

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 non-capital cases.¹ While these cases show that significant numbers of factually innocent persons are convicted of crimes that they did not commit, most such convictions remain hidden because they occur in cases where DNA analysis has no application. This article seeks to show the coordinate failure of the two main 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 jury evaluation of live testimony. On the other hand, the model of the trial put forth 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. Either account of the trial allows judges, especially appellate judges, to avoid responsibility for conviction of the factually innocent. This article asserts that claims of actual innocence in fact (strictly defined) possess a moral purchase far superior to other 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, the article proposes special trial rules for such claims aimed at curbing adversary excess, and 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 trials 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,² Progressive Proceduralism,³ the Rationalist

¹ BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000).

² See Fed. R. Evid. 102. The phrase "search for truth" is a cliché of the first order, appearing 3,575 times in the West Journals database (as of Feb. 27, 2004), which generally reflects only articles published since 1982. Though the phrase can be found as a descriptor of the purposes of trial at least as far back as the 1840's, *Bogardus v. Trinity Church*, 4

Tradition,⁴ The Official Ideology,⁵ The Rectitude of Decision Model,⁶ and the Received View of the Trial.⁷ The person most responsible for systematic description of the contours of this account or model is William Twining. Twining's assertion is that if one examines the notions about the place of the law of evidence and proof within the trial from the early 19th century to the present, certain foundational ideas emerge as common to virtually all commentators, including text writers, academics,⁸ and (I would be willing to add) judges. Twining distilled the content of these ideas down into a single (though lengthy) sentence setting out a prescriptive "Rationalist Model of Adjudication," and a list of nine "common assumptions" which 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 . . . 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 the truth and discover untruth, to supposedly competent and impartial decisionmakers, with adequate safeguards against corruption and

Sandford's Chancery Rep. 633, 635 (N.Y. 1847), it did not become a commonplace until the 1930's and 1940's. The notion is perhaps most closely associated with Jerome Frank, see e.g. JEROME FRANK, *COURTS ON TRIAL* (1949); Jerome Frank, *The Search for Truth, An Umpireal View*, 123 U. PA L. REV. 1031 (1975).

³ Kenneth Graham, *The Persistence of Progressive Proceduralism*, 61 TEX. L. REV. 929 (1983).

⁴ William Twining, *THEORIES OF EVIDENCE: BENTHAM AND WIGMORE*, 1-18 (1985) 9 [hereinafter Twining, *BENTHAM AND WIGMORE*]; William Twining, *RETHINKING EVIDENCE* 71-92 (1990)[hereinafter Twining, *RETHINKING EVIDENCE*]. Although recognizing profound differences in their evaluation of the effects of the model, Twining (and apparently Graham also) identify Graham's "progressive proceduralism" descriptively with Twining's model of the content of the "rationalist tradition." *Id.* at 77-78, especially fn. 212.

⁵ 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)

⁶ *Id.* The phrase is Bentham's. Twining, *RETHINKING EVIDENCE*, supra note 4, 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 is to defend it as an instantiation of the rule of law, which may be one reason anomalies are ignored when the official ideology is embraced and celebrated.

⁷ ROBERT P. BURNS, *A THEORY OF THE TRIAL* 10-33 (1999)

⁸ Twining, *RETHINKING EVIDENCE* 72-73, supra n. 4.

mistake and adequate provision for review and appeal.⁹

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.
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.
4. The establishment of the truth of alleged facts in adjudication is typically a matter of probabilities, falling short of absolute certainty.
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. (b) The characteristic mode of reasoning about probabilities is induction.
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 the 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.
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.
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.¹⁰

Twining further sets out a classification of common attitudes toward this model, which he calls prescriptive (or aspirational) rationalism,

⁹ *Id.* at 73 (internal numbering of separate propositional phrases omitted).

¹⁰ *Id.*

complacent rationalism, and optimistic rationalism¹¹ (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. Complacent rationalists believe that current arrangements achieve the model, or at any rate do so sufficiently closely such that, by and large, there is nothing too much wrong.¹² Optimistic rationalists hold that there is much needed to be changed in order to bring practice in respectable line with the model, but that this can be accomplished by the efforts of people of talent committed to reform. 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. “Deviants” (Twining’s word)¹³ truly believe that the rationalist model is either fundamentally illusory or wrong, both descriptively and normatively.¹⁴

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 a historic aspect.”¹⁵ In its historic aspect, that is, as a description of the center of gravity of conceptualization of nearly 200 years of lawyers, Twining is quite careful to identify both those subgroups and those points of view for which he considers himself to have more evidence and those for which he has less. He is most confident of his position for the writers of evidence texts, because those constitute the universe of his specific examination. He admits less complete information concerning writers on other legal subjects,¹⁶ including both civil and criminal procedure, and, especially cogently, that domain on the borderline of analysis and practice, writings about the trial from the “how-to” point of view.¹⁷ Similarly, he makes no claims of formal sampling and examination of the attitudes of

¹¹ *Id.* at 75.

¹² For a recent example of approaching the complacent end of the scale, see Gerald Walpin, *America’s Adversarial and Jury Systems: More Likely to Do Justice*, 26 HARV. J. LAW & PUB. POL’Y. 175 (2003).

¹³ Twining, *RETHINKING EVIDENCE* 77, *supra* n. 4.

¹⁴ They 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 an infusion of repressive values into procedural arrangements.” *Id.* at 78 (characterizing the positions of Kenneth Graham).

¹⁵ *Id.* at 74.

¹⁶ *Id.*

¹⁷ *Id.*

judges in legal opinions,¹⁸ or of practitioners. Nevertheless, it seems clear to me after more than three decades of reading legal literature and judicial opinions on evidence, proof and procedural matters, that the dominant rhetoric of opinions is consistent with Twining's rationalist model of adjudication, again, as far as it goes.¹⁹ Whether it represents judges' private attitudes is harder to say, but it seems clearly to represent generally their formal public pronouncements. (There are some significant exceptions, most notably *United States v. Old Chief*,²⁰ about which more later.)

As to 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.²¹ More often in private, perhaps, they may appear cynical about the amount of contact that exists between the Rationalist Model and the "sausage factory,"²² the law as delivered in the courtrooms they inhabit. But even in those times it is difficult to tell 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 which, behind the pretense of the model's kind of rationality, serves other, more powerful, masters.²³

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, it also represents a powerful analytic tool, a jumping-off point 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 about litigation (written and oral,

¹⁸ *Id.*

¹⁹ A search of the Westlaw Allcases database reveals (as of Feb 27, 2004) nearly 3,300 uses of the phrase in judicial opinions since 1944, most recently by the Supreme Court in *Banks v. Dretke*, 2004 WL 330040 (U.S. Sup. Ct, Feb. 24, 2004).

²⁰ 519 U.S. 172 (1997).

²¹ See e.g., Walpin, *supra* note 11.

²² "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, 72 *FORDHAM L. REV.* 373, 394 n. 9. According to the Oklahoma City University School of Law Library web page, 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. www.okcu.edu/law/library/Spring2003.asp.

²³ See note 14 *supra*.

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,²⁴ is any reference to the adversary system. This is wholly justifiable on historic 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.²⁵ They were, as a colleague and I have styled them elsewhere, "adversary skeptics."²⁶ But if evidence theorists have had a tendency toward adversary skepticism, practicing lawyers and judges are more likely to be "adversary enthusiasts." In general they have celebrated "our adversary system," and as such the adversary system forms an important part of the "official ideology," which includes the Rationalist Model.²⁷

Can the adversary system be domesticated and incorporated into the Rationalist Model without violating that 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."²⁸ While this position, thus stated, may seem counter-intuitive to a substantial degree, there are arguments which can be made for such an arrangement as maximizing "best available" rationality in the 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."²⁹

²⁴ Twining, *RETHINKING EVIDENCE* 81-82 *supra* note 4.

²⁵ *Id.*

²⁶ 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 skeptical" literature there cited in fn. 27.

²⁷ The shibboleth phrase "our adversary system" appears in nearly a thousand journal articles since 1980, and in nearly 5,000 judicial opinions since 1945, more even than "search for truth."

²⁸ 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 (2004). Professor Burns obviously accepts this: "The consistent attempts 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 7, at 19, quoting James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 *U. CHI. L. REV.* 882 (1983). See also Dale A. Nance, *Reliability and Admissibility of Experts*, 34 *SETON HALL L. REV.* 191, 195 (2003), and authorities there cited.

²⁹ "Democracy is the worst form of government except for 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 (5th ed. 1999).

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 recognizing 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 co-exist a bit uncomfortably in the official ideology, the same can be said for the institution of the jury. While certain aspects of the arrangement of the jury mechanism can easily be seen as accuracy promoting,³⁰ the employment of a cross section of the common run of adults as decision makers strikes some as at odds with the requirements of rationality and maximized accuracy of result, at least in regard to certain kinds of issues.³¹ 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,³² though perhaps in a more heavily qualified way than in regard to the adversary system. Nevertheless, I will ultimately conclude that there are kinds of issue for which juries and a fully adversary process are well suited to the proper ends of adjudication, and others where juries are so suited if partisan adversariness is reduced.³³ In coming to these 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.

³⁰ See, e.g., Denbeaux & Risinger, *supra* note 26, at 20 (comparing the bias filtration aspects of the jury process to bias filtration devices in the methodology of modern science).

³¹ See generally CHARLES ALAN WRIGHT & MARY KAYE KANE, *THE LAW OF FEDERAL COURTS* 662-663 (6th ed. 2002).

³² *Id.*

³³ There may also be issues where full adversariness would be fine if some version of the special jury were brought back in 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 Practices, The Reasonable Cross-Section Requirement, and Preemptory Challenges*, 6 WM. & MARY BILL RTS. J. 623 (1998). See also 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 the present article.

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 defined³⁴) will be important. But the standard model also emphasizes that justice under law emerges from the application of pre-existing rules comprised of general fact categories (and combinative rules) that reflect pre-existing value judgments. In this view, juries find facts, then overlay the substantive law as a template, which yields a determinate output that is not value neutral, but for which all the values have been supplied by the lawgivers and none by the fact-finders. In this view, if the factfinders' own values influence the outcome, there has been a miscarriage, a failure to heed the jurors' oath (except perhaps in the exceptional situation of acquittal pursuant to that controversial power, jury nullification³⁵). 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 some kinds of issues, but in regard to so many of the issues that constitute the real practical nub of litigation 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.³⁶

Now, virtually no observer of any sophistication would fail to concede that sometimes we 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. Take negligence, for one. The conclusion that an act (or failure to act) was negligent is a value judgment organized around such notions as "reasonable

³⁴ By "fact" I mean any proposition that is ultimately referable back to, and at least in theory falsifiable by, sense data available in principle to most if not all human observers. This definition makes clear the problematic nature of subjective states as facts. One's own experience of one's own conscious subjective states may make them epistemically privileged to one's own self a la Descartes's *cogito*, but for others, they cannot be falsified by sense data available to all, in the same way that claims about external facts, past present or future, can at least in theory 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 71-73 (2001), but merely making an important point about the empirics of propositions regarding objective external "facts" versus subjective internal "facts."

³⁵ Only perhaps. See John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477 (2002).

³⁶ 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 7, at 26-33.

person” and “careful enough.” If we had a full color, full feel, full smell hologram of the events alleged to constitute “negligence,” complete with a cap which would induce the conscious subjective states of the actors from instant to instant, we would still need some mechanism to make the normative judgment.³⁷ In such cases the jury acts, under official delegation and warrant, not only as factfinder, but as the source of normative judgment. They are like a particularized legislature for the particular circumstances of the case. They perform “discretion” in the best sense of the word, “discrete-tion,” making a case-specific or “discrete” normative judgment to arrive at justice in the particular circumstances of the case, guided only by general statements of principle defining the sort of normative authority with which they are vested.

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. In fact, they are better described as “mixed questions of fact and value,”³⁸ since some effort to determine the facts is always preliminary to the normative judgment. Note, however, that in such circumstances the exact historical details bearing on the normative judgment are not particularly specified in advance by any legal rule. What 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.

So what is the relative incidence of actual real-fact issues versus normative or other non-fact (or perhaps, fact-plus) issues as the triable ultimate issues in cases that are actually submitted for adjudication? In approaching this, 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 the potentially triable issues of every element of every claim under every substantive law that exists in a typical American jurisdiction, that 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, asking the jury to determine the existence *vel non* of specified kinds of historical details in a binary way which would in most cases be either clearly within or without the bounds of the empirically specifiable and specified element definition. But these kinds of elements would 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 which are formally necessary but which are not practically in play in a given particular case. In

³⁷ See Section C, “Normative Expertise,” in D. Michael Risinger, *Preliminary Thoughts on a Functional Taxonomy of Expertise*, 31 SETON HALL L. REV. 508, 526-529 (2000).

³⁸ *Id.* at 526.

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 burden of producing evidence and 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 by admission or else not really contested either in opening or closing.

What seem to be the “live” issues, the practically triable issues, in much if not most litigated civil cases, are either the explicitly normative issues like negligence, or another closely related kind of issue which I have elsewhere called “magnitude judgment issues,”³⁹ which are not binary, and which, like the particularized normative judgments already discussed, have no single right answer, even in theory. The best illustration, and among the practically most 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 but never fully determined by 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). 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.⁴⁰

Finally, there are some very important issues that are hard to pin down, 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.”⁴¹ With all due respect to Lord Justice Bowen, it just ain’t so.⁴² Determining the state of digestion requires empirical assumptions about independent physical entities in the world, observations about which are theoretically available to

³⁹ *Id.* at 536.

⁴⁰ 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 530-531.

⁴¹ *Eddington v. Fitzmaurice*, 29 Ch. Div. 459, 483 (1885).

⁴² Assuming that Bowen was referring to whether digestion was occurring, not to whether the man felt a stomach ache. *See* note 34 *supra*.

every observer. There are no a priori privileged observers. Subjective states (at least more or less conscious ones the law generally cares about) all have one privileged observer: the person directly experiencing the subjective state.⁴³ 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 gun behind another person's ear and pulls the trigger, both the shooter's belief that the person will die and his desire that that should be the result are pretty firm empathetic inferences in most contexts, for what else of any likelihood can we imagine in such circumstances?⁴⁴ 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 not available to report on her state of mind, the range of potential subjective accounts is very great. Even the drivers' current testimony may not clarify matters all that much.

Most state-of-mind judgments that we expect juries to make, such as negligence or insanity, carry a more or less explicit normative warrant. So, at common law, did the definitions of mens rea (think of "malice aforethought").⁴⁵ On the other hand, the three state-of-mind definitions that figure most prominently in establishing criminal responsibility in modern American criminal codes, "acting knowingly" "acting purposely" 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 by the jury.⁴⁶ How successfully this was accomplished is subject to debate.⁴⁷ 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. In addition, in many cases the practical issue would seem to be where defendant's conduct falls on what appears to be a normative continuum, and it would not be surprising if many juries simply determined the subjective element of guilt by where they believed it fell upon that continuum.⁴⁸

⁴³ *Id.*

⁴⁴ There is always the possibility of delusional hallucination.

⁴⁵ At common law, mens rea "doubtless meant little more than a general immorality of motive." Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 411-412 (1934).

⁴⁶ See Kenneth W. Simons, *Rethinking Mental States*, 72 B. U. L. REV. 463, 535 (1992).

⁴⁷ *Id.* at 534-535; Richard Singer, *The Model Penal Code and Three, Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139 (2000).

⁴⁸ See generally Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining*

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 the jury will operate best in a contextually rich environment. Because they 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 individual jurors 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 the anthropologists (and legal theorists influenced by them) call “thick description.”⁴⁹ 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.

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

The last line of the preceding section represents something of a revision of position, since in recent years my writing has taken on a tone more and more explicitly skeptical concerning “our adversary system.”⁵⁰ Then not too long ago I read *A THEORY OF THE TRIAL* by Robert P.

Criminal Liability: The Model Penal Code and Beyond, 35 *STANFORD L. REV.* 681 (1983).

⁴⁹ The term appears to have been coined by the British philosopher Gilbert Ryle, *see* “Thinking and Reflecting” in GILBERT RYLE, *COLLECTED PAPERS* (1971), but is most closely associated with the anthropologist Clifford Geertz, *see* “Thick Description: Toward an Interpretive Theory of Culture” in CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 1-30 (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* “The Relevance of the Irrelevant” in Risinger, *supra* note 5, at 431-446.

⁵⁰ *See, e.g.*, Risinger, *supra* note 5, especially at 441-446, 456-458; Denbeaux & Risinger, *supra* n. 25, at 22-24; Risinger & Saks, *supra* n. 28 at 1032-1037; D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 *ALBANY L. REV.* 99, 131-143 (2000); 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); 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, 227-228, 271-276 (2002);

Burns,⁵¹ 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).⁵² In order to understand how he reaches that conclusion, it is necessary to examine Burns’s position more closely.

Burns tells us⁵³ that “well tried cases produce a form of concrete universal where an event and its meaning are transparent to one another.”⁵⁴ 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”⁵⁵ (i.e., those already embedded in the pre-existing substantive rules which are the subject of the judge’s instructions on the law). However, the “Received View” “grasps only partial truth,”⁵⁶ a truth “so partial as to be a serious distortion of what we have allowed and designed the trial to be”⁵⁷ that is “especially inapposite to criminal trials.”⁵⁸ The 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.”⁵⁹ As actually

⁵¹ Burns, *supra* note 7.

⁵² I am not without criticisms of Burns’s general approach. The two main ones are his reliance in defending the current system based on the model of the “well tried case,” *see id.* at 5, and on the good will 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 *TEMPLE 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 partisan advocates most devoted to winning, let us simply say that, as to that, I remain deeply skeptical.

⁵³ 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 tenor of his position and a feel for it. 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.

⁵⁴ Burns, *supra* note 7, 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. The 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 1. In my experience, however, what is austere clear to the jury and to the losing party are often two different things.

⁵⁵ *Id.* at 18.

⁵⁶ *Id.* at 7.

⁵⁷ *Id.* at 26.

⁵⁸ *Id.* at 15 n. 20.

⁵⁹ *Id.* at 7.

conducted, “[t]he trial provides for a kind of highly contextual moral and political decision making.”⁶⁰ 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 admirable practices that actually constitute the contemporary trial.”⁶¹ Lawyers often seek decisions by invoking norms bearing “little resemblance to those in the instructions”⁶² 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”⁶³ [Such realities of practice suggest] that the Received View has captured only a portion of the normative resources available at trial.”⁶⁴ The general verdict, doctrine of harmless error, and the insulation of jury verdicts from any very significant judicial scrutiny under weak notions of sufficiency of evidence leave “plenty of room for a jury to decide the case based on norms that have no place within the Received View.”⁶⁵ The trial is “a great cultural achievement with ‘situated ideals’.”⁶⁶ “The moral significance of trial transcends its conscious purposes.”⁶⁷ It “serves to realize the ‘ethical substance’ of a community.”⁶⁸

Despite their occasional near-mysticism,⁶⁹ I found much to persuade

⁶⁰ *Id.* at 8.

⁶¹ *Id.* at 25.

⁶² *Id.* at 28.

⁶³ *Id.* (citing John Gardner, *THE ART OF FICTION* (1983) for the internal quotation).

⁶⁴ *Id.*

⁶⁵ *Id.* at 29.

⁶⁶ *Id.* at 33.

⁶⁷ *Id.* at 35.

⁶⁸ *Id.*

⁶⁹ Try this one: “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. 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”). Twining, *RETHINKING EVIDENCE*, supra note 3, at 238-251. Because an assumption of this approach is that humans process both factual information and norms 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 6, at 210), such vergings on mysticism are perhaps to be expected. Burns virtually admits as much on page 203, characterizing a full

me in these and other 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, which have influenced my thinking most, were mainly criminal cases involving what I have called "brute fact innocence,"⁷⁰ most particularly, cases where the defendant was not the perpetrator of the crime, someone else was.⁷¹ I have always regarded such errors as injustices of the worst kind. While I have some fairly strong views on what the limits of criminal responsibility ought to be, both 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 that a jury ought to have had a reasonable doubt about whether her state of mind met the applicable criteria for murder.⁷² I also believe that John E. du Pont ought to have been found insane in regard to the killing of David Schultz.⁷³ 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 I am alone in this.⁷⁴ But what lies behind this instinctive

account as unlikely because the whole process is too "mysterious." 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, 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.

⁷⁰ D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALBANY L. REV. 99, 114 (2000).

⁷¹ Often referred to by criminal defense attorneys as SODDI cases: "Some other dude done it."

⁷² 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. JAY DAVID, *THE SCARSDALE MURDER* 1980; DUNCAN SPENSER, *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. 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. Twining, *supra* note 2, at 244-247.

⁷³ Du Pont, heir to one of America's great fortunes, was (to use a term of art) about as nuts as one can be at the time 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," *Washington Post*, Feb. 26, 1997, p. A-1.

⁷⁴ Indeed, it seems that much of the moral and political force behind the DNA exoneration derives from this instinct. It is no surprise that the mass market book documenting them is entitled "Actual Innocence." BARRY SCHECK, PETER NEUFELD & JIM

ranking of miscarriages of justice?

First, if a human clearly does the acts which constitute the *actus reus* of an appropriately defined crime, they are 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 their head. “Errors” in regard to those conclusions are thus just not errors 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 any latitude given to marshal all sorts of context information, at least where those issues are practically, and not just formally, in 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 the fatal discharge by Williams of a shotgun that resulted in the death of Costas Christoffi. The trial is occurring (with gavel-to-gavel coverage on Court TV) as I write.⁷⁵ As the case evolved prior to trial, there is no real issue about the fact that the shotgun was in the hands of Jayson Williams when it discharged. As such, it is the kind of case where a legitimate outcome is best served by allowing partisan attempts at normative contextualization on both sides.⁷⁶ Whatever judgment the jury thereafter makes concerning the level of Williams’s responsibility, if any, seems legitimate and acceptable.⁷⁷

It should come as no shock, then, that virtually all of the illustrations in Burns’s book,⁷⁸ and in other recent adversary enthusiast literature as

DWYER, *supra*, n. 1

⁷⁵ Details of the case and the trial are available at CourtTV.com.

⁷⁶ In Williams’s case there are some circumstantial real-fact disputes (how much Williams had drunk before the shooting, whether his finger was on the trigger while he was holding the shotgun), and there are issues of factual innocence in regard to some of the lesser charges alleging an early failed attempt to obstruct justice by trying to claim, and make it appear, that Christoffi shot himself. These issues are sufficiently subsidiary to the main charge and sufficiently tied up with live *mens rea* defenses even in regard to the alleged cover-up, such that it would not be appropriate to treat this case as if it presented a simple isolatable binary decision about factual innocence.

⁷⁷ 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 CourtTV.com (last visited July 28, 2004).

⁷⁸ The centerpiece of Burns’s case illustration is a murder case in which the defense opening is: “The evidence presented by the state and by Debra Miller will largely overlap.

well,⁷⁹ refer to cases where the real triable issues were issues of this sort. But such normative contextualization brings nothing of value to the decision of cases 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” and “narrative context” and “partisan adversary rhetoric” are more likely to undermine than promote both proper decision and legitimacy (to the extent that these two are separable). So while 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*. 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, and instead adopted a construction of both the nature of criminal adjudication and of the relevancy of evidence that embraces evidence “that tells a story of guiltiness as well as of guilt.”⁸⁰ This 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 phrase⁸¹), a practice that time out of mind had always been anomalously at odds with the standard theory.⁸² This odd, conceptually radical but practically conservative, aspect of *Old Chief* has not been widely recognized.⁸³

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 afterward.”

⁷⁹ See, e.g., Charles Nesson, *The Evidence or the Event: On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357(1985) (using as examples mostly evidence practices which give advantage to criminal defendants). Many adversary enthusiasts stick to a theoretical defense and do not discuss concrete cases at all.

⁸⁰ Burns himself, without citing *Old Chief*, perceives a move toward an expansion of the concept of relevance to cover such proffers. Burns, *supra* note 6, at 31. As the text indicates, it is unclear whether this is really a change in practice, or merely the adoption of an account for longstanding practice.

⁸¹ JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW sec. 2591 (3d ed., 1940). The phrase originally appeared in the same section in the 2nd ed. (1923).

⁸² See Risinger, *supra* note 4, at 412-415, 429-430 and appendix 1.

⁸³ 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. 512, 564-569

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, Old Chief was charged with being a felon in possession of a firearm in violation of 15 U.S.C section 922(g).⁸⁴

Old Chief had realistically triable cases 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, and 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).⁸⁵ Old Chief's previous felonies were both assaults with deadly weapons (one with a gun, one with a knife).⁸⁶ 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 FED. R. EVID. 404, and even though they might be so instructed. So Old Chief "offered to stipulate" that he had been

(2004) See also Richard O. Lempert, *Narrative Relevance, Imagined Juries and a Supreme Court Inspired Agenda for Jury Research*, 21 SLU Pub. L. Rev. 15 (2002)

⁸⁴ Risinger, *supra* note 4, at 403.

⁸⁵ *Id.* at 450-451.

⁸⁶ *Id.* at 449.

previously convicted of a felony within the meaning of section 922(g).⁸⁷ 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 conviction, the government's proffer of the records of conviction should be excluded under Rule 403.⁸⁸ Old Chief was convicted on all counts by the jury, and on appeal the Ninth Circuit affirmed.⁸⁹

In a 5-4 decision, the Supreme Court reversed. 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 non-problematic alternative means of proof that might be available to the proponent.⁹⁰ He then held that, in the narrow circumstances of a prosecution where a felon-in-possession charge under section 922(g) was joined with other counts charging crimes similar to the predicate felony that 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).⁹¹

What is important in the case, however, is not Old Chief's victory, but how narrow it was, and how 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 a victory for prosecutors. 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 evidence was broader than the notion of contested or even contestable fact, at least in criminal prosecutions.⁹² Ironically, in distinguishing Old Chief's case from virtually every other, 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."⁹³ As to them, the

⁸⁷ *Id.* at 453 n. 128; *Old Chief*, 519 U. S. at 176.

⁸⁸ *Old Chief*, 519 U.S. at 177.

⁸⁹ *Id.*

⁹⁰ *Id.* at 184.

⁹¹ *Id.* at 185-187, 190.

⁹² *Id.* at 188-189 (majority); 198-200 (dissent).

⁹³ "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

prosecution bore the burden of persuasion beyond a reasonable doubt pursuant to *In re Winship*.⁹⁴ 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 Justice O’Connor took to undermine any power to admit any particular thing unilaterally.⁹⁵ 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 which she that lose by accepting the proposal and bypassing the evidence, that was a right of the prosecution which was a corollary of the responsibility for proof beyond a reasonable doubt on each element.

The dissent’s position can be criticized on a number of grounds.⁹⁶ 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 Federal Rule of Evidence 401.⁹⁷ 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 sufficient to render the rebuttal of such negative inference a “fact that is of consequence to the determination of the action” under Rule 401.⁹⁸ Then, in a spasm of enthusiasm for both narrative theory and a view of the adjudicative process apparently at odds with the standard rationalist model, Justice Souter declares that “evidence has force beyond any linear scheme of reasoning”⁹⁹—“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.”¹⁰⁰ So evidence that seeks to “tell a story of guiltiness as much as to support an inference of guilt, to convince

Government bears the burden of proof on every element of a charged offense, it must be accorded substantial leeway to submit evidence of its own choosing to prove its case.” *Id.* at 200 (O’Connor, J., dissenting) (citations omitted).

⁹⁴ *Id.* (citing *In Re Winship*, 397 U.S. 358 (1970)).

⁹⁵ *Id.* See also the discussion on this point in Risinger, supra note 4, at 412-413, 452.

⁹⁶ Risinger, supra note 4, at 451-453.

⁹⁷ “‘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

⁹⁸ There is a “need for evidence in all its particularity to satisfy 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 props, see Risinger, supra note 4, at 433-435.

⁹⁹ *Old Chief*, 519 U.S. at 187.

¹⁰⁰ *Id.*

the jurors that a guilty verdict would be morally reasonable,”¹⁰¹ is likewise directed toward a “fact of consequence” under Rule 401, and likewise generally inappropriate for exclusion under the probative value/prejudicial effect balancing formula of Rule 403.¹⁰²

It is hardly a secret that I have considered this part of *Old Chief* to be a disaster,¹⁰³ and I was not alone.¹⁰⁴ But now, just as 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.¹⁰⁵ As Burns makes clear, parties in both civil and criminal cases have always been accorded fairly wide contextual and narrative latitude.¹⁰⁶ 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 and the human tragedy of the victims and their families. This has been especially true with regard to the prosecution in a criminal case. Such a practice is difficult to square with rationalist assumptions about the purposes of trial, but it is easy to account for under a fair fight model. The

¹⁰¹ *Id.* at 188.

¹⁰² This is the clear implication, since the court here confirms its admissibility in the context of a discussion in which both Rule 401 and 403 have been previously brought into play. 519 U.S. at 183-184. The court makes an odd attempt to (apparently) disclaim its own discussion in fn. 7: “While our discussion here has been general because of the general wording of Rule 403, our holding is limited to cases involving proof of felon status.” However, this appears to have been no more than a further attempt to limit any future use of the ruling for anything else.

¹⁰³ Risinger, *supra* note 4, 215 *et passim*.

¹⁰⁴ 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 juror’s 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* is now effectively telling us 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 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, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L. REV. 463, 467-468 (1997).

¹⁰⁵ See *supra* note 80 and accompanying text.

¹⁰⁶ Burns, *supra* note 6, at 50-52.

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 defendant's guilt?" to "If there is a good chance the defendant did this horrible thing, he shouldn't 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?"¹⁰⁷ The defendant has the rhetoric of proof beyond a reasonable doubt, and the prosecution can counter that by "heartstrings and gore" evidence. Whatever resultant level of certainty persuades the jury to convict is all we mean by "proof beyond a reasonable doubt."¹⁰⁸

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.¹⁰⁹ 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). 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

¹⁰⁷ Risinger, *supra* note 4, 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 norm jury responses, but they differ on whether such a situation should be resisted or embraced. *Compare* Risinger, *supra* note 4, at 444 (resisting) with Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002) (generally embracing).

¹⁰⁸ *Id.* at 442 n. 97.

¹⁰⁹ These practices "quickly come closer to bread and circuses (or Christians and lions) than our usual claimed notions of proper judicial procedure would comfortably embrace." *Id.* at 456.

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.¹¹⁰ If you have an complex civil case in Federal Court you get different pre-trial procedures from the average case.¹¹¹ 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 multi-variate, “polyvalent,” often normative, judgments involves a kind of complexity.¹¹²

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.¹¹³ It is a two-stage split-function system in which a first decisionmaker (a judge) controls the information available to a second decisionmaker (the jury), thus making possible (in theory) masking and bias filtration.¹¹⁴ Second, the group nature of the jury insures that a variety of life experiences and perspectives will be represented. Since these are the

¹¹⁰ 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*, 25 AM. CRIM L. REV. 1, 8 n. 26 (1995) (petty crimes).

¹¹¹ Ronald J. Hedges, *Complex Case Management*, ALI-ABA course of study, Westlaw SJOYO ALI-ABA-1 (Dec. 11, 2003).

¹¹² By analogy, this reminds me in a way of Lon Fuller's distinction between “polycentric” disputes and the non-polycentric 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) (first drafted 1957-1961). 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 non-polycentric 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 multi-variate “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 6, at 185, with Fuller, *supra*, at 395. Burns draws his version from MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS* (1986)

¹¹³ See *supra* note 29.

¹¹⁴ *Id.*

experiential bases of “common sense,” and since evaluating the likelihood of various possibilities represented by the evidence seen in the courtroom are dependent on such common sense for “social fact” “major premise” information¹¹⁵ for evaluating the evidence and drawing inferences from it, the group nature of the jury insures to some degree that evidence will be evaluated from different perspectives. This insures that wrong decisions will not be made simply because a single decisionmaker has an inaccurate view of the relevant social facts, a problem which 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 job¹¹⁶ are reinforced in general 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 bear, reinforcing both accuracy and legitimacy. Finally, what has been said in regard to facts up to now 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 non-technical type are the kinds of decision where ordinary juries can most often be led by adversary excess to miscarry, especially in the context of high profile and highly dramatic cases. Partially this is because it is difficult to establish that a jury’s normative decision was wrong, but 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.

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 not be

¹¹⁵ See generally Laurens Walker and John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 483 (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 (1985). See also John William Strong, *Language and Logic in Expert Testimony: Limiting Expert testimony by Restrictions of Function, Reliability and Form*, 71 OR. L. REV. 349, 350-353 (1992), and Risinger, *Taxonomy supra note 36 at 517 n. 16*. This account is part of the standard model of adjudication. See Burns, *supra note 6*, at 24; Twining, *RETHINKING EVIDENCE, supra note 3*, at 21-22.

¹¹⁶ On the epistemic benefits of group inquiry in general, see SUSAN HAACK, *DEFENDING SCIENCE—WITHIN REASON* 106-110 (2003).

controversial decisions, and it is also not to say that there will not be organized political pressure put on to “reform” the system so that the beneficiaries of such putative reform run a greatly reduced risk of liability (or perhaps in some cases, 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 multi-variate normative issue or some other no-one-right-answer issue, not a real-fact, 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-trying) case tend toward an overall reality.¹¹⁷

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”).¹¹⁸ 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 it is in such cases where 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 system as it is, generally does not exist. Finally, it is in this kind of case where the prosecution will often have resort to forensic identification “expert” testimony of both high impact and doubtful quality. (And of course it should not be overlooked that whatever problems there are in the average such case, they are enhanced when the death penalty is in play.)¹¹⁹

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

¹¹⁷ This is not to say that there are not areas of civil litigation, such as landlord-tenant or franchise litigation, where disparity of resources may have a systematic impact in favor of one type of player over another. However, in civil litigation, these pockets of imbalance seem to be tilted toward those who would benefit least from normative contextualization.

¹¹⁸ This article considers in detail a case of each type: *Florida v. Tibbs* (identity) and *Regina v. Cannings* (no actus reus).

¹¹⁹ See Part X *infra*.

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 a process of debate concerning the likely accuracy-fostering effect of various changes to practice as it currently exists. It is well beyond the scope of this article to attempt any such proposed changes in detail, but tentatively, such rules might look something like this: The defendant would be required to isolate the one (or perhaps two¹²⁰) binary exterior facts that underlie his claim of innocence. 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 proffers 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” any defense-proffered expert evidence on the weaknesses of eyewitness identification, false confessions, and the commonness of false testimony by jailhouse snitches (where the trial contains such testimony), and also on 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. The cross-sectional jury would be retained, together with the finality rule for acquittals. Convictions would be reviewable not merely on the basis of sufficiency, but also on the issue of whether they were “unsafe.”

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.¹²¹ Let me expand

¹²⁰ The Louise Woodward case (the Boston Nanny infanticide case) was an example of a case in which both actus reus and identity were practically in issue. Woodward was charged with the killing of her charge, infant Matthew Eapen, by shaking or other application of force on the day she called 911 for help in resuscitating him because he had become unconscious. Her evidence tended to establish that the subdural hematoma associated with his condition was “old”, having occurred weeks before the crisis. Such a circumstance raised both the “no crime” issue (the bleed resulted from accident) and the identity issue (if the bleed was the result of the application of force by a person, it was not the defendant). See closing argument of defense attorney Barry Scheck, Oct. 24, 1997 (on file with author).

¹²¹ 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. However, although these or other such proposals might actually increase the system’s “resolving power” in regard to claims of

a bit on what was put in and why.

First, as to the requirement of a motion by the criminal defendant, the main effect is to give the criminal defendant the kind of specific pleading option the nonexistence of which Justice O'Connor seemed to make so much of in *Old Chief*. So the motion functions as a kind of special pleading. However, it does not seem appropriate to give the defendant the untrammelled 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, as to the notion of usable relevance, which takes into account the capacities of the jury as well as the content of the information ("the characteristics of the decoder as well as the code"¹²²), it is somewhat narrower than the usual construction given to Rule 401. I am not seeking to eliminate all narrative context information by this measure, 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, 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.¹²³ Fourth, while it is proper to require some showing of reliability for defense-proffered expertise also, 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 facts for which there is reasonable basis in research that jurors could not be expected to know from their general background experience.¹²⁴ Finally, the creation of the "unsafe verdict" ground of review in criminal cases by the British Parliament provided exactly what is needed to correct for the artificial limits currently existing in the United States on the review of convictions based either on sufficiency of evidence grounds, or on the ground that the verdict was

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.

¹²² See Risinger, *supra* note 5, at 432-433. Federal Rule of Evidence 401 declares evidence relevant if it has "any tendency to make the existence of a fact more or less probable than it would be without the evidence." In taking this form it 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, 96 (1997).

¹²³ See Risinger, *Taxonomy*, *supra* note 37 at 533-535.

¹²⁴ *Id.* at 517 n. 17.

against the weight of the evidence. Indeed, the adoption of such a standard for the review of guilty verdicts when claims of actual factual innocence are made would be a signal improvement independent of the adoption of any other changes in procedure

VI. 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. The party 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, which 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.¹²⁵ 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 veracity of witnesses because of the jurors’ opportunity to observe demeanor during testimony.¹²⁶ While this doctrine, like any other, can be stretched to give relief in extreme cases if appellate courts are of a mind to, such cases have to be pretty extreme, and the courts usually are not, and are not required to consider being, of a mind to. In general it is fair to say that it is very unusual for a criminal conviction to be found to be based on insufficient evidence under this technical standard. When it is, however, the result is an acquittal that is entitled to double jeopardy effect.

Seeking a new trial on the ground that a criminal verdict is against the

¹²⁵ See Albert W. Alschuler, *The Supreme Court and the Jury: Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 212 (1989).

¹²⁶ 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, etc, since 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. In such a case “a reasonable jury must necessarily entertain a reasonable doubt.” *U.S. v. Cassesse*, 290 F. Supp. 443, 452 (S.D.N.Y. 2003), quoting *United States v. Glenn*, 312 F. 3d 58 (2nd Cir. 2002), and *United States v. Lopez*, 74 F. 3d 575 (5th Cir. 1996). This difference in deference between witness credibility cases and circumstantial cases seems so extreme that one suspects some other hidden dynamic at work. Perhaps since most criminal cases involve direct testimony, it is a way for the system in practice to make verdicts of guilty nearly as unreviewable on the merits as verdicts of not guilty, on trial-by-combat symmetry grounds.

weight of the evidence might at first glance seem to capture the same notion as the British “unsafe verdict” ground, but in modern practice it does not. Historically, trial judges in at least some American jurisdictions were taken to possess such a power in regard to 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 was either never recognized or abolished altogether.¹²⁷ 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.¹²⁸ 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 dilute, since the court is called upon to defer to the trial court’s decision and reverse only for an abuse of discretion.¹²⁹ By this time the soup is too thin to contain much nourishment at all. In those rare cases where 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.

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

¹²⁷ 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, *State v. Harrod*, 200 Az. 309 (2001); Arkansas, *Wilcox v. State*, 342 Ark. 388 (2000); Connecticut, *State v. Vassell*, 79 Conn. App. 843 (2000); Delaware, *Nelson v. State*, 781 A. 2d 695 (Del. Super. 2001), Hawaii, *State v. Aki*, 102 Hawaii 457 (2003); Kansas, 256 Kan. 527 (1971), Kentucky, *Craig v. Commonwealth*, 2003 WL 22870977 (Ky. App., 2003); Louisiana, *State v. Brown*, 2003 WL 23095559 (La. App., 1st Cir., 2003); Maine, *State v. Corbin*, 419 A. 2d 362 (1980).

¹²⁸ The usual formula is that the evidence “must preponderate against the verdict.” *State v. Reeves*, 2001 WL 296366 (Iowa App. 2001). Some courts go even further and say that the power is to be “exercised with caution, and granted only in exceptional cases” where the evidence “preponderates heavily against the verdict.” *Dorman v. State*, 622 P. 2d 448, 454 (Alaska App. (2001).

¹²⁹ The usual standard given for review of denials of new trials based on the weight of the evidence in criminal cases is abuse of discretion, and 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*, 45 Cal. 3d 1268, 1318 (1998).

interpreted by the British Court of Appeal (Criminal Division.). As we shall see, the whole course of the 20th 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.¹³⁰

IX. THE HISTORY OF THE UNSAFE VERDICT STANDARD IN BRITAIN

When the 20th 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.¹³¹ A number of high profile wrongful convictions, perhaps most notably the Adolph Beck case,¹³² created political pressure for the creation of a Court of Criminal Appeals, which culminated in an act of Parliament to that effect in 1907.¹³³ Two details of that initial scheme are relevant for our discussion. First, the Court 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.”¹³⁴ Second, the Court 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.¹³⁵

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.”¹³⁶ This can easily be construed as a broad warrant to protect the notion of reasonable doubt in circumstances where (under current American standards) the evidence might be formally sufficient to support a finding of guilt, but not actually practically sufficient given any analysis of weight and plausibility. Such a

¹³⁰ “We are by no means the first commentators to observe patterns in the history of the [Criminal] Court of Appeals: 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).

¹³¹ *Id.* at 45-46.

¹³² “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 at both trials were without foundations.” BEN HARRISON, TRUE CRIME NARRATIVES 453 (1997).

¹³³ Nobles & Schiff, *supra* note 130, at 48-50. The court thus created has gone under two names: The Court of Criminal Appeals from 1907 to 1964, and the Court of Appeal (Criminal Division) (abbreviated CACD) since then. The terms are used interchangeably in the text.

¹³⁴ *Id.* at 52-53.

¹³⁵ *Id.* at 56, nn. 65 and 62.

¹³⁶ Criminal Appeal Act, s. 4, ch. 1 (1907), quoted *id.* at 54.

construction was apparently intended by many of the bill's parliamentary supporters.¹³⁷ 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 and many of whose members had spoken against the bill, preferring the old system in which a jury verdict was completely final on the facts.¹³⁸ In addition, the Court's lack of power to grant a new trial even in cases where 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.¹³⁹ Generally the Court of Appeal followed a standard of review very much like the American sufficiency standard. In only a handful of cases in 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.¹⁴⁰ For our purposes, it is interesting to note that in general those cases involved weak identifications of the defendant as the perpetrator of the crime.¹⁴¹

Despite these exceptional cases, by the 1950's leading judicial authorities like Lord Tucker and Lord Goddard could write opinions doubting the existence of any power to evaluate the weight of evidence supporting a criminal conviction.¹⁴² In addition, the Court of Appeal jurisprudence on "fresh evidence" had become narrowed. While 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, since 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.¹⁴³

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 1960's, aimed both at the creation of a power to grant new trials in appropriate cases,¹⁴⁴ and also at unloosening "some of

¹³⁷ Nobles & Schiff, *supra* n. 130, at 52-54.

¹³⁸ *Id.* at 47, 55-56.

¹³⁹ *see id.* at 64 (explaining the effect assumed in 1964 that adoption of a power to order retrials would loosen judicial unwillingness to consider fresh evidence on appeal).

¹⁴⁰ *Id.* at 56.

¹⁴¹ *Id.*

¹⁴² *Id.* at 57.

¹⁴³ *Id.* at 59-60.

¹⁴⁴ *Id.* at 60-64.

the fetters which the court has imposed on itself in pursuance of the principle that the verdict of a jury should not be interfered with.”¹⁴⁵ Again, one should note that a major focus of concern was “disputed identity cases,” and a central aim of the proposed reforms was “to make it easier for such disputed identity cases to be evaluated as if there had been a miscarriage of justice.”¹⁴⁶

The first enactment was the Criminal Appeal Act of 1964, which granted the power to order new trials.¹⁴⁷ 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 Appeals toward the consideration of fresh evidence. This expectation was not unreasonable, given the assurances of the Lord Chief Justice to that effect.¹⁴⁸ However, the expected liberalization of “fresh evidence” standards did not materialize in practice to any great degree over the next decades.¹⁴⁹

The Criminal Appeal Act of 1966 took on the “self imposed fetters” directly. The Act provided that the Court of 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.”¹⁵⁰ 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.”¹⁵¹ 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.”¹⁵²

The effect of the 1966 act was less than might have been hoped. In 1967 the Court of Appeal denied the appeal in *R. v. Luckhurst*¹⁵³ even though the court seemed to concede that there ought to have been a reasonable doubt of guilt.¹⁵⁴ On the other hand, there was Lord Widgery’s famous 1968 opinion in *R. v. Cooper*,¹⁵⁵ which took the position that a verdict was unsafe if the Court of Appeal examined the record and came

¹⁴⁵ *Id.* at 64-64, quoting the Donovan Committee Report, Interdepartmental Report on the Court of Criminal Appeal, cmdnd 2755 (1965), para 10.

¹⁴⁶ *Id.* at 66.

¹⁴⁷ *Id.* at 67.

¹⁴⁸ *Id.* at 67-68.

¹⁴⁹ *Id.* at 69.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 54.

¹⁵² *Id.* at 70, quoting Mr. Tavern in Parliamentary Debate, 11 July 1966, c. 1146.

¹⁵³ (1967) Crim. L.R. 292.

¹⁵⁴ Nobles & Schiff, *supra* n. 130, at 71.

¹⁵⁵ 53 Crim. App. Rep. 184,

away with a “lurking doubt”¹⁵⁶ regarding guilt. While 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.¹⁵⁷ As early as 1972 the British organization Justice was complaining that the “unsafe and unsatisfactory” ground “has very nearly become a dead letter,”¹⁵⁸ 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.¹⁵⁹ 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.

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),¹⁶⁰ Parliament attempted to get the courts to do more in regard to overseeing reasonable doubt standards in reviewing the evidence in criminal cases. 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.”¹⁶¹ It is clear that the change was intended to be liberalizing, and so the courts have understood.¹⁶²

The Commission report upon which the statute was based spent considerable time on the expected interconnection between fresh evidence, unsafety, and new trial.¹⁶³ Where 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).¹⁶⁴ Where 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 the grant of a new trial.¹⁶⁵ 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 to do in a situation where

¹⁵⁶ Nobles & Schiff, *supra* n. 130, at 185.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 72.

¹⁵⁹ *Id.* at 73.

¹⁶⁰ *Id.* at 100-101.

¹⁶¹ *Id.* at 86-87.

¹⁶² *Id.* at 87.

¹⁶³ *Id.* at 85.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

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 conviction on the same record? 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 Appeal, “turning the Court of Appeal into a second trial court.”¹⁶⁶

VIII. UNSAFE VERDICTS AND DOUBLE JEOPARDY

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 United States Supreme Court, at least peripherally, in *Tibbs v. Florida*.¹⁶⁷ 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. The story is generally well told by Justice O’Connor in her opinion for the majority:

Tibbs was indicted 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, 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,

¹⁶⁶ *Id.*

¹⁶⁷ 457 U.S. 31 (1982).

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 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.¹⁶⁸ When Nadeau examined the photographs she identified Tibbs as the assailant.¹⁶⁹ Nadeau subsequently picked Nadeau out of a lineup and positively identified him at trial as the man who raped her.¹⁷⁰

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.¹⁷¹ Tibbs was a college graduate and an

¹⁶⁸ [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. 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 Supreme Court. Justice O’Connor took the racial characterization of the defendant from a police report that had been introduced at trial.]

¹⁶⁹ 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 (S. Ct. Fla., 1976) [hereinafter *Tibbs I*].

¹⁷⁰ *Tibbs*, 457 U.S. at 32-33 (internal citations and footnotes omitted; author’s footnote inserted).

¹⁷¹ 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 “jail-house snitch.” Even Justice O’Connor characterized this testimony 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 the witness on cross examination, revealing inconsistencies in his testimony and suggesting that he had testified in the hope of leniency from the state.” *Id.* at n. 3. The Florida Supreme Court in its initial decision in *Tibbs* declared that “no credence can be given to the testimony of this witness” in that it “appears to be the product of purely selfish considerations,” 337 So. 2d at 790, and nothing in Justice O’Connor’s opinion takes issue with that statement. Nevertheless, under

aspiring author with the beginnings of a record of publication who claimed to be hitchhiking around the country gathering material.¹⁷² He had stayed the night of February 1 at a YMCA in Daytona Beach,¹⁷³ over 200 miles from Fort Myers.¹⁷⁴ He claimed to have been in Daytona Beach until February 6, but could produce no corroboration of that assertion.¹⁷⁵ He was first picked up by police acting on the all-points-bulletin regarding the Nadeau description on February 6 while hitchhiking in Leesburg (which is 20 miles southeast of Ocala), but was released.¹⁷⁶ He was picked up the next day while hitchhiking in Ocala, and once again released after being photographed.¹⁷⁷ It was these photographs that led to Nadeau's identification.¹⁷⁸ Another bulletin was issued, and Tibbs was picked up March 13 while hitchhiking in Clarksdale, Mississippi, at which point he waived extradition and returned to Florida. Aside from Nadeau's testimony,¹⁷⁹ there was little evidence that Tibbs had ever been within 150 miles of Ft. Myers,¹⁸⁰ and there were serious weaknesses with her

standard theory, the rejection of the face value meaning of the assertions of even such a witness as this, turns the case from one of sufficiency to one of weight.

¹⁷² *Tibbs*, 457 U.S. at 34.

¹⁷³ *Id.*

¹⁷⁴ 212 miles, according to the 2003 Rand McNally Road Atlas Florida mileage chart.

¹⁷⁵ *Tibbs*, 457 U.S. at 34.

¹⁷⁶ *Tibbs I*, 337 So. 2d. at 790-791.

¹⁷⁷ *Tibbs*, 457 U.S. at 33.

¹⁷⁸ *Id.*

¹⁷⁹ *Tibbs*, 337 So. 2d at 791.

¹⁸⁰ The prosecution produced a card from a YMCA in Orlando which it claimed bore Tibbs's signature showing he was there on February 4. Tibbs had denied ever being in Orlando. Tibbs took the stand and continued to maintain he was never in Orlando, and that the signature was not his. 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 Dayton 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 789, fn. 1. This illustrates well the havoc that collateral disputes can work on a trial. Orlando is more than 150 miles from Fort Myer, and closer to Daytona Beach than is 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 to having stayed in Orlando on the 4th would have added nothing to the prosecution's case. If anything, it would have made the case against Tibbs weaker, since 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 YMCA on the morning of the 2nd, acquire the green truck somewhere where it would apparently never be reported stolen, travel to Fort Myer 250 miles away (most likely passing through Orlando early in the trip), commit the rape and murder on the night of the 3rd, then ditch the truck where it would never be found and get back to Orlando by the night of the 4th to check into the YMCA.. Embracing the YMCA 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.

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.”¹⁸¹

On this record, Tibbs was convicted of both rape and murder, and sentenced to death. When the case came before the Florida Supreme Court, they reversed.¹⁸² 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, at the beginning of the 20th century British courts had no authority to directly evaluate the sufficiency of evidence supporting a jury verdict of guilt in a criminal case, let alone whether it was against the weight of the evidence. American courts, on the other hand, were in general taken to have the authority to evaluate the sufficiency of the evidence proffered in a criminal prosecutions the same as in civil cases, and in some jurisdictions even to grant new trials based on the weight of that evidence, usually under the rubric of authority to act “in the interest of justice.”¹⁸³ However, even in regard to determinations of insufficiency after conviction, many, perhaps most, jurisdictions allowed retrial even if the retrial might turn out to be on exactly the same evidence. Such a result was not thought to run afoul of proper notions of double jeopardy, since the defendant was asking for relief from a jury conviction in being. This was the clear construction of the double jeopardy clause of the U.S. Constitution from at least 1896¹⁸⁴ until 1978, when the Court determined in *Burks v. United States*¹⁸⁵ that there was one exception to the rule that a retrial after reversal of a conviction did not violate double jeopardy. That exception was when the reversal was founded on a determination that the evidence adduced at trial was legally insufficient to prove the elements of

¹⁸¹ *Tibbs I*, 337 So. 2d at 791.

¹⁸² *State v. Tibbs*, 337 So. 2d 788, 791 (S. Ct. Fla. 1976).

¹⁸³ For instance, 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 II*. See *infra* text at nn 180-182.

¹⁸⁴ *United States v. Ball*, 163 U.S. 662 (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.

¹⁸⁵ 437 U.S. 1 (1978). *Burks* was applied to the states in *Greene v. Massey*, 437 U.S. 19 (1978).

the crime beyond a reasonable doubt.¹⁸⁶ But of course, the insufficiency referred to was the constricted view of insufficiency already discussed, which mandated, in regard to virtually any live testimony of witnesses, that the jury had a right as judges of “credibility” to accept the testimony at face value wholeheartedly and completely. Under this approach all eyewitness identifications, no matter how rationally implausible their accuracy, are legally sufficient to establish identity.

When the Florida Supreme Court overturned Tibbs’s conviction in 1976, they assumed that a retrial would follow. 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 a new trial.”¹⁸⁷ However, due to the law’s delays, Tibbs had not yet been retried when *Burks* was decided, and the trial judge ruled that a retrial would violate double jeopardy. 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*.¹⁸⁸ The Florida Supreme Court agreed 4-3,¹⁸⁹ and *pour l’agienne*, decided that they had never really had the authority to reverse based on a determination of weight, and declared that neither they or any other Florida court should ever be tempted to do so again. In so doing they restricted the power to grant relief “in the interests of justice”¹⁹⁰ authorized by their court rules, to “fundamental injustices unrelated to evidentiary concerns.”¹⁹¹

Justice Boyd dissented based on his position in *Tibbs I*, which he found to be equivalent to an insufficiency determination.¹⁹² Justice England dissented, saying that “[r]ather than recycling Tibbs through the criminal justice system, I would direct his discharge in the interest of justice” (citing the rule the majority had just narrowed).¹⁹³ It was Justice England 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

¹⁸⁶ *Burks*, 437 U.S. at 11.

¹⁸⁷ *Tibbs I*, 337 So. 2d at 792 (Boyd, J., specially concurring).

¹⁸⁸ *State v. Tibbs*, 370 S. 2d. 386 (1979) (Fla. Dist. Ct of App., 2d Dist. 1979).

¹⁸⁹ *State v. Tibbs*, 397 So. 2d 1120 (S. Ct. Fla. 1981) [hereinafter *Tibbs II*].

¹⁹⁰ *Id.* at 1125-1126.

¹⁹¹ *Id.* at 1126.

¹⁹² *Id.* at 1130-1131.

¹⁹³ *Id.* at 1130.

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."¹⁹⁴

The United States Supreme Court granted certiorari, and affirmed in a 5-4 decision.¹⁹⁵ There is nothing particularly exceptionable about the decision of the majority on purely double jeopardy grounds. While the Supreme Court is not exactly bound by the characterization of the state court concerning whether their disposition is based on sufficiency or weight for double jeopardy purposes, it would seem difficult to argue that the characterization of the Florida Supreme Court was wrong in *Tibbs II*, given the centrality of witness credibility evaluation in the decision in *Tibbs I*, and the fact that *Jackson v. Virginia*¹⁹⁶ had adopted the standard model of sufficiency as the right model for due process purposes.¹⁹⁷

Justice White's dissent proposed a different approach, essentially accepting Justice England's position quoted above. 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 established 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, was "no retrial."¹⁹⁸ 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, and a resulting conviction would then a fortiori have to be reversed as based on insufficient evidence.¹⁹⁹ It was in response to this latter assertion of the dissent that the majority included its fn. 18, 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

¹⁹⁴ *Id.*

¹⁹⁵ *Tibbs v. Florida*, 457 U.S. 31 (1982).

¹⁹⁶ 443 U.S. 307 (1979)

¹⁹⁷ *Id.* at 319.

¹⁹⁸ *Tibbs*, 457 U.S. at 47-48.

¹⁹⁹ *Id.*

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 (1926) (en banc). The weight of evidence rule, moreover, often derives from a mandate to act in the interests of justice. See nn. 8 and 12 *supra*. Although reversal of a first conviction 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, 92 S. Ct., 1766, 32 L. Ed. 2d 116 (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.²⁰⁰

So here we have two opposing views of what to do when a court decides that a jury verdict cannot be sustained (dare I say is unsafe) in a way that necessarily rests on some evaluation of the credibility of the statement of a witness. The Tibbs majority says “retrial on the same record, and acquiesce in a second (or at least a third) conviction.” The Tibbs dissent says “no retrial ever—discharge as if acquitted, on double jeopardy grounds.” But I say there is a middle way, one suggested (though not explicitly described) by the most recent decision of the British Court of Criminal Appeals dealing with the problem of crib death prosecutions for murder. *R. v. Cannings*.²⁰¹

The facts of the Cannings case are relatively straightforward. Angela Cannings was born Angela Connolly in 1963, grew to adulthood, married a man named Terry Cannings, and on August 14, 1989 bore their first child,

²⁰⁰ *Tibbs*, 457 U.S. 31, 43, n. 18. 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 nol. prossed, and Tibbs was released. See Michael Seward, Note: *The Sufficiency-Weight Distinction—A Matter of Life or Death*, 38 U. MIAMI L. REV. 147 n. 55.

²⁰¹ 1 All E. R. 725 (Court of Appeal (Criminal Division), 2004).

Gemma. On the afternoon of November 14, 1989, while her husband was at work, Mrs. Cannings went in to check on the baby and found her lifeless. The pathologist who examined the child's body could find no specific condition or indication of anything that might have caused Gemma's death. The cause of death was listed as "natural, being Sudden Infant Death Syndrome." Mrs. Cannings had their second child, Jason, on April 25, 1991. She underwent training on resuscitation techniques and Jason was provided with an apnea alarm, which is supposed to sound if a child quits breathing. 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. On June 13, 1991, while Mr. Cannings was at work, Mrs. Cannings discovered Jason dead. No specific cause could be identified after autopsy. The Cannings's third child, Jade, was born on January 15, 1996. 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. On July 5, 1999, the Cannings's fourth child, Matthew, was born. He was placed on both an apnea monitor and an oxygen monitor when sleeping. On November 3, Mrs. Cannings called emergency services and reported that the apnea alarm had sounded and that Matthew's breathing was labored. He was taken to a hospital but nothing was found wrong with him. On Nov. 12, while her husband was at work, the apnea alarm again went off. Mrs. Cannings found Matthew in crisis. She attempted to revive him, but it did no good. She called her husband who called emergency services, but Matthew was already dead. Once again, an autopsy revealed neither a specific cause of death nor anything specifically suspicious.

Mrs. Cannings was charged with the deaths of Jason and Matthew. The prosecution's theory was that she had smothered them in some way that left no trace. The evidence against her consisted of the fact of three deaths while in her care, the fact that all three died while she was alone, and various responses of hers which were alleged to be "suspicious," particularly her call to her husband instead of to emergency services in Matthew's case. 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. Mrs. Cannings was convicted on April 16, 2002. Her first appeal to the Court of Appeals, Criminal Division, was denied. Her second appeal was based largely on a "fresh evidence" claim in regard to research that suggested 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. The CACD quashed the conviction, 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 (such as we have exemplified in paragraph 10) which tends to support the conclusion that the infant or infants was deliberately harmed. . . .

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 actual fact guilt from a record of conflicting expert evidence and ambiguous circumstances. However, as fascinating as further exploration of *Cannings* in depth 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." 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, that nevertheless further prosecution should 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 which 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*.

IX. 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 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 level. 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 obliged 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. Thus it would dispense with the necessity of proving the theoretical undiscoverability that underlies the current notion of “newly discovered evidence,” or the alternative requirement of having to establish “ineffective assistance of counsel.”

If a court were to declare a verdict “unsafe,” one of three results would 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, unless the new evidence was such that a review after a new trial would have to be quashed because actual innocence is clearly established (as in many DNA exonerations), in which case the case should be dismissed with double jeopardy effect. However, if the determination is (with or without fresh evidence) that the original record was necessarily subject to a reasonable doubt, the result should be to quash of the verdict with no retrial possible without application to a court to determine if significant new evidence of guilt has been developed. Although it is clear that double jeopardy would not attach in such a situation under *Tibbs*, a retrial on the same record should be prohibited.

X. FACTUAL INNOCENCE AND THE DEATH PENALTY

It is a commonplace to say that “death is different”²⁰² and that proof beyond a reasonable doubt as currently conceived is not a reliable enough basis for killing someone.²⁰³ Without directly becoming involved in the complexities of the “floating reasonable doubt” discussion,²⁰⁴ 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 verdict rejecting a claim of actual innocence: That the record made the imposition of capital punishment “unsafe.” In so doing, some will 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. 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 which judges perform in bench trials all the time. Granted that political 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, that is no reason to reject the explicit adoption of such a ground of review, in the interest of justice.²⁰⁵

²⁰² Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 104-105 (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”).

²⁰³ Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1082-85 (2003), and authorities there cited.

²⁰⁴ See supra note 107.

²⁰⁵ 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 death is involved. Consider the following: “In a case such as this, 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.” *Graham v. People*, 95 Colo. 544, 549 (1934). 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*, 200 Az. 309, 322 (2003) (Feldman, J., concurring) Consider, also, the following, from *Beck v. Alabama*, 447 U.S.625, 640:

XI. CONCLUSION

DNA exonerations have finally established beyond doubt that the current system of trial convicts a significant number of factually innocent defendants,²⁰⁶ putting to rest literally centuries of rhetoric that such results were either non-existent or vanishingly rare.²⁰⁷ It is not yet possible to put a properly framed denominator under the numerator represented by the exonerations, in order to generate an actual rate of wrongful conviction for the system as a whole, or some significant sub-universe of prosecutions.²⁰⁸ 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 18th 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.²⁰⁹

“[T]here is a significant constitutional difference between the death penalty and lesser punishments.”

²⁰⁶ Scheck et al, supra n. 1; Rosen, supra n. 202, 65-67. The latest numbers are available at Innocenceproject.org.

²⁰⁷ “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 considering a bill to authorize appeals in criminal cases, 1848, quoted in A.H. MANCHESTER, SOURCES OF ENGLISH LEGAL HISTORY, 1750—1870, 184 (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 . . .” editorial, *The Times* (London) Feb.2, 1860 (commenting on yet another attempt to create a court of criminal appeal.). Closer to home in space and time, Prof. 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’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 n. 201, at 62-63 (citation footnotes incorporated in text).

²⁰⁸ Various estimates run from 3% to over 7%. *Id* at nn. 40 and 41.

²⁰⁹ 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, PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY, bk. 6, ch. 9 at 455 (5th ed, 1793). Rosen discusses modern forms of this argument, Rosen, supra n. 202, at 104-106 (“Accepting the Death of Innocents as the Cost of Justice”).

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-19th Century proposals to bring criminal appeals to Britain, unlikely to be explicitly adopted by statute or rule any time 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 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.