ARTICLE

UNSAFE VERDICTS: THE NEED FOR REFORMED STANDARDS FOR THE TRIAL AND REVIEW OF FACTUAL INNOCENCE CLAIMS

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I. INTRODUCTION

DNA analysis has resulted in a troubling number of exonerations in both capital and noncapital cases.[1] Although these cases show that a significant number of factually innocent persons are convicted of crimes they did not commit, most such convictions remain hidden because they occur in cases where DNA analysis has no application.[2] This Article seeks to show the coordinate failure of the two dominant current visions of the trial. On one hand, the standard model of the trial has obscured the proper normative warrant of the jury, while at the same time inappropriately insulating jury verdicts of guilt from review because of excessive deference to the jury's evaluation of live testimony. On the other hand, the model of the trial endorsed by adversary enthusiasts celebrates the jury's normative warrants but obscures the shortcomings of current adversary processes when such a normative warrant is inapplicable—that is, in criminal cases where the practical issue is the actual "innocence in fact" of the defendant.[3] Either account of the trial allows judges—especially appellate judges—to avoid responsibility for conviction of the factually innocent.[4]

This Article asserts that claims of actual innocence in fact (strictly defined) possess a moral purchase far superior to other

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1. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED, at xviii, 262–63, app. 2 (2000) [hereinafter SCHECK ET AL.].

2. *See id.* at 263 (describing a number of factors, including mistaken identification, police misconduct, and false confessions, that account for the wrongful convictions in cases of DNA exoneration and are therefore likely to result in wrongful conviction in cases where DNA evidence is not available).

3. *See* Gerald Walpin, *America's Adversarial and Jury Systems: More Likely to Do Justice*, 26 HARV. J.L. & PUB. POL'Y 175, 183 (2003) (asserting that juries "overwhelmingly make determinations consistent with justice" while conceding that a jury's sense of justice may appear contrary to the evidence).

4. *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 136–37 (1949) (noting with disapproval that functionally "the jury is . . . a buck-passing device" for the judge).

moral claims that animate the legal process. It proposes reforms intended to recognize the special moral position of innocence-in-fact claims and to make real the legal system's commitment to truly responsive standards of reasonable doubt in regard to such claims. Specifically, this Article proposes special trial rules for such claims, aimed at curbing adversary excess, and proposes review of convictions in such cases by a new standard of review, borrowed in part from British jurisprudence, the "unsafe verdict" standard.

II. THE STANDARD RATIONALIST MODEL AND THE OFFICIAL IDEOLOGY OF TRIAL

Examinations of the theory of trial have for some time been in general agreement that there is a dominant official account of the trial and its proper purposes. This account has been variously referred to as the "Search for Truth" model,[5] "Progressive Proceduralism,"[6] the "Rationalist Tradition,"[7] the "Official Ideology,"[8] the "Rectitude of Decision" model,[9] and the "Received

5. *See* FED. R. EVID. 102 ("These rules shall be construed . . . to the end that the truth may be ascertained . . . ."). The phrase "search for truth" is a cliché of the first order, appearing 3,747 times in the Westlaw Journals database (as of Nov. 12, 2004), which generally reflects only articles published since 1982. Although the phrase can be found as a descriptor of the purposes of trial at least as far back as the 1840s, Bogardus v. Trinity Church, 4 Sand. Ch. 633, 772 (N.Y. Ch. 1847), it did not become commonplace until the 1930s and 1940s. The notion is perhaps most closely associated with Jerome Frank. *See* FRANK, *supra* note 4, at 80–81 (discussing the "truth" theory and method in light of the adversary process); *see also* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1032 (1975) (discussing FRANK, *supra* note 4).

6. *See* Kenneth W. Graham, Jr., *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929 (1983) (book review).

7. *See* WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 71–82 (1990) [hereinafter TWINING, RETHINKING EVIDENCE]; WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 1–18 (1985). Descriptively, Graham's Progressive Proceduralism is the same as Twining's Rationalist Tradition model, although Graham and Twining differ profoundly on how they evaluate the effects of the model. *Id.* at 77–78 & n.212.

8. *See* D. Michael Risinger, *John Henry Wigmore, Johnny Lynn Old Chief, and "Legitimate Moral Force": Keeping the Courtroom Safe for Heartstrings and Gore*, 49 HASTINGS L.J. 403, 409 (1998) [hereinafter Risinger, *Heartstrings and Gore*].

9. *Id.* at 409 & n.17. The phrase is Bentham's. *See* TWINING, RETHINKING EVIDENCE, *supra* note 7, at 72. "Rectitude of decision" occupies a central place in the standard model, depending as it does on the notion of the accurate application of pre-existing rules that embody predetermined value judgments to the specific facts of the case, accurately determined by rational inference from evidence. Rectitude of decision makes real the rule of law. The more the system is seen to depart from rectitude of decision, the more difficult it becomes to defend the system as an instantiation of the rule of law, which may be one reason anomalies are ignored when the official ideology is embraced and celebrated.

View of the Trial."[10] The person most responsible for systematic description of the contours of this account or model is William Twining. Twining asserts that if one examines the notions about the place of the law of evidence and proof within the trial from the early nineteenth century to the present, certain foundational ideas emerge as common to virtually all commentators, including text writers, academics,[11] and (I would be willing to add) judges. Twining distills the content of these ideas down into a single (though lengthy) sentence setting out a prescriptive "Rationalist Model of Adjudication" and a list of "common assumptions" that underlie "rationalist theories of evidence and proof." The Rationalist Model of Adjudication is specified by Twining as follows:

> The direct end of adjective law is rectitude of decision through correct application of valid substantive laws deemed to be . . . good, and through accurate determination of the true past facts material to precisely specified allegations expressed in categories defined in advance by law (i.e. facts in issue) proved to specified standards of probability or likelihood on the basis of the careful and rational weighing of evidence, which is both relevant and reliable, presented (in a form designed to bring out truth and discover untruth) to supposedly competent and impartial decision-makers, with adequate safeguards against corruption and mistake and adequate provision for review and appeal.[12]

The nine "assumptions" are as follows:

> 1. Knowledge about particular past events is possible.
>
> 2. Establishing the truth about particular past events in issue in a case (the facts in issue) is a necessary condition for achieving justice in adjudication; incorrect results are one form of injustice.
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> 3. The notions of evidence and proof in adjudication are concerned with rational methods of determining questions of fact; in this context operative distinctions have to be maintained between questions of fact and questions of law, questions of fact and questions of value and questions of fact and questions of opinion.

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10. ROBERT P. BURNS, A THEORY OF THE TRIAL ch.1 (1999).
11. *See* TWINING, RETHINKING EVIDENCE, *supra* note 7, at 72–73.
12. *Id.* at 73 (internal numbering omitted and punctuation added).

> 4. The establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty.
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> 5. (a) Judgments about the probabilities of allegations about particular past events can and should be reached by reasoning from relevant evidence presented to the decision-maker;
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> (b) The characteristic mode of reasoning appropriate to reasoning about probabilities is induction.
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> 6. Judgments about probabilities have, generally speaking, to be based on the available stock of knowledge about the common course of events; this is largely a matter of common sense supplemented by specialized scientific or expert knowledge when it is available.
>
> 7. The pursuit of truth (i.e. seeking to maximize accuracy in fact-determination) is to be given a high, but not necessarily overriding, priority in relation to other values, such as the security of the state, the protection of family relationships or the curbing of coercive methods of interrogation.
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> 8. One crucial basis for evaluating "fact-finding" institutions, rules, procedures and techniques is how far they are estimated to maximize accuracy in fact-determination—but other criteria such as speed, cheapness, procedural fairness, humaneness, public confidence and the avoidance of vexation for participants are also to be taken into account.
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> 9. The primary role of applied forensic psychology and forensic science is to provide guidance about the reliability of different kinds of evidence and to develop methods and devices for increasing such reliability.[13]

Twining further sets out a classification of common attitudes toward this model, which he calls prescriptive (or aspirational) rationalism, complacent rationalism, and optimistic rationalism[14] (to which I would add skeptical rationalism). Prescriptive rationalists hold that it would be desirable to realize such a rationalist program in real practice, that it is the proper ideal against which to judge actual arrangements, and that it is at least sufficiently possible to approach the vision in some significant way so that efforts to that end are not ipso facto futile.[15] Complacent rationalists believe that current

13. *Id.*
14. *Id.* at 75.
15. *Id.* at 74–75.

arrangements achieve this model, or at any rate do so closely enough so that, by and large, there is nothing too much wrong.[16] Optimistic rationalists hold that much needs to be changed to align practice with the rationalist model but that this can be accomplished through the efforts of people of talent committed to reform.[17] Skeptical rationalists accept the desirability of the rationalist vision but doubt that, given the weight of history and human limitation, we can actually get very close to there from here.[18] "Deviants" (Twining's word)[19] truly believe that the rationalist model is either fundamentally illusory or wrong, both descriptively and normatively.[20]

I have not set out this sketch as a preliminary to a detailed critique of Twining. Indeed, I have no great criticism of his position, as far as it goes. Twining is an analyst of great sophistication, and he makes modest claims in context. First, he recognizes that his account "has both an analytical and an historical aspect."[21] In its historical aspect, that is, as a description of the center of gravity of conceptualization of nearly 200 years of legal thinking, Twining is quite careful to identify the subgroups and points of view for which he considers himself to have more evidence, as well as those for which he has less. He is most confident about his position for the writers of evidence texts because those constitute the universe of his specific examination.[22] He admits that there is less complete information concerning writers on other legal subjects, including both civil and criminal procedure and, especially cogently, in that domain on the borderline of analysis and practice—writings about the trial from the "how-to" point of view.[23]

Similarly, he makes no claim of formal sampling and examination of the attitudes of judges in legal opinions[24] or of practitioners. Nevertheless, it seems clear to me after more than three decades of reading legal literature and judicial opinions on

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16. *See id.* For a recent example of the more complacent end of the scale, see Walpin, *supra* note 3.

17. *See* TWINING, RETHINKING EVIDENCE, *supra* note 7, at 75.

18. *See id.* at 131–34.

19. *Id.* at 77.

20. Deviants believe that "the Rationalist Tradition is an obfuscating ideology which has been used to legitimate institutions and doctrines that uphold an ethos of social control" and "disguises the infusion of repressive values into procedural arrangements." *Id.* at 78 (characterizing the position of Kenneth Graham).

21. *Id.* at 74.

22. *See id.* at 33–70.

23. *See id.* at 74.

24. *See id.*

evidence, proof, and procedural matters, that the dominant rhetoric of opinions is generally consistent with Twining's rationalist model of adjudication, again, as far as it goes.[25] Whether it represents judges' private attitudes is harder to say, but it clearly seems to generally represent their formal public pronouncements. (There are some significant exceptions, most notably *Old Chief v. United States*,[26] about which more later.[27]) As for litigators as a group, they, like some academics, are harder to pin down. In my experience (such as it is), litigators are, of course, aware of the main contours of the rationalist model. Sometimes, like complacent rationalists, they celebrate their own role in the system as conducive to the realization of that model.[28] More often in private, perhaps, they may appear cynical about the amount of contact that exists between the rationalist model and the "sausage factory"[29]—the law as delivered in the courtrooms they inhabit. But even then it is difficult to distinguish the skeptical rationalist, who is disappointed by the failure of the system to live up to its rationalist promises, from the irrationalist, who revels in his own role in a litigation process that, behind the pretense of the model's kind of rationality, serves other, more powerful masters.

So it seems fair to say that Twining's rationalist model of adjudication fairly represents a large part of the dominant story of adjudication that the law tells about itself (and has for a long time) through the voices of most of its main participants. As such, the model also represents a powerful analytical tool, a jumping-off point from which to organize inquiry about how closely actual practice approaches the model, how it might be made to conform more closely, and whether the model represents a proper set of desiderata for adjudication in the first place. However, few at all familiar with how lawyers and judges speak

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25. A search for the phrase "search for truth" in the Westlaw Allcases database reveals (as of February 27, 2004) nearly 3,300 uses of it in judicial opinions since 1944, most recently by the U.S. Supreme Court in *Banks v. Dretke*, 124 S. Ct. 1256, 1275 (2004).

26. 519 U.S. 172 (1997).

27. Refer to notes 101–37 *infra* and accompanying text.

28. *See, e.g.*, Walpin, *supra* note 3, at 177, 179.

29. "Anyone who likes laws or sausages shouldn't watch them being made," Otto von Bismarck. Actually, there is no written source for this quotation, it exists in a half-dozen or more variants (Google it and see), and it is not entirely certain that it originated with Bismarck. *See* Jeremy Waldron, *Legislating with Integrity*, 72 FORDHAM L. REV. 373, 374 n.9 (2003). According to the Oklahoma City University School of Law Library webpage, Fred Shapiro, editor of the forthcoming *Yale Dictionary of Quotations*, indicates that the source of the quotation was most likely a verbal quip by Bismarck. *Of Laws and Sausages*, GAVEL: NEWSL. OCU L. LIBR. (Okla. City Univ. Sch. of Law, Oklahoma City, Okla.), Spring 2003, *at* http://www.okcu.edu/law/library/Spring2003.asp.

about litigation—written and oral, public and private—would conclude that Twining's model completely captures the official ideology of adjudication, at least in the United States. Conspicuously absent, as Twining himself notes, is any reference to the adversary system.[30] This is wholly justifiable on historical grounds, since many of the dominant architects of the rationalist model were either hostile to the adversary system in general or to its perceived excesses, which they appeared to believe outweighed its benefits as they saw it practiced.[31] They were, as a colleague and I have styled them elsewhere, "adversary skeptics."[32] But if evidence theorists have had a tendency toward adversary skepticism, practicing lawyers and judges are more likely to be "adversary enthusiasts." In general, lawyers and judges have celebrated "our adversary system," and, as such, the adversary system forms an important part of the "official ideology," which includes the Rationalist Model.[33]

Can the adversary system be domesticated and incorporated into the Rationalist Model without violating the Rationalist Model's other claims? It can, if one can believe that a "collision between two interested adversaries with no loyalty to either veritistic rationality or accuracy beyond their tactical uses, will result in outcomes which . . . maximize accuracy."[34] Although this position, thus stated, may seem counterintuitive to a substantial degree, there are arguments that can be made for such an arrangement as maximizing "best available" rationality in the

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30. TWINING, RETHINKING EVIDENCE, *supra* note 7, at 81–82.

31. *Id.* at 82.

32. See Mark P. Denbeaux & D. Michael Risinger, Kumho Tire *and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15, 22 (2003) and representative adversary skeptic literature cited in Denbeaux & Risinger, *supra*, at 22 n.28.

33. The shibboleth phrase "our adversary system" has appeared in the Westlaw Journals database in nearly 1,132 articles since 1980 (as of Nov. 12, 2004) and in the Westlaw Allcases database in 2,410 judicial opinions since 1945 (as of Nov. 12, 2004), only slightly less than the phrase "search for truth."

34. D. Michael Risinger & Michael J. Saks, *Rationality, Research and Leviathan: Law Enforcement-Sponsored Research and the Criminal Process*, 2003 MICH. ST. L. REV. 1023, 1035. Professor Burns obviously accepts this:

> The consistent attempts on the part of lawyers, however willful, to construct a case in aid of private goals serve "to convert the raw human materials of greed and fear and the desire for power, and the like, into questions presented in . . . a language of description, value, and reason—a culture of argument—without which it would be impossible even to ask the questions . . . about the nature of justice in general or about what is required in a particular case."

BURNS, *supra* note 10, at 49 (second ellipsis in original) (quoting James Boyd White, *The Ethics of Argument: Plato's* Gorgias *and the Modern Lawyer*, 50 U. CHI. L. REV. 882, 889 (1983)). See also Dale A. Nance, *Reliability and the Admissibility of Experts*, 34 SETON HALL L. REV. 191, 195 (2003) and authorities there cited.

long run over many cases in controversy-charged social situations. Like democracy, one can argue that the adversary system may be the "worst possible system . . . except for all the others."[35]

However one comes down on these questions (and one of the points of this Article is to claim that the current adversary system may be the "best available" system for some things but not for others), it seems clear that a commitment (largely independent of evidence) to the accuracy-maximizing nature of the adversary system "in general" (perhaps qualified by a recognition of the occasional excess in need of regulation) is an article of faith in our official ideology of adjudication. This too constitutes part of the story the law tells about itself through its main participants.

If the adversary system and the Rationalist Model coexist a bit uncomfortably in the official ideology, the same can be said for the institution of the jury. Although certain aspects of the arrangement of the jury mechanism can easily be seen as promoting accuracy,[36] the employment of a cross-section of the common run of adults as decisionmakers strikes some as incompatible with the requirements of rationality and maximized accuracy of result, at least regarding certain kinds of issues.[37] However, it seems accurate to say that, given its position in federal Fifth and Seventh Amendment jurisprudence and in many state constitutions as well, a commitment to the jury is also part of the official ideology of trial in the United States,[38] though perhaps in a more heavily qualified way than the commitment with respect to the adversary system. Nevertheless, I will ultimately conclude that there are some kinds of issues for which juries and a fully adversarial process are well suited to the proper ends of adjudication, and others for which juries are so suited if partisan adversariness is reduced.[39] In coming to these

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35. "Democracy is the worst form of Government except all those other forms that have been tried from time to time." Winston Churchill, Speech in the House of Commons (Nov. 11, 1947), *quoted in* THE OXFORD DICTIONARY OF QUOTATIONS 216 (Elizabeth Knowles ed., 5th ed. 1999).

36. *See* Denbeaux & Risinger, *supra* note 32, at 20 (comparing the bias filtration aspects of the jury process to bias filtration devices in the methodology of modern science).

37. *See* CHARLES ALAN WRIGHT & MARY KAYE KANE, LAW OF FEDERAL COURTS 662–63 (6th ed. 2002).

38. *See id.*

39. There may also be issues for which adversariness would be fine if some version of the special jury were brought back into civil cases turning on technical issues of science or engineering, such as cases involving "increased risk" causation in toxic tort. The arguments for and against such special juries are well considered in James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire*

conclusions, I hope to show that the Rationalist Model, as (concededly accurately) described by Twining, has obscured the scope of the officially sanctioned normative authority of juries, and in so doing has made it difficult to describe the proper limits of that normative authority in a proper rationalist model.

III. IMPORTANT ANOMALIES BETWEEN THE STANDARD THEORY AND PRACTICE

In the standard version of the rationalist model, juries decide facts. Certainly, in any tenable version of a rationalist account of jury function, facts (strictly defined[40]) will be important. But the standard model also emphasizes that justice under law emerges from the application of preexisting rules comprised of general fact categories (and combinative rules) that reflect preexisting value judgments.[41] Under this model, juries find facts and then overlay the substantive law as a template, which yields a determinate output that is not value neutral, but for which all values have been supplied by the lawgivers rather than by the factfinders.[42] In this view, if the factfinders' own values influence the outcome, there has been a miscarriage of justice, a failure to heed the jurors' oath (except perhaps in the exceptional situation of acquittal pursuant to that controversial

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Practices, the Reasonable Cross-Section Requirement and Peremptory Challenges, 6 WM. & MARY BILL RTS. J. 623 (1998). *See also generally* Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781 (1998); Charles W. Fournier, Note, *The Case for Special Juries in Complex Civil Litigation*, 89 YALE L.J. 1155 (1980). Except for whatever analytic symmetry and completeness this footnote provides, the topic is generally outside the scope of this Article.

40. By "fact" I mean any proposition that is ultimately referable back to, and at least theoretically falsifiable by, sense data available in principle to most, if not all, human observers. This definition makes clear the problematic nature of treating a defendant's subjective states as facts. One's experience of one's own conscious subjective states may make them epistemically privileged to one's own self à la Descartes's *cogito*, but these subjective states cannot be falsified by sense data available to others in the same way that claims about external facts—past, present, or future—can at least theoretically be falsified. If one is to count them as facts, they are certainly facts of another color. Note that I am not here taking a radical skeptic's view of the "other minds" problem, *see generally* MICHAEL WILLIAMS, PROBLEMS OF KNOWLEDGE: A CRITICAL INTRODUCTION TO EPISTEMOLOGY 71-72 (2001), but am merely making an important point about the empirics of propositions regarding objective external "facts" versus subjective internal "facts."

41. This is the gravamen of the standard model's requirement that valid substantive laws reflect what is "deemed to be good." *See* TWINING, RETHINKING EVIDENCE, *supra* note 7, at 73, *quoted at* text accompanying note 12 *supra*.

42. Professor Burns, for example, explains that a jury is given preexisting rules in the jury instructions, and the jury's job is to reach a just outcome by applying those rules to the evidence. BURNS, *supra* note 10, at 18. Thus, under standard theory, preexisting values are already delineated and legitimized in the jury instructions. *Id.*

power, jury nullification[43]). Perhaps needless to say (perhaps not), this is a complete distortion of both the substantive law and the jurors' function, not merely in regard to occasional issues, but in regard to many of the issues that constitute the real practical nub of litigation. The distortion is so profound that the standard model in the context of actual cases verges on a fiction, or an unaccountably parochial error of description in regard to phenomena staring an observer in the face.[44]

Now, virtually no observer of any sophistication would deny that we sometimes use juries to perform some value judgment functions beyond pure factfinding. How else would we account for the jury's conceded power to translate subjective suffering into a monetary award? And moving from remedies to rights, there are still plenty of examples, such as negligence. In negligence cases, the conclusion that an act (or failure to act) was negligent is a value judgment organized around such notions as "the reasonable person" and "careful enough." Even if we had a full-color, full-feel, full-smell hologram of the events alleged to constitute "negligence," complete with a cap that would induce the conscious subjective states of the actors from instant to instant, we would still need some mechanism by which to make the normative judgment.[45] In such cases the jury acts, under official delegation and warrant, not only as factfinder, but as the source of normative judgment.[46] It is like a particularized legislature for the particular circumstances of the case.[47] The jury exercises "discretion" in the best sense of the word, "discretetion," making a case-specific or "discrete" normative judgment to arrive at justice under the particular circumstances of the case, guided only by general statements of principle defining the sort of normative authority with which they are vested.[48]

The common term used to describe such issues, "mixed questions of law and fact," seems almost designed to conceal the normative authority of the jury.[49] In fact, these issues are better

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43. Only perhaps. *See* John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 479–82 (2002).

44. Professor Burns also provides a useful exposition of practices he regards as anomalies from the perspective of the rationalist model (the "Received View"). *See* BURNS, *supra* note 10, at 26–33.

45. D. Michael Risinger, *Preliminary Thoughts on a Functional Taxonomy of Expertise for the Post-*Kumho *World*, 31 SETON HALL L. REV. 508, 526–29 (2000) [hereinafter Risinger, *Functional Taxonomy*].

46. *Id.* at 526.

47. *Id.*

48. *See id.* at 526–27.

49. *Id.* at 526.

described as "mixed questions of fact and value,"[50] since some effort to determine facts is always preliminary to making a normative judgment.[51] Note, however, that the exact historical details bearing on the normative judgment are not particularly specified in advance by any legal rule. Which facts are "relevant" to the material issue of "negligence" is subject to an individualized determination in each case, first by the judge and then by the jury, both under the press of adversary argument.[52]

So what is the relative incidence of actual real-fact issues versus normative or other nonfact (or perhaps, fact-plus) issues, as the triable ultimate issues in cases that are actually submitted for adjudication? In approaching this question, we must keep firmly in mind some questions that are not being asked and, as a result, claims that are *not* being made. First, I am not claiming that, were one to describe all of the potentially triable issues of every element of every claim under every substantive law that exists in a typical American jurisdiction, a majority of such issues would have an explicit normative delegation component. The majority, perhaps the great majority, might fit comfortably into the standard model, which asks the jury to determine the existence *vel non* of specified kinds of historical details in a binary way, which in most cases would be either clearly within or without the bounds of the empirically specifiable and specified element definition. But these kinds of elements do not seem to be what brings most cases into court or to trial, perhaps especially in the civil litigation context. First, virtually every case, civil or criminal, has some elements that are formally necessary but that are not practically in play. In a civil case seeking damages from an auto collision, the identity of the defendant as the actor who performed the allegedly negligent acts is an element upon which the plaintiff has the formal burdens of producing evidence and of persuasion, but in the average case (that is, barring a hit-and-run situation or some other unusual circumstance), this issue is not practically contestable, and is either removed from the case by admission or else not really contested in either opening or closing.[53]

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50. *Id.*

51. *See* Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1065–66 (1992) (observing that "factual truth is a necessary condition of a correct and just normative judgment").

52. *See* Risinger, *Functional Taxonomy*, *supra* note 45, at 526–27.

53. *See* McLhinney v. Lansdell Corp., 254 A.2d 177, 180 (Md. 1969) (noting that admissions of counsel of any fact affecting the issues can be considered as if it had been established by the "clearest proof").

What seem to be the "live" issues, the practically triable issues, in many if not most litigated civil cases, are either the explicitly normative issues like negligence, or other closely related issues that I have elsewhere called "magnitude judgment issues,"[54] which, like the particularized normative judgments already discussed, are not binary, and have no single right answer, even in theory. The best illustration, and among the most practically important, is the issue of market value, which underlies much of the substantive law of remedies. As I have argued elsewhere, market value is not a "fact" but a counterfactual prediction, based on, yet never fully determined by, the facts, and therefore it cannot have a determinate single "right" answer even in the clearest cases (though the range of acceptable answers may vary with the real facts).[55] In this circumstance we use the jury to put a point estimate on a range, where any point estimate within the range will be treated as satisfactory.[56]

Finally, there are some very important issues that are hard to pin down: it is difficult to know if they should be conceived of as binary-valued fact issues, magnitude judgment issues, or normative delegation issues—most notably, state-of-mind determinations.

Many claims, both criminal and civil, require the determination of the state of mind of one or more human actors at the time of some act or event. States of mind are not factual in the same way that determining it was cloudy at noon in Newark last Wednesday is factual, despite the rather flippant but oft-cited observation of Lord Justice Bowen that "the state of a man's mind is as much a fact as the state of his digestion."[57] With all due respect to Lord Justice Bowen, it just ain't so.[58] Determining the state of digestion requires empirical assumptions about independent physical entities in the world, observations theoretically available to every observer. There are no a priori privileged observers. Subjective states, on the other hand (at least the more or less conscious ones with which the law is

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54. Risinger, *Functional Taxonomy*, *supra* note 45, at 536.

55. *Id.* at 531–32.

56. *Id.* Setting the limits of the range is generally done very effectively by adversary presentation and the use of not-very-reliable expertise in a process that has many of the characteristics and strengths of "last offer" or "baseball" arbitration. To my mind, such a demonstrable silk purse from a couple of sow's ears is one of the real beauties of adjudication. *See id.* at 530–31 & n.49.

57. Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (1885).

58. Assuming that Bowen was referring to whether digestion was occurring, not to whether the man felt a stomach ache.

generally concerned), all have one privileged observer: the person directly experiencing that subjective state.[59] Other humans must either rely on that observer's reports or on circumstances plus empathetic projection: "If I did that under those circumstances, what might I be thinking or feeling?" Empathetic projection usually and generally yields a range of possibilities. Perhaps when a person puts a loaded gun behind another person's ear and pulls the trigger, both the shooter's belief that the person will die and his desire for that particular result are pretty firm empathetic inferences in most contexts, for what else of any likelihood can we imagine under such circumstances?[60] But when a car runs off the road at night, and the driver was not under the influence of any mind-altering substances and is available to report on her state of mind, the range of potential subjective accounts is very great. Even the driver's current testimony may not clarify matters all that much.

Some state-of-mind judgments that we expect juries to make, such as negligence or insanity, carry a more or less explicit normative warrant. So too, at common law, did the various definitions of mens rea (think of "malice aforethought").[61] On the other hand, the three state-of-mind definitions that figure most prominently in establishing criminal responsibility in modern American criminal codes, "acting purposely," "acting knowingly," and even "acting recklessly," resulted from an apparently explicit attempt by the American Law Institute to craft state-of-mind categories that fulfilled the requirements of the official ideology as closely as possible, with the value judgment inhering entirely in the category definition without further normative input from the jury. How successfully this was accomplished is subject to debate.[62] The definitional language is not transparently easy to apply across a large range of situations; except in certain prototypical cases squarely within the bull's-eye of the categories, it is often unclear what was intended by the language.[63] In addition, in many cases the practical issue is where the defendant's conduct falls on what appears to be a normative

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59. Refer to note 45 *supra* and accompanying text.

60. There is always the possibility of delusional hallucination.

61. At common law, "*mens rea* doubtless meant little more than a general immorality of motive." Francis Bowes Sayre, *The Present Significance of* Mens Rea *in the Criminal Law*, *in* HARVARD LEGAL ESSAYS 399, 411–12 (1934).

62. *See* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 534–35 (1992); Richard Singer, *The Model Penal Code and ~~Three~~ Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 142 (2000).

63. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 694–96 (1983).

continuum, and it would not be surprising if many juries simply determined the subjective element of guilt by where they believe the conduct falls on the continuum.[64]

Even if we concede that certain state-of-mind judgments such as purposefulness are as close to "ordinary" fact judgments as they can be, it is nevertheless true of them, as it is of magnitude judgments, that in making its determination the jury will operate best in a contextually rich environment.[65] Because such judgments depend so much on minor variations in detail, and because the details that properly condition them are not well specified by the substantive law, and because the very thing that renders a detail relevant—the experience-based general background assumptions that individual jurors will use in empathetic projection—can neither be fully exposed nor effectively co-coordinated except in regard to a few conditions, these issues are best handled in an environment of what anthropologists (and legal theorists influenced by them) call "thick description."[66] This is even more true of issues involving explicitly delegated normative warrants. It is those issues that the adversary system and the jury mechanism are best suited to handle and that form the practically triable and dispositive issues in much, perhaps most, litigation.[67]

IV. POLYVALENT ISSUES VS. BINARY-VALUED ISSUES OF ACTUAL FACT

The last line of the preceding Part represents something of a revision of position, because in recent years my writing has taken on a tone more and more explicitly skeptical concerning "our

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64. *See id.* at 695–97.

65. Craig Haney, *Making Law Modern: Toward a Conceptual Model of Justice*, 8 PSYCHOL. PUB. POL'Y & L. 3, 30–31 (2002) (arguing that the justice system must recognize the extent to which jury decisions are already influenced by social context and other psychological factors).

66. The term appears to have been coined by the British philosopher Gilbert Ryle, *see* Gilbert Ryle, *Thinking and Reflecting*, *in* 2 GILBERT RYLE, COLLECTED PAPERS 465, 474–79 (1971), but is most closely associated with the anthropologist Clifford Geertz. *See generally* Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, *in* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 3 (1973). The notion is that every piece of descriptive information, often best generated in the form of a detailed expository narrative, contributes to the proper understanding of an event within a culture and its practices. It was meant to rescue anthropology as an exercise in descriptive (anecdotal) empirics from the inroads of extreme quantifiers. Embracing notions of the virtue of thick description in trials raises the question of the various uses of context and the line between relevant and irrelevant context information. *See* Risinger, *Heartstrings and Gore*, *supra* note 8, at 431–46.

67. *See* Risinger, *Heartstrings and Gore*, *supra* note 8, at 440–41.

adversary system."[68] Then, not too long ago, I read *A Theory of the Trial* by Robert P. Burns,[69] who must, on its strength, count as the current leading adversary enthusiast. Burns makes a very good case that the adversary system and the institution of the jury are not merely "best available," but perhaps even affirmatively excellent (at least for some things).[70] To understand how he reaches that conclusion, it is necessary to examine Burns's position more closely.

Burns tells us[71] that a well-tried case produces "a form of concrete universal where an event and its meaning are transparent to each other."[72] The rationalist "Received View" holds that the jury constructs (or ought to construct) "its version of what occurred without recourse to value judgments not legitimized by the Rule of Law,"[73] (i.e., those already embedded in

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68. *See, e.g.*, Denbeaux & Risinger, *supra* note 32, at 22–24; Risinger, *Heartstrings and Gore*, *supra* note 8, at 441–46, 456–58; D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 131–43 (2000) [hereinafter Risinger, *Navigating Expert Reliability*]; D. Michael Risinger & Jeffrey L. Loop, *Three Card Monte, Monty Hall,* Modus Operandi *and "Offender Profiling": Some Lessons of Modern Cognitive Psychology for the Law of Evidence*, 24 CARDOZO L. REV. 193, 193–210, 227–28, 271–76 (2002); Risinger & Saks, *supra* note 34, at 1033–36; D. Michael Risinger, Michael J. Saks, William C. Thompson & Robert Rosenthal, *The* Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1, 35–42 (2002).

69. *See generally* BURNS, *supra* note 10.

70. I am not without criticism of Burns's general approach. The two main criticisms concern his reliance in defending the current system based on the model of the "well-tried case," *see id.* at 5, and on the goodwill of lawyers in complying with ethical standards of conduct, *see id.* at 38–39. *See also* Robert P. Burns, *Notes on the Future of Evidence Law*, 74 TEMP. L. REV. 69, 84–85 (2001). The "well-tried case" of his imagination seems a relative rarity in reality. Perhaps it is enough that cases be *evenly* tried, but even this seems sufficiently problematical in the mine run of criminal trials, given the superior resources of the state. As to voluntary compliance with standards of ethical practice by those partisan advocates most devoted to winning, let us simply say that, as to that, I remain deeply skeptical.

71. I have selected and strung together what I regard as typical assertions in Burns's own language in an attempt to let the reader get both the feel and tenor of his position. Of course, in a 244-page book, especially one as broadly erudite and thoughtful as *A Theory of the Trial*, there are many nice insights and points for mulling on a finer-grained level than I have attempted to capture in my broad summary, but it will serve for my purposes, and I hope that Professor Burns does not feel too much disserved by it.

72. BURNS, *supra* note 10, at 5. In the same vein, Burns says,

> In the course of trial there emerges an understanding of the people and events being tried that has a kind of austere clarity and power. This experience surprises and "elevates" the participants, including the jury. The grasp of what has occurred and what should be done seems to have a kind of comprehensiveness, almost self-evidence, of which it is extremely difficult to give an account.

Id. at 3. In my experience, however, what is austerely clear to the jury and to the losing party are often two different things.

73. *Id.* at 18.

the preexisting substantive rules that are the subject of the judge's instructions on the law). However, "the Received View grasps only a partial truth,"[74] a truth "so partial as to be a serious distortion of what we have allowed and designed the trial to be"[75] that is "especially inapposite in criminal cases."[76] "The legal realists understood that the trial did not fit easily into inherited formalistic conceptions of law, but were too much the creatures of the philosophical positivism of their age to give any constructive normative account of the institution."[77] As actually conducted, "the trial provides for a kind of highly contextual moral and political decision making."[78] The Received View "commits the error of misplaced concreteness. It takes one subset of rules and claims that they exhaust the reality of the enormously more complex and more admirable practices that actually constitute the contemporary trial."[79] Lawyers often seek decisions by invoking norms bearing "little resemblance to those in the instructions"[80] that the judge gives to the jury. In opening statements,

> Lawyers tell stories that contain episodes to which there will be no testimony in the language of perception at all. These rich narratives will ideally be "vivid and continuous dreams" that describe human motives, intentions, and actions of which there could in principle be no testimony in the language of perception. They will be "compelling" for reasons that have little to do with the jury's purely empirical generalizations, and may invoke all manner of moral and political values. Closing argument as well, in many different ways, even if delivered in a manner that transgresses no rule of trial procedure, may invoke values that go well beyond the instructions.[81]

Such realities of practice suggest that "the Received View has captured only a portion of the normative resources available at trial."[82] The general verdict, the doctrine of harmless error, and the insulation of jury verdicts from any very significant judicial scrutiny under weak notions of sufficiency of evidence

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74. *Id.* at 7.
75. *Id.* at 25–26.
76. *Id.* at 15 n.20.
77. *Id.* at 7.
78. *Id.* at 8.
79. *Id.* at 25.
80. *Id.* at 27–28.
81. *Id.* at 28 (footnotes omitted) (citing JOHN GARDNER, THE ART OF FICTION (1983) for the first internal quotation).
82. *Id.*

leave "plenty of room for a jury actually to decide the case based on norms that have no place within the Received View."[83] The trial is "a great cultural achievement" with "situated ideals."[84] "[T]he moral significance of the trial transcends the conscious purposes of the participants."[85] It "serves to realize the 'ethical substance' of a community."[86]

Despite their occasional near-mysticism,[87] I found much to persuade me in these and others of Burns's observations, which caused me to reflect upon why I have such deep suspicion of the partisan adversary process. It seems that the cases, both real and hypothetical, that have influenced my thinking the most were mainly criminal cases involving what I have called "brute fact innocence,"[88] most particularly, cases where the defendant was not the perpetrator of the crime, and someone else was.[89] I have always regarded such errors as injustices of the worst kind. Although I have some fairly strong views on what the limits of criminal responsibility ought to be as to age, impaired intelligence, etc., I don't regard disagreements with juries on such issues as raising questions of injustice of the same magnitude as real factual innocence. For instance, in Jean Harris's trial for the murder of Herman Tarnower, I think the jury ought to have had a reasonable doubt about whether her

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83. *Id.* at 29.

84. *Id.* at 33.

85. *Id.* at 35.

86. *Id.*

87. Consider this section heading from Professor Burns's book: "There is a human capacity to grasp a truth manifest in the tensions created by the trial's consciously structured hybrid of languages." *Id.* at 230 (internal capitalization omitted). Burns, like many adversary enthusiasts, falls within what Twining identifies as the "holistic" school of evidence and trial theorists (which he also identifies with "narratologists" as opposed to those whose approach to information is more formally inductive or "Bayesian"). *See* TWINING, RETHINKING EVIDENCE, *supra* note 7, at 238–51. Because an assumption of this approach is that humans process both factual and normative information in ways so subliminal and intertwined that analysis (atomism, reductionism) can never do the process full (or perhaps even substantial) justice, *see* BURNS, *supra* note 10, at 210–11, such vergings on mysticism are perhaps to be expected. Burns essentially admits as much, characterizing a full account as unlikely because the whole process is too "mysterious." *Id.* at 203. Perhaps one's attraction to or tolerance for such mystic-speak varies with age and simple predilection. Zen koans are fine for those who find it a gratifying exercise to contemplate them. I generally find such statements frustrating, unsatisfying, and almost, in a way, a shirking of responsibility. Having said all this, I will say that, unlike some others in this genre of scholarship, Burns keeps the mystical excesses to a tolerable minimum.

88. *See* Risinger, *Navigating Expert Reliability*, *supra* note 68, at 114.

89. Such claims by defendants are often referred to by criminal defense attorneys as SODDI claims: The "Some-other-dude-did-it" defense. BLACK'S LAW DICTIONARY 1425 (8th ed. 2004) (defining "SODDI defense" as "a claim that somebody else committed a crime, usu[ally] made by a criminal defendant who cannot identify the third party").

state of mind met the applicable criteria for murder.[90] I also believe that John E. du Pont ought to have been found insane in regard to the killing of David Schultz.[91] However, I am not bothered by such cases in the way that I am by the contemplation of anyone convicted even of shoplifting on a mistaken identification. And I do not believe that I am alone in this.[92] But what lies behind this instinctive ranking of miscarriages of justice?

First, if a human clearly does the acts that constitute the actus reus of an appropriately defined crime, he is, in a sense, properly at the mercy of vagaries of the resolution of those complex, no-one-right-answer, normatively charged judgments about what was going on in his head. "Errors" regarding those conclusions are thus just not of the same type or moral magnitude as errors convicting the wrong person.

Second, given the often explicitly normative nature of the issues in such cases, it is harder to bring to bear rationalist objections to the partisan nature of the presentation, or to the latitude given to marshal all sorts of context information, at least where those issues are practically, and not just formally, at issue. These are the kind of issues that may benefit from "thick description" and from a variety of normative perspectives, including partisan perspectives, not merely in their "accuracy" but in their very legitimacy as proper conclusions. A good recent example may be found in the manslaughter charges brought against former NBA star Jayson Williams in connection with his discharge of a shotgun that resulted in the death of Costas

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90. As opposed to manslaughter. No manslaughter instruction was given to the jury, but analytically this should not have changed the result. Whether it actually changed the result is another thing. The case is the subject of a number of true crime volumes. *See* JAY DAVID, THE SCARSDALE MURDER (1980); DUNCAN SPENCER, LOVE GONE WRONG: THE JEAN HARRIS SCARSDALE MURDER CASE (1981); DIANA TRILLING, MRS. HARRIS: THE DEATH OF THE SCARSDALE DIET DOCTOR (1981). Even Jean Harris herself weighed in. *See* JEAN HARRIS, STRANGER IN TWO WORLDS (1986). The enduring mystery remains whether it was Harris or her lawyers who were most responsible for bypassing a lesser-included-offense charge on manslaughter that would likely have spared her a murder conviction. Twining uses the Harris case to illustrate the complexities of actual practice in ways that would appeal to Burns, before withdrawing into caveats. *See* TWINING, RETHINKING EVIDENCE, *supra* note 7, at 244–47.

91. Du Pont, heir to one of America's great fortunes, was (to use a term of art) about as nuts as one can be when he shot Schultz. Although he was not found "not guilty by reason of insanity," he was found "guilty but mentally ill," a finding that negatives premeditation under Pennsylvania's not entirely coherent approach to criminal responsibility. *See* Debbie Goldberg, *John du Pont Found Guilty, Mentally Ill*, WASH. POST, Feb. 26, 1997, at A1.

92. Indeed, it seems that much of the moral and political force behind the DNA exonerations derives from this instinct. It is no surprise that the mass-market book documenting them is entitled "Actual Innocence." SCHECK ET AL., *supra* note 1.

Christofi.[93] The trial is occurring (with gavel-to-gavel coverage on Court TV) as I write.[94] As the case evolved before trial, there was no real issue about the fact that the shotgun was in the hands of Williams when it was discharged.[95] As such, it is the kind of case in which a legitimate outcome is best served by allowing partisan attempts at normative contextualization on both sides.[96] Whatever judgment the jury thereafter makes concerning the level of Williams's responsibility, if any, seems legitimate and acceptable.[97]

It should come as no shock then, that virtually all of the illustrations in Burns's book,[98] and in other recent adversary enthusiast literature as well,[99] refer to cases in which the real triable issues were issues of this sort. But such normative contextualization brings nothing of value to the decision of cases

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93. *See* Harriet Ryan, *Gunshot Lands Williams in New Court*, Courttv.com, *at* http://courttv.com/trials/jaysonwilliams/background_ctv.html (last updated Jan. 13, 2004) [hereinafter Ryan, *Gunshot*].

94. Details of the case and the trial are available at http://courttv.com/trials/jaysonwilliams/index.html (last visited Nov. 12, 2004).

95. *See* Harriet Ryan, *Expert Witness Disputes Blood Evidence as Williams Launches His Defense*, Courttv.com, *at* http://courttv.com/trials/jaysonwilliams/032404_ctv.html (last updated Mar. 24, 2004).

96. In Williams's case there are some circumstantial real-fact disputes (such as how much Williams drank before the shooting and whether his finger was on the trigger while he was holding the shotgun), and there are issues of factual innocence regarding some of the lesser charges alleging an early failed attempt to obstruct justice by trying to claim, and making it appear, that Christofi had shot himself. *See* Ryan, *Gunshot*, *supra* note 93. These issues are sufficiently subsidiary to the main charge and tied up with live mens rea defenses such that it would not be appropriate to treat this case as if it presented a simple, isolatable, binary decision about factual innocence.

97. In the actual trial of the case, Williams was acquitted of aggravated manslaughter and various ancillary counts (such as possession of a firearm for an unlawful purpose) and convicted of attempted obstruction of justice (based on his own statements to authorities and those given by others at his instance). The jury could reach no verdict on the charge of simple manslaughter, and the prosecutor has announced his intention to retry Williams on that charge. *See* Harriet Ryan, *Prosecutors to Retry Jayson Williams on Reckless Manslaughter Charge*, Courttv.com, *at* http://courttv.com/trials/jaysonwilliams/052104_ctv.html (last updated May 21, 2004).

98. The centerpiece of Burns's case illustration is a murder case in which the defense opening states,

> The evidence presented by the state and by Debra Miller will largely overlap. There may be a few disputes of facts, but that's not what this case is about. There will be no dispute that on November 9, 1978, one child killed another, that a sixteen year old girl, Debra Miller, twice threw a ten-month old girl, Priscilla Smith, to the floor, and Priscilla died soon afterwards.

BURNS, *supra* note 10, at 113.

99. *See, e.g.*, Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1370–71 (1985) (using as examples mostly evidence practices that give the advantage to criminal defendants). Many adversary enthusiasts stick to a theoretical defense and do not discuss concrete cases at all. *See, e.g.*, Walpin, *supra* note 3, at 178, 183.

that turn, both legally and practically, on discrete binary empirical "brute fact" decisions, such as cases in which the only practically triable issue is whether the defendant was or was not the perpetrator of the charged crime. In such a case, the "thick description," "narrative context," and "partisan adversary rhetoric" are more likely to undermine than to promote both proper decision and legitimacy (to the extent that these two are separable).[100] So although I can accept the excellence of the traditional adversary process (at least in regard to Burns's "well-tried case") in resolving the normatively charged polyvalent issues of the sort that he uses as illustrations, I remain skeptical of its suitedness for issues of actual factual innocence in criminal cases.

Which brings us to *Old Chief v. United States*.[101] This case is remarkable because it is the first and only case in which the Supreme Court of the United States, virtually unanimously, rejected the standard rationalist model of adjudication for criminal cases, adopting instead a construction of the nature of criminal adjudication (and a theory of evidentiary relevance) that embraces evidence that "tell[s] a story of guiltiness as [well as] of guilt."[102] That the Court should have espoused a view so anomalously at odds with the standard theory would be shocking, except for one thing: in so doing, the Court merely confirmed (without referring to it) the practice of allowing prosecutors to introduce evidence based on its "legitimate moral force" (to use Wigmore's quaint phrase),[103] a practice that since time immemorial has done violence to the rationalist model.[104] This odd aspect of *Old Chief*, conceptually radical but practically conservative, has not been widely recognized.[105]

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100. *See* Nesson, *supra* note 99, at 1360–63, 1366–67 (discussing the difference between judicial proof within the province of the factfinder and public acceptance of the verdict).

101. 519 U.S. 172 (1997).

102. *Id.* at 188. Burns himself, without citing *Old Chief*, perceives a move toward an expansion of the concept of relevance to cover such proffers. BURNS, *supra* note 10, at 31–32. As the text indicates, it is unclear whether this is really a change in practice or is merely the adoption of an account for longstanding practice. *See id.*

103. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2591 (3d ed. 1940). The phrase originally appeared in the same section in the 1923 second edition.

104. *See* Risinger, *Heartstrings and Gore*, *supra* note 8, at 412–15, 429–30 & app.1 (critiquing the prosecutions' use of "heartstrings and gore" evidence that are formally irrelevant yet routinely admitted in court, such as horrific crime scene photos with the sole ostensible purpose to prove death).

105. For a recent example of such recognition, see Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 564–69 (2004). *See also generally* Richard O. Lempert, *Narrative Relevance, Imagined Juries, and*

Some expansion is in order. I have previously summarized the facts as follows:

> On October 23, 1993, Johnny Lynn Old Chief and two lady-friends spent the day driving around the Blackfeet Indian Reservation in northern Montana in a borrowed truck, hanging out and getting drunk. At some point, one of the women found a pistol under one of the seats and pulled it out to play with it.
>
> Late in the day, the group drove to a bar called Ick's Place to buy more beer. In the parking lot, Mr. Old Chief was challenged to fight by one Anthony Calf Looking and a friend, who were also drunk. Calf Looking, the conceded aggressor, hit Old Chief and knocked him down. At that point, a shot was fired, though the evidence was in conflict about who had the gun, who fired the shot, and whether it was fired in the direction of Calf Looking, who fled. Significantly, neither Calf Looking nor his companion knew who fired the shot. No one was injured.
>
> Old Chief left in the truck with the two women. They drove to an abandoned gas station, where they got out of the truck. Police had been called by someone at Ick's Bar. The police arrived at the gas station and found the gun under the seat of the truck. Old Chief was charged with assault with a dangerous weapon, and with using a firearm during that assault. Because he had a prior felony record, he was also charged with being a felon in possession of a firearm in violation of 15 U.S.C. section 922(g).[106]

Old Chief had realistically triable issues on both the assault with a dangerous weapon charge and on the use of the firearm charge. The evidence was conflicting and unclear concerning whether Old Chief had possessed the gun, whether it was he who fired the shot, and further, whether the discharge was an assault or a justified warning shot fired in self-defense or defense of another (by whoever fired it).[107] Old Chief's previous felonies were both assaults with a deadly weapon (one with a gun, one with a knife).[108] If the jury found out the nature of one or both previous convictions, that might very well resolve any doubts they might have about Old Chief's guilt even though the nature of the convictions could not in theory be used in that way under Federal

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a Supreme Court Inspired Agenda for Jury Research, 21 ST. LOUIS U. PUB. L. REV. 15 (2002).

106. *See* Risinger, *Heartstrings and Gore*, *supra* note 8, at 403–04 (footnote omitted).

107. *Id.*

108. *Id.* at 449.

Rule of Evidence 404[109] and even though the jurors might be so instructed. So Old Chief offered to stipulate that he had been previously convicted of a felony within the meaning of § 922(g).[110] The government objected, and the trial court allowed the government to prove the fact of one of the previous convictions by a certified copy of the record of conviction (which included the description of the felony involved) over Old Chief's objection that, given his willingness to admit the prior conviction, the government's proffer of the records of conviction should be excluded under Rule 403.[111] Old Chief was convicted on all counts by the jury, and on appeal the Ninth Circuit affirmed.[112]

In a 5–4 decision, the U.S. Supreme Court reversed.[113] Justice Souter, writing for the Court, held that, in making determinations balancing prejudicial effect against probative value under Rule 403, a court should not consider the challenged proffer in a vacuum but should also consider the existence of any equally probative but nonproblematic alternative means of proof that might be available to the proponent.[114] He then held that, in the narrow circumstances under which a felon-in-possession charge under § 922(g) was joined with other counts charging crimes similar to the predicate felony, which the government desired to prove by a judgment of conviction revealing the type of felony and where the defendant was willing to admit his status as a predicate felon, it was an abuse of discretion not to exclude the judgment of conviction and force the government to avail itself of the equally probative admission (offer to stipulate).[115]

What is important in the case, however, is not Old Chief's victory, but how narrow it was and how much at odds with standard theory the Court's declarations were, cabining the scope of Old Chief's victory so narrowly that it was, in essence and institutionally, more of a victory for prosecutors.[116] Essentially, both the majority and the dissent agreed that the proper construction of the phrase "fact that is of consequence to the determination of the action" in Rule 401's definition of relevant

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109. *Id.* at 450–51.

110. *See* 18 U.S.C. § 922(g) (1994); *Old Chief*, 519 U.S. at 175; Risinger, *Heartstrings and Gore*, *supra* note 8, at 453 n.128.

111. *Old Chief*, 519 U.S. at 177.

112. *Id.*

113. *Id.* at 173.

114. *Id.* at 184.

115. *Id.* at 185–86, 190–91.

116. *See id.* at 183 n.7; *see also* Risinger, *Heartstrings and Gore*, *supra* note 8, at 453–55 (stating the *Old Chief* majority went to "extreme pains" to isolate the "predicate felon" element of the case).

evidence was broader than the notion of contested or even contestable fact, at least in criminal prosecutions.[117] Ironically, in distinguishing Old Chief's case from virtually every other case, it was the majority that adopted a broader construction of this phrase than the dissent. For Justice O'Connor in dissent, the ultimate "facts" defined by the substantive law as charged in the indictment were the determiners of such "facts of consequence."[118] As to the facts of consequence, the prosecution bore the burden of persuasion beyond a reasonable doubt pursuant to *In re Winship*.[119] A criminal defendant might propose to admit one of the elements. But standard criminal procedure allows defendants only the option of the general issue plea of "not guilty," a circumstance that Justice O'Connor took to undermine any power to admit guilt for any particular issue unilaterally.[120] If a prosecutor wished to reject such a proposed admission because, in her judgment, the evidence properly admissible to prove that element carried with it overall benefits in obtaining a conviction that she would lose by accepting the proposal and bypassing the evidence, that was a right of the prosecution corollary to the responsibility for proof beyond a reasonable doubt on each element.

The dissent's position can be criticized on a number of grounds.[121] But the majority position went well beyond the dissent. For the majority, apparently even the formal "ultimate facts" of the crime charged do not mark the outer limits of "facts of consequence" under Rule 401.[122] In sweeping terms, the opinion asserts that if the jury would expect to see proof of a certain kind, even if not relevant to a material issue under the substantive law, then the danger that the jury might (wrongly) draw a negative inference from the absence of such expected proof is

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117. *See Old Chief*, 519 U.S. at 178, 188–89; *id.* at 198–200 (O'Connor, J., dissenting).

118.

> The Government must prove every element of the offense charged beyond a reasonable doubt, and the defendant's strategic decision to "agree" that the Government need not prove an element cannot relieve the Government of its burden. Because the Government bears the burden of proof on every element of a charged offense, it must be accorded substantial leeway to submit evidence of its choosing to prove its case.

Id. at 200 (O'Connor, J., dissenting) (citations omitted).

119. *Id.* (O'Connor, J., dissenting) (citing *In re* Winship, 397 U.S. 358, 361 (1970)).

120. *See id.* (O'Connor, J., dissenting); *see also* Risinger, *Heartstrings and Gore*, *supra* note 8, at 412–13, 452.

121. *See* Risinger, *Heartstrings and Gore*, *supra* note 8, at 451–53.

122. "'Relevant Evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

sufficient to render the rebuttal of such negative inference a "fact that is of consequence to the determination of the action" under Rule 401.[123] Then, in a spasm of enthusiasm for narrative theory, and with a view of the adjudicative process apparently at odds with the standard rationalist model, Justice Souter declared that "evidence . . . has force beyond any linear scheme of reasoning . . . not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment."[124] So evidence that seeks "as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable,"[125] is directed toward a "fact of consequence" under Rule 401, and is likewise generally inappropriate for exclusion under the probative value/prejudicial effect balancing formula of Rule 403.[126]

It is hardly a secret that I have considered this part of *Old Chief* to be a disaster,[127] and I was not alone.[128] But now, in the

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123. *Id.* There is a

> need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence.

Old Chief, 519 U.S. at 188. On the relevance problems of such propositions, see Risinger, *Heartstrings and Gore*, *supra* note 8, at 433–35.

124. *Old Chief*, 519 U.S. at 187–88.

125. *Id.* at 188.

126. This is the clear implication, because the Court here confirms its admissibility through a discussion in which both Rules 401 and 403 have been previously brought into play. *See id.* at 183–84. The Court makes an odd attempt to (apparently) disclaim its own discussion: "While our discussion has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status." *Id.* at 183 n.7. However, this appears to have been no more than a further attempt to limit any future use of the ruling for anything else.

127. *See* Risinger, *Heartstrings and Gore*, *supra* note 8, at 449–58.

128. Professor Duane was particularly eloquent:

> Thus, the Court is now telling us, the probative value of an item of evidence, and thus the case for its admissibility under Rule 403, is measured in part by its capacity . . . to influence jurors' hearts as well as their minds, even in ways that are not strictly logical, and even if the evidence has no rational tendency to prove any historical fact that is disputed at trial. Incredibly, this breathtakingly radical vision of the trial process was asserted with virtually no supporting authority.
>
> . . . *Old Chief* has now effectively introduced the radical new suggestion that some of the "facts of consequence to the determination" of a criminal trial include relatively subjective moral "facts"—such as "the fact that the victim in this case died a hideous death deserving of our moral outrage" . . . . Never before to my knowledge has the Supreme Court, or any other court, come so close to formally declaring that evidence which logically proves no disputed historical fact may nevertheless have probative value . . . .

James Joseph Duane, *"Screw Your Courage to the Sticking-Place": The Roles of Evidence,*

same way that I concluded that there was a core of correct application in Burns's book, I am beginning to think that there may be something similar in *Old Chief*, albeit heavily qualified.

As previously indicated, what *Old Chief* did was to confirm, in the main, practice as it had long existed in spite of its ill fit with the standard theory and the rationalist tradition.[129] As Burns makes clear, parties in both civil and criminal cases have always been accorded fairly wide contextual and narrative latitude.[130] In addition, the party with the burden of persuasion has generally been allowed to utilize proof whose main practical object is to engage the jury in the horrors of the episode complained of, as well as the human tragedy of the victims and their families.[131] This has been especially true with regard to the prosecution in a criminal case.[132] Such practices are difficult to square with rationalist assumptions about the purposes of trial, but are easy to account for under a fair fight model.[133] The main impact of such emotionally gripping horror-of-the-crime evidence, I am convinced, is to lower the jury's functional standard of what constitutes a reasonable doubt. The question in the jurors' minds can easily be shifted from "Is there a reasonable doubt of the defendant's guilt?" to "If there is a good chance the defendant did this horrible thing, should he be walking around?" or "How would I feel if I were the victim's mother and a person who might have done this to my daughter were turned loose in the face of this evidence?"[134] The defendant has the rhetoric of proof beyond a reasonable doubt, and the prosecution can counter that by

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Stipulations, and Jury Instructions in Criminal Verdicts, 49 HASTINGS L.J. 463, 467–68 (1998).

129. Refer to note 102 *supra* and accompanying text.

130. *See* BURNS, *supra* note 10, at 50–52 (commenting, inter alia, that lawyers routinely present a vivid narrative theory of the case during opening statements that lays the foundation for a possible moral judgment from the jury).

131. *Id.* at 95 (pointing out that gruesome pictures of the deceased are routinely admitted into evidence in murder trials even if the defendant agrees to stipulate to the element of death).

132. *See id.*

133. For an account of the "fair fight" model, see generally FRANK, *supra* note 4 (especially ch. 6, "The 'Fight' Theory v. the 'Truth' Theory"). *See also* Risinger, *Heartstrings and Gore*, *supra* note 8, at 436–37.

134. *See* Risinger, *Heartstrings and Gore*, *supra* note 8, at 445. This raises the "floating reasonable doubt" question. "Floating reasonable doubt" is a phrase that suggests that the level of certainty required for a jury to convict both does and ought to vary with the type of case and its details. Commentators are perhaps agreed that as a practical matter some float is inevitable no matter what steps are taken to instruct or attempt to normalize jury responses, but they differ on whether such a situation should be resisted or embraced. *Compare* Risinger, *Heartstrings and Gore*, *supra* note 8, at 443–46 (resisting), *with* Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 146–76 (2002) (embracing generally).

"heartstrings and gore" evidence. Whatever resultant level of certainty persuades the jury to convict is all we mean by "proof beyond a reasonable doubt."[135]

My initial response to *Old Chief* was to find its acceptance, or perhaps more accurately, celebration, of this way of doing business to be hateful.[136] And in regard to my primary focus, brute fact innocence in criminal cases, this is still the case. But now it appears that my global response was perhaps overbroad. In most civil litigation that comes to trial, and in most criminal prosecutions where the real issue is not the identity of the accused as the perpetrator, the *Old Chief* vision (and that of Burns) may be superior to the standard rationalist model (always assuming that it is intended to be symmetrically applied between prosecution and defense).[137] When the practically live issues are either normative or magnitude judgment issues not like the simple binary fact of perpetration, then perhaps free-proof, free-for-all, highly contextualized, thick-description sausage-making by partisan cooks is the most legitimate way to approach the special competence of a jury. But by the same token, when the actual triable issue in a criminal case is the simple binary issue of perpetration, or a similar pure-fact binary issue, then this is perhaps the least legitimate way to proceed.

V. MATCHING PROCEDURE TO THE ACTUAL ISSUES OF TRIAL

What has been said thus far suggests that there ought to be some mechanism that matches procedures to cases depending on the nature of the issues actually in play in the case, with current procedures for cases turning on normative assessment and special new procedures for cases turning on specific and specifiable issues of fact. This is not as radical an idea as it sounds at first hearing. We already match cases to procedures according to a number of variables. If you have a small case, civil or criminal, you get informal procedures but no jury.[138] If you

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135. Risinger, *Heartstrings and Gore*, *supra* note 8, at 442 n.97.

136. Such a way of doing things "quickly comes closer to bread and circuses (or Christians and lions) than our usual claimed notions of proper judicial procedure would comfortably embrace." *Id.* at 456.

137. *See* Duane, *supra* note 128, at 468–69 (exploring the possibility of courts following *Old Chief* in the future to admit evidence evenhandedly for both defendant and prosecutor alike).

138. Small claims courts and tribunals for the disposition of petty offenses exist in every American jurisdiction. *See* Bruce Zucker & Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. REV. 315, 317 (2003) (small claims); Sean Doran, John D. Jackson & Michael L. Siegal, *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 8 n.26 (1995) (petty crimes).

have a complex civil case in Federal Court, you get different pretrial procedures from the average case.[139] In those situations, the matching of case to procedure is done by making judgments along an axis of importance or complexity. But that does not mean that those are the only legitimate axes that might be invoked; besides, the distinction that I am drawing between binary external "true-fact" cases and multivariate, "polyvalent," often normative judgments involves a kind of complexity.[140]

Having appealed to the "special competence of the jury," I should explain what I take to be that "special competence." First, by happy accident, the Anglo-American jury system displays a remarkable structural attribute that formal scientific methodologies have come to only recently.[141] It is a two-stage split-function system in which a first decisionmaker, the judge, controls the information available to a second decisionmaker, the jury, thus making possible (in theory) both masking and bias filtration.[142] Second, the group nature of the jury tends to promote accuracy. Evaluating the likelihood of various possibilities raised by the evidence depends on "social fact" and "major premise information,"[143] information derived from the "common sense"

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139. *See* Ronald J. Hedges, *Complex Case Management*, *in* LATEST DEVELOPMENTS IN COMPLEX CIVIL LITIGATION 1, 42–43 (ALI-ABA Course of Study, Dec. 11–13, 2003).

140. By analogy, this reminds me, in a way, of Lon Fuller's distinction between "polycentric" disputes and the nonpolycentric disputes that are the ordinary subject matter of litigation. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978) (analogizing a polycentric situation to a spider web, in which "each crossing of strands is a distinct center for distributing tensions"). However, Fuller was suspicious of the propriety of adjudication to properly deal with "polycentric" disputes, feeling that the special competence of adjudication, its métier, if you will, was in regard to nonpolycentric or concentrated disputes. *Id.* at 395–402. In my case, I see the traditional way of doing business—as opposed to the "official ideology"—as involving practices best adapted to multivariate "polyvalent" and (particularly) normative decisions, as opposed to binary "true fact" decisions, which, with a somewhat superficial irony, seems the opposite of Fuller. Burns seems to embrace the analogy to Fuller, though he does not note it explicitly. Both he and Fuller use the same "spiderweb" model to capture the nature of their subject of examination. *Compare* BURNS, *supra* note 10, at 185, *with* Fuller, *supra*, at 395. Burns draws his version from Martha Nussbaum. *See* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 69 (1986) ("The Sophoclean soul is more like Heraclitus's image of *psuche*: a spider sitting in the middle of its web, able to feel and respond to any tug in any part of the complicated structure.").

141. *See* Denbeaux & Risinger, *supra* note 32, at 19–20.

142. *See id.*

143. *See generally* Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987). Walker and Monahan's "social framework" facts are generally synonymous with what otherwise might be called "jury notice" facts—generalized notions about the way the world works, usually derived from life experience, without which a jury could not reason from the formal evidence to conclusions about the more particularized "adjudicative facts" of the case, properly so called. *See* John H. Mansfield, *Jury Notice*, 74 GEO. L.J. 395, 396–401 (1985); *see also*

provided by life experiences. A group brings a variety of life experiences to the process, thereby insuring to some degree that evidence will be evaluated from different perspectives.[144] Thus, wrong decisions will not be made simply because a single decisionmaker has an inaccurate view of the relevant social facts, a problem that would be compounded if all single decisionmakers in all cases were drawn from a particular group with particular social criteria of membership, such as judges. Thus, the strengths of the group for its job[145] are generally reinforced by the breadth of conditions from which the group is selected. The "cross-sectional jury" brings both proper breadth of life experience and democratic participation to deliberations, reinforcing both accuracy and legitimacy.[146] Finally, what has been said regarding facts up to this point applies even more cogently in regard to normative functions, with the jury embodying the local community for such purposes and clothing the resulting normative judgments with democratic legitimacy. Indeed, it is hard to see how one could design a more legitimate mechanism to determine such case-specific normative judgments.

However, it seems to me that binary fact determinations of the nontechnical type are the kinds of decisions where ordinary juries can most often be led to miscarry by adversary excess, especially in the context of high profile and highly dramatic cases.[147] This is partly because it is difficult to establish that a jury's normative decision was wrong. But beyond that, the very starkness of decisions about binary true-false facts puts such decisions in a special class. In such cases, it would seem that there should be special rules to rein in partisan excess and more tightly structure the trial.

Risinger, *Functional Taxonomy*, *supra* note 45, at 517 n.16; John William Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability, and Form*, 71 OR. L. REV. 349, 350–54 (1992) (noting that the jury has an extensive collection of general propositions from their life experiences). This account is part of the standard model of adjudication. *See* BURNS, *supra* note 10, at 23–25; TWINING, RETHINKING EVIDENCE, *supra* note 7, at 21–22.

144. *See* Mansfield, *supra* note 143, at 404 (considering the significance of jury selection from a diverse section of the community). *See also generally* Kenneth S. Klein & Theodore D. Klastorin, *Do Diverse Juries Aid or Impede Justice?*, 1999 WIS. L. REV. 553 (presenting an empirical study correlating race, gender, and other factors with outcomes of criminal case and concluding that there is a significant benefit to diversifying juries).

145. On the epistemic benefits of group inquiry in general, see SUSAN HAACK, DEFENDING SCIENCE—WITHIN REASON 106–09 (2003).

146. *See* Mansfield, *supra* note 143, at 404 (addressing the requirement that juries be randomly drawn from a "representative cross-section of the community").

147. *See* Denbeaux & Risinger, *supra* note 32, at 23 (citing the argument made by adversary skeptics that "juries can be persuaded to abandon reason or overvalue certain information").

So what do I believe? On the whole, current practice is likely to work satisfactorily in civil cases. That is not to say there will be no controversial decisions, nor is it to say there will be no organized political pressure to "reform" the system so that the beneficiaries of such putative reform run a greatly reduced risk of liability (or perhaps in some cases, an increased likelihood of recovery). But, with the exception of isolated pockets, I do not think the mine-run of civil cases are subject to a systemic problem springing from adversary excess or jury weakness. This is because in most civil cases that reach trial the practically dispositive issue is usually a multivariate normative issue or some other no-one-right-answer issue, not a real-fact or truly binary-choice issue, and also because—in large part as a result of the contingency fee in tort—a market mechanism is at work to make the notion of the equally matched (if not always well-tried) case tend toward an overall reality.[148]

Neither of these conditions is true in the average criminal case that goes to trial. Most criminal trials with a chance of acquittal involve either the binary fact of identity ("it was a crime, and no doubt purposeful, but it wasn't me") or occasionally the true-fact claim that no actus reus occurred ("it wasn't death by the hand of another, it was death from natural causes, or by misadventure not involving another, or by suicide").[149] It is this kind of case in particular where adversary excess is most likely to result in miscarriage, a circumstance compounded by the fact that the prosecution and the defense are likely to be so mismatched in resources (and perhaps in skill) that the notion of the "well-tried case," which seems to underlie so much of Burns's defense of the existing system,[150] generally does not exist. Finally, it is in this kind of case that the prosecution will often to have resort to forensic identification "expert" testimony of both high impact and doubtful quality.[151] (And of course it should not be

148. This is not to say that there are no areas of civil litigation, such as landlord-tenant or franchise litigation, in which disparity of resources may have a systematic impact in favor of one type of player over another. *See* Benjamin J. Lambiotte, *Defensively Pleading Commercial Landlords' Breaches in Summary Actions for Possession: A Retrospective and Proposal*, 37 CATH. U. L. REV. 705, 710 (1988) (landlord-tenant); Nathan E. Ross, *Federalism Versus the Greater Good . . . Should Powerful Franchisors Be Allowed to Contract for the Home Court Advantage Through Forum Selection Clauses?*, 2000 J. DISP. RESOL. 199, 211 (franchise litigation). However, in civil litigation, these pockets of imbalance seem to be tilted toward those who would benefit least from normative contextualization.

149. This Article considers in detail a case of each type: *Florida v. Tibbs* (identity) and *Regina v. Cannings* (no actus reus). Refer to Part IX *infra*.

150. Refer to text accompanying notes 72–79 *supra*.

151. *See* Margaret A. Berger, *Expert Testimony in Criminal Proceedings: Questions*

overlooked that the problems plaguing the average case are enhanced when the death penalty is in play.)

VI. CHANGES IN TRIAL PROCEDURES FOR CLAIMS OF ACTUAL FACTUAL INNOCENCE IN CRIMINAL CASES

It seems fair to say that our traditional procedures in criminal trials are more suited to polyvalent and normatively charged disputes than to the accurate determination of claims of binary-valued factual innocence. One approach to curing the weaknesses of "our adversary system" in this regard would be a tracking structure that allowed a criminal defendant to move for treatment by "factual innocence rules." Once the need for such rules is accepted, their exact contours would, of course, have to be worked out in minute and systematic detail by debating the likely accuracy-fostering effects of various changes to current practice. It is well beyond the scope of this Article to recommend any such changes in detail, but tentatively, such proposed rules might look something like this: The defendant would be required to isolate the one (or perhaps two) binary exterior ultimate facts that underlie his claim of innocence.[152] All other elements of the case would be conceded by binding judicial admission, a circumstance to be explained to the jury in the most unambiguous fashion after alternative proposals for the explanatory charge have been made by the defense and the prosecution. Thereafter, in the actual trial, all proffers of evidence by both sides would have to be found "usably" relevant to the factual issues as limited. Prosecution use of expert testimony would be closely screened for reliability, and the court would be prevented from excluding, on the ground of "invasion of the province of the jury,"[153] any defense-proffered expert evidence

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Daubert *Does Not Answer*, 33 SETON HALL. L. REV. 1125, 1140 (2003) (commenting on the unwillingness of courts "to exclude expert proof on the ground that it has not been sufficiently validated" under *Daubert*).

152. The Louise Woodward (Boston Nanny) case is an example of one in which both actus reus and identity were practically at issue. *See* Commonwealth v. Woodward, 694 N.E.2d 1277, 1281, 1286–94 (Mass. 1998). Woodward was charged with killing infant Matthew Eappen by shaking or otherwise applying force on the day she called 911 because he was unconscious. British Au Pair Chooses "All or Nothing Verdict," cnn.com, *at* http://edition.cnn.com/us/9710/27/au.pair.trial/ (Oct. 27, 1997). Woodward's evidence tended to establish that the baby's subdural hematoma was caused weeks before the crisis. *Woodward*, 694 N.E.2d at 1293 & n.37. Such a circumstance raised both the "no crime" issue (the bleed resulted from an accident) and the identity issue (if the bleed was the result of the application of force, it was not applied by the defendant). Closing Argument of Barry Scheck to the Court, *Woodward* (transcript on file with Author); *see also Woodward*, 694 N.E.2d at 1293–94, 1298.

153. United States v. Holland, 537 F.2d 821, 822–23 (5th Cir. 1976); *see also* United

on the weaknesses of eyewitness identification, false confessions, the commonness of false testimony by jailhouse snitches, and the weaknesses of any expert evidence proffered by the prosecution. Closing arguments would be expected to stick closely to the factual issues raised in the application.[154] The cross-sectional jury would be retained, together with the finality rule for acquittals.[155] Convictions would be reviewable not merely on the basis of sufficiency, but also on the issue of whether they were "unsafe."[156]

The law of unintended consequences makes alterations in longstanding practices in an area of such importance a course not to be undertaken, or even proposed, lightly. And I considered making my proposal even more radical than what appears in the text.[157] Let me expand a bit on what I included and why.

First, as to the requirement of a motion by the criminal defendant, the main effect is to give the defendant the kind of specific pleading option the nonexistence of which Justice O'Connor seemed to make so much in *Old Chief*.[158] So the motion functions as a kind of special pleading. However, it does not seem appropriate to give the defendant the untrammeled right to trigger special actual innocence procedures unilaterally and without judicial evaluation of the propriety and sufficiency of the circumstances alleged to make out an actual binary exterior-fact claim. Hence the requirement of a motion (with its corollary right of counterargument by the prosecution). Second, the notion of usable relevance, which takes account of the capacities of the jury as well as the content of the information (the characteristics of the decoder as well as the code[159]), is somewhat narrower than

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States v. Stokes, No. 00-2397, 2004 WL 2494951 (1st Cir. Nov. 5, 2004) (presenting current law); Risinger, *Functional Taxonomy*, *supra* note 45, at 517 n.17 (discussing courts' disallowing of expert testimony on the grounds that it usurps the function of the jury).

154. *See* David C. Tierney, *Limitations on Closing Arguments*, ARIZ. ATT'Y, Nov. 2003, at 22, 24 (stressing the importance of requiring closing arguments to be "based on facts which the jury is entitled to find from the evidence").

155. *See* 61 AM. JUR. *Trials* § 24 (2004) ("[I]f the final disposition is acquittal, that effectively precludes the possibility of an appeal . . . because an acquittal is not subject to appeal.").

156. Refer to Part X *infra*.

157. For instance, I considered obliging criminal defendants who elected "factual innocence" procedures to testify, requiring that their examination be conducted by a judicial officer, not the partisan advocates, and severely limiting the extent of prior convictions that would be admissible purely on impeachment grounds. Although these or other such proposals might actually increase the system's "resolving power" in regard to claims of actual innocence, I ultimately concluded that they would only get in the way of a fair consideration of the need for *some* provision of special procedures for factual innocence claims.

158. Refer to note 120 *supra* and accompanying text.

159. *See* Risinger, *Heartstrings and Gore*, *supra* note 8, at 432–33. Federal Rule of

the usual construction given to Rule 401. I am not seeking by this measure to eliminate all narrative context information, but to exhort courts to adopt a fairly narrow notion of admissibility in order to squeeze out inflammatory proffers, especially of the "heartstrings and gore" variety, that are not significantly relevant to the defined factual claims of actual innocence. Third, in dealing with prosecution-proffered expertise, I have adopted a linkage between standards of reliability and applicable standards of proof, which I have espoused at length elsewhere.[160] Fourth, although it is proper to require some showing of reliability for defense-proffered expertise as well, the exclusion of it on grounds that it "invades the province of the jury" is misplaced whenever the testimony seeks to educate the jury about counterintuitive facts that are well supported by research and that jurors may not know from their general background experience.[161] Finally, the creation of the "unsafe verdict" ground of review in criminal cases by the British Parliament[162] provided exactly what is needed to correct for the artificial limits existing in the United States on appeals from convictions on the grounds that they are based on insufficient evidence or are against the weight of the evidence.[163] Indeed, the adoption of such a standard for the review of guilty verdicts when claims of actual factual innocence are made would a signal improvement independent of the adoption of any other changes in procedure.

VII. ADOPTION OF AN "UNSAFE VERDICT" STANDARD OF REVIEW

In virtually every American jurisdiction, when the sufficiency of evidence to support a verdict is attacked, the rubric is the same whether the case is civil or criminal.[164] The party

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Evidence 401 declares evidence relevant if it has "any tendency to make the existence of any fact that is of consequence to the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. In taking this form, the rule adopts an Olympian perspective that does not address the capacities of the jury to perceive and process the supposedly relevant information. In so doing, it is rather like Archimedes with his lever and no place to stand. Professor Leonard has proposed an amendment to the rule that would solve the problem. *See* David P. Leonard, *Minimal Probative Value and the Failure of Good Sense*, 34 HOUS. L. REV. 89, 95–96 (1997) (recommending an amendment to Federal Rule of Evidence 402 to provide "a standard by which the trial court could assess the value of a given item of evidence without" too much weighing of the evidence in the place of the jury).

160. *See* Risinger, *Taxonomy*, *supra* note 37, at 533–37.

161. *Id.* at 517–18 n.17.

162. Refer to text accompanying notes 175–97 *infra*.

163. Refer to Part X *infra*.

164. *See, e.g.*, Frazier v. State, 770 So. 2d 986, 993 (Miss. Ct. App. 2000) (stating that when sufficiency of evidence is challenged in a criminal case, a court is not at liberty to

prevailing below is entitled to every inference that a reasonable jury might have made given the evidence on the record considered in its most favorable light. This essentially means accepting at face value all testimonial evidence in favor of the verdict and assuming all testimonial evidence to the contrary to have been rejected on credibility grounds.[165] The reasons for this rather extreme deference are perhaps complex, but the usual surface justification vests the jury with plenary authority on the judgment of witness veracity because of the jurors' opportunity to observe demeanor during testimony.[166] Although this doctrine, like any other, can be stretched to give relief in extreme cases if appellate courts are of a mind to do so, such cases have to be pretty extreme, and courts usually are not (nor are they required to consider being) of a mind to. In general, it is very unusual for a criminal conviction to be found to be based on insufficient evidence under this technical standard. When such a finding is made, however, the result is an acquittal that is entitled to double jeopardy effect.[167]

Seeking a new trial on the ground that a criminal verdict is against the weight of the evidence might, at first glance, seem to capture the same notion as the British "unsafe verdict" ground,

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review the evidence in place of the jury except in limited circumstances); *see also* Leichihman v. Pickwick Int'l, Inc., 589 F. Supp. 831, 832–33 (D. Minn. 1984) (holding that in an age discrimination case, the court is not free to weigh the evidence or pass on the credibility of witnesses or substitute its judgment of the facts for that of the jury).

165. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 211–13 (1989).

166. The usual term used is "credibility," not "veracity," but to the extent that deference to the jury regarding testimony has any rational basis, it must focus on veracity and the related phenomena of exaggeration, resistance, et cetera. This is because the jury is not in even an arguably superior position in regard to the facial plausibility of the information given when viewed against other information. When no live testimony is involved, the case against the defendant otherwise being circumstantial, courts have developed a less deferential standard, "reasonable doubt as a matter of law," which allows both the trial court and the appellate court to determine that the evidence is insufficient to support a conviction beyond a reasonable doubt—and therefore to acquit the defendant in the face of a jury verdict—when, viewing the evidence "'in the light most favorable to the prosecution'" the evidence at most provides "'equal or nearly equal circumstantial support'" for the competing inferences of innocence and guilt. United States v. Cassese, 290 F. Supp. 2d. 443, 452 (S.D.N.Y. 2003) (quoting United States v. Glenn, 312 F.3d 58, 70 (2d Cir. 2002); United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996)). In such a case "a reasonable jury must necessarily entertain reasonable doubt." *Id.* This difference in the degree of deference between witness credibility cases and circumstantial cases seems so extreme that one suspects some other hidden dynamic at work. Perhaps because most criminal cases involve direct testimony, it is a way for the system to make guilty verdicts nearly as unreviewable on the merits in practice as not guilty verdicts, on trial-by-combat symmetry grounds.

167. Burks v. United States, 437 U.S. 1 (1978). *Burks* was applied to the states in *Greene v. Massey*, 437 U.S. 19 (1978). Refer to Part IX *infra*.

but in modern practice it does not. Historically, trial judges in at least some American jurisdictions were taken to possess such a power regarding both criminal and civil verdicts. Further, it was conceded that their role in the exercise of that power was to function as a "thirteenth juror," examining the verdict not for sufficiency in the artificially narrow legal sense, but weighing the evidence on their own, including their own determinations of veracity, or at least plausibility. However, the standard for granting such relief in criminal cases was never commonly invoked, and in many states it was either never recognized or was abolished altogether.[168] Even in the jurisdictions that retain the power, including the federal system, most courts do not generally see themselves as either obliged or authorized to grant such a new trial unless their subjective evaluation convinces them that the defendant was more likely than not innocent.[169] As such, the "against the weight of the evidence" decision provides no functional protection of the reasonable doubt standard. And on appeal the protection is even more diluted because the court is called upon to defer to the trial court's decision and reverse only for abuse of discretion.[170] By this time, the soup is too thin to contain much nourishment at all. In those rare cases in which a criminal verdict of guilt is found to be against the weight of the evidence, the decision does not trigger double jeopardy protection, and a new trial will generally follow, subject only to decisions within prosecutorial discretion.[171]

Adoption of the unsafe verdict ground would correct a number of defects in the current unsatisfactory role of courts in

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168. States seem about evenly divided in this regard. Among the states that reject the power to grant new trials because the verdict was against the weight of the evidence are Arizona, *see* State v. Harrod, 26 P.3d 492 (Ariz. 2001); Arkansas, *see* Wilcox v. State, 39 S.W.3d 434 (Ark. 2000); Connecticut, *see* State v. Vassell, 832 A.2d 99 (Conn. App. Ct. 2003); Delaware, *see* Nelson v. State, 781 A.2d 695 (Table), 2001 WL 458264 (Del. 2001); Hawaii, *see* State v. Aki, 77 P.3d 948 (Haw. Ct. App. 2003); Kansas, *see* State v. Ramsey, 612 P.2d 603 (Kan. 1980); Kentucky, *see* Craig v. Commonwealth, No. 1999-CA-001376-MR, 2003 WL 22870977 (Ky. Ct. App. Dec. 5, 2003); Louisiana, *see* State v. Brown, 868 So. 2d 775 (La. Ct. App. 2003); and Maine, *see* State v. Corbin, 419 A.2d 362 (Me. 1980).

169. The usual formula is that a new trial may be granted based on the weight of the evidence if the evidence "preponderates heavily against the verdict." State v. Reeves, No. 00-0481, 2001 WL 246366, at *3 (Iowa Ct. App. Mar. 14, 2001). Some courts go even further and say that the power is to be "exercised with caution" and granted only in exceptional cases "in which the evidence preponderates heavily against the verdict." Dorman v. State, 622 P.2d 448, 454 (Ala. 1981).

170. The usual standard given for the review of denials of new trials based on the weight of the evidence in criminal cases is abuse of discretion. Again, some courts underline this in red, saying that such a denial will be disturbed only for "manifest and unmistakable abuse of discretion." People v. Williams, 756 P.2d 221, 250 (Cal. 1998) (internal quotation marks omitted).

171. *See* Tibbs v. Florida, 457 U.S. 31, 42–45 (1982).

protecting the factually innocent. Before discussing this further, however, I need to make clear that I am referring to the unsafe verdict ground as it was intended to function by Parliament when it was created, not necessarily as it has been interpreted by the British Court of Appeal (Criminal Division). As we shall see, the whole course of the twentieth century involved something of a struggle between Parliament and the British judiciary over the proper standards of review for jury verdicts of guilt in criminal cases.[172]

VIII. THE HISTORY OF THE UNSAFE VERDICT STANDARD IN BRITAIN

When the twentieth century dawned, there was in Britain no legal appeal mechanism whatsoever to review the factual basis of a jury verdict of guilt in a criminal case.[173] A number of high profile wrongful convictions, perhaps most notably the Adolph Beck case,[174] created political pressure for the creation of a Court of Criminal Appeal, which culminated in an act of Parliament to that effect in 1907.[175] Two details of that initial scheme are relevant for our discussion. First, the Court of Criminal Appeal had a potentially unlimited warrant in the language of the statute to consider (and even to develop) any new evidence it might deem fit and to re-evaluate the evidence before the original jury with or without such "fresh evidence."[176] Second, the Court of Criminal Appeal was not authorized to grant new trials, but was forced either to let the original verdict stand or to set aside the original verdict, which had the functional effect of an acquittal.[177]

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172. "We are by no means the first commentators to observe patterns in the history of the [Criminal] Court of Appeal: legislation offering the prospect of remedying greater numbers of miscarriages, followed by *conservative practices* leading to eventual crisis." RICHARD NOBLES & DAVID SCHIFF, UNDERSTANDING MISCARRIAGES OF JUSTICE 245 (2000) (emphasis in original).

173. *Id.* at 45–46.

174.

> In a case of mistaken identity, Beck was tried for larceny in 1896, convicted, served five years in prison, and was again indicted and convicted in 1904. His sentence was suspended and a court of inquiry appointed, which reported that all charges against Beck in both trials were without foundation.

BEN HARRISON, TRUE CRIME NARRATIVES 453 (1997).

175. *See* NOBLES & SCHIFF, *supra* note 172, at 48–50. The court thus created has gone under two names: the Court of Criminal Appeal from 1907 to 1964, and the Court of Appeal (Criminal Division) (CACD) since then. *Id.* at 64–72. The terms are used interchangeably in the text.

176. *Id.* at 52–53.

177. *Id.* at 55–56, nn.62, 65.

In the former regard, the operative language authorized the court to find that "the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence . . . or that on any ground there was a miscarriage of justice."[178] This can easily be construed as a broad warrant to protect the notion of reasonable doubt in circumstances in which (under current American standards) the evidence might be formally sufficient to support a finding of guilt but is not actually practically sufficient given any analysis of weight and plausibility. Such a construction was apparently intended by many of the bill's parliamentary supporters.[179] However, such a construction was not by any means compelled by the language of the statute, and it was put into the hands of a judiciary that was deeply conservative, many of whose members had spoken against the bill, preferring the old system in which a jury verdict was completely final on the facts.[180] In addition, the court's lack of power to grant a new trial even in cases in which new evidence undermined confidence in the verdict but did not affirmatively establish defendant's innocence put further pressure to be conservative on judges already inclined in that direction.[181] Generally, the Court of Appeal followed a standard of review very much like the American sufficiency standard.[182] In only a handful of cases during the next sixty years were convictions quashed because the verdict was "not a satisfactory verdict" given the evidence, despite what might be taken to be formal sufficiency.[183] For our purposes, it is interesting to note that those cases generally involved weak identifications of the defendant as the perpetrator of the crime.[184]

Despite these exceptional cases, by the 1950s leading judicial authorities like Lord Tucker and Lord Goddard could write opinions doubting the existence of any power to evaluate the

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178. Criminal Appeal Act, 1907, 7 Edw. 7, c. 23 § 4 (Eng.).

179. NOBLES & SCHIFF, *supra* note 172, at 52–55.

180. *Id.* at 47, 55–56.

181. *See id.* at 64 (explaining the effect assumed in the debate on the 1964 bill that adoption of a power to order retrials would loosen judicial unwillingness to consider fresh evidence on appeal).

182. *Id.* at 65 (noting the Court of Criminal Appeal generally refused to "usurp the role of the jury and retry cases . . . if there was some evidence on which to convict"); *see* Jackson v. Virginia, 443 U.S. 307, 319 (1979) (holding that a federal trial court must use the sufficiency standard, which "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts").

183. NOBLES & SCHIFF, *supra* note 172, at 55–57.

184. *Id.* at 56.

weight of evidence supporting a criminal conviction.[185] In addition, the Court of Appeal's jurisprudence on "fresh evidence" had become narrowed.[186] Although never going quite so far as the American practice of requiring a finding of incompetence of counsel in failing to discover evidence in existence at the time of the original trial, the court generally refused to evaluate the impact of any evidence actually known to counsel and not introduced in the original trial, because findings of barrister incompetence in regard to the omission of such evidence were almost unthinkable, and in this one regard might be said to have been less generous than current American practice.[187]

This judicially narrowed scope for consideration of fresh evidence, once again coupled with a number of high-profile miscarriage of justice cases, led to parliamentary scrutiny of the whole structure, spurring various committee reports that led to a number of parliamentary reforms (or attempts at reform) in the 1960s. These reforms were aimed both at the creation of a power to grant new trials in appropriate cases[188] and at the unloosening of "some of the fetters which the court has imposed on itself in pursuance of the principle that the verdict of the jury should not be interfered with."[189] Again, one should note that a major focus of concern was on "disputed identity cases," and a central aim of the proposed reforms "was to make it easier for such disputed identity cases to be reevaluated if there had been a miscarriage of justice."[190]

The first enactment was the Criminal Appeal Act of 1964, which granted the power to order new trials.[191] Though fresh evidence was not included in the Act in explicit terms, it was expected that the new power would loosen the attitude of the Court of Criminal Appeal toward the consideration of fresh evidence.[192] This expectation was not unreasonable, given the assurances of the Lord Chief Justice to that effect.[193] However,

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185. *See id.* at 57 ("Where there is evidence on which a jury can act and there has been a proper direction to the jury this court cannot substitute itself for the jury and retry the case." (quoting Lord Goddard)).

186. *Id.* at 60–61 (noting that "around the 1950s the high watermark of judicial non-receptivity [of fresh evidence] was reached").

187. *Id.* at 59–60.

188. *Id.* at 60–64.

189. *Id.* at 66–67 (internal quotation marks omitted).

190. *Id.* at 66.

191. *Id.* at 67.

192. *See id.* at 66–67.

193. *Id.* at 67–68 (quoting the Lord Chief Justice as saying that the guiding principle under the 1964 Act was "'to ensure so far as possible that there has been no miscarriage of justice'").

the expected liberalization of fresh evidence standards did not materialize in practice to any great degree over the next decades.[194]

The Criminal Appeal Act of 1966 took on the "self imposed fetters" directly. The Act provided that the Court of Criminal Appeal could either quash a conviction absolutely or order a retrial, as the circumstances of the case demanded, when the verdict of guilt was "unsafe and unsatisfactory."[195] The phrase "unsafe and unsatisfactory" had originally been proposed as the standard to be followed in the original 1907 act, but had been rejected as being too "loose . . . and unscientific."[196] Now, apparently, it was felt to be just what was needed to make courts "'feel themselves more free than they have been in the past to interfere with a verdict of a jury about which there must be a considerable measure of doubt.'"[197]

The effect of the 1966 Act was less than might have been hoped. In 1967, the Court of Criminal Appeal denied the appeal in *R. v. Luckhurst*[198] even though the court seemed to concede that there should have been a reasonable doubt of guilt.[199] On the other hand, there was Lord Widgery's famous 1968 opinion in *R. v. Cooper*,[200] which took the position that a verdict was unsafe if the Court of Appeal examined the record and came away with a "lurking doubt"[201] regarding guilt. Although this phrase seems to have entered the lore of British law in regard to the meaning of an unsafe verdict, the conclusion of most observers was that it had little impact on the actual decision of cases.[202] As early as 1972 the British organization Justice was complaining that the unsafe and unsatisfactory ground "has very nearly become a dead letter,"[203] and in 1989 a parliamentary report was able to identify only six cases of successful appeal based on anything consistent with the lurking doubt theory.[204] Still, six cases are six cases, and their existence shows that the unsafe rubric is not without some marginal value, even in the hands of a skeptical and conservative judiciary.

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194. *Id.* at 69.
195. *Id.*
196. *Id.* at 54.
197. *Id.* at 70 (quoting Mr. Taverne in Parliamentary Debate (1966 c. 1146)).
198. R. v. Luckhurst, 51 Crim. App. R. 292 (C.A. 1967).
199. NOBLES & SCHIFF, *supra* note 172, at 71–72.
200. R. v. Cooper, 53 Crim. App. R. 82 (C.A. 1969).
201. *Id.* at 86; *see also* NOBLES & SCHIFF, *supra* note 172, at 71.
202. NOBLES & SCHIFF, *supra* note 172, at 72.
203. *Id.* (internal quotation marks omitted).
204. *Id.* at 73.

However, that marginal value was still not enough to fulfill parliamentary desire, and, once again as the result of high-profile cases of miscarriage, many growing out of the extreme measures taken to suppress IRA terrorism (and the appellate courts' narrow response to such cases),[205] Parliament attempted to get the courts to do more in regard to overseeing reasonable doubt standards in reviewing the evidence in criminal cases.[206] To that end, among other things, it amended the standard of review, eliminating the word "unsatisfactory" and indicating that a verdict should be overturned when the court finds the conviction to be unsafe.[207] It is clear that the change was intended to be liberalizing, and so the courts have understood.[208]

The commission report upon which the statute was based spent considerable time on the expected interconnection between fresh evidence, unsafety, and a new trial.[209] When affirmatively convinced that the jury verdict was "wrong," whether as a result of fresh evidence or not, the court was expected, functionally, to acquit (that is, quash the verdict without allowing a retrial).[210] When there was fresh evidence that might or might not convince a reasonable jury that there was a reasonable doubt of guilt, the proper course was to grant a new trial.[211] Presumably after such retrials, actual acquittals would in many cases spare the system from having to determine the ultimate tenability of a conviction on the new record. Any second convictions would be dealt with in due course.

What was not clearly considered was what the courts should do in a situation in which the verdict was unsafe, not because of an affirmative determination (almost certainly based on fresh evidence) of the actual innocence of the defendant, but where, even with no fresh evidence, the court felt strongly that any reasonable jury ought to have had a reasonable doubt on the evidence before it—what in American parlance would be deemed a determination that the verdict was "against the weight of the evidence." In such a case, a retrial on exactly the same evidence seems an unsatisfactory remedy, for if the court was right the first time, how could it do anything but grant the appeal after the next and any subsequent convictions on the same record?

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205. *Id.* at 100–01.
206. *Id.* at 86–87.
207. *Id.*
208. *Id.*
209. *Id.* at 85.
210. *Id.*
211. *Id.*

Arguably, this would present a situation in which a retrial was "impractical," and in that case the court was to do its own evaluation of guilt beyond a reasonable doubt on the record as it existed in the Court of Criminal Appeal, "turning the Court of [Criminal] Appeal into a second trial court."[212]

IX. UNSAFE VERDICTS: DOUBLE JEOPARDY AND BEYOND

Interestingly, there is disagreement in American jurisprudence on the proper approach to the last referenced situation, in the rare circumstance of its arising, given the narrowness of usual American appellate standards of review. However, this very issue presented itself to the U.S. Supreme Court, at least peripherally, in *Tibbs v. Florida*.[213] The sharply conflicting views of the justices on this issue well illustrate the problem.

Tibbs involved a Florida murder that resulted in a death sentence.[214] The story is generally well told by Justice O'Connor in her opinion for the majority:

> In 1974, Florida indicted Delbert Tibbs for the first-degree murder of Terry Milroy . . . and the rape of Cynthia Nadeau. Nadeau, the State's chief trial witness, testified that she and Milroy were hitchhiking from St. Petersburg to Marathon, Fla., on February 3, 1974. A man in a green truck picked them up near Fort Myers and, after driving a short way, turned off the highway into a field. He asked Milroy to help him siphon gas from some farm machinery, and Milroy agreed. When Nadeau stepped out of the truck a few minutes later, she discovered the driver holding a gun on Milroy. The driver told Milroy that he wished to have sex with Nadeau, and ordered her to strip. After forcing Nadeau to engage in sodomy, the driver agreed that Milroy could leave. As Milroy started to walk away, however, the assailant shot him in the shoulder. When Milroy fell to the ground, pleading for his life, the gunman walked over and taunted, "Does it hurt, boy? You in pain? Does it hurt, boy?" Then, with a shot to the head, he killed Milroy.
>
> This deed finished, the killer raped Nadeau. Fearing for her life, she suggested that they should leave together, and that she "would be his old lady." The killer seemed to agree and they returned to the highway in the truck. After driving a short distance, he stopped the truck and ordered

212. NOBLES & SCHIFF, *supra* note 172, at 85.

213. 457 U.S. 31 (1982).

214. *Id.* at 35.

> Nadeau to walk directly in front of it. As soon as her feet hit the ground, however, she ran in the opposite direction. The killer fled with the truck, frightened perhaps by an approaching car. When Nadeau reached a nearby house, the occupants let her in and called the police.
>
> That night, Nadeau gave the police a detailed description of the assailant and his truck. Several days later a patrolman stopped Tibbs, who was hitchhiking near Ocala, Fla., because his appearance matched Nadeau's description. The Ocala Police Department photographed Tibbs and relayed the pictures to the Fort Myers police.[215] When Nadeau examined these photos, she identified Tibbs as the assailant.[216] Nadeau subsequently picked Tibbs out of a lineup and positively identified him at trial as the man who murdered Milroy and raped her.[217]

Nadeau's identification of Tibbs was virtually the only evidence that he was the killer of Milroy, or that he had had any contact with Milroy or Nadeau on the night of the crime.[218] Tibbs

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215. Here is a point of significant omission in Justice O'Connor's rendition, at least to my mind. Ocala is nearly 200 miles from Fort Myers. RAND MCNALLY, THE ROAD ATLAS 26–27 (2003) (depicting that Fort Myers is approximately 218 miles southeast of Ocala). In addition, Tibbs was black and Nadeau was white, making this a case of cross-racial identification. One wonders what the specificity of the description emanating from Fort Myers was that could have justified picking up a hitchhiker in Ocala, especially given that the Fort Myers individual left in a truck and the Ocala individual was hitchhiking. It is interesting to note that none of the Florida appellate opinions mention the racial aspect of the case, nor do any of the briefs in the U.S. Supreme Court. Justice O'Connor took the racial characterization of the defendant from a police report that had been introduced at trial. *Tibbs*, 457 U.S. at 34 n.4.

216. The Florida Supreme Court described the circumstances of this identification thus:

> [T]he manner in which Tibbs was first identified ten days after the crimes, by bringing Nadeau to Ft. Myers from St. Petersburg after she had reestablished herself in that community, in order to see three photographs of Tibbs, suggests a less reliable identification than would have been possible with multiple photographs of more than one person.

Tibbs v. State, 337 So. 2d 788, 791 (Fla. 1976) [hereinafter *Tibbs I*].

217. *Tibbs*, 457 U.S. at 32–33 (citations and footnotes omitted, Author's footnotes added).

218. Except for Nadeau's identification, whatever its strengths or weaknesses, the only other evidence pointing toward Tibbs as the perpetrator was the testimony of a classic "jailhouse snitch." Even Justice O'Connor characterized this testimony as follows:

> A Florida prisoner, sentenced to life imprisonment for rape, also testified for the State. This prisoner claimed that he had met Tibbs while Tibbs was in jail awaiting trial and that Tibbs had confessed the crime to him. The defense substantially discredited this witness on cross examination, revealing inconsistencies in his testimony and suggesting that he had testified in the hope of obtaining leniency from the State.

Id. at 34 n.3. The Florida Supreme Court initially declared in *Tibbs I* that "no credence can be given to the testimony of this witness" in that it "appears to be the product of purely selfish considerations." *Tibbs I*, 337 So. 2d at 790. Nothing in Justice O'Connor's opinion takes issue with that statement. Note that under standard theory, even if the jailhouse snitch had been the only witness in the case, his testimony would still have been "sufficient" to sustain the

was a college graduate and an aspiring author with the beginnings of a publication record who claimed to be hitchhiking around the country gathering material.[219] He stayed the night of February 1 at the Daytona Beach Salvation Army Transit Lodge in Daytona Beach,[220] over 200 miles from Fort Myers.[221] Tibbs claimed to have been in Daytona Beach until February 6, but could produce no corroboration of that assertion.[222] He was first picked up by police acting on the all-points-bulletin regarding the Nadeau description on February 6 while he was hitchhiking in Leesburg (which is approximately thirty-five miles southeast of Ocala),[223] but was released.[224] He was picked up the next day while hitchhiking in Ocala, and once again released after being photographed.[225] These were the photographs that led to Nadeau's identification of Tibbs as the assailant.[226] Another bulletin was issued, and Tibbs was picked up on March 13 while hitchhiking in Clarksdale, Mississippi, at which point he waived extradition and returned to Florida.[227] Aside from Nadeau's testimony, there was little evidence that Tibbs had ever been within 150 miles of Ft. Myers,[228] and there were serious

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conviction, and the rejection of the face value meaning of the assertions of such a witness grounds the appeal in weight, not insufficiency.

219. *Tibbs*, 457 U.S. at 34.

220. *Id.* at 34–35.

221. The distance is 212 miles between Fort Myers and Daytona Beach. RAND MCNALLY, *supra* note 215, at 26 tbl.

222. *Tibbs*, 457 U.S. at 35.

223. RAND MCNALLY, *supra* note 215, at 26–27.

224. *Tibbs I*, 337 So. 2d at 790–91.

225. *Tibbs*, 457 U.S. at 33.

226. *Id.*

227. *Tibbs I*, 337 So. 2d at 790–91.

228. *See id.* at 790. The prosecution produced a card from a Salvation Army in Orlando, which it claimed bore Tibbs's signature, showing he was in Orlando on February 4, 1974. *Id.* at 790 n.1. Tibbs had denied ever being in Orlando. *Tibbs*, 457 U.S. at 31. Tibbs took the stand and continued to maintain that he was never in Orlando and that the signature was not his. *Id.* The Supreme Court of Florida took the remarkable step of commenting that, to them, the signature did not look like his:

> Without passing on Tibbs' assertion that the signature on the card was not his (which a superficial comparison with his admitted signature on a like record from the Daytona Beach Salvation Army seems to bear out), Orlando is still the nearest place to Ft. Myers, geographically and in time, that the state was able to place him, except of course for Nadeau's testimony.

Tibbs I, 337 So. 2d at 790 n.1. This illustrates well the havoc that collateral disputes can work on a trial. Orlando is more than 150 miles from Fort Myers and is closer to Daytona Beach than is Leesburg. RAND MCNALLY, *supra* note 215 (noting distances of approximately fifty-four miles between Daytona Beach and Orlando and seventy miles between Daytona Beach and Leesburg). Both are on a kind of southerly swing that one might easily take going between Daytona Beach and Ocala while hitchhiking with no particular destination. An admission by Tibbs as to having stayed in Orlando on February 4, 1974 would have added nothing to the prosecution's case. If anything, it would have

weaknesses in Nadeau's testimony. Specifically (as the Florida Supreme Court described it),

> Despite her assertions that adequate daylight was present at the time of the alleged crimes to impress Tibbs's features and characteristics into her mind, all independent evidence of the events indicates that the crimes occurred after nightfall. . . . [H]er admitted use of marijuana throughout the day and immediately prior to the crimes casts doubt on her identification of Tibbs.[229]

On this record, Tibbs was convicted of both rape and murder, and sentenced to death.[230] When the case came before the Florida Supreme Court, it reversed.[231] The basis of the reversal was not clearly characterized pursuant to the standard categories (then and now) of sufficiency and weight, in part because the characterization at the time the case was decided made no difference. Here's why.

As we have already noted, American courts (unlike British courts) were traditionally taken to have the same authority to evaluate the sufficiency of the evidence proffered in a criminal prosecutions as in civil cases. In addition, in some jurisdictions American courts could grant a new trial when they found a conviction to be against the weight of the evidence, usually under the rubric of authority to act "in the interest of justice."[232] However, many, perhaps most, jurisdictions allowed retrial on exactly the same evidence, even after a determination of insufficiency. Until 1978, such a result was taken to be consistent with the longstanding rule that retrial after a reversal did not violate the Double Jeopardy Clause of the U.S. Constitution, because the defendant was asking for relief from a jury

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made the case against Tibbs weaker because it would have established Tibbs's exact whereabouts on the day after the crime, and would have meant that, in order to commit the crime, Tibbs would have had to leave the Daytona Beach Salvation Army on the morning of February 2, acquire the green truck (which was apparently never reported stolen), travel to Fort Myers 250 miles away (most likely passing through Orlando early in the trip), commit the rape and murder on the night of February 3, then ditch the truck where it would never be found and get back to Orlando by the night of February 4 to check into the Salvation Army. Embracing the Salvation Army card would actually have helped Tibbs, but the denial gave the prosecution the chance to make Tibbs look like a liar, even though it is more likely evidence of a kind of stubborn honesty.

229. *Tibbs I*, 337 So. 2d at 791.

230. *Id.* at 789.

231. *Id.* at 791.

232. For example, this was the phraseology of the statutory authority under which the Florida Supreme Court acted in *Tibbs I*, or so the court seemed to say in its later opinion in *Tibbs v. State*, 307 So. 2d 1120 (Fla. 1981) [hereinafter *Tibbs II*]. Refer to text accompanying notes 244–45 *infra*.

conviction in being.[233] In 1978, however, the Supreme Court held in *Burks v. United States*[234] that a retrial after reversal of a conviction did violate double jeopardy when the reversal was founded on a determination that the evidence adduced at trial was legally insufficient to prove the elements of the crime beyond a reasonable doubt.[235] Of course, the "insufficiency" referred to was the constricted view of insufficiency discussed above, which mandated, with respect to virtually any live witness testimony, that the jury, as judges of "credibility" had the right to accept the testimony wholeheartedly and completely at face value. Under this approach, all eyewitness identifications, no matter how rationally implausible, are legally sufficient to establish identity.

When the Florida Supreme Court overturned Tibbs's conviction in 1976, they assumed that a retrial would follow.[236] Justice Boyd, in a special concurrence, manifested some discomfort with this result, but concluded that "although the weakness of the evidence presented in the trial court might well require that the appellant be released from incarceration without further litigation, it is my understanding that Florida law permits a new trial and I, therefore, reluctantly concur in the majority opinion providing for such new trial."[237] However, due to the law's delays, Tibbs had not yet been retried when *Burks* was decided,[238] and the trial judge ruled that a retrial would violate double jeopardy under *Burks*.[239] The Florida intermediate appellate court reversed, saying that, whatever its basis, the original decision in *Tibbs I* was not an insufficiency ruling within the meaning of *Burks*.[240] The Florida Supreme Court agreed in a 4–3 decision[241] and, *pour lagniappe*, decided that they never really had the authority to reverse based on a determination of weight,[242] declaring that neither they nor any other Florida court

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233. *See* United States v. Ball, 163 U.S. 662, 669–72 (1896). As the Court said in *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Double Jeopardy Clause "imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside." *Id.* at 720.

234. 437 U.S. 1 (1978).

235. *Id.* at 18 (holding that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient").

236. *See Tibbs I*, 337 So. 2d at 791 ("[W]e reverse his conviction and remand for a new trial.").

237. *Id.* at 792 (Boyd, J., concurring specially).

238. Tibbs v. Florida, 457 U.S. 31, 37 n.10 (1982).

239. State v. Tibbs, 370 So. 2d 386, 386 (Fla. Dist. Ct. App. 1979).

240. *Id.* at 388.

241. *Tibbs II*, 397 So. 2d 1120, 1127 (Fla. 1981).

242. *Id.* at 1126.

should ever be tempted to do so again.[243] In so doing, they restricted the power to grant relief "in the interest of justice,"[244] which had been authorized by the Florida Rules of Appellate Procedure, to "*fundamental* injustices, unrelated to evidentiary shortcomings."[245]

Justice Boyd dissented based on his position in *Tibbs I*, which he found to be equivalent to an insufficiency determination.[246] Justice England dissented in part, saying that "rather than recycle Tibbs through the criminal justice system, I would direct his discharge in the interest of justice" (citing the Rule that the majority had just narrowed).[247] It was Chief Justice Sundberg whose dissenting remarks are most cogent for our purposes:

> The majority implies that the evidence was legally sufficient to convict Tibbs and that therefore a retrial would not violate the fifth amendment since the state would not be allowed a second attempt at mustering evidence it had failed to produce at the first trial. But we must carry the principle of sufficient evidence through the retrial stage, since it is the basis for avoiding *Burks* and *Greene*. We cannot logically allow the state in a second trial to supplement the evidence presented at the first trial, at least not without completely ignoring the themes of the double jeopardy clause here outlined. Since the same evidence must be used, an appellate court would have no choice but once again to reverse a conviction because of our reversal under identical circumstances. This result would follow unless the majority's opinion were construed to reverse our reversal of Tibbs' conviction, in which case we should reinstate the original judgment to avoid double jeopardy problems.[248]

The U.S. Supreme Court granted certiorari and affirmed in a 5–4 decision.[249] There is nothing particularly exceptionable about the decision of the majority on purely double jeopardy grounds. Although the Court is not exactly bound by the state court's characterization of whether its disposition was based on sufficiency or weight for double jeopardy purposes, it would seem

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243. *Id.* at 1125.

244. *Id.* at 1126.

245. *Id.*

246. *Id.* at 1130–31 (Boyd, J., dissenting).

247. *Id.* at 1130 (England, J., concurring in part and dissenting in part).

248. *Id.* (Sundberg, C.J., concurring in part and dissenting in part) (footnote omitted).

249. Tibbs v. Florida, 457 U.S. 31, 32, 47 (1982).

difficult to argue that the characterization of the Florida Supreme Court was wrong in *Tibbs II*, given the centrality of witness credibility evaluation in *Tibbs I* and the fact that the U.S. Supreme Court in *Jackson v. Virginia* had adopted the standard model of sufficiency as the right model for due process purposes.[250]

Justice White's dissent proposed a different approach, essentially accepting chief Justice Sundberg's position quoted above.[251] The dissent argued that if and when there was a final state court determination that a conviction was "against the weight of the evidence," this determination would establish as a matter of state law that that trial record could not support a conviction, and the implication of that, pursuant to good double jeopardy policy, would be no retrial.[252] This was because either the retrial would be on a new record with more evidence (in which case it would violate the central no-serial-trials, one-bite-at-the-apple, prepare-your-best-case-before-subjecting-a-citizen-to-a-criminal-trial policy), or else it would be a retrial on the same evidence (in which case a resulting conviction would then a fortiori have to be reversed once again as being against the weight of the evidence).[253] It was in response to this latter assertion of the dissent that the majority included footnote eighteen, written as follows:

> The dissent suggests that a reversal based on the weight of the evidence necessarily requires the prosecution to introduce new evidence on retrial. Once an appellate court rules that a conviction is against the weight of the evidence, the dissent reasons, it must reverse any subsequent conviction resting upon the same evidence. We do not believe, however, that jurisdictions endorsing the "weight of the evidence" standard apply that standard equally to successive convictions. In Florida, for example, the highest state court once observed that, although "[t]here is in this State no limit to the number of new trials that may be granted in any case, . . . it takes a strong case to require an appellate court to grant a new trial in a case upon the ground of insufficiency of conflicting evidence to support a verdict when the finding has been made by two juries." *Blocker v. State*, 92 Fla. 878, 893, 110 So. 547, 552

250. "[T]he Due Process Clause forbids any conviction based on evidence insufficient to persuade . . . beyond a reasonable doubt." *Id.* at 45 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).

251. *Id.* at 48 & n.* (White, J., dissenting).

252. *Id.* at 48–49 (White, J., dissenting).

253. *Id.* at 48 (White, J., dissenting).

> (1926) (en banc). The weight of the evidence rule, moreover, often derives from a mandate to act in the interests of justice. Although reversal of a first conviction based on sharply conflicting testimony may serve the interests of justice, reversal of a second conviction based on the same evidence may not. See *United States v. Weinstein*, 452 F.2d 704, 714, n.14 (CA2, 1971) ("We do not join in the . . . forecast that the granting of a new trial would doom the defendant and the Government to an infinite regression. . . . [I]f a third jury were to find [the defendant] guilty, we should suppose any judge would hesitate a long time before concluding that the interests of justice required still another trial"), cert. denied *sub nom*. *Grunberger v. United States*, 406 U.S. 917 (1972). While the interests of justice may require an appellate court to sit once as a thirteenth juror, that standard does not compel the court to repeat the role.[254]

So here we have two opposing views of what to do when a court decides that a jury verdict cannot be sustained (or, dare I say, is unsafe) in a way that necessarily rests on some evaluation of credibility of a witness's statement. The *Tibbs* majority essentially says "retrial on the same record, and acquiesce in a second (or at least a third) conviction."[255] The *Tibbs* dissent essentially says "no retrial ever—discharge as if acquitted, on double jeopardy grounds."[256] But I say there is a middle way, one that was suggested (though not explicitly described) by the most recent decision of the British Court of Criminal Appeal dealing with the problem of a crib death prosecution for murder, *R. v. Cannings*.[257]

The facts of *Cannings* are relatively straightforward. Angela Cannings was born Angela Connolly in 1963, married a man named Terry Cannings, and on August 14, 1989, bore their first child, Gemma.[258] On the afternoon of November 14, 1989, while her husband was not home, Mrs. Cannings went in to check on the baby and found her lifeless.[259] The pathologist who examined

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254. *Id.* at 43 n.18 (alterations in the original) (cross-reference omitted). So a majority of the Supreme Court were happy to let Tibbs be retried and perhaps executed on this record. Luckily for Tibbs, the prosecutor who inherited the case had better judgment and dropped the charges, and Tibbs was released. *See* Michael Seward, Comment, *The Sufficiency-Weight Distinction—A Matter of Life or Death*, 38 U. MIAMI L. REV. 147, 155 n.55 (1983).

255. *See Tibbs*, 457 U.S. at 42–43.

256. *See id.* at 48 (White, J., dissenting).

257. 1 All E.R. 725 (C.A. 2004).

258. *Id.* at 726.

259. *Id.* at 736.

the child's body could find no specific condition or indication of anything that might have caused Gemma's death.[260] The cause of death was listed as "natural, being Sudden Infant Death Syndrome."[261] Mrs. Cannings had their second child, Jason, on April 25, 1991.[262] She underwent training on resuscitation techniques and was provided with an apnoea alarm, which is supposed to sound if a child quits breathing.[263] Nevertheless, on June 4, 1991, Mrs. Cannings found Jason apparently lifeless, but he was revived with the help of a visiting nurse who had been assigned to counsel the family on safety.[264] On June 13, 1991, while Mr. Cannings was at work, Mrs. Cannings discovered Jason dead.[265] No specific cause could be identified after autopsy.[266] The Cannings's third child, Jade, was born on January 15, 1996.[267] Jade was hospitalized once at two and a half months for a condition which included vomiting and diarrhea as well as labored breathing, but was otherwise a healthy child.[268] On July 5, 1999, the Cannings's fourth child, Matthew, was born.[269] He was placed on an apnea monitor when sleeping.[270] On November 3, Mrs. Cannings called emergency services and reported that the apnea alarm had sounded and that Matthew's breathing was labored.[271] He was taken to a hospital but nothing was found wrong with him.[272] On November 12, while her husband was at work, the apnea alarm again went off.[273] Mrs. Cannings found Matthew in crisis.[274] She called her husband, who called emergency services. She then attempted to revive Mathew, but it did no good.[275] When the ambulance arrived, Matthew was already dead.[276] Once again, an autopsy revealed neither a specific cause of death nor anything specifically suspicious.[277]

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260. *Id.*
261. *Id.*
262. *Id.* at 726.
263. *Id.* at 738.
264. *Id.*
265. *Id.* at 740.
266. *Id.* at 741.
267. *Id.* at 726.
268. *Id.* at 744–45.
269. *Id.* at 726.
270. *Id.* at 749.
271. *Id.*
272. *Id.*
273. *Id.* at 750–51.
274. *Id.* at 751.
275. *Id.* at 750–51.
276. *Id.* at 750.
277. *Id.* at 752.

Mrs. Cannings was charged with the deaths of Jason and Matthew.[278] The prosecution's theory was that she had smothered them in some way that left no trace.[279] The evidence against her consisted of three deaths while in her care, each of whom died while she was alone with them, and various responses of hers that were alleged to be "suspicious"—particularly, in Matthew's case, her call to her husband instead of to emergency services.[280] There was a great deal of expert testimony proffered by both the prosecution and defense, but none of it was dispositive or claimed to be dispositive on the question of whether any individual death was due to natural causes or not.[281] Mrs. Cannings was convicted on April 16, 2002.[282] Her first appeal to the Court of Appeal, Criminal Division, was denied. Her second appeal was based largely on a "fresh evidence" claim in regard to research suggesting that the base rate occurrence of multiple SIDS deaths in a single family was not as rare as one might think, perhaps as a result of significant substructuring stemming from genetic or environmental factors.[283] The CACD quashed the convictions,[284] in a long and detailed opinion by Lord Justice Judge, which declared that, without specific objective evidence of interference, this conviction and any conviction based merely on multiple deaths while in the defendant's care was "unsafe":

> With unexplained infant deaths, however, as this judgment has demonstrated, in many important respects we are still at the frontiers of knowledge. Necessarily, further research is needed, and fortunately, thanks to the dedication of the medical profession, it is continuing. All this suggests that, for the time being, where a full investigation into two or more sudden unexplained infant deaths in the same family is followed by a serious disagreement between reputable experts about the cause of death, and a body of such expert opinion concludes that natural causes, whether explained or unexplained, cannot be excluded as a reasonable (and not a fanciful) possibility, the prosecution of a parent or parents for murder should not be started, or continued, unless there is additional cogent evidence, extraneous to the expert evidence . . . which tends to support the conclusion that the

278. *Id.* at 726 (noting that the allegation regarding Gemma's murder did not proceed).

279. *Id.* at 727.

280. *Id.* at 762–63.

281. *Id.* at 767–68 (noting that the court was "satisfied that there is a realistic, albeit as yet undefined, possibility of a genetic problem within [Canning's] family").

282. *Id.* at 726.

283. *Id.* at 787–68.

284. *Id.* at 727.

> infant or, where there is more than one death, one of the infants, was deliberately harmed.[285]

The result in *Cannings* may be taken to illustrate a number of things about the evolving British jurisprudence of "unsafe verdicts." Although nominally a "fresh evidence" case, it really is a case about the limits of jury authority to determine real-fact guilt from a record of conflicting expert evidence and ambiguous circumstances.[286] However, as fascinating as further in-depth exploration of *Cannings* would be, for my present purposes I will limit myself to one observation not directly dealt with by the court, but perhaps hinted at by the phrase "for the time being" in the quoted portion of the opinion. Suppose, in a case like *Cannings*, a verdict of guilt is quashed after trial as being "unsafe." Quashing the verdict instead of ordering a new trial is the right course, because the result of a new trial on the same evidence would also a fortiori be "unsafe." That would be consistent with Justice White's position in *Tibbs*. But suppose that thereafter a videotape of the defendant smothering one of the children is discovered. Should the state be barred from retrial in that circumstance? I suggest that the answer is no. It is one thing for the reviewing court to say that a conviction on the record in front of the jury was unsafe and would always be unsafe. It is quite another to say that when the prosecution obtains substantial newly discovered evidence, further prosecution should nevertheless be barred. So I would propose that, in the case of any conviction reversed because of the unsafety of the verdict, the door should be kept open for the prosecution, on application, to demonstrate the discovery of new evidence that was not and could not reasonably have been known at the time of the first prosecution, which supplements the original record in such a way as to make a conviction now safe. It would seem that this would be a reasonable accommodation to the interests of the state in the face of the new standard of review, and it would not appear to present a double jeopardy problem under the U.S. Constitution based on the analysis in *Tibbs*.

X. THE CHARACTERISTICS AND MEANING OF THE PROPOSED "UNSAFE VERDICT" STANDARD OF REVIEW

The proposed standard of review would be intended specifically to protect the reasonable doubt criterion in regard to

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285. *Id.* at 768 (cross-reference omitted).

286. *See id.*

claims of actual factual innocence. It is neither an insufficiency judgment nor an "against the weight" judgment as they are currently conceived and practiced. It is specifically targeted at maintaining some supervision of the notion of reasonable doubt even where one would not necessarily be affirmatively convinced of actual innocence. It would place the responsibility for that protection squarely on judges at both the trial and appellate levels. It would be similar to the traditional "against the weight of the evidence" standard, in that the court would not be limited in its ability to evaluate and discount the face value of witness testimony and would be morally obligated to do so when rationally appropriate. It would carry a special obligation when a conviction was undergirded primarily with evidence known to be of questionable reliability, such as stranger-on-stranger eyewitness identification or "jailhouse snitch" testimony. As in Britain, it would oblige a court to consider any relevant fresh evidence, including research results casting doubt on the kind of evidence relied upon at trial, as long as that evidence was not "in hand" and intentionally bypassed by trial counsel.[287] Thus, it would dispense with the necessity of proving the theoretical undiscoverability that underlies the current notion of "newly discovered evidence,"[288] or the alternative requirement of having to establish "ineffective assistance of counsel."[289]

If a court declares a verdict "unsafe," one of three results should follow. If the unsafety results from fresh evidence concerning adjudicative facts that would be admissible at a new trial, a new trial should generally result. If the new evidence is such that a review after a new trial would have to be quashed because actual innocence was clearly established (as in many DNA exonerations), the case should be dismissed with double jeopardy effect. Finally, if the determination is (with or without

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287. *See, e.g.*, *id.* at 767.

288. *See* FED. R. CRIM. P. 33(b) (permitting a motion for new trial based on "newly discovered evidence" if timely filed); United States v. Lopeztegui, 230 F.3d 1000, 1002 (7th Cir. 2000) (construing Rule 33 to permit a new trial based on newly discovered evidence when that evidence "(1) came to his knowledge after trial, (2) could not have been discovered sooner with due diligence, (3) is material and not merely impeaching or cumulative, and (4) would probably lead to acquittal in the event of a retrial"); United States v. Alessi, 638 F.2d 466, 479 n.12 (2d Cir. 1980) (stating that motions for retrial based on newly discovered evidence "should only be granted with great caution" (internal quotation marks omitted)).

289. Under the Supreme Court's test as articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a convicted defendant, to prevail on his claim that he was deprived of his Sixth Amendment right to counsel, must demonstrate both that his attorney committed errors that were "outside the wide range of professionally competent assistance" and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 690, 694.

fresh evidence) that the original record was necessarily subject to a reasonable doubt, the result should be to quash the verdict with no retrial possible without application to a court after development of significant new evidence of guilt. Although it is clear that jeopardy would not attach in the last situation under *Tibbs*, a retrial on the same record should nevertheless be prohibited—not on double jeopardy grounds at all, but on the grounds that a second or third conviction on the same record would a fortiori be subject to reasonable doubt, and therefore fundamentally in violation of due process and our duty to protect the innocent.

XI. FACTUAL INNOCENCE AND THE DEATH PENALTY

It is a commonplace to say that "death is different"[290] and that proof beyond a reasonable doubt, as currently conceived, is not a reliable enough basis for killing someone.[291] Without directly becoming involved in the complexities of the "floating reasonable doubt" discussion,[292] I think it is reasonably clear that, given a particular record, a verdict rejecting a claim of actual innocence might be considered safe for purposes of incarceration (with its attendant possibilities of future "fresh evidence") but not for execution. So in capital cases I would explicitly add a fourth option to the warrant of a court reviewing the safety of a verdict rejecting a claim of actual innocence: an option to determine that the record makes the imposition of capital punishment "unsafe." In so doing, some will likely claim that I am proposing transferring the power of clemency from the executive to the judiciary, but I do not think this objection is well placed. The ground I propose for quashing the execution does not bestow upon the judiciary a general clemency warrant with all the normative and political discretion that that implies. Rather, the ground is narrow and within the traditional ambit of judicial competence—that is, a competence to evaluate the weight of evidence on an issue of actual fact, a function that judges perform in bench trials all the time.[293] Granted that political

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290. Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 104–05 (2003) (arguing that "despite the 'death is different' rhetoric that has infused our capital punishment jurisprudence over the last thirty years, we really do not treat capital cases all that differently from other serious criminal cases").

291. *See* Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1084 (2003).

292. Refer to note 134 *supra*.

293. *See* 71 TEX. JUR. 3D *Trial and Dispute Resolution* § 57 (2002) (stating that "the trial court, acting as fact finder, is presumed to rule . . . on the weight of the evidence").

considerations might prevent many courts from using the ground as much as one might think a proper view of the obligation to protect the factually innocent from execution requires,[294] that is no reason to reject the explicit adoption of such a ground of review in the interest of justice.[295]

XII. CONCLUSION

DNA exonerations have finally established beyond doubt that the current system of trial convicts a significant number of factually innocent defendants,[296] putting to rest literally centuries of rhetoric that such results were either nonexistent or vanishingly rare.[297] It is not yet possible to put a properly framed

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294. *See, e.g.*, Rosen, *supra* note 290, at 104 (commenting that the Court generally is "willing to find constitutionally tolerable rather significant amounts of arbitrariness and discrimination as the required costs of allowing the people to carry out their political desire to use capital punishment").

295. Interestingly, there is actually some precedent backing this particular proposal, a scattered recognition in some jurisdictions that courts, even appellate courts, have special responsibilities beyond the usual weak notions of sufficiency when the death penalty is involved. Consider the following:

> In a case of this character, not only should the jury be convinced beyond a reasonable doubt before agreeing upon such a verdict, and fixing the penalty at death, but the trial court . . . must be very certain that the verdict and judgment are justified by the weight of the evidence before we can sanction the infliction of the penalty here imposed.

Piel v. People, 119 P. 687, 690 (Colo. 1911). More recently:

> Residual doubt is not grounds for a new trial. Despite rhetoric about a thirteenth juror, so long as a verdict is supported by properly admitted evidence, a trial judge may not overturn it and grant a new trial, even if he or she has doubts about the jury's finding. . . . But it is one thing to say that a verdict will not be disturbed just because the judge disagrees with it and quite another to say that a judge should sentence a defendant to death even though the judge believes the jury might have made a mistake.

State v. Harrod, 26 P.3d 492, 505 (Ariz. 2001) (Feldman, J., specially concurring). Consider also the following, from *Beck v. Alabama*, 447 U.S. 625, 637 (1980): "[T]here is a significant constitutional difference between the death penalty and lesser punishments."

296. *See, e.g.*, SCHECK ET AL., *supra* note 1, at xiv.; Rosen, *supra* note 290, at 65–69. The latest numbers are available at http://innocenceproject.org (last visited Nov. 12, 2004).

297. "I think that the Complaints of the present Mode of administering the Criminal Law have little Foundation, for the Case in which the Innocent are improperly convicted are extremely rare." Testimony of Baron Parke before the Select Committee of the House of Lords (May 12, 1848) (considering a bill to authorize appeals in criminal cases), *reprinted in* A.H. MANCHESTER, SOURCES OF ENGLISH LEGAL HISTORY 1750–1950, at 177, 179 (1984).

> We believe that in our Courts of Justice innocent men never are convicted. If at long intervals some singular exception occurs to this universal rule, it is only an exception, which by its extreme rarity proves the rule. Mr. Denman, in last night's debate, declared, as a result of many years' experience as a Sessions' barrister, that, although he had defended many scores of prisoners, he had never seen one convicted of whose guilt he was not convinced.

denominator under the numerator represented by the exonerations in order to generate an actual rate of wrongful convictions for the system as a whole, or some significant sub-universe of prosecutions.[298] Nevertheless, it is clear that the problem of convicting the innocent is more real and more pressing than ever before realized. Systematic complacency with the old ways of dealing with the issues is simply unacceptable, unless we are to adopt a version of the extreme position espoused by William Paley in the eighteenth century: that such convictions, however many there are, are simply the price of security, and the wrongfully convicted should be viewed as necessary, and even honorable, casualties in the war on crime.[299] For literally centuries the courts have insulated themselves from responsibility for protecting the factually innocent, hiding behind an artificial concept of evidentiary sufficiency, a misplaced apotheosis of direct witness testimony, and deference to juries. It is time they realized that, in regard to claims of factual innocence, justice demands more. The suggestions I have made in this Article may appear radical, and, like the mid-nineteenth century proposals to bring criminal appeals to Britain, unlikely to be explicitly adopted by statute or rule anytime soon. But here is the final point: Judges convinced that factual innocence requires special protection, either at trial or on appeal, can approximate the results of these suggestions by using the powers

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Editorial, TIMES (London), Feb. 2, 1860, at 8 (commenting on yet another attempt to create a court of criminal appeal.). Closer to home in space and time, Professor Rosen writes,

> Historically, we operated our capital punishment systems in this nation as if there were no real likelihood that we would execute an innocent person. As Justice O'Connor explained less than a decade ago in *Herrera v. Collins*, 506 U.S. 390 (1993), there was not much concern with this distasteful scenario occurring "in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Id.* at 420 (O'Connor, J., concurring). O'Connor's blithe confidence in the efficacy of our procedural protections in capital cases was not challenged by any of the other Justices writing in that case, nor did her statement subject her to widespread criticism. It apparently was viewed as an unremarkable description of reality.

Rosen, *supra* note 290, at 62–63 (footnotes incorporated into text).

298. Various estimates run from three percent to over seven percent. Rosen, *supra* note 290, at 74 nn.40–41.

299. Paley asserted that courts ought not to be swayed from conviction

> by *every* suspicion of danger. . . . They ought rather to reflect, that he, who falls by a mistaken sentence, may be considered as falling for his country; whilst he suffers under the operation of those rules, by the general effect and tendency of which, the welfare of the community is maintained and upheld.

WILLIAM PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 553 (1785). Rosen discusses modern forms of this argument. *See* Rosen, *supra* note 290, at 104–06 ("Accepting the Death of Innocents as the Cost of Justice").

they already possess to those ends. If formal adoption of these reforms is too much to hope for in the near term, perhaps changes in judicial awareness and behavior are not.