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We Have Seen the Enemy: Scenes from a Trial

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WE HAVE SEEN THE ENEMY: SCENES FROM A TRIAL

*Robert E. Precht**

Introduction

Prosecutors — like all people — are prone to making bad decisions.

Discussing decision-making in the *Harvard Business Review*, authors Hammond, Keeney, and Raiffa identify a number of mental traps people often encounter when making decisions.[1] For example, decision-makers tend to seek out information that verifies their prejudices, even given evidence to the contrary.[2] Moreover, decision-makers often give excessive credence to the first bit of information that they learn, anchoring all subsequent interpretation to this early knowledge.[3] Such tendencies result in bad decisions.[4]

What makes these pitfalls so distressing is that they seem to be a natural part of the human thought process.[5] Because these traps are ingrained in the way the mind works, they are difficult to detect.[6] Ultimately, in order to compensate for these misjudgments, the human actor must build disciplines into the decision-making process.[7] Only with such structured care can the decision-maker detect and rectify the problems caused by inaccurate assumptions.[8]

For prosecutors, who have a substantial decision-making role within the criminal justice system, the psychological traps are espe-

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1. John S. Hammond et al., *The Hidden Traps in Decision Making*, HARV. BUS. REV. (Sept.-Oct. 1998), 47, 52. Identifying a number of traps, the authors believe that the mind can unconsciously sabotage decisions. *See id.* at 47. I have borrowed heavily from their analysis.
2. *See id.* at 52.
3. *See id.* at 48.
4. *See id.*
5. *See id.* at 47.
6. *See id.* at 50.
7. *See id.* at 58.
8. *See id.*

cially dangerous. These traps can undermine everything from guilt determination to credibility judgments to plea negotiations.

This Article examines two traps that are particularly likely to undermine prosecutorial decision-making — the confirming-evidence trap and the anchoring trap.[9] During the World Trade Center bombing trial,[10] at which the author served as defense counsel, prosecutors stumbled into both of these traps.

Part I of this Article examines the confirming-evidence trap in the context of the prosecution's failure to accept contradictory evidence regarding the material used in the bomb. Part II similarly examines the anchoring trap in light of the debacle that occurred during testimony by the prosecution's main witness. In addition to examining these episodes, the Article concludes that prosecutors need substantial trial experience to learn to avoid these tricks of the mind, and plea-bargaining negotiations do not suffice in providing such experience. Unfortunately, as the trial rate in federal courts drops, new prosecutors receive far less experience than their predecessors did.[11] Consequently, these crucial decision-makers in the criminal justice system are doomed to make critical, albeit avoidable, mistakes.

I. Confirming the Phantom Chemical Fingerprint

Five months into the World Trade Center bombing trial, there was still a major gap in the government's case; investigators could not identify the type of explosive used. Fred Whitehurst, the senior chemist in the Federal Bureau of Investigation's ("FBI") renowned crime laboratory, was scheduled to be the government's witness on explosives. The day before he testified, a prosecutor handed defense counsel a letter that Whitehurst had addressed to his superiors. In the letter, Whitehurst accused principal examiner David Williams, the agent who summarized the scientific analysis and prepared the laboratory's final report, of pressuring the crime laboratory to slant its findings to favor the prosecution.

Perhaps understandably, the prosecutor decided not to call Whitehurst and instead summoned Steven Burmeister, Whitehurst's junior colleague and the laboratory's only other chemist.[12] Nevertheless, Burmeister admitted that it was impossible to iden-

9. *Id.* at 48, 52.

10. United States v. Salameh et. al., No. S593 Cr. 180 (S.D.N.Y. 1993).

11. *See infra* note 84 and accompanying text.

12. *See* Trial Transcript at 7081, *Salameh*, No. S593 Cr. 180 (S.D.N.Y. 1993) [hereinafter Trial Transcript].

tify the contents of the bomb from the tire fragment they had analyzed.[13] His admission made front-page news.[14]

As unhelpful as that testimony was, Burmeister compounded it by revealing further evidence of Williams' bias. Burmeister further related how, immediately after the explosion, investigators summoned Whitehurst and him to the blast scene in New York. Consequently, no qualified chemists remained to perform explosives-residue analysis at the laboratory in Washington where investigators had sent the tire fragment for analysis. Thus, non-specialists in the Chemistry-Toxicology Unit tested the tire and concluded that urea nitrate was detected on the specimen.[15] This conclusion helped the prosecution because it tended to establish that the World Trade Center bomb contained urea nitrate, a rare substance that matched chemical residues found at locations linked to the defendant. Williams approved the dictation and included it in his official report.[16]

When Whitehurst and Burmeister returned to Washington, they realized that the non-specialists had misinterpreted instrumental readings, which only showed the presence of urea and nitric acid. Cognizant of the fact that these substances could have originated from any number of non-incriminating substances such as urine, fertilizer, car exhaust, or antifreeze, the two pleaded with Williams and asked him to amend the report.[17] He refused.[18] Laboratory mangers subsequently rebuffed Whitehurst and Burmeister's appeals, but permitted the two to test the tire fragment themselves.[19] They told Williams the results were consistent with the presence of urea and nitric acid, but they cautioned that materials other than urea nitrate could have produced the same results.[20] Williams con-

13. *See id.*

14. *See* Richard Bernstein, *Chemist Can't Pinpoint Bomb Contents at Trial*, N.Y. TIMES, Jan. 21, 1994, at B3.

15. *See* Michael R. Bromwich, Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (April 1997)* (visited Feb. 20, 1999) <http://www.usdoj.gov/oig/fbilab1/fbil1toc.htm> [hereinafter Bromwich, *Investigation*].

16. *See* Bromwich, *Investigation*, *supra* note 15, at 50-51; *see also* Trial Transcript, *supra* note 12, at 7085-7105.

17. *See* Bromwich, *Investigation*, *supra* note 15, at 50-51; *see also* Trial Transcript, *supra* note 12, at 7085-7105.

18. *See* Bromwich, *Investigation*, *supra* note 15, at 50-51; *see also* Trial Transcript, *supra* note 12, at 7085-7105.

19. *See* Bromwich, *Investigation*, *supra* note 15, at 50-51; *see also* Trial Transcript, *supra* note 12, at 7085-7105.

20. *See* Bromwich, *Investigation*, *supra* note 15, at 50-51; *see also* Trial Transcript, *supra* note 12, at 7085-7105.

tinued to resist adopting the full conclusions of the scientists.[21] After receiving the new findings, he grudgingly agreed to amend the earlier report, but he also asked Whitehurst's unit chief to remove the caveat that innocent substances could have produced the same results.[22] The unit chief refused, after which Williams unsuccessfully appealed the decision all the way up to the chief of the entire scientific analysis section. In the end, Williams forwarded a report including the important caveat.[23]

Although David Williams had a clear penchant for slanting evidence, prosecutors called him as their last witness.[24] They had worked closely with Williams and relied upon him to summarize all of the forensic evidence against the defendants.

Burmeister and my own expert had said that it was impossible to identify the contents of the bomb. Nevertheless, the prosecutor asked Williams if he could form any conclusions about the contents of the bomb based on an inspection of the explosion rubble.[25] Williams replied that he could identify the composition from the distribution of the damage.[26] By looking at the destruction, he claimed that he could narrow the type of bomb to fertilizer-based explosives, including urea nitrate.[27] His conclusion was incomplete at best.

On cross-examination, a lawyer asked Williams about the Whitehurst letter and elicited some startling admissions. Why had Williams altered the reports prepared by the chemists?[28]

"It hampered the defense," Williams replied, apparently serious.[29]

"So, . . . you encouraged Mr. Whitehurst . . . to go out of his way to help the defense, is that what your testimony is?"[30]

"That's correct."[31]

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21. *See* Bromwich, *Investigation*, *supra* note 15, at 50-51.

22. *See* Bromwich, *Investigation*, *supra* note 15, at 50-51; *see also* Trial Transcript, *supra* note 12, at 7085-7105.

23. *See* Bromwich, *Investigation*, *supra* note 15, at 50-51; *see also* Trial Transcript, *supra* note 12, at 7085-7105.

24. *See* Trial Transcript, *supra* note 12, at 7970.

25. *See id.* at 7973.

26. *See id.*

27. *See id.* at 7973-75.

28. *See generally id.* at 8080-83.

29. *Id.* at 8083.

30. *Id.* at 8085.

31. *See* Trial Transcript, *supra* note 12, at 8035.

Williams went on to identify urea nitrate as the main charge of the explosive.[32] His identification was by no means a trivial one because evidence linked the defendants to a bomb factory and storage locker containing evidence of urea nitrate, an explosive rarely used in a criminal device. On cross-examination, Williams's testimony that the explosives were urea nitrates added credence to the government's case without any basis in scientific fact.

Three years later, in April 1997, the Inspector General released its report alleging corruption in the FBI laboratory.[33] The report found that large portions of David Williams's testimony were either downright false or completely unsupported by scientific evidence.[34] Specifically, Williams had given invalid and misleading opinions when he testified that he could narrow the type of bomb by looking at the destruction.[35] He subsequently asserted on cross-examination that he could identify the main charge of the explosion as urea nitrate, a speculation beyond his scientific expertise and one that appeared tailored to provide the most incriminating result.[36] He later admitted to Inspector General investigators that he could in no way determine the composition of the bomb from independent evidence at the blast site.[37] He stated that he made the identification because he knew that agents had found urea nitrate at the storage locker.[38] The report noted: "For Williams to identify the main charge as urea nitrate based on evidence that the defendants had or could make that compound is comparable to a firearms expert identifying the caliber of a spent bullet based on the mere fact that a suspect had a handgun of a particular caliber."[39]

How did well-intentioned prosecutors make the mistake of relying on a manifestly biased witness in the first place? They obviously believed that the defendants were guilty and that urea nitrate was the explosive ingredient the defendants used. They sought out evidence to support that opinion in the person of David Williams

32. *See id.* at 8035-36.

33. *See* Michael R. Bromwich, Inspector General, *The FBI Laboratory One Year Later: A Follow-Up to the Inspector General's April 1997 Report on FBI Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (June, 1998)* (visited Feb. 20, 1999) <http://www.usdoj.gov/oig/fbil1yr.htm> [hereinafter Bromwich, *One Year Later*].

34. *See* Bromwich, *Investigation*, *supra* note 15, at 8, 10, 18-19, 24, 32, 38-42.

35. *See id.* at 55.

36. *See id.*

37. *See id.*

38. *See id.*

39. *Id.* at 40.

and rejected Whitehurst and Burmeister's allegations apparently because they contradicted that opinion. Naturally, Williams himself had been the first to fall into the confirming-evidence trap, ignoring the truth to justify his own belief that the defendants had crafted their bomb out of materials the FBI had discovered.

How can people avoid falling into the confirming-evidence trap? The authors of "The Hidden Traps in Decision Making" suggest that decision-makers should consult with a "devil's advocate" when contemplating their decisions.[40] Importantly, trials can present prosecutors with this opportunity. Prosecutors must present witnesses to establish their case and defense counsel can probe the weaknesses of their accounts. In this way, defense counsel prompts the prosecution to examine all of the evidence with equal vigor, rather than accepting confirming-evidence without question.

To be sure, the defense counsel in the World Trade Center case did only an imperfect job in revealing the full extent of the witness's misrepresentations. Nevertheless, the trial presented an opportunity for the defense lawyers to air the issue of Williams's bias. If our clients had pleaded guilty, we would not have had that chance.

The questioning process that occurs in trials promotes better prosecutorial decision-making not only in the cases at trial, but also in future prosecutions. With repeated trials, prosecutors are more likely to become skeptics of confirming-evidence in other areas of their work as well. Because defense counsel has so little opportunity to challenge confirming-evidence, plea bargaining is one area in which prosecutors need to develop healthy skepticism. First, in my experience, most prosecutors did not fully disclose the government's evidence. Hence, I often found myself shadowboxing, trying to strike a blow at a target whose identity was unknown to me. They never produced live witnesses so I could not probe the credibility of witnesses even when I knew their identities. These limitations hobbled my efforts to argue persuasively against decisions the prosecutor was considering.[41] At the same time, the limitations denied the prosecutor the benefit of strong counter-arguments. Trials

40. Hammond et al., *supra* note 1, at 52.

41. For an informative discussion of the state of plea bargaining in federal court, see Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2128 (1998), in which Professor Lynch incisively describes the process as an essentially *ex parte* affair run by prosecutors and law enforcement. While defense counsel can make presentations to the prosecutor, the prosecutor and law enforcement agencies function as a team, making the process neither neutral nor adversarial.

are the best place for prosecutors to learn to build counter-arguments themselves.

II. Anchoring the Case to the Wrong Man

Another example of flawed decision-making in this case occurred when the prosecutors snared themselves in the anchoring trap by clinging to their first impression of a witness's credibility at the expense of everything else. Even before the trial began, rumors circulated that someone could disprove the contention of my client, that the van used in the explosion had been stolen from him fourteen hours before the bomb exploded.[42] Newspapers reported that the government found a gas station attendant who said he pumped gas for a yellow Ryder van driven by Mohammad Salameh, my client, just a few hours before the blast and well after he had reported it stolen.[43]

The prosecution provided us with FBI reports summarizing an interview with gas station attendant Willie Moosh conducted soon after my client's arrest.[44] According to the reports, the FBI showed Moosh several sets of mug shots.[45] In one set, he identified the photograph of Salameh as one of his customers in the early morning hours before the explosion.[46] In a second set, he identified another defendant named Abouhalima.[47] The other photographs in each set were of men who had no connection to the case. The evidence seemed unassailable.

The prosecutor called Moosh to the stand, hoping that he would discredit Salameh's story. In a case that had very few eyewitnesses, the government was counting on Moosh to identify Abouhalima and Salameh in court as the persons he had seen that night.

Moosh, a small, bespectacled man, settled into the witness chair and smiled broadly at the judge. He nodded to us in the courtroom. A Spanish interpreter stood beside him. The prosecutor asked preliminary questions to set the stage for the in-court identification.[48] Moosh had worked as a gas station attendant at a Shell station in Jersey City and had been on duty in the early morning

42. See Mary B.W. Tabor, *Witnesses Report Seeing Suspects on Eve of Blast*, N.Y. TIMES, Mar. 22, 1993, at B4.

43. *See id.*; *see also* Peg Tyre, *Feds: Salameh Drove Bomb Van*, N.Y. NEWSDAY, Mar. 24, 1993, at 3.

44. FBI Reports on file with the author.

45. *See* Trial Transcript, *supra* note 12, at 5035-37.

46. *See id.*

47. *See id.*

48. *See id.* at 5035-37.

hours of February 26, 1993.[49] Between 3 a.m. and 4 a.m., about eight hours before the bomb exploded, a yellow Ryder van followed by a Lincoln Sedan pulled into the station.[50] Moosh related how he had pumped gas for the two vehicles.[51] The prosecutor then asked Moosh to describe the occupants of the vehicles.[52] He testified the van's driver wore a closely cropped black beard, a description that generally matched Salameh's appearance in court, and that a man with a "horse face" was in the passenger seat.[53] Moosh said the person driving the Lincoln was husky and had red hair, a description that generally matched Abouhalima's appearance.[54]

Then came the crucial moment. The prosecutor wanted to prove that it was Salameh and Abouhalima who had seen Moosh saw that night. As the witness had recognized their photographs in the FBI interview, the prosecutor had good reason to be optimistic. He asked Moosh to look around the courtroom and see if he recognized the man who drove the Lincoln.[55] The atmosphere of the courtroom suddenly seemed to change. As Richard Bernstein of The New York Times described it, the trial took on the air of a television quiz show when everybody in the audience knows the right answer and waits in suspense for the contestant to respond.[56]

Moosh left the stand and ventured toward the defense table. He peered at the defendants. Then he looked beyond us to the press benches in the back of the courtroom and looked over the reporters covering the trial.

"Look all over," the prosecutor urged.[57]

"Objection!" Abouhalima's counsel screamed.[58]

Moosh spun his head in the direction of the objection and looked at the redheaded defendant. He skimmed the defense table again. He glanced at the jury. He looked at me. Then he turned toward the jury box. He appeared to fixate on it. Resolute now, he strode up to the left side of the box and stopped six feet from the startled jurors.

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49. *See id.* at 4980-82.
50. *See id.* at 5038-39.
51. *See id.*
52. *See id.*
53. *See id.* at 5025.
54. *See* Trial Transcript, *supra* note 12, at 5025-38.
55. *See id.*
56. Richard Bernstein, *Witness Fails to Identify Two Blast Defendants*, N.Y. TIMES, Dec. 8, 1993, at B1.
57. Trial Transcript, *supra* note 12, at 5038.
58. *Id.*

Moosh stared at Juror No. 6, a man with blond hair sitting in the front row. He took one step toward him. Another juror, sitting right behind him, began to wave his arms frantically.

Moosh raised his arm and pointed: "It was a person such as this."[59]

"The record should reflect that he was pointing at Juror No. 6," Judge Duffy said.[60]

Showing remarkable composure, the prosecutor told Moosh to return to the stand and resumed his questioning as if nothing had gone wrong.[61] He asked Moosh to identify the yellow van's driver.[62] Again, Moosh left the stand and repeated his movements of a few minutes ago. He looked at the defendants. He looked at me. He looked out at the spectators. Then, like a heat-seeking missile, he darted toward the jury box.

"It was a person like this one," Moosh said, pointing to a man with a beard.[63]

"Indicating Juror No. 5," Judge Duffy said.[64]

The government asked for a sidebar conference and the lawyers for both sides gathered around the judge. The defense argued unsuccessfully that the damage Moosh's identification had inflicted on the government's case warranted a mistrial.

"It was devastating," said one of the defense lawyers.[65]

"I don't think it's devastating unless I plan to indict Juror No. 6," the prosecutor replied.[66]

Over defense objections, the prosecutor obtained the judge's permission to introduce into evidence the prior photographic identifications.[67] In addition, he showed Moosh a single photograph of Ramzi Yousef — a fugitive — whom Moosh identified as "horse face."

The next day, during cross-examination, I showed Moosh the particular set of six photographs from which he had selected Salameh's picture in March and the day before.[68] The five other photographs were of people who had no connection to the case.

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59. Trial Transcript, *supra* note 12, at 5035-37.
60. *Id.*
61. *See id.*
62. *See id.*
63. *Id.* at 5039.
64. *Id.*
65. *Id.*
66. *Id.*
67. *See id.*
68. *See id.* at 5024.

"Now, this was the group of photographs which the FBI agent showed you on that first day he came to your house, isn't it?"[69]

Moosh looked at the photographs. "I don't remember very well, but I think so. Yes, yes, yes."[70]

"And you recognized the person you had seen in the newspaper, didn't you?"[71]

"Yes."[72]

I now came to the main point I wanted to make to the jury. I wanted him to admit that he recognized no one else in the group from the newspapers. In this way, I hoped to suggest that Moosh identified Salameh's photograph not because he saw him at the gas station on February 26, 1993, but because Moosh saw Salameh's picture in the newspapers after his arrest.

"Now sir, besides that person, do you recognize any other person in those photographs having appeared in any newspaper or having been on any television program," I asked.[73]

"I had not seen him on television, but I recognized this person when it was shown to me here," he replied.[74]

I just wanted him to say no, he recognized no one else, so that I could leave the point. I rephrased the question: "Besides the person that you recognized and who you say drove the van, do you recognize any other people in that group of photographs?"[75]

Moosh confidently pointed to two of the pictures. "Horse face, who's this one. And this guy, who was in back of the blue car."[76] The groans from the prosecution's table were audible. Moosh had not mentioned until then anything about a person in the back seat of the Lincoln. Moreover, the previous day he had identified the picture of an entirely different man as "horse face" — Ramzi Yousef — who looked nothing like the man in the photo spread.[77] Most important of all, Moosh had identified two people *with no connection to the case.*

Despite Moosh's failures to correctly identify the defendants, the government argued in summation that his identifications were reliable, anchored, as it were, to their original position in the face of

69. Trial Transcript, *supra* note 12, at 5024.
70. *Id.* at 5025.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *See id.*

abundant evidence to the contrary.[78] Two years later, however, at the trial of Ramzi Yousef, prosecutors did not call Moosh to testify.[79] Indeed, the government claimed that someone other than Salameh drove the van that night.[80]

The Moosh episode illustrates the power of anchoring. The FBI gave the prosecutors information about Moosh's ability to identify the suspects. This information anchored the prosecutor's judgment of Moosh's reliability. If Moosh identified the defendants initially, then his subsequent misidentifications were simply mistakes. In reality, Moosh's initial identification was the mistake.

How can people avoid the anchoring trap? Not surprisingly, the authors of "The Hidden Traps in Decision Making" suggest that decision-makers "[t]hink about the problem on their own before consulting others."[81] For prosecutors, this is no easy task, for the first information they receive usually comes from law enforcement agents on which prosecutors analyze the case. In that event, decision-makers should "[t]ry using alternative staring points . . . rather than sticking with the first line of thought that occurs to them."[82]

Trials may offer good places for prosecutors to view a problem from different perspectives. The necessity of having to present witnesses in court encourages prosecutors to question agents' accounts. Even when this scrutiny fails to challenge the prosecutor's first impressions, the visibility of the trial process — and the expectation that counsel will be adversarial — encourages prosecutors to entertain alternative starting points. Cross-examination allows defense lawyers to flesh out those alternative views. Armed with evidence of Moosh's cross-examination, I was able to argue more persuasively that the jury should have a different starting point, namely, that Moosh's initial identification was wrong.

In a plea negotiation setting, neither the prosecutors nor I would have ever discovered the weakness of Moosh's identification. As any defense lawyer will attest, prosecutors almost never let counsel cross-examine government witnesses in the course of plea negotiations. The prosecutors would have presented me with the FBI's account of Mr. Moosh's initial identification and that would have been the end of it. If I had asked the prosecutors to produce the

78. *See id.*

79. United States v. Yousef, No. S1293 Cr. 180 (S.D.N.Y. 1997).

80. *See* Benjamin Weiser, *Driver Gets 240 Years in Prison for Bombing of Trade Center*, N.Y. TIMES, Apr. 4, 1998, at B2.

81. Hammond et al., *supra* note 1, at 48.

82. *Id.*

witness, let alone asked them to let me cross-examine him, I would have been sent packing.

There are other reasons why plea negotiations are poor places for prosecutors to examine evidence in a fresh light. Without having to present agents as witnesses in court, prosecutors have little incentive to challenge them. Equally important, it is exceedingly difficult for defense counsel to break through the shell of intimacy that pervades the relationship of prosecutor and law enforcement agent to present a fully-fleshed alternative view of reality. As commentators note, prosecutors and agents view themselves as part of the same team.[83] Defense counsel can make presentations to prosecutors, but agents are almost always present, and they remain present after counsel is dismissed. Counsel may feel constrained to press the agents too hard for fear of offending them or the prosecutor. Even if defense counsel wanted to, without the power of cross-examination, counsel can only go so far in developing an alternative starting point for prosecutors. Thus, while it is important for prosecutors to bring a spirit of open-mindedness to plea negotiations to counteract the anchoring trap, the incestuousness of the process discourages prosecutors from seriously entertaining outside views.

* * *

The jury convicted all four defendants in the World Trade Center case. My two stories might have been stronger if they showed indisputably that innocent individuals had been convicted as a result of prosecutors falling into these traps. The examples do not show anything that dramatic. At best, they illustrate how trials can reveal tricks of the mind that may adversely affect the quality of a prosecutor's work.

Trials not only help prosecutors uncover and avoid traps in the cases that go to trial. If they are sufficient in number, trials will also help prosecutors avoid traps in the cases that end in guilty pleas. If prosecutors repeatedly experience their assumptions challenged in trial settings, they are likely to carry over those lessons into other areas of their work. A prosecutor who repeatedly witnesses her initial impressions being altered or even proven wrong at trial will probably approach plea bargaining with more self-awareness. She will be more likely to question herself. Is she gathering evidence to make a smart choice or just looking for evidence to confirm her initial impression? Has she anchored her view of the case without

83. *See, e.g.*, Lynch, *supra* note 41, at 2128.

considering other viewpoints? The role of trial work as a tool for improving prosecutorial judgment more generally should not be underestimated.

Unfortunately, new prosecutors are getting drastically less trial experience than their predecessors did. In the mid 1980s, assistants in their first year in the Southern District of New York typically tried three to seven cases.[84] Assistants in their first year now try only one or two cases — a sixty-six percent drop.[85]

Whether this drop in trial experience will erode the quality of prosecutorial decision-making over time is difficult to predict. One thing seems certain, though. If errors of judgment do increase, without more trials, we will never discover them.

84. Deborah Pines, *Drop in Criminal Cases in City's Federal Courts*, N.Y. L.J., July 27, 1995, at 1.

85. *See id.*