the investigation’s trajectory? A more developed record on these issues could have better enabled the courts to weigh probative value against potential harm. More importantly, such an

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246 *United States v. Malpeso*, 115 F.3d 155, 162 (2d Cir. 1997); *see also supra* notes 25, 27.

247 *Malpeso*, 115 F.3d at 162.

248 *Id.*

249 *Id.* at 163.

250 *See* FED. R. EVID. 403 (requiring that relevant evidence be admitted unless its probative value is substantially outweighed by, among other things, the risk of unfair prejudice or undue delay).

analysis would have been more transparent and faithful to the real matters at stake.

In this example, as in all enforcement-finding questions, what matters is less the outcome than the process. Rather than disguising a given piece of evidence's true purpose, either as an improper attempt at "nullification" or a means of presenting factual "background," litigants and courts should acknowledge and embrace enforcement-finding's proper place within the adjudicative scheme. If courts were to acknowledge openly, and to weigh publicly, the benefits of jury assessment of law enforcement against the harms in any given instance, they would enhance their own legitimacy, and that of the jury's verdict.

#### CONCLUSION

Criminal juries today necessarily find facts, occasionally define or refine law, and invariably evaluate law enforcement. This latter role—what I have called "enforcement-finding"—has attributes of fact-finding and law-finding, but doesn't fit comfortably within either model. Courts, litigants, and scholars too often mistake enforcement-finding for something else, or, recognizing it, apply a framework that doesn't quite fit. We lack a theory to properly frame enforcement-finding, institutional mechanisms to handle it, and a doctrine to appropriately set its parameters.

History provides the theoretical frame. The criminal jury is an evolving institution; enforcement-finding, a natural adaptation. Over time, as criminal law and enforcement changed—from common law to statutory law; from a vehicle for censure to also a tool of regulation; and from private to public enforcement—the criminal jury evolved accordingly. And as public police and prosecutors exercised greater power and discretion with fewer outside constraints, the criminal jury's role naturally accounted for that shift. In short, juries judge law enforcement because law enforcement needs judging.

This insight should inform both doctrine and institutional design. Institutional design should mitigate enforcement-finding's risks while leveraging its regulatory and communicative potential. And doctrine should allow courts to admit and engage the hard normative questions openly and forthrightly, tempering those normative commitments against enduring adjudicative values.

As regulatory interventions go, acknowledging and enhancing the jury's evaluative role is admittedly slight. This is a limitation, but also a virtue. Criminal juries already evaluate law enforcement. Acknowledging, accepting, and embracing this reality thus requires no herculean reworking of our justice system, no drastic reimagining of our procedures. What is needed instead is a clear-eyed look at what the criminal jury does and naturally must do, and how we can enable and ultimately leverage its task.