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## From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law

Michael P. Vandenberg

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# Appellate Courts, Historical Facts, and the Civil-Criminal Distinction

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Among the pieties of our legal system is the notion that appellate courts do not engage in factual evaluation. Murky though the distinction between “fact” and “law” may be,<sup>1</sup> there is general agreement that somewhere along the fact-law spectrum lies a point beyond which appellate courts ought not venture.<sup>2</sup> Past it exist

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1. See 2 STEVEN A. CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* 7-26 (2d ed. 1992) (noting that “[t]he law-fact distinction, joined by the pesky but realistic hybrid mixed question, is a difficult concept but often is seen as decisive on appeal”); HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 349-62 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (observing that “[s]ome critics have concluded that ‘law’ cannot be distinguished analytically from ‘fact’”). See generally Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003) (arguing that “law” and “fact” are not distinct categories).

2. See, e.g., FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* 668-69 (4th ed. 1992) (“Even more fundamental is the principle that an appellate court reviews questions of law and may not substitute its own view of the facts or make new fact findings.”); see also Samuel H. Hofstadter, *Appellate Theory and Practice*, 15 N.Y. CO. B. BULL. 34, 34 (1957) (“The principle that the trier of the facts, whether judge or jury, is in a far better position to determine where the truth lies than an appellate court with only the cold trial record before it has been stated and restated so often that it has become a truism.”); Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 208 (1937) (noting that “[t]his is a canon of decision so well accepted that it is scarcely necessary to cite specific instances”). The extent to which this general rule actually is applicable generally may be debated. One can trace complaints about appellate courts meddling into factual determinations back at least seventy years. See Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 751, 778 (1957) (noting a trend, identified at least twenty-five years earlier, of appellate courts transforming what had previously been regarded as questions of fact into questions of law). Even so, deference to the factual findings of the lower court is, at the very least, the default position. See, e.g., FED. R. CIV. P. 52(a) (“Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”).

questions of “historical fact,”<sup>3</sup> the “who, when, what, and where”<sup>4</sup> series of questions that we have deemed only juries or trial judges to be capable of answering.

Just as well accepted is the reasoning behind this juridical line in the sand. Simply put, we believe that appellate courts are not very good at fact finding. As it is most often articulated, this justification consists largely of reasoning thought to flow from the reality that appellate judges are not present in the courtroom to witness testimony and evidence firsthand.<sup>5</sup> Having instead only a transcript of the proceedings below, the reviewing court lacks information critical to a full understanding of what took place. Under the conventional wisdom, then, appellate courts would likely do a worse job of factual evaluation, making the endeavor pointless even without regard to the consumption of judicial resources and other systemic effects it would entail.

This Article contends that the conventional wisdom is misguided. There are, it turns out, many respects in which appellate courts enjoy substantial advantages over trial judges and juries when it comes to the evaluation of historical facts. This alone would compel reevaluation of the relationship between trial and appellate courts. But there is more. Considerations of institutional design and purpose lead to the conclusion that if the courts are to exercise these advantages, they ought to do so much more often in the criminal system, in which ensuring the factual guilt of the convicted is of paramount importance, than in the civil system, in which the avoidance of factual error is not of overriding importance. Yet the reality is exactly backwards. Despite governing standards that appear to preclude evaluation of historical facts in any context, mounting empirical evidence<sup>6</sup> suggests that appellate courts routinely reexamine the evidence supporting a trial verdict in civil cases, but almost never do so in criminal cases.

There are many potential explanations for this disparity. At one extreme, it may be that the articulated characterizations of the criminal and civil systems do not accurately describe their respective aims—certainly a significant point if true, but one I do not consider in great detail. Less dramatically, but still significantly, it may be that the standards governing appellate review in fact provide very little governance at all. After briefly taking up the latter possibility, this

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3. See George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 38-39 (1992) (noting, but not adopting, the “historical fact” label).

4. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985).

5. See *infra* Part I.A.

6. See *infra* Part II.B.2.

Article concludes that a more appropriate mechanism for appellate review would require express consideration of a court's institutional competence to evaluate any historical facts under consideration. Review structured in this manner would not only provide a stronger linkage between systemic goals and their implementation in a given case, but would also serve to make appellate review itself more systematized and transparent; both of these attributes prove valuable in a broader jurisprudential sense.

Part I begins the inquiry by contemplating and rejecting the conventional account of the relative institutional competencies of appellate courts and trial-level actors when it comes to the assessment of historical facts. The discussion begins with a consideration of the nature of the raw materials based on which these assessments are conducted. Rather than operating as a handicap, having recourse only to a transcript provides the reviewing court with certain advantages. Thought processes based on information from a textual source are more compatible with systematic, rational (and therefore "legal") thought than are those based on information received orally.<sup>7</sup> Working with words fixed on a page rather than evanescent oral utterances, appellate courts are better able to perform the complex intellectual operations necessary to the proper evaluation of certain types of evidence. Moreover, research demonstrates that people consistently perform poorly at using demeanor evidence to assess credibility and veracity, such that much of the information traditionally thought to provide the jury with a fact-finding advantage may actually operate to mislead.<sup>8</sup> In addition, appellate courts are at least as well equipped as trial-level fact finders to assess documentary and circumstantial evidence,<sup>9</sup> and also enjoy advantages arising from experience and perspective.<sup>10</sup> In sum, there are fundamental respects in which appellate courts can function as superior fact finders.

The fact that appellate courts possess these capabilities does not, of course, mean that they ought to exercise them. Part II takes up that determination, which depends on an analysis of the larger aims of the systems in which appellate courts, trial judges, and juries operate, coupled with a consideration of the standards currently governing appellate review and the manner in which courts apply those standards. That exercise is revealing.

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7. See *infra* Part I.B.1.

8. See *infra* Part I.B.2.

9. See *infra* Part I.B.4.

10. See *infra* Part I.B.3.

Despite the frequency and apparent intensity with which conclusions about the relative institutional competencies of appellate courts are repeated, examination of the courts in operation suggests that, at some perhaps not fully conscious level, judges recognize that they are not so limited in their ability to assess facts as the traditional justification holds. A growing body of empirical research reveals that appellate courts are quite willing to engage in factual reexamination in civil cases, and accordingly uphold challenges to the sufficiency of the evidence supporting a verdict in a substantial portion of cases.<sup>11</sup> Some scholars have attributed this willingness to an attitude among appellate judges that plaintiffs are treated too hospitably in trial courts.<sup>12</sup>

On the criminal side, in contrast, the conventional wisdom continues to hold sway.<sup>13</sup> Despite mounting evidence that our criminal justice system has done a much worse job of sorting the guilty from the innocent than previously imagined, informed observers agree that challenges to the sufficiency of the evidence almost never succeed in criminal appeals.<sup>14</sup> Although the empirical evidence is less well developed in this context, it is nonetheless consistent with that understanding.

This is, or at least ought to be, an astonishing revelation. Standard accounts of the respective functions of the two systems suggest that if there is a disparity between them in the amount of deference appellate courts give to trial-level fact finding, it should be criminal cases in which courts engage in greater scrutiny. In criminal cases, after all, our common understanding is that we must ensure that those who are convicted are in fact guilty. Because of the stigma associated with being a convicted felon,<sup>15</sup> together with the loss of

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11. See *infra* Part II.B.2.

12. See *infra* text accompanying note 275.

13. See *infra* text accompanying notes 184-189.

14. See *infra* notes 188-190 and accompanying text.

15. See, e.g., *Morissette v. United States*, 342 U.S. 246, 260 (1952) (observing that the label "felon" is "as bad a word as you can give to a man or thing" (citing 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 465 (2d ed. 1899))); *United States v. Wulff*, 758 F.2d 1121, 1125 n.2 (6th Cir. 1985) (making an observation similar to the court in *Morissette*); see also Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 680 (1999) ("Because both the stigma from being labeled a 'felon' and the harm suffered by the defendant from the punitive sanction is so great, the federal Constitution grants a criminal defendant a vast array of procedural protections not afforded a defendant in a civil action."). This stigma stems from the notion that a criminal conviction reflects moral blameworthiness. PAUL H. ROBINSON, CRIMINAL LAW 5 (1997).

liberty that typically results from a felony conviction,<sup>16</sup> we believe that it is better that ten guilty men go free than that a single innocent be convicted.<sup>17</sup> And while the criminal justice system serves multiple ends, “[w]here a conflict exists between protecting the innocent and other cornerstone objectives, it is the protection of the innocent that almost always prevails.”<sup>18</sup> The civil system, in contrast, is more squarely focused on the simple resolution of disputes,<sup>19</sup> with fewer moral overtones and less emphasis on the avoidance of error.<sup>20</sup> What is more, the Seventh Amendment expressly constrains judicial reexamination of jury fact finding in civil cases, based in large part on concerns about governmental overreaching that are not implicated in the criminal setting.<sup>21</sup> These considerations suggest that any departures from extreme appellate deference should occur in criminal, rather than civil, cases.

16. See, e.g., *United States v. Wilson*, 36 F. Supp. 2d 1177, 1184 (N.D. Cal. 1999) (noting the substantial difference between the loss of money and property and the loss of liberty and stigmatization of a felony conviction).

17. While ten appears to be the number most frequently used, the number varies depending on the source. See Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. REV. 979, 980-81 (1993) (citing authorities advocating numbers ranging from ten to ninety-nine). See generally Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997). Consistent with these notions, the structure of our trial mechanism provides numerous protections against wrongful convictions. Foremost among these is the requirement that every element of a crime be proven beyond a reasonable doubt, which the Supreme Court first held as constitutionally compelled in *In re Winship*, 397 U.S. 358, 364 (1970). In addition, most jurisdictions require that a jury’s verdict be unanimous. Federal criminal trials require unanimous verdicts. FED. R. CRIM. P. 31(a). Although the Supreme Court has noted that unanimous verdicts are not constitutionally compelled, most states require them. See *Apodaca v. Oregon*, 406 U.S. 404, 412 (1972); *Johnson v. Louisiana*, 406 U.S. 356, 363 (1972); Michael H. Glasser, Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 671 (1997) (noting that only two states allow for non-unanimous verdicts in criminal cases). These core protections are buttressed by a host of ancillary safeguards, such as prohibitions on improper argument, requirements that certain types of unduly prejudicial evidence generally be excluded, and similar protections. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935) (formulating the standard that while a prosecutor “may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”); FED. R. EVID. 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”). Prior to trial, the less formalized mechanisms of police and prosecutorial discretion also operate to reduce the number of innocent or not-guilty people subjected to the possibility of wrongful conviction.

18. WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 192 (2d ed. 1999).

19. E.g., JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 1.1 (2d ed. 1993) (noting that the purpose of most rules of civil procedure “is to promote the just, efficient, and economical resolution of civil disputes”); FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* § 1.1 (4th ed. 1992) (observing that procedural law “is a model . . . of dispute resolution”).

20. See *infra* text accompanying notes 123-130.

21. See *infra* text accompanying notes 288-293.

Doctrinally, this systemic differential receives only minimal recognition. In general and in both systems, the standards governing both the scope and manner<sup>22</sup> of appellate review of facts reflect the traditional understanding of relative institutional competencies and thus call for considerable deference. For example, in the context of claims that the evidence at trial was insufficient to support the verdict,<sup>23</sup> the governing standards in both criminal and civil cases pose roughly the same question for the reviewing court. The court must first view the evidence in the light most favorable to the verdict, and then ask whether the verdict could have been reached by a reasonable jury. This is, at least nominally, a question of law or so-called “ultimate fact,” but it also provides the principal means through which appellate courts supervise the finding of historical facts.<sup>24</sup> Assessment of credibility and the weighing of evidence are deemed to be off-limits. The only meaningful difference between the two sets of standards relates to the incorporation of the underlying burden of proof.<sup>25</sup> In criminal cases, of course, a jury can only convict based on proof beyond a reasonable doubt, whereas in civil cases, all that is typically required for the jury to return a verdict for the plaintiff is proof by a preponderance of the evidence. In each instance, the appellate court is to incorporate this standard into determining whether a reasonable jury could have reached its verdict on the evidence presented. At least at the margins, then, appellate courts should be more likely to find the evidence insufficient in criminal than in civil cases.

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22. This Article tends to use the phrase “standard of review” somewhat loosely to refer to both of these notions, thereby including ideas that some might prefer to see expressed in terms of “scope of review.” See, e.g., J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, LAW & CONTEMP. PROBS., Spring 1984, at 1, 1 (distinguishing between standards of review and scope of review and lamenting the lack of “a fairly well-developed and readily accessible jurisprudence” concerning either); see also Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 993-98 (1986) (focusing on scope of review in summarizing the distinction between trial and appellate functions); *id.* at 997 (“Scope of review . . . is the principal means by which adjudicative decisional power and responsibility are divided between the trial and appellate levels.”).

23. I generally refer to such claims as “sufficiency claims,” and in so doing, mean to refer to the entire class of claims in which a defendant asserts that the trial-level fact finder did not have an appropriate evidentiary basis for its verdict. Cf. Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469, 474 (1996) (“A conviction can be ‘wrong’ in many ways. It might be excessive—for example, if the defendant is really guilty of second-degree murder but was convicted of first-degree murder; or the jury might have been right to conclude that the defendant committed the fatal act, but wrong to reject a defense of insanity or self-defense; or a conviction that is factually accurate might have been obtained in violation of the defendant’s constitutional rights.”).

24. Louis, *supra* note 22, at 1019.

25. See *infra* Parts II.A.1, II.B.1.



There are many possible interpretations of this seeming disconnect between the implications of institutional design and function, on the one hand, and the actual practice of appellate review, on the other.<sup>26</sup> This Article focuses on the possibility that the standards governing appellate review of facts do not provide meaningful guidance or appropriate constraints. By fixing the level of appellate deference based on the type of claim rather than on the type of evidence under consideration, the standards fail to appropriately calibrate the relationship between the questions the courts are required to ask and those they are competent to answer. By incorporating the concept of reasonableness, they allow enough analytical wiggle room for either no review or nearly full review.

This allows not only for a reality in which the conduct of appellate review is in tension with the purported functions of the systems in which it takes place, but also a state of affairs that is troubling on a higher level. The idea that like cases be treated alike, which is fundamental to the American legal system, requires that law be updated to account for expansions in our understanding of which cases are in fact alike. Accordingly, this Article's prescriptive point is that appellate review of facts should be reordered so as to require express consideration of institutional competence as applied to the specific matters before the court in a given case. At the same time, appellate review should account for these disparate systemic aims in answering the distinct question of the extent to which courts ought to utilize their competence advantages in various types of cases. Appropriately done, this would serve not only to correct the imbalance between review in the criminal and civil systems, but also to make the process of appellate factual review more systematized in a general sense.

## 1. THE INSTITUTIONAL COMPETENCE JUSTIFICATION FOR APPELLATE DEFERENCE TO TRIAL-LEVEL FACT FINDING

### A. *Review of Facts and the Centrality of Perceived Institutional Competence*

Notions of relative institutional competence form the grounds on which justifications of appellate deference to trial-level fact finding

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26. I briefly discuss one account of the ostensible difference between what we say the criminal justice system is designed to accomplish and what we may actually mean for it to accomplish below. *See infra* Part II.C.

are almost universally formulated.<sup>27</sup> There are, to be sure, many additional considerations governing the allocation of responsibilities between the trial and appellate levels, including judicial economy, the enhancement of public regard for the functioning of the judicial system, and the need for both consistent decisions and clear rules. These considerations certainly play some role in the allocation of primary fact-finding responsibility to trial judges and juries, and they are addressed below.<sup>28</sup> It is clear, however, that institutional competence is the dominant consideration.

The perceived advantage of the trial-level fact finder has two dimensions. The first is situational. Whether judge or jury, the finder of fact at the trial level is present in court as the evidence comes in. The fact finder thus enjoys an advantage over appellate courts in that it experiences the introduction of evidence and testimony as it happens.<sup>29</sup> Because of this, the fact finder can assess not only what a witness says, but also how she says it. Her tone of voice may signal sarcasm, confusion, or hostility. She may appear truthful, or not. She may confidently handle cross-examination on proposed inconsistencies in her story, or she may appear flustered, hesitant, and untruthful. She may even illustrate her testimony with an exhibit or by way of a temporary diagram not admitted into evidence and thus not a part of the appellate record.

This reasoning reflects an intuitive recognition of the nature of oral communication, in which words do not carry the entire burden of transmitting information. Used orally, words alone are a relatively inefficient vehicle for communication because the limitations of human oral memory and processing capacity cap the amount of information we can keep in present memory, as well as the length of

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27. See, e.g., 3 AM. BAR ASS'N, STANDARDS OF JUDICIAL ADMINISTRATION: STANDARDS RELATING TO APPELLATE COURTS § 3.11, 24-28 (1994) (offering a competence-based account of the reasons for appellate deference); ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 28 (1941) ("There is a loss of fine shades in even the stenographic transcript of testimony, and the effect of evidence may depend upon them."); ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 20 (1970) ("Many factors may affect the probative value of testimony, such as age, sex, intelligence, experience, occupation, demeanor, or temperament of the witness. A trial court or jury before whom witnesses appear is at least in a position to take note of such factors. An appellate court has no way of doing so."); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759 (1982) ("The most notable exception to full appellate review is deference to the trial court's determination of the facts. The trial court's direct contact with the witnesses places it in a superior position to perform this task."); Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 KAN. L. REV. 1, 19 (1991) ("An assessment of the relative competence of courts to evaluate evidence is, thus, the primary force behind development of the clearly erroneous standard.").

28. See *infra* Part II.A.3.

29. See, e.g., Friendly, *supra* note 27, at 759.

time it remains there.<sup>30</sup> As a consequence, much of the meaning conveyed by a verbal utterance lies outside the actual words that the speaker uses.<sup>31</sup> Because speakers must, in effect, economize on words, the words themselves—if considered apart from the behavior of the speaker—may be ambiguous. Put another way, it is often characteristic of verbal communication that the words themselves do not autonomously represent the speaker's meaning.<sup>32</sup> "Speakers in face-to-face situations circumvent this ambiguity by means of such prosodic and paralinguistic cues as gestures, intonation, stress, quizzical looks, and restatement."<sup>33</sup> Jurors and trial judges are presumed to be able to decipher these cues.

The appellate court, in contrast, cannot access these additional cues to meaning, and must instead review what is typically characterized as the "cold" record.<sup>34</sup> This consists primarily of a transcript of the proceedings before the trial court. Almost none of the behavioral nuances that are readily apparent to the fact finder come through in such a transcript.<sup>35</sup> Court reporters do not denote witness

30. See *infra* notes 53-54 and accompanying text.

31. See David R. Olson, *From Utterance to Text: The Bias of Language in Speech and Writing*, 47 HARV. EDUC. REV. 257, 263 (1977) (observing that certain oral statements "require context and prior knowledge and wisdom for their interpretation"); see also MARSHALL McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 79 (1964) ("Many a page of prose and many a narrative has been devoted to expressing what was, in effect, a sob, a moan, a laugh, or a piercing scream. The written word spells out in sequence what is quick and implicit in the spoken word."). For a general discussion of how these ideas play out in various aspects of the legal system, see Paul Bergman, *The War Between the States (of Mind): Oral Versus Textual Reasoning*, 40 ARK. L. REV. 505 (1987).

32. Olson, *supra* note 31, at 277 (noting that "utterances appeal for their meaning to shared experiences and interpretations"); see also WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 101-02 (1982) ("In a text even the words that are there lack their full phonetic qualities. In oral speech, a word must have one or another intonation or tone of voice—lively, excited, quiet, incensed, resigned, or whatever. It is impossible to speak a word orally without any intonation."); Walter J. Ong, *The Writer's Audience Is Always a Fiction*, reprinted in CROSS-TALK IN COMP THEORY: A READER 55, 57 (Victor Villanueva, Jr. ed., 1997) ("[T]he spoken word is part of present actuality and has its meaning established by the total situation in which it comes into being. Context for the spoken word is simply present, centered in the person speaking and the one or ones to whom he addresses himself and to whom he is related existentially in terms of the circumambient actuality.").

33. Olson, *supra* note 31, at 272.

34. See, e.g., LESTER BERNHARDT ORFIELD, CRIMINAL APPEALS IN AMERICA 85 (1939) ("The cold printed record inevitably must give an incomplete and sometimes distorted picture of the case."); Robert C. Owen & Melissa Mather, *Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROC. 411, 412 (2000) (noting that some appellate judges insist that "only the traditional 'cold' record permits reasoned decisionmaking"); see also KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 28 n.20 (1960) (referring to "the frozen record").

35. It is impossible for any appellate judge or judges to read a bare transcript and secure from it all of the nuances bearing on the question of credibility—the lifted

demeanor, and while they may note when a witness points or gestures, they cannot reveal what she was pointing at or capture the information conveyed by the gesture. Sometimes court reporters edit the record for ease of reading or fail to accurately transcribe the proceedings, thereby shifting the relative eloquence of various witnesses.<sup>36</sup> Thus, the information available to the appellate court is a less textured, and perhaps even different, version of what was experienced by the fact finder. Because of this, even those who have advocated for a significant appellate role in the review of facts have conceded that “[t]he cold printed record inevitably must give an incomplete and sometimes distorted picture of the case.”<sup>37</sup> Because “there is a significant difference between being there and reading about it,”<sup>38</sup> the reasoning goes, the appellate court is comparatively inept at assessing testimony and therefore ought not to do so at all.

The second, and less frequently emphasized, dimension to the trial court’s supposed advantage has to do with experience. Interestingly, the content of this justification varies considerably depending on whether the fact finder is judge or jury. With respect to judges, the contention is not merely that trial courts are better positioned to assess facts, but also that trial courts “develop an

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eyebrow; the ‘yes’ which means ‘no’ or ‘maybe,’ or vice versa; the delays or hesitations in answering questions; the soft-spoken word; the loud voice; the nervous voice; the quizzical glance.

Judge John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the “Clearly Erroneous Rule” Being Avoided?*, 59 WASH. U. L.Q. 409, 422 n.87 (1981) (citations omitted); see also POUND, *supra* note 27, at 28 (“There is a loss of fine shades in even the best stenographic transcript of testimony, and the effect of evidence may depend on them.”). Interestingly, this justification appears to predate the widespread generation of transcripts, and not to have changed in light of it. See William W. Blume, *Review of Facts in Non-Jury Cases*, 20 J. AM. JUDICATURE SOC’Y 68, 71 (1936). Blume noted:

In literally thousands of cases courts of the United States have iterated and reiterated the supposed truth that a trial judge who sees and hears the witnesses is in a better position to determine issues of fact than an appellate court which gets its impressions from a cold, printed record. This supposed truth became accepted before the days of court stenographers and has persisted in spite of the fact that it is now possible to reproduce for the appellate court the exact words of the questions propounded, and the answers given, in the court below.

*Id.*

36. See Jeremy A. Blumenthal, *A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility*, 72 NEB. L. REV. 1157, 1203-04 (1993) (“There is currently dispute as to the accuracy of the current transcription procedures.”).

37. ORFIELD, *supra* note 34, at 85; see also POUND, *supra* note 27, at 6 (“[W]here evidence is taken orally in open court, even if fully transcribed verbatim, much of what is important in arriving at a determination of the facts is lost to a reviewing court. Hence it is universally agreed that the scope of review on the facts is necessarily limited . . .”).

38. Cynthia K.Y. Lee, *A New “Sliding Scale of Deference” Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 13 (1997).

expertise in fact finding that eludes the appellate courts, which deal primarily with issues of law.”<sup>39</sup> In other words, not only do trial judges have the ability to view witness demeanor, but they also are better at disentangling conflicting evidence simply because they have more practice. In the case of juries, the emphasis shifts to jurors’ utter lack of experience. Since jurors are typically not repeat participants in the court system, the reasoning goes, they do not approach cases with the sorts of predispositions that judges, who may have seen the same type of case hundreds of times, are likely to develop. Instead, jurors bring the beliefs and attitudes of the community, a willingness to treat each case as novel, and openness to both sides’ arguments.<sup>40</sup>

These appear to be powerful justifications. Just as a picture is worth a thousand words, so does being in the presence of the parties, witnesses, and counsel allow a juror to take in considerably more information than an appellate judge merely reading a transcript. The two experiences are not the same, and anyone who has absorbed a trial solely through its transcript knows that it can be a frustrating and incomplete experience. Perhaps because of the strong intuitive appeal of this reasoning, the notion that trial-level fact finders are always and for all purposes superior to appellate courts in dealing with historical facts has received very little judicial or scholarly consideration.<sup>41</sup> Most of the few commentators to have spoken to the issue have done so in passing and have simply stated it as a more or less incontrovertible proposition. It is assumed that, to use a representative quote, “[t]he jury that heard the case, complete with

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39. Thomas Cane & Kevin M. Long, *Shifting the Main Event: The Documentary Evidence Exception Improperly Converts the Appellate Courts into Fact-Finding Tribunals*, 77 MARQ. L. REV. 475, 485 (1994); see also *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985) (“The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise.”); *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 168 (2d Cir. 2001) (noting that an appellate court’s deference to the trial court’s findings of fact is based upon “the belief that district courts have a good deal of ‘expertise’ when it comes to fact-finding”).

40. Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 883-85 (2002) (arguing that a jury’s “decisions are manifestly based on the attitudes of the citizens of the community rather than on those of a judicial elite”). Taken together, these arguments suggest not only that primary fact-finding responsibility should lie in the trial-level fact finder, but also that, in jury cases, trial courts should have the primary responsibility by way of post-trial motions for determining whether the jury based its verdict on sufficient evidence, and that appellate courts should give almost complete deference to these rulings.

41. To a lesser degree the same is true of the topic of appellate review more broadly. In 1984, Judge Phillips lamented the general lack of a “well-developed and readily accessible jurisprudence” concerning the scope of appellate review and standards of review, both of which are implicated in this Article. Phillips, *supra* note 22, at 1.

live testimony, was in a better position to assess the evidence than subsequent decisionmakers.”<sup>42</sup>

### *B. Critique of the Institutional Competence Justification*

There is much to be said for the institutional competence justification for appellate deference. Whatever imperfections may be attributed to trial judges or a group of twelve citizens off the street when it comes to evaluating behavior, assessing motives, and the like,<sup>43</sup> such a group will often be in a better position to do so than a group of judges removed in time and space from the evidence and possessing only a transcript of the proceedings. Moreover, even if one believes that juries sometimes or often perform these tasks badly, there is, with respect to many of the core functions of juries, no reason to believe that an appellate court could do better. And, in some situations in which an appellate court could outperform the trial-level fact finder, we might still conclude that appellate intervention is inappropriate for reasons apart from a concern for factual accuracy.<sup>44</sup>

To say, however, that juries and trial courts are superior fact-finding instruments in *most* cases and with respect to *most* types of evidence is not to say that they are superior in *all* cases and with respect to *all* types of evidence. Indeed, reflection on everyday experience suggests that the institutional competence justification is not as powerful as its near-universal acceptance would appear to indicate. Despite the relative power of pictures and other visual sources of information, much of our communication takes place through the written word. We watch the nightly news on television or listen to it on the radio, but we also read newspapers and newsmagazines.<sup>45</sup> In our daily lives we constantly recognize that some sorts of information are better conveyed and absorbed visually or orally, while others come across better through text. Perhaps more significantly for present purposes, we recognize that different aspects of the same information are better conveyed via different modes of communication. Reading the text of a poem or play is a different, and

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42. John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 727 (1990).

43. A large body of literature examines the capabilities of juries. See generally, e.g., STEPHEN J. ADLER, *THE JURY* (1994); HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); SAUL M. KASSIN & LAURENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* (1988).

44. See *infra* text accompanying notes 209-211.

45. Cf. David Brinkley, *On Being an Anchorman*, N.Y. TIMES, June 14, 2003, at A15 (“Television news is not merely the same news delivered in a different way. It is different because the means of its delivery changes its meaning to its audience . . .”).

not necessarily inferior, experience as compared to hearing it read or seeing it performed.

There is no reason to believe that a similar dynamic does not hold with respect to trials. To be sure, just as plays are written to be best appreciated by an audience watching them be performed, jury trials are in an important sense theater. Counsel for both sides recognize that it is the jury that will make the determination as to guilt or liability, and accordingly structure their presentations in a manner calculated to maximize the appeal of their case in the eyes of the jury.<sup>46</sup> Though trials are in this sense productions designed for an audience of jurors,<sup>47</sup> they are not (primarily) about the jury. The jury's deliberation and verdict perhaps constitute one of the ends of the process,<sup>48</sup> but they function more prominently as the primary means to a different end. That is to say, although the parties may direct their efforts toward the jury with the goal of obtaining a favorable verdict, the articulated<sup>49</sup> aim of the process is to resolve a dispute between civil litigants or to determine whether, beyond a reasonable doubt, a criminal defendant committed the crimes with which he is charged. To the extent that the jury (or trial judge) is comparatively less competent than an appellate court in performing the tasks necessary to satisfy these primary goals, the traditional, the competence-based justification fails to fully account for the universality of appellate deference to factual determinations that inheres in the stated standards of review.

The same considerations that motivate us to gather information in different forms in our daily lives suggest that appellate courts may enjoy certain advantages when it comes to the assessment of some facts. The remainder of this section explores those areas of potential superiority.

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46. See, e.g., MICHAEL R. FONTHAM, TRIAL TECHNIQUE AND EVIDENCE § 1-5(d) (2d ed. 2002) (exhorting lawyers to "consider the listeners and their ability to absorb information, and tailor the presentation for easy understanding"); ASHLEY S. LIPSON, DOCUMENTARY EVIDENCE: ART OF ADVOCACY §§ 10.07-10.09 (1995) (emphasizing repeatedly the need to use documentary evidence so as to maximize the appeal of one's case to the jury); THOMAS A. MAUET, TRIAL TECHNIQUES § 2.2 (6th ed. 2002) (discussing research concerning juror capabilities and its implications for trial strategy).

47. The comparison of trials to theater is not infrequently made. See RICHARD A. POSNER, OVERCOMING LAW 126-30 (1995) (analogizing judging to being a spectator at a play or movie); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 17 (1990) (asserting that a trial's "symbolic and educational effects are made so powerful only because the human drama of the trial is so engrossing and . . . entertaining").

48. See *infra* text accompanying note 235-239.

49. As discussed below, some have speculated that the articulated ends may not be the same as the actual ends. See *infra* Part II.A.3.c.

### 1. The Advantages of a Transcript

The first sense in which a jury or trial judge is disadvantaged relative to an appellate court involves the form in which information is presented to the jury or trial judge. Trials are largely oral and visual productions. Although demonstrative and documentary evidence is often involved,<sup>50</sup> the main feature of trials is witness testimony sandwiched between opening statements and closing arguments. As noted above, the opportunity to observe all this firsthand is generally thought to place juries and trial judges at a tremendous comparative advantage. At least some of the meaning of the testimony is conveyed via means apart from the words the witness uses, and only those present in the courtroom are in a position to extract that meaning. But there is a flipside. While much information is amenable to being communicated effectively in this manner, some is not, or at least not to an equal extent.<sup>51</sup> Perhaps more significantly, the largely oral nature of trials can lead juries to evaluate the evidence in a manner that is inconsistent with the rigorous, logical ideals of the legal system.<sup>52</sup>

Consider the juror's situation. Much of the information conveyed at trial is present only for an instant, then disappears, almost always to be replaced by additional, new information that the juror must also process.<sup>53</sup> "[S]ound has a special relationship to time unlike that of the other fields that register in human sensation. Sound exists only when it is going out of existence. It is not simply perishable but essentially evanescent, and it is sensed as evanescent."<sup>54</sup> Thus, the juror has little opportunity to reflect on what she has heard. She may fail to connect a piece of information with the rest of what she has heard, fail to understand it, forget it, or simply miss it altogether. In the typical courtroom, jurors are expected to passively receive the information presented to them. This leads to

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50. For the implications of documentary evidence on appellate review, see *infra* text accompanying notes 111-116.

51. For this reason, a common theme in works on trial advocacy is that lawyers should structure their presentations to the jury to avoid complexity. See, e.g., FONTHAM, *supra* note 46, § 1-5(d), at 8-9. "People today are part of the television age or, more recently, computer age, and are used to receiving information visually. Trials, however, largely involve witness testimony. Research has shown that after two or three days listeners retain only about 10 percent of aural messages . . ." MAUET, *supra* note 46, § 2.2, at 21.

52. See *infra* text accompanying notes 73-78.

53. "Under normal viewing conditions, visual information is erased from the sensory register in about a quarter of a second and is replaced by new information long before it has a chance to fade out by itself." CHARLES G. MORRIS, *PSYCHOLOGY: AN INTRODUCTION* 222 (7th ed. 1990). Auditory information is retained longer, but still only for a matter of seconds. *Id.*

54. ONG, *supra* note 32, at 31-32.



their having only a limited appreciation of the larger context in which that information exists, and a perhaps more limited understanding of the ultimate issues they will be expected to resolve based on the information provided.<sup>55</sup> Only infrequently are jurors allowed to ask questions, take notes, or, in some courtrooms, have testimony read back to them.<sup>56</sup> Thus, detailed or complicated information may be difficult to convey to a jury.<sup>57</sup> And although this difficulty can be addressed through the use of demonstrative evidence, there always remains the possibility that jurors will fail to appreciate critical factual nuances due simply to the manner in which evidence is presented at trial.

Not only does the reliance on oral testimony create difficulties with respect to information retention, it also affects the manner in which jurors think about the evidence.<sup>58</sup> Language functions not only to facilitate communication among human beings, but also as an important mechanism for the manipulation of cognition.<sup>59</sup> As a consequence, changes in the medium of communication can affect the

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55. "Too often, jurors are allowed to do nothing but listen passively to the testimony, without any idea what the legal issues are in the case, without permission to take notes or participate in any way, finally to be read a virtually incomprehensible set of instructions and sent into the jury room to reach a verdict in a case they may not understand much better than they did before the trial began." Sandra Day O'Connor, *Juries: They May Be Broken, But We Can Fix Them*, FED. LAW., June 1997, at 20, 22. Jury research confirms that jurors are often uncertain as to their role. See ANDREAS KAPARDIS, *PSYCHOLOGY AND LAW* 141-43 (1997) (discussing the ability of jurors to "understand and return all important information"); LAWRENCE S. WRIGHTSMAN ET AL., *PSYCHOLOGY AND THE LEGAL SYSTEM* 325-29 (1994) (discussing the ability of jurors to "understand and retain all important information"); Edith Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, LAW & CONTEMP. PROBS., Autumn 1989, at 225, 229-31 (discussing research based on juror interviews); see also Ronald S. Longhofer, *Jury Trial Techniques in Complex Civil Litigation*, 32 U. MICH. J.L. REFORM 335 (1999) (cataloging the difficulties facing jurors in complex litigation, and suggesting solutions); William W. Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 586-88 (1991) (discussing ways in which the legal system operates to keep information from jurors).

56. See Marietta S. Robinson, *Should Jurors Be Allowed to Ask Questions of Witnesses? Yes!*, FED. LAW., May 1998, at 48, 48-50 (discussing jurors' general inability to ask questions); Schwarzer, *supra* note 55, at 590-94 (discussing juror note-taking, questions by jurors, and some judges' refusal to have testimony read back to the jury). In most jurisdictions, the decision whether to allow testimony to be read back rests in the discretion of the trial judge. See generally L.S. Tellier, Annotation, *Right to Have Reporters Notes Read to Jury*, 50 A.L.R.2d 176 (1956).

57. See Bergman, *supra* note 31, at 520 ("[O]ral language is concrete and imagistic, unsuitable to the expression of abstract concepts or logical propositions."); Olson, *supra* note 31, at 278 (noting that oral language "is an instrument of limited power for exploring abstract ideas").

58. Larry C. Farmer et al., *The Effect of the Method of Presenting Trial Testimony on Juror Decisional Processes*, in *PSYCHOLOGY IN THE LEGAL PROCESS* 59, 66-71 (Bruce D. Sales ed., 1977) (concluding that methods of presentation affect the manner in which jurors evaluate testimony).

59. JACK GOODY, *THE INTERFACE BETWEEN THE WRITTEN AND THE ORAL* 259-60 (1987) (discussing the work of Russian psychologist Vygotsky).

cognitive processes of those on the receiving end.<sup>60</sup> As Marshall McLuhan famously put it, “the medium is the message.”<sup>61</sup> Thus, there are fundamental differences in the ways in which people use orally, as opposed to textually, conveyed information.<sup>62</sup> In addition to being relatively ineffective as a means of communicating abstract or complex material, oral language encourages an intuitive and emotional thought process in its hearers.<sup>63</sup> The medium itself strongly tends toward concrete and imagistic, as opposed to abstract and logical,

60. *Id.* at 260, 262-64.

61. *See, e.g.,* MCLUHAN, *supra* note 31, at 7. Elsewhere McLuhan made the point more poetically:

Until WRITING was invented, we lived in acoustic space, where all backward peoples still live: boundless, directionless, horizonless, the dark of the mind, the world of emotion, primordial intuition, mafia-ridden. Speech is a social chart of this dark hog.

SPEECH structures the abyss of mental and acoustic space, shrouding the race; it is a cosmic, invisible architecture of the human dark.

In the computer age, speech yields to macrocosmic gesticulation or the direct interface of total cultures. The silent movies began this move.

WRITING turned a spotlight on the high, dim Sierras of speech; writing was the visualization of acoustic space. It lit up the dark.

A goose quill put an end to talk, abolished mystery, gave us enclosed space and towns, brought roads and armies and bureaucracies. It was the basic metaphor with which the cycle of CIVILIZATION began, the step from the dark into the light of the mind. The hand that filled a paper built a city.

MARSHALL MCLUHAN, COUNTERBLAST 13-14 (1969). For a recent article drawing on McLuhan's work in the First Amendment context, see generally Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339 (2002).

62. These differences have effects on both the individual and social levels. “After its movement from script to print, the law tended toward the depersonalized, the objectified and systematic, the controllable and inflexible, and the abstract.” Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 516 (1992). Collins and Skover traced the evolution of law from orality to print, concluding that the supremacy of print “means that the printed text typically will overpower and subdue context. The typographic word enhances all of the values associated with the supremacy of law—uniformity, predictability, universality, and analytical applicability of printed commands. With its systematic categories and abstract concepts, typographic law emphasizes detached and logical analysis.” *Id.* at 534 (citation omitted). They predict that the increasing use of electronic “paratexts” will lead to a fundamental change in the nature of the legal regime. *Id.* See generally Richard J. Ross, *Communications Revolutions and Legal Culture: An Elusive Relationship*, 27 LAW & SOC. INQUIRY 637 (2002) (evaluating the work of Collins & Skover and others). For other explorations of the significance of the media through which law is communicated, see generally Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489 (2002); Bernard J. Hibbits, “Coming to Our Senses”: *Communication and Legal Expression in Performance Cultures*, 41 EMORY L.J. 873 (1992); Glen Stohr, Comment, *The Repercussions of Orality in Federal Indian Law*, 31 ARIZ. ST. L.J. 679 (1999).

63. See Bergman, *supra* note 31, at 511-18 (discussing the theory suggesting this hypothesis and research examining it). Bergman traces the thinking on this subject back to Plato, who was highly skeptical of oral learning. *Id.* at 513.

expression.<sup>64</sup> In addition, limitations on human ability to hold orally communicated information in memory impair the ability to process the information in an intellectually complex fashion.<sup>65</sup> These observations led Paul Bergman to conclude that the mechanism of the jury trial “tolerates and even encourages decisions made not through the application of logic but through the use of common folk wisdom.”<sup>66</sup>

Consider now the situation of the appellate court. It must rely on text—specifically, a transcript of the proceedings below—to reconstruct what happened.<sup>67</sup> This is a radically different mechanism for delivery of information, and it has certain advantages over oral testimony.<sup>68</sup> Although the information conveyed by a transcript is perhaps less textured than that conveyed by the testimony it reflects, this might itself provide an advantage. As discussed in the next subsection,<sup>69</sup> some of the additional texture to which the fact finder is exposed, such as witness demeanor, might actually operate to mislead, and thereby to impede the fact-finding process. Thus, the appellate court’s ability to consider the testimony divorced from its nonverbal components may itself provide a competence advantage. In short, less information can result in more accurate fact finding.

A more obvious advantage of a transcript is that it represents a less ephemeral mode of communication. A jury or trial judge is

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64. *Id.* at 520.

65. *Id.* at 524.

66. *Id.* at 509. See generally Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989) (investigating juror fact finding through the lens of cognitive theory, and in so doing, touching on the effect of the oral nature of trials).

67. Typically, a transcript is not prepared until after the appeal process has commenced, and consequently a trial court would not have access to one. See FED. R. APP. P. 10, 11 (outlining requirements for preparation of the record on appeal and the transcript). As a result, the trial judge’s experience of the trial, like the jury’s, consists primarily of oral testimony. This reality suggests that trial judges’ evaluation of the evidence is subject to the same limitations as the jury’s evaluation, and thus amenable to the same correctives. Cf. Bergman, *supra* note 31, at 531 (“If the theory that oral discourse produces a different reasoning process than written text is correct, we would expect that trial judges and jurors should, as a general rule, arrive at similar results.”).

68. This assumption does not suggest that text is universally the best means of communicating information. For example, research suggests that a combination of audio and visual means is generally superior to text alone or auditory information alone. See, e.g., Richard E. Mayer & Roxana Moreno, *A Split-Attention Effect in Multimedia Learning: Evidence for Dual Processing Systems in Working Memory*, 90 J. EDUC. PSYCHOL. 312 (1998); Roxana Moreno & Richard E. Mayer, *Cognitive Principles of Multimedia Learning: The Role of Modality and Contiguity*, 91 J. EDUC. PSYCHOL. 358 (1999); Roxana Moreno & Richard E. Mayer, *Verbal Redundancy in Multimedia Learning: When Reading Helps Listening*, 94 J. EDUC. PSYCHOL. 156 (2002). Except to the extent that demonstrative exhibits are used (in which case the jury has the benefit of such a combination), neither trial-level fact finders (who will be restricted to a mostly oral presentation) nor appellate courts (who will be restricted to a mostly textual format) has the advantage of such a combination.

69. See *infra* Part I.B.2.

disadvantaged in that it has only a single opportunity to view a trial. Jurors may simply forget information provided early in the trial. Things that appear utterly insignificant at the outset—and thus are likely disregarded—may later turn out to be significant. Another problem is that juries may be required to keep many versions of the same story straight in their heads. Crime victims may be interviewed several times, by several different police officers, with a slightly different version of events emerging each time. Each eyewitness is likely to report having seen something different from the others. The defendant may have said one thing at one time and another thing at a different time. It is difficult enough to keep the details of a single statement present in one's mind over the course of a trial, let alone those of a series of related statements.

For an appellate judge viewing a transcript, the words on the page do not appear for only an instant, but instead remain to be reread and reconsidered.<sup>70</sup> This ability to “backloop” allows the reader to devote less effort to keeping information in memory and thus to allocate more cognitive resources to understanding the material.<sup>71</sup> The limitations of oral memory no longer constrain the intellectual operations that may be performed with the information conveyed. Information can now be placed side by side. Witness A's testimony can be contrasted directly with Witness B's. Factual and logical gaps that were not apparent in the constant flow of testimony can be uncovered and explored.

Purely in terms of attaining full comprehension of historical facts, this ability to revisit testimony can provide significant value. Here, again, everyday analogies abound. A second viewing of a play or a movie, for example, will reveal details and nuances missed in the first viewing. The viewer has to expend less effort simply following the story and can thus allocate more attention to the details. Moreover, the repeat viewer knows where the story will lead, and as a

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70. “Writing freezes oral utterances in place, and prevents a ‘system of elimination’ from operating. It is the permanence of words when they are in written form that gives rise to the hallmark of logical analysis, sequential thought, and the development of syllogisms.” Bergman, *supra* note 31, at 525.

71. See ONG, *supra* note 32, at 39-40 (discussing the differences between written and oral discourse).

Thought requires some sort of continuity. Writing establishes in the text a “line” of continuity outside the mind. If distraction confuses or obliterates from the mind the context out of which emerges the material I am now reading, the context can be retrieved by glancing back over the text selectively. Backlooping can be entirely occasional, purely *ad hoc*. The mind concentrates its own energies on moving ahead because what it backloops into lies quiescent outside itself, always available piecemeal on the inscribed page.

*Id.* at 39.

result knows which details are worthy of that attention. Certainly this analogy is not perfect. Trials are structured to address this limitation through the mechanism of the opening statement, which allows counsel to tell the jury where they believe the story will lead, and thus to provide jurors with some guidance concerning which details will be important. But counsel does not know exactly where the story will lead. Evidentiary rulings remain to be made, some of which could significantly impact how the trial unfolds. Witnesses may not testify as anticipated—a phenomenon more likely to occur in criminal trials, where pre-trial discovery is limited. What is more, the evidence in a trial almost necessarily comes in a cumbersome, disjointed fashion, presented witness-by-witness rather than according to chronology or some similar organizing principle. And much of the testimony is noise that is necessary to satisfy evidentiary prerequisites but at best tangentially useful in resolving the core disputes.<sup>72</sup> On balance, the format of a trial seems as likely to impede the fact finder's ability to analyze the evidence as to enhance it.

The appellate court's reliance on a transcript provides a final, less apparent advantage. As noted above, written text triggers a different thought process than oral language, one that is considerably more amenable to logical and abstract operations.<sup>73</sup> For example, the use of syllogisms, which are a primary tool of logical thought, arguably requires a textual medium.<sup>74</sup> Syllogisms may not be merely an act of thought, but "an act of graphic representation, in the sense that laying out an argument in this way is hardly a characteristic feature of oral discourse but . . . is one whose formal presentation depends upon the written word."<sup>75</sup> Thus, a transcript not only provides a better set of resources for certain types of fact finding, it also facilitates a mode of thinking that is more consistent with the ideal of legal thought. This point is easily overstated, however, and so it is important to bear in mind that, because the text that the appellate court has to work with

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72. See, e.g., FED. R. EVID. 901 (establishing a general condition to admissibility that exhibits are authenticated "by evidence sufficient to support a finding that the matter in question is what its proponent claims").

73. Indeed, Bergman characterized juror and appellate court thought processes as polar opposites. "[J]ury deliberations and appellate opinions are paradigm examples of the differences between oral and written cultures. They reflect not merely a difference in style, but in the very process of reasoning that produces a result." Bergman, *supra* note 31, at 529.

74. For discussions of the use of syllogistic reasoning in law, see, for example, STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 43-58 (2d ed. 1995); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 38-42 (1990). Judge Posner notes that "most legal questions are resolved syllogistically." *Id.* at 42 (emphasis omitted).

75. GOODY, *supra* note 59, at 279; see also ONG, *supra* note 32, at 33-34 (discussing the difficulties facing a member of a primarily oral culture seeking to work through a complex problem).

was not designed to be text, there are limitations on the operations the appellate court can perform with it. In other words, because the words in a transcript were used as part of oral communication, there remains the possibility that the words themselves do not autonomously represent the speaker's meaning.<sup>76</sup> Failure to appreciate this point might lead to the misinterpretation of testimony the meaning of which was, because the speaker employed cues not reflected in the transcript, clear to the trial-level fact finder. Even so, the larger point remains that its recourse to the text places the appellate court in the best position to think logically and abstractly about the testimony and evidence in a case. To return to the example of syllogisms, while the witness testimony reflected in a transcript is unlikely to contain explicit syllogistic components, the textual form of the information allows the reviewing court to reorder the information.<sup>77</sup> It can thereby test whether the information works as a syllogism, or at least whether it is consistent with a workable syllogism, and thus with logic. Abstract and logical thought, of course, is characteristic of our legal system.<sup>78</sup>

## 2. Witness Demeanor

As noted above, at the very core of the institutional competence justification for appellate deference is the notion that the jurors or the trial judge, who were actually present when the witnesses testified, enjoyed a far superior position from which to assess such things as credibility of those witnesses. The assumption underlying this justification, however, is flawed. Research consistently shows that people perform poorly at using demeanor to determine whether a person is telling the truth.<sup>79</sup> This is not because liars do not engage in types of behavior that, properly interpreted, are suggestive of

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76. Olson notes: "To serve the requirements of written language . . . all of the information relevant to the communication of intention must be present in the text. Further, if the text is to permit or sustain certain conclusions . . . then it must become an autonomous representation of meaning." Olson, *supra* note 31, at 277.

77. See GOODY, *supra* note 59, at 276-77.

78. See, e.g., Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366 (1978) ("Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering.")

79. See Paul Ekman, *Lying and Deception*, in MEMORY FOR EVERYDAY AND EMOTIONAL EVENTS 333 (Nancy L. Stein et al. eds., 1997); Aldert Vrij, *Nonverbal Communication and Credibility*, in PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 32 (Amina Memon et al. eds., 1998); Blumenthal, *supra* note 36, at 1189-1200; Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809 (2002).

deception, but rather because people focus on the wrong cues. Observers tend to focus on facial expressions, which are highly manipulable and therefore unreliable, rather than on speech patterns, which are better indicators of deception.<sup>80</sup> When the speaker and the observer are of different races or cultures, even more opportunities for mistranslation may exist, since behavioral cues thought to signal sincerity in one culture may be taken as signs of deception by members of another culture.<sup>81</sup> Even those who might be expected to have well-developed abilities to separate the lying from the truthful, such as law enforcement officers, forensic psychiatrists, lawyers, and judges, perform at little better than chance level in experimental settings.<sup>82</sup> What is more, there is no correlation between a person's confidence in her judgment that a person is lying and the accuracy of that judgment.<sup>83</sup> In short, the experimental evidence strongly suggests that the ability to observe demeanor is of no value in assessing witness credibility.

Of course, some caution is warranted in transferring these experimental findings to the trial setting. The design of trials might have some ameliorating effect.<sup>84</sup> In contrast to the experiments conducted to date, testimony at trials generally fits (or fails to fit) into a larger evidentiary context and is subject to cross-examination, both of which might allow for greater assessment of credibility on substantive grounds. The fact that juries make decisions as a group, including (at least implicitly) whether to credit testimony, might also be thought to provide some check on the ability of a witness to carry out a successful deceit. Yet those commentators who have considered

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80. Kassir, *supra* note 79, at 810 (citing studies). Consistent with this assertion, anecdotal evidence suggests that the blind may be better detectors of falsehood than the sighted. See Oliver Sacks, *A Neurologist's Notebook: The Mind's Eye: What the Blind See*, THE NEW YORKER, July 28, 2003, at 48, 56-57 (discussing the heightening of other senses in response to blindness and the resulting increased sensitivity to moods in other people).

81. See generally Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1 (2000).

82. Paul Ekman, *Why Don't We Catch Liars?*, 63 SOC. RES. 801 (1996). In one study, researchers tested a wide range of people, including law enforcement personnel from the Secret Service, CIA, FBI, National Security Agency, and California police departments, using a videotape showing ten people who either were lying or telling the truth in describing their feelings. Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 913 (1991). Prior assessments of the videotaped subjects established that there were measurable behavioral differences between those telling the truth and those lying. *Id.* at 915. Even so, of all the occupational groups tested, only members of the Secret Service performed at a rate better than chance. *Id.* at 913.

83. Kassir, *supra* note 79, at 810 (citing studies).

84. See Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1082 (1991) (identifying differences between the trial and experimental settings and ultimately rejecting the assertion that the design of trials has ameliorating effects).

the transferability of the experimental results to the trial setting have uniformly concluded that none of these features of trials enhance a juror's ability to decode witness demeanor. If anything, the trial setting may worsen the problem. Cross-examination may have a further distorting effect both because of the typically suspicious tone of the questioning, which has been shown to create a suspicious mindset in observers, and the stress caused in the witness, which may lead her to give off the sorts of behavioral cues that observers improperly associate with deception.<sup>85</sup> Further research has demonstrated that jurors' collective assessment of witness credibility tends to be based on demeanor rather than substance, with no suggestion that the dynamics of group decision making do anything to improve upon individual shortcomings in performing this task.<sup>86</sup>

It turns out that the best method for detecting lies is to listen without looking.<sup>87</sup> And, contrary to the lore of the legal system, research reveals that reading a transcript is a close second-best, with those basing their judgments on that basis performing nearly twice as effectively at detecting deceit as those exposed to both audio and visual cues.<sup>88</sup> Purely from the perspective of assessing witness credibility, then, there is a strong argument for no appellate deference to trial-level fact finders.<sup>89</sup>

### 3. The Advantages of Experience

Appellate judges may enjoy another competence advantage, at least vis-à-vis jurors, based simply on the fact that as repeat

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85. *Id.* at 1080; see Kassin, *supra* note 79, at 811-12 (discussing interrogation techniques and stating that it is doubtful "that one can easily distinguish between the person who is under stress because he is guilty and on the verge of being uncovered and the person who is under stress because he is innocent and stands falsely accused").

86. See Blumenthal, *supra* note 36, at 1158 (discussing research regarding jury resolution of witness disagreement); Wellborn, *supra* note 84, at 1081 (considering the inability of jury deliberation to enhance lie detection skills).

87. Blumenthal, *supra* note 36, at 1203; Kassin, *supra* note 79, at 810.

88. Blumenthal, *supra* note 36, at 1203.

89. Wellborn concluded that

[s]trictly with regard to accuracy of credibility judgments, the available evidence indicates that legal procedures could be improved by abandoning live trial testimony in favor of presentation of deposition transcripts. Transcripts are probably superior to live testimony as a basis for credibility judgments because they eliminate distracting, misleading, and unreliable nonverbal data and enhance the most reliable data, verbal content.

Wellborn, *supra* note 84, at 1091. Blumenthal characterized Wellborn's claims regarding the invalidity of demeanor evidence as "too extreme," but nonetheless conceded that the superiority of assessments based on transcripts over those made by observers exposed to misleading verbal cues provides "support for the claim that findings of credibility could be reviewed de novo by appellate courts." Blumenthal, *supra* note 36, at 1203 & n.288.



participants in the system, they are likely to have greater experience with the type of case at hand.<sup>90</sup> This provides them with a more expansive context in which to assess factual matters, which may lead to better, or at least more consistent, fact finding across the range of cases.

Consider, for example, the determination of punitive damages. The assessment of the appropriate amount of such damages is an almost entirely fact-driven endeavor, involving consideration of such factors as “the extent of harm or potential harm caused by the defendant’s misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved negligently, recklessly, or maliciously.”<sup>91</sup> Even so, awards of punitive damages are frequently criticized on the ground that they appear to be arbitrary and even irrational when viewed across the range of cases.<sup>92</sup> Drawing on a substantial body of psychological research,<sup>93</sup> Cass Sunstein and his coauthors, have suggested that this pattern of results is a natural function of human cognition.<sup>94</sup> Human thought is category bound, meaning that people tend to evaluate a given case with reference only to other situations involving the same sort of conduct or harm. This leads to inconsistencies between types of cases, since people do not naturally call upon their less directly related experiences in making their assessments. “When they consider an individual case of physical injury, or commercial fraud, the frame of reference for evaluation is usually a set of instances of the same kind of harm.”<sup>95</sup> Another difficulty arises from what Sunstein and his coauthors called the translation problem. While people do typically share intuitions

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90. In patent law, a disparity in experience and expertise has led to de novo appellate review of fact finding. See Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1037 (2003) (discussing appellate de novo review of factual questions in patent cases). In the patent system, the Federal Circuit hears all appeals, and, for this and other reasons, it enjoys a position of comparative fact finding superiority vis-à-vis district courts and the Patent and Trademark Office. See *id.* at 1040 (discussing the argument that the Federal Circuit has fact-finding capabilities superior to those of the other decision makers in the patent system). Even so, Rai is critical of this arrangement, based in part on the assumption that “appellate courts are hardly equipped for fact finding.” *Id.*

91. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 446 (2001) (Ginsburg, J., dissenting). The Court in *Cooper* took pains to distinguish punitive damages awards from other sorts of factual determinations. *Id.* at 432-40.

92. See David A. Schkade, *Erratic by Design: A Task Analysis of Punitive Damages Assessment*, 39 HARV. J. ON LEGIS. 121, 121-22 (2002) (discussing criticisms).

93. For a representative collection of this work, see CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds., 2000).

94. See generally Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153 (2002).

95. *Id.* at 1155.

regarding the seriousness of harms within a category,<sup>96</sup> they do not share a sense of how harm ought to translate into a monetary award. The factors used to translate the relevant legal concept, such as the level of harm to the victim or the blameworthiness of the actor's state of mind, into dollars accordingly vary based on random or irrelevant considerations. As a consequence, juries that likely share an assessment of the relative seriousness of their cases might nonetheless impose inconsistent punishments because they arrived at different translation factors.<sup>97</sup>

Sunstein and his coauthors suggested that one of the implications of their analysis would be to provide reviewing courts with greater authority to assess the appropriateness of punitive damage awards on the grounds that, having seen more cases, those courts enjoy a superior position from which to place any given case within the overall framework of cases.<sup>98</sup> Put another way, appellate courts could act to ensure at least some level of uniformity in the translation factors used by juries across the range of cases. There are limitations to this suggestion, including the fact that judges are human and are themselves susceptible to the same sorts of cognitive errors that jurors make.<sup>99</sup> But so long as the review mechanism is structured to require reviewing courts to make the appropriate comparisons, providing for enhanced review should lead to greater consistency among awards, a point the Supreme Court appears to have at least implicitly realized.<sup>100</sup>

Similar dynamics exist with respect to other types of issues. Consider, for example, eyewitness identification testimony. In criminal cases, misidentifications represent one of the most frequent causes of wrongful convictions.<sup>101</sup> The literature on the shakiness of eyewitness identification testimony is well established, and courts have acknowledged the untrustworthiness of this evidence.<sup>102</sup> Indeed,

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96. For example, if provided with a set of personal injuries, generally people consistently rank the relative seriousness of the injuries. *Id.* at 1158.

97. *Id.* at 1167-68.

98. *Id.* at 1182-83.

99. *Id.*

100. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2001) (noting that courts reviewing a punitive damage award must assess its consistency with "civil penalties authorized or imposed in comparable cases" and concluding that this evaluation "which calls for a broad legal comparison, seems more suited to the expertise of appellate courts" relative to trial courts).

101. See BARRY SCHECK ET AL., ACTUAL INNOCENCE app. at 263 (2000) (showing that in fifty-two out of sixty-two cases involving wrongful convictions, mistaken identification was a factor).

102. In the words of Justice Frankfurter:

What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such

some courts have at least suggested that convictions based largely on eyewitness testimony might be subjected to greater scrutiny in the context of sufficiency review.<sup>103</sup> There is, in short, a good deal of judicial experience with this issue. Jurors, even though instructed on the evaluation of eyewitness testimony,<sup>104</sup> lack the broader suspicion of this evidence necessary to engage in a consistent or sophisticated evaluation of it. This is exacerbated by the jury's susceptibility to the dangers associated with the evaluation of demeanor evidence. That is, the jury might be swayed by a witness' confident statement of identification, and fail to focus on factors that call the statement into question.

This is not to suggest that appellate courts enjoy a competence advantage with respect to all eyewitness testimony. There will, of course, be many cases in which the identification testimony is not questionable, such as when the witness identified someone whom he or she knew previously or when the witness had a sufficient opportunity to view the perpetrator of the crime. As a result, it will not be the case that every trial involving eyewitness testimony will present either the need or the opportunity for greater factual scrutiny by an appellate court. But when the identification occurs under questionable circumstances, such as when the lighting was poor, or

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testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.

FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927). Twenty years ago the Second Circuit stated the problem as follows:

There can be no reasonable doubt that inaccurate eyewitness testimony may be one of the most prejudicial features of a criminal trial. Juries, naturally desirous to punish a vicious crime, may well be unschooled in the effects that the subtle compound of suggestion, anxiety, and forgetfulness in the face of the need to recall often has on witnesses. Accordingly, doubts over the strength of the evidence of a defendant's guilt may be resolved on the basis of the eyewitness' seeming certainty when he points to the defendant and exclaims with conviction that veils all doubt, "That's the man!"

*Kampshoff v. Smith*, 698 F.2d 581, 585 (2d Cir. 1983) (footnote and citation omitted). Thus, "while juries may be led by their experience to believe their eyes, and, by inference, what they hear from those who have seen, the experience of law and psychology has been that eyewitness testimony may sometimes be the least trustworthy means to identify the guilty." *Id.*

103. See, e.g., *State v. Walker*, 310 N.W.2d 89, 90 (Minn. 1981) ("[W]e have recognized that not all single eyewitness cases are the same and have emphasized that when the single witness' identification of a defendant is made after only fleeting or limited observation, corroboration is required if the conviction is to be sustained."); *State v. Ani*, 257 N.W.2d 699, 700 (Minn. 1977) (suggesting more broadly that "[t]he absence of corroboration in an individual case . . . may well call for a holding that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt." (quoting Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1391 (1972) (emphasis omitted))).

104. See, e.g., *MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT* §4.14 (2000) (describing factors for jurors to consider in evaluating eyewitness identification testimony).

when the witness had only a brief glimpse of the perpetrator, the appellate court's superior learning on the fallibility of such testimony may make it appropriate for the court to consider whether the testimony ought to be given much credence.

#### 4. Circumstantial and Documentary Evidence

Historically, courts reviewing cases in equity had the broad ability to reconsider factual as well as legal matters.<sup>105</sup> More recently, the most express recognition of the role that appellate courts can play in assessing evidentiary weight has appeared in the context of convictions based in part on circumstantial or documentary evidence; in each context the appellate courts have, at one time or another, expressly assumed the right to review those portions of the evidence anew. Further, in each situation the stated justification centers on appellate courts' institutional competence to deal with the type of evidence at issue.

Circumstantial evidence is, of course, to be contrasted with direct evidence, with the distinction turning on "whether or not the evidence requires the trier to reach the ultimate factual proposition to which the evidence is addressed by a process of inference."<sup>106</sup> Thus, for example, testimony that a witness saw the defendant committing an assault is direct evidence that he did so, while testimony that the defendant possessed the weapon used in the assault is circumstantial evidence of the same proposition. In the latter situation, the jury must not only consider whether to credit the testimony, but also whether and to what extent the information testified to, if believed, supports the conclusion that the defendant was in fact the assailant. In some federal courts in the past,<sup>107</sup> and in some states even now,<sup>108</sup>

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105. Clark & Stone, *supra* note 2, at 190; see Christie, *supra* note 3, at 16 n.5.

106. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 48 (3d ed. 1996).

107. For a detailed history, see Robert J. Gregory, *Whose Reasonable Doubt? Reconsidering the Appropriate Role of the Reviewing Court in the Criminal Decision Making Process*, 24 AM. CRIM. L. REV. 911, 940-57 (1987) (discussing the role of inferences and the standard of review); see also 2 CHILDRESS & DAVIS, *supra* note 1, § 9.06 (discussing the "hypothesis of innocence" doctrine).

108. In Minnesota, for example, the articulated standard is as follows:

[A] conviction based entirely on circumstantial evidence merits stricter scrutiny than convictions based in part on direct evidence. In such cases "the circumstantial evidence must do more than give rise to suspicion of guilt; 'it must point unerringly to the accused's guilt.'" . . . [O]n appeal a conviction based on circumstantial evidence may stand "only where the facts and circumstances disclosed by the circumstantial evidence form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilt."

State v. Jones, 516 N.W.2d 545, 549 (Minn. 1994) (citations omitted).

appellate courts reviewing convictions based on circumstantial evidence did so under a standard pursuant to which the court was to consider whether guilt was the only reasonable hypothesis flowing from the evidence.<sup>109</sup> This standard assumes that an appellate court is as qualified to draw inferences from circumstances as a trial judge or jury, because the process of reasoning from the circumstantial evidence to the conclusion that the relevant element of the offense was satisfied involves only reasoning, and not any of the weighing or assessing of evidence thought to be within the particular competence of the jury. Thus, while it would remain the province of the jury to determine whether to believe the testimony that the defendant possessed the weapon, the appellate court would be entitled to consider anew whether the only rational inference from his possession of the weapon is that he committed the crime. When circumstantial evidence provided a material portion of the government's support for an ultimate fact in the case, then, the appellate court would have an appropriate role in determining whether that evidence established guilt beyond a reasonable doubt.<sup>110</sup>

The second context where the appellate courts have expressly assumed the right to review evidence anew involves documentary evidence. Written evidence, of course, has no demeanor, nor does the fact finder enjoy any other advantages as a result of being present in the courtroom when such evidence is introduced.<sup>111</sup> In consequence, some courts have taken the position that when evidence is in written form—be it a document or a transcript of deposition testimony—an appellate court is just as competent to assess that evidence as is a trial court, and therefore ought to be able to do so.<sup>112</sup> Perhaps because criminal cases are considerably less likely to involve situations in which a material portion of the evidence is documentary, this exception to the general rule of appellate deference has only been developed to a significant degree in the civil context,<sup>113</sup> and there primarily in the context of appellate review of the trial judge's factual findings.<sup>114</sup> As has happened with cases based on circumstantial

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109. For a thorough discussion of the history of this standard and an argument that it ought to be revived, see generally Gregory, *supra* note 107.

110. See *id.* at 951-52 (summarizing the applicable standard).

111. Indeed, some courts advanced this reasoning even beyond written evidence to include any undisputed witness testimony. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 2.09(B) (2d ed. 1992).

112. See Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 518-20 (1963) (discussing the "gloss" approach).

113. For a criminal case considering the exception, see *United States v. Jabara*, 644 F.2d 574, 577 (6th Cir. 1981) (refusing to review the record de novo).

114. See generally 1 CHILDRESS & DAVIS, *supra* note 111, § 2.09.

evidence, federal courts have almost completely returned to the position of appellate deference in this context,<sup>115</sup> with a few states still implementing the exception.<sup>116</sup> The point, however, is not whether courts continue to apply these rules. It is that courts have recognized that there are situations in which appellate courts are at least as competent as trial-level fact finders when it comes to assessing evidence.

Here, too, the logic underlying greater appellate scrutiny can be extended to cover analogous forms of evidence,<sup>117</sup> such as certain types of hearsay. The classic definition of hearsay is an “out of court statement. . . offered to prove the truth of the matter asserted.”<sup>118</sup> Among the reasons for the general exclusion of hearsay is the absence of a testifying witness for the jury to evaluate. “A testifying witness gives her evidence on the stand under the gaze of the trier of fact, and her demeanor provides valuable clues about meaning and credibility.”<sup>119</sup> Yet much of what falls within the classic definition of hearsay is admitted under one of the many exceptions to the rule.<sup>120</sup> While a jury might have an opportunity to assess the hearsay declarant’s demeanor—a statement that falls within the definition is

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115. The Rules of Civil Procedure were amended to address this situation expressly. See FED. R. CIV. P. 52(A) (providing that “[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous”); see also *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) (rejecting, prior to amendment of Rule 52, the contention that it allows for less deferential review of documentary evidence); 1 CHILDRESS & DAVIS, *supra* note 111, § 2.09(D) (discussing the amendment of Rule 52 and recent cases). For a recent example of a court dealing with one of the lingering effects of its prior body of law regarding the review of documentary evidence, see *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 167-72 (2d Cir. 2001) (discussing the implications of the now-displaced “*Orvis*” rule, under which a district court’s factual determinations are reviewed de novo).

116. See, e.g., *Cane & Long*, *supra* note 39 (criticizing the continued differential treatment of documentary evidence on appeal in Wisconsin).

117. Other possibilities might include: cases involving accomplice testimony, see, e.g., Arthur L. Alarcon, J., *Suspect Evidence: Admissibility of Co-Conspirator Statements and Uncorroborated Accomplice Testimony*, 25 LOY. L.A. L. REV. 953, 953 (1992) (noting that, in such cases, “the question whether a conviction rests on sufficient evidence is perhaps one of the most troubling in appellate review” and lamenting the appellate court’s lack of ability to reweigh such evidence), cases involving other bad acts evidence admitted under one of the exceptions to the general prohibition set forth in Federal Rule of Evidence 404(b), and cases where evidence has been introduced subject to a limiting instruction charging the jury not to use the evidence for impermissible purposes, see CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 1.16 (3d ed. 2003) (noting the concern that limiting instructions, beyond merely being ineffective as prophylactics, might “do more to sensitize the jury to evidence than to dispel the risk that the jury will misuse it”).

118. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES* 123 (4th ed. 2000).

119. MUELLER & KIRKPATRICK, *supra* note 117, § 8.3, at 698.

120. MUELLER & KIRKPATRICK, *supra* note 118, at 124.

hearsay even if the declarant testifies as a witness at trial—it might not.<sup>121</sup>

When the hearsay statement of a non-testifying witness is allowed into evidence, the situation is analogous to that of documentary evidence.<sup>122</sup> The jury has received a statement that is not accompanied by any of the contextual cues that we look to juries to unravel. What it has, in other words, is at best nothing better than what an appellate court can obtain by reading a transcript. At worst, the jury could be misled by the demeanor of the witness who testifies to the content of the hearsay statement, attributing its assessment of the credibility of the witness to the actual declarant. Either way, the reviewing court would be competent to assess this testimony, and based on that assessment to evaluate the sufficiency of the entirety of the evidence supporting the conviction.

### *C. Institutional Competence and the Role of Appellate Courts in Reviewing Facts*

It is clear that institutional competence, typically the only justification offered in favor of appellate deference to trial-level fact finders, fails to explain all, or perhaps even most, of the deference purportedly accorded pursuant to the standards governing such review. This is not to suggest that there are no fact-finding tasks that juries and trial judges perform better than appellate courts, but rather that both the category of such tasks and, in many cases, the magnitude of the competency advantage are considerably smaller than generally acknowledged. Nor does the at least partial failure of the institutional competence justification suggest that other factors might not justify some degree of appellate deference. But it does suggest the need for reexamination of the governing standards, and for consideration of adjustments in light of that analysis. The next Part takes up that project.

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121. The exceptions to the general hearsay prohibition contained in Federal Rule of Evidence 803 apply regardless of whether the declarant is available to testify at trial, and those contained in Federal Rule of Evidence 804 apply only if the declarant is not available.

122. Indeed, most documentary evidence would qualify as hearsay. See MUELLER & KIRKPATRICK, *supra* note 117, § 8.1, at 694-95 (“[T]he hearsay doctrine embraces not just oral statements, but written ones too.”).

## II. SUFFICIENCY REVIEW IN CRIMINAL AND CIVIL CASES

Among the various explanations<sup>123</sup> for the maintenance of separate civil and criminal systems is the notion that, because of the greater stakes involved in criminal litigation, greater procedural safeguards are required. Justice Harlan nicely summarized this viewpoint in his concurring opinion in *In re Winship*.<sup>124</sup> Building on the observation that the standard of proof utilized by the trier of fact affects the comparative frequency of false positive and false negative outcomes,<sup>125</sup> he noted that “the reason for different standards of proof in civil as opposed to criminal litigation [is] apparent.”<sup>126</sup> Civil suits typically involve two private parties disputing whether one owes money damages to the other. In that context, Harlan continued, “we view it as no more serious in general for there to be an erroneous verdict in the defendant’s favor than for there to be an erroneous verdict in the plaintiff’s favor.”<sup>127</sup> The preponderance of the evidence standard is thus appropriate in the civil context because it has little if any tendency to generate erroneous verdicts disproportionately in favor of plaintiffs or defendants. “In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.”<sup>128</sup> We instead view human liberty as a transcendent interest, and accordingly seek to reduce the number of erroneous determinations against defendants by requiring the government to establish guilt beyond a reasonable doubt.<sup>129</sup>

This asymmetric concern for factual accuracy in criminal cases suggests that any disparity between appellate courts’ willingness to reexamine facts in the context of a challenge to the sufficiency of the evidence in the criminal context versus the civil context would run in

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123. For a brief overview of the justifications for the maintenance of the two systems, see Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 202-09 (1996).

124. *In re Winship*, 397 U.S. 358, 368-75 (1970) (Harlan, J., concurring).

125. *Id.* at 370-71 (“In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff’s favor. The criminal analogue would be the acquittal of a guilty man. The standard of proof influences the relative frequency of these two types of erroneous outcomes.”).

126. *Id.* at 371.

127. *Id.*

128. *Id.* at 372.

129. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).



favor of greater scrutiny in the former setting.<sup>130</sup> There, the benefit arising from any enhancement in factual accuracy—the reversal of a wrongful conviction—is high, presumably high enough to offset even a substantial investment of systemic resources toward its achievement. Moreover, even if the appellate court errs—resulting in the reversal of a just conviction—the cost of that error is regarded as comparatively low, merely a tenth the value of the corresponding gain according to the common formulation,<sup>131</sup> if not less. So far as accommodation of this dynamic is concerned, then, it suggests that appellate courts ought to be relatively aggressive in attempting to achieve greater factual accuracy.

Civil cases involve no such asymmetry. The benefit of a correct reversal based on factual reconsideration—reversing, say, a verdict against a defendant who ought not have been held liable—is roughly, if not exactly, the same as the cost of an erroneous reversal, at least over the run of cases. This suggests that appellate review ought to be comparatively less aggressive, perhaps restricted to those situations in which the appellate contribution to accuracy is reasonably certain.

To be sure, factual accuracy is not the only end of either civil or criminal litigation, nor is assuring correct results in individual cases the only function of appellate review.<sup>132</sup> Many other considerations might lead to the conclusion that appellate courts should avoid factual assessment even as to matters on which they enjoy clear superiority. Accordingly, this Part examines both the doctrinal and functional treatment of fact finding in both the civil and criminal contexts. Although many potential opportunities for factual reconsideration arise on appeal,<sup>133</sup> the focus here is primarily on appellate treatment of claims that the evidence at trial was insufficient to support the verdict rendered. Though such claims are often characterized as involving questions of “ultimate fact,” they also serve as the primary mechanism through which appellate courts oversee the historical fact-

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130. Cf. Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 729 (1993) (outlining arguments for why divisions of decisional authority between juries and courts ought generally to be the same in the civil and criminal settings).

131. See *supra* note 17.

132. See Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 247-56 (1991) (considering the argument that the only proper role for appellate courts is to develop and maintain the uniformity of legal doctrine).

133. Harmless error review represents another situation where the recognition of appellate fact-finding capabilities could have a significant impact, particularly given that appellate courts are arguably more involved in fact assessment in that context than in the context of sufficiency review. See *infra* text accompanying notes 222-224.

finding process,<sup>134</sup> since they place the appellate court in the position of potentially displacing the jury as to the performance of its core function. This Part thus discusses the formulation of the applicable standards of review and courts' application of those standards. Evidence concerning that application suggests, contrary to the hypothesis set forth above, that appellate courts are quite willing to reexamine the work of juries and trial judges in civil cases, while they almost never do so in criminal cases. The analysis proceeds to consider whether factors other than institutional competence might account for either the formulation of the standards or their manner of application. On the criminal side, these questions have not been thoroughly explored, and the discussion here considers them in detail. On the civil side, in contrast, a number of recent scholarly articles have examined these issues. The discussion here relies heavily on that work, and as a consequence is relatively brief.

### *A. Insufficiency of the Evidence in Criminal Appeals*

Although both the original Constitution<sup>135</sup> and the Bill of Rights<sup>136</sup> provide for jury trial in criminal cases, there are important differences between these provisions and the Seventh Amendment's guarantee of the right to jury trial in civil cases. The Seventh Amendment specifically prohibits reexamination of jury fact finding,<sup>137</sup> whereas the Sixth Amendment does not. Perhaps more fundamentally, the structure created by the Bill of Rights allows for asymmetric reexamination in criminal cases. Thus, "[i]f a properly instructed jury voted to convict, a judge could set aside the conviction, but if that jury voted to acquit, reexamination was barred."<sup>138</sup> And while notions of democratic participation and public education may have played a role in the formulation of the Sixth Amendment just as in the Seventh,<sup>139</sup> the Court has held that the right to a jury trial is a

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134. Louis, *supra* note 22, at 1019.

135. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art III, § 2, cl. 3.

136. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

137. See U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

138. AKHIL REED AMAR, *THE BILL OF RIGHTS* 97 (1998).

139. *Id.* at 104, 110-13.

criminal defendant's alone.<sup>140</sup> Thus, the Constitution presents no obstacle to appellate reexamination of the facts supporting a conviction.

Indeed, in the 1930s (when the problem of wrongful convictions last garnered the sort of widespread interest it receives today),<sup>141</sup> proposals for appellate review of the facts underlying convictions were prevalent,<sup>142</sup> and assumed the appropriateness and power on the part of the appellate court to revisit anew such matters as witness credibility.<sup>143</sup> Lester Orfield identified four proposals for implementing appellate review of facts, ranging from appellate examination of "all the facts set out in the full record of the proceedings below," as the narrowest form, to "a complete retrial of the case," as the broadest.<sup>144</sup> Intermediate approaches would have allowed appellate courts to call new witnesses or receive other evidence not considered in the trial court in limited circumstances.<sup>145</sup> All of these proposals would have compelled substantial appellate engagement in the fundamental question of the defendant's guilt or innocence, and would likewise have required little deference to the determinations of the trial-level fact finder.

Given the practical implications of Orfield's proposed review mechanisms, it is not surprising that they have not been offered in the current debate as realistic solutions to the wrongful convictions problem. In part, this has to do with the increased burden such

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140. See *Patton v. United States*, 281 U.S. 276, 288-89, 299 (1930).

141. Widespread interest in the problem of wrongful convictions in the 1930s appears to have been largely the result of the Sacco-Vanzetti case, together with the publication of Edwin Borchard's *Convicting the Innocent* in 1932. See Leonard J. Shapiro, *Criminal Appeal on the Facts and the Federal Judicial System*, 34 ILL. L. REV. 332, 332 (1939) (attributing interest in the issue to the Sacco-Vanzetti case).

142. ORFIELD, *supra* note 34, at 77-91; Blume, *supra* note 35, at 71-72; Shapiro, *supra* note 141, at 342. The American Law Institute's proposed Code of Criminal Procedure provided that "the appellate court shall review the evidence to determine if it is insufficient to support the judgment where this is a ground of appeal and may review the evidence whether its insufficiency is a ground of appeal or not." AM. LAW INST., CODE OF CRIMINAL PROCEDURE § 457(2) (Official Draft 1930).

143. See ORFIELD, *supra* note 34, at 81-82 (contrasting review for sufficiency with review of the facts, which includes a review of such things as witness credibility).

144. *Id.* at 82-83; see also Shapiro, *supra* note 141, at 342.

145. In an intermediate form, and the form in which it is most commonly referred to in England it would mean review of the whole record, with a power in the appellate court to call new witnesses where there is doubt, or obscurity, or overlooking. A slight variant of review merely of the full record is to allow the appellate court to receive evidence not offered below, provided the issue is "capable of proof by record or other incontrovertible evidence." A highly interesting, but perhaps impracticable proposal, is that of permitting the appellate court, like the pardoning authority or an administrative tribunal, to call on the prosecuting attorney or on the police directly to make inquiries for their information.

ORFIELD, *supra* note 34, at 82-83.

review would impose on appellate courts. Consider Orfield's narrowest alternative. If all of the facts remained entirely open to reconsideration in the appeal of every conviction, then every appeal—even one limited to reconsideration of the facts that were before the jury—could potentially include a claim that would succeed if the appellate court could be persuaded to adopt a different interpretation of the evidence than the jury did. Given that appeals are without cost to most criminal defendants,<sup>146</sup> adoption of even this alternative would arguably result in a substantially increased burden on appellate courts as a result of an increased number of such claims, coupled with the greater investment of judicial resources required to reassess witness credibility and thus properly adjudicate the claims.<sup>147</sup> Orfield's broader proposals, all of which would involve the reviewing court to some degree in the consideration of new evidence, would certainly increase the appellate burden. In a world where the dockets of appellate courts have grown to the point where commentators routinely speak of a "crisis of volume,"<sup>148</sup> proposals that bring the possibility of a significant increase in the courts' workload simply do not represent realistic avenues for reform.

### 1. *Jackson v. Virginia* and the Prevailing Standard of Review

The prevailing standard by which appellate courts evaluate insufficiency claims in the criminal context was first articulated by the Court in *Jackson v. Virginia*.<sup>149</sup> The precise question before the Court concerned whether its holding in *In re Winship*<sup>150</sup> had any implications

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146. See Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, LAW & CONTEMP. PROBS., Winter 1995, at 31-32 (noting that in many jurisdictions up to 90 percent of defendants are represented by indigent defense programs). This is not to say that every defendant would make such a claim, even were they allowed. While the appeal may cost nothing to the defendant, and thus it makes sense from his perspective to make the argument even if it is likely to fail, the limited resources of appointed counsel make it unlikely that well-developed arguments on these grounds would, as a practical matter, appear in most appeals.

147. As this Article argues below, it is not entirely clear that the effort involved in assessing these claims would, in fact, be significantly greater than that involved in many other sorts of claims that appellate courts routinely address. See *infra* text accompanying notes 223-224. It is not clear that many defendants choosing to raise a factual claim would not substitute it for, rather than add it to, the claim or claims that they would have made if factual review were not available. Even so, the mere possibility that the sort of factual review contemplated by Orfield would dramatically increase the burden on appellate courts makes its adoption inconceivable in the present environment.

148. See, e.g., DANIEL J. MEADOR ET AL., APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES AND PERSONNEL 329-545 (1994) (discussing the "crisis of volume" and the various responses to it).

149. 443 U.S. 307 (1979).

150. 397 U.S. 358 (1970).

for the manner in which appellate courts are to review insufficiency of the evidence claims. In *Winship* the Court held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."<sup>151</sup> The problem facing the Court in *Jackson*, then, was how this requirement was to be implemented. On the one hand, due process could require merely that the fact finder be accurately instructed that it must apply the reasonable doubt standard, which was the position that the courts of appeals had generally taken.<sup>152</sup> Under this view, the reviewing court's role would be limited to applying the test of *Thompson v. City of Louisville*, which allowed for reversal only if there was "no evidence" in the record to support the conviction.<sup>153</sup> On the other hand, due process could require reviewing courts to determine not only whether some evidence existed in support of a conviction, but further whether that evidence met the constitutional standards articulated in *Winship*. The Court chose the latter alternative. To the majority it was "clear"<sup>154</sup> that the logic of *Winship* requires something more than a "trial ritual."<sup>155</sup> Because even properly instructed juries will sometimes convict<sup>156</sup> when the evidence does not support the conclusion of guilt beyond a reasonable doubt, "[a] doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence."<sup>157</sup>

It is difficult to divine, however, exactly how the Court intended that this requirement be implemented. As one commentator put it: "[o]ther than conveying the obvious—that the reviewing court does not retry the case—the Court's pronouncement provides little

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151. *Id.* at 364.

152. *Jackson*, 443 U.S. at 316.

153. *Thompson* involved convictions for loitering and disorderly conduct, based entirely on evidence that police officers observed Thompson dancing alone in a café where he had been for approximately thirty minutes while waiting for a bus and evidence that Thompson questioned officers after his arrest. 362 U.S. 199, 200 (1960). The Court's opinion in the case contains little constitutional analysis. See generally 362 U.S. 199. Instead, from a thorough review of the scant evidence in the record and the ordinances on which the charges were based the Court concluded that there was "no evidence in the record whatever to support these convictions" and that Thompson's convictions must be reversed because it is "a violation of due process to convict and punish a man without evidence of his guilt." *Id.* at 206. For a standard comparable to that in *Thompson*, see *American Tobacco Co. v. United States*, 328 U.S. 781, 787 n.4 (1946), and *Mortensen v. United States*, 322 U.S. 369, 374 (1944).

154. *Jackson*, 443 U.S. at 314.

155. *Id.* at 316-17.

156. "[A]nd the same may be said of a trial judge sitting as a jury." *Id.* at 317. Indeed, *Jackson* actually involved a bench trial. The Court expressly indicated that whether a judge or jury was the trier of fact had no bearing on the standard the court should apply. *Id.* at 317 n.8.

157. *Id.* at 317.

guidance regarding [an appellate] court's proper role in the criminal decision making process."<sup>158</sup> The *Jackson* opinion contains at least nine sentences or fragments thereof that can be viewed as reflecting the opinion's core proposition, and they are not entirely consistent.<sup>159</sup> Indeed, this inconsistency formed the basis of much of the criticism of the *Jackson* decision. Because the Court did not clearly outline the parameters of the standard it adopted, each of the possibly key phrases in the opinion can be read to require a somewhat different focus on the part of reviewing courts.

Judge Newman of the Second Circuit, for example, has observed that *Jackson* conveys two "quite different thoughts."<sup>160</sup> He

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158. Gregory, *supra* note 107, at 912.

159. In the order in which these sentences appear: (1) The Court notes at the end of the first section of the opinion that it granted certiorari to consider the claim that "a federal habeas corpus court must consider not whether there was *any* evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." 443 U.S. at 312-13. (2) In the penultimate sentence of the next paragraph, we learn that "the question to be decided in this case is whether any rational fact finder could have concluded beyond a reasonable doubt that the killing for which the petitioner was convicted was premeditated." *Id.* at 313. (3) The first sentence of the next paragraph heralds this as the first case "to expressly consider the question whether the due process standard recognized in *Winship* constitutionally protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." *Id.* at 313-14. (4) Following a review of the pedigree of *Winship* and a consideration of prevailing approaches in the federal courts of appeals, the Court reasons that "[a] doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence." *Id.* at 317. (5) Thus, because the "reasonable doubt" standard is based upon reason, a jury verdict upon evidence upon which "no rational trier of fact could find guilt beyond a reasonable doubt" requires reversal. *Id.* (6) Moreover, because federal courts must assess even historic facts when examining the application of constitutional standards to state-court convictions, the Court proclaims that *Winship* compels that "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. (7) In limitation of the preceding sentence, however, the Court disclaims any requirement that appellate courts review the evidence anew. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. (8) In considering the state's statutory argument that sufficiency claims ought not to be cognizable on habeas, the Court states, "[I]t is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim." *Id.* at 321. (9) Finally, in wrapping up its consideration of the statutory argument, the Court holds that an "applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Id.* at 324.

160. Newman, *supra* note 17, at 987. Justice Stevens also observed that the majority opinion in *Jackson* referenced two arguably distinct standards without either acknowledging the difference or choosing between them. 443 U.S. at 334 n.8 (Stevens, J., concurring); see also Diane Kutzko, Comment, *The Jackson v. Virginia Standard for Sufficiency of the Evidence*, 65

focused on two sentences in the opinion. The first is the Court's statement that "[a]fter *Winship* the critical inquiry . . . must be . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."<sup>161</sup> Judge Newman viewed this sentence as setting forth what he characterizes as the more traditional test, pursuant to which the inquiry is whether a reasonable jury, the sort of unitary fictional construct used throughout the law, could have found guilt beyond a reasonable doubt.<sup>162</sup> In the second sentence, the Court states that "the relevant question is whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>163</sup> Judge Newman argued that this formulation, by its incorporation of the word "any," creates a less stringent standard that "shifts the emphasis away from the law's construct of the reasonable jury and conjures up the image of a vast random distribution of reasonable juries, with the risk of creating the misleading impression that just one of them need be persuaded beyond a reasonable doubt."<sup>164</sup> Adding to the confusion over what the Court may have meant by the "any rational trier of fact" formulation is that it was entirely of the Court's making. No such standard had previously been used in any American jurisdiction.<sup>165</sup>

Another source of confusion stems from the inherent slipperiness of the concept of proof beyond a reasonable doubt. Although *Winship* holds that a conviction may only rest on proof that meets this standard, and *Jackson* charges appellate courts with ensuring that *Winship*'s mandate is satisfied, nobody is quite certain precisely what the standard means. The Supreme Court has stayed clear of giving any precise content to the term, and has held that the Constitution does not require any particular definition of "reasonable doubt," or that it be defined at all, so long as "taken as a whole, the

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IOWA L. REV. 799, 800 n.12 (1980) (noting the possibility that the Court articulated two, distinct standards).

161. 443 U.S. at 318.

162. Newman, *supra* note 17, at 987.

163. *Jackson*, 443 U.S. at 319.

164. Newman, *supra* note 17, at 987; *see also* 2 CHILDRESS & DAVIS, *supra* note 1, at 9-6 to 9-7 (noting the possibility of differences between these and other formulations of the standard).

165. Newman, *supra* note 17, at 992. Newman notes that, "prior to *Jackson*, no federal court had ever used the phrase 'any rational trier' or 'any rational jury' in determining whether the evidence in a criminal case was sufficient." *Id.* at 992. Justice Stevens criticized the majority for failing to consider what standards state courts applied at the time. *Jackson*, 443 U.S. at 332 n.4 (Stevens, J., concurring). Such a consideration would have revealed that some state and federal courts utilized standards that incorporated the concept of a rational juror, though not "any" rational juror. *See* Edward Imwinkelreid, *Jackson v. Virginia: Reopening the Pandora's Box of the Legal Sufficiency of Drug Identification Evidence*, 73 KY. L.J. 1, 17-22 (1984) (discussing the pre-*Jackson* standards for assessing the legal sufficiency of prosecution evidence).

instructions . . . correctly convey the concept of reasonable doubt to the jury.”<sup>166</sup> Indeed, some courts have gone so far as to prohibit, or at least strongly discourage, lower courts and prosecutors from attempting to further define the standard.<sup>167</sup>

The imprecision of the “beyond a reasonable doubt” standard suggests that it will be interpreted inconsistently from one jury to the next, a hypothesis supported by empirical research.<sup>168</sup> This imprecision creates problems for an appellate court attempting to apply a standard of review that requires it to determine whether a

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166. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994). For a brief history of the beyond a reasonable doubt standard, see Gregory, *supra* note 107, at 913-17. Other courts similarly have shied away from attempts to lend content to the reasonable doubt standard beyond that which is conveyed by its words and their accumulated baggage. As Justice Mitchell wrote for the Minnesota Supreme Court over a century ago:

The term “reasonable doubt” is almost incapable of any definition which will add much to what the words themselves imply. In fact it is easier to state what it is not than what it is; and it may be doubted whether any attempt to define it will not be more likely to confuse than to enlighten a jury.

*State v. Sauer*, 38 N.W. 355, 356 (Minn. 1888). Judge Posner echoed this reasoning in an opinion written one hundred years later:

But ordinarily the district judge will be well advised to attempt no definition of reasonable doubt. . . . This advice reflects experience (almost uniformly negative) with attempts to define the term rather than a dogmatic insistence on its resistance to definition or its self-evident quality. The verbal elaborations that have been tried appear to add little if any substance to the meaning conveyed by the term itself; deeply entrenched in the popular culture as it is, the term “beyond a reasonable doubt” may be the single legal term that jurors understand best. Definitions that translate the term into a probabilistic measure, while they may add content, are apt to mislead the jurors.

*United States v. Hall*, 854 F.2d 1036, 1044 (7th Cir. 1988) (Posner, J., concurring). Elsewhere Judge Posner has articulated his understanding of the reasonable doubt standard as follows:

Essentially the jury is told in criminal cases not to convict unless it is certain of the defendant’s guilt, with the proviso that it is not to insist on a degree of certainty unreasonable in the circumstances (that is, to put aside unreasonable doubts): the kind of certainty that attends propositions such as that  $2 + 2 = 4$  or that cats do not grow on trees or that no person born before 1800 is still alive.

RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 213 (1990).

167. The Fourth Circuit has held “that trial courts should refrain from charging the jury on reasonable doubt unless such guidance is made unavoidable by a specific request from a confused jury.” *Murphy v. Holland*, 776 F.2d 470, 479 (4th Cir. 1985), *vacated on other grounds* by 475 U.S. 1138 (1986). With respect to prosecutorial commentary, the Seventh Circuit has adopted a clear prohibition—“we admonish counsel, do not define ‘reasonable doubt’ to a jury.” *United States v. Alex Janows & Co.*, 2 F.3d 716, 723 (7th Cir. 1993). The Eighth Circuit, while not categorically barring such argument, has cautioned that “prosecutors would be well advised to avoid trying to explain to the jury the meaning of ‘beyond a reasonable doubt.’” *United States v. Drew*, 894 F.2d 965, 969 (8th Cir. 1990). *But see United States v. Mabry*, 3 F.3d 244, 249 (8th Cir. 1993) (permitting instruction regarding the reasonable doubt standard).

168. See Newman, *supra* note 17, at 984-85; Elisabeth Stoffelmayr & Shari S. Diamond, *The Conflict Between Precision and Flexibility in Explaining “Beyond a Reasonable Doubt,”* 6 PSYCHOL. PUB. POL’Y & L. 769, 774-78 (2000) (discussing empirical studies on the effect of the beyond a reasonable doubt standard).



jury acted appropriately in convicting on the basis of the evidence before it. If we are not confident enough about what reasonable doubt means to define it for a jury, how can we suppose that appellate courts can determine whether a jury applied the standard in a rational fashion?<sup>169</sup> Is there a single, rational interpretation of the standard, or might most or all of the interpretations given the standard by juries be rational? The result of empowering appellate courts to review convictions under a standard that requires the implementation of a concept as ill-defined as reasonable doubt, critics argue, is that the courts' decisions will necessarily be unpredictable and somewhat arbitrary.<sup>170</sup>

The elusiveness of the concept of beyond a reasonable doubt, coupled both with the *Jackson* opinion's multi-layered vagueness as to the standard it purported to adopt and, more broadly, with assumptions about the institutional limitations of appellate courts,<sup>171</sup> led immediately to suggestions that in practice the *Jackson* standard would differ little if at all from the "no evidence" standard of *Thompson v. City of Louisville*.<sup>172</sup> Yet the Court in *Jackson* clearly viewed itself as adopting a standard more stringent than that required by *Thompson*. A significant portion of the *Jackson* opinion is devoted to distinguishing between both the issues presented in the two cases and the constitutional underpinnings of their respective holdings. *Thompson*, the Court noted, was grounded in the due process prohibition against arbitrariness,<sup>173</sup> and the *Thompson* Court expressly stated that it was not considering the case before it in terms of sufficiency of the evidence.<sup>174</sup> *Jackson's* holding, in contrast, follows from *Winship*, which is based on the separate guarantee that no conviction can be had except upon sufficient proof.<sup>175</sup> Indeed, *Jackson* himself did not contend that he would have a valid claim under the *Thompson* standard.<sup>176</sup> The Court accepted this reasoning, specifically noting that the "no evidence" standard "is simply inadequate to

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169. Kutzko, *supra* note 160, at 804-05.

170. *Id.* at 809-10.

171. *See supra* Part I.A.

172. 362 U.S. 199 (1960).

173. *Jackson v. Virginia*, 443 U.S. 307, 314 (1979).

174. *Thompson*, 362 U.S. at 199.

175. 443 U.S. at 314-16. To some degree, the Court's analysis paralleled its method of analysis in so-called "constitutional fact" cases. *See generally* Monaghan, *supra* note 4. For this reason, Robert Gregory argues that the opinion's logic compelled a less deferential standard than that which the Court actually adopted. *See* Gregory, *supra* note 107, at 940.

176. *Jackson*, 443 U.S. at 313.

protect against misapplication of the constitutional standard of reasonable doubt.”<sup>177</sup>

## 2. Application of the *Jackson* Standard in Practice

Many commentators writing in the immediate wake of *Jackson* supposed that the Court’s opinion enabled, if not required, reviewing courts to assess the weight of the evidence supporting a conviction. Indeed, an evaluation of the weight of the evidence seems necessary in any inquiry concerning whether the fact finder acted reasonably in returning a guilty verdict.<sup>178</sup> For an appellate court to consider whether the evidence in a given case was sufficient to enable a reasonable jury to convict, the court must consider that evidence in light of the elements of the crime, and in the further light of the requirement that guilt be proven beyond a reasonable doubt. Given that the *Jackson* standard was meant to set a higher requirement than the “no evidence” standard of *Thompson*,<sup>179</sup> this necessarily means that there is some quantum of evidence between none and the point at which the evidence of guilt is constitutionally sufficient. Assuming a case with some evidence, the reviewing court must somehow assess the quality of that evidence to determine whether it meets the *Jackson* standard. It is difficult to imagine how it could do so without weighing the evidence.

Perhaps the primary problem is that the logic of *Jackson* does not provide its own limits.<sup>180</sup> Given the imprecision of both the “rational fact finder” and “reasonable doubt” concepts on which *Jackson* rests, the opinion could easily be interpreted as allowing for a virtually unbounded role for appellate courts in reviewing the evidence underlying convictions. Viewed broadly, and with the understanding that the standard allows for the appellate court to

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177. *Id.* at 319-20.

178. Gregory, *supra* note 107, at 913; Kutzko, *supra* note 160, at 807; Case Note, *Standard of Review of Sufficiency of Evidence Supporting Criminal Conviction*, 93 HARV. L. REV. 210, 215 n.50 (1979) [hereinafter *Standard of Review*]; *id.* at 215 n.53 (“[T]he standard may allow reversal if there is strong evidence with respect to credibility that a reviewing court can judge from the record.”).

179. See *supra* text accompanying notes 172-177 (discussing the *Jackson* holding).

180. Justice Stevens expressly noted,

[T]he Court places all of its reliance on a dry, and in my view incorrect, syllogism: If *Winship* requires the fact finder to apply a reasonable-doubt standard, then logic requires a reviewing judge to apply a like standard. But, taken to its ultimate conclusion, this “logic” would require the reviewing court to “ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.”

*Jackson*, 443 U.S. at 334 (Stevens, J., concurring) (citing *Woodby v. INS*, 385 U.S. 276, 282 (1966) (internal quotation omitted)).

assess evidentiary weight, many, if not most, criminal appeals would present colorable sufficiency claims. But the opinion can just as easily be read narrowly. There need not be a great practical difference between review under *Jackson* and review under *Thompson*. If, as *Jackson* mandates, reviewing courts are to view the evidence in the light most favorable to the verdict,<sup>181</sup> then the gap between no evidence and sufficient evidence could be quite small, indeed almost nonexistent. Justice Stevens made just this point in his concurrence, noting that "in practice there may be little or no difference between" the *Thompson* "no evidence" standard and the standard adopted by the Court.<sup>182</sup> Though some have suggested that *Jackson* compels that at least certain types of cases be evaluated differently than under *Thompson*, most commentators writing in the wake of the opinion agreed with Justice Stevens, concluding that even though the logic of *Jackson* suggested a role for appellate courts in weighing evidence, the decision would likely not lead to any more searching appellate review of convictions than under the *Thompson* standard.<sup>183</sup> And that is precisely how the *Jackson* standard has worked out. As applied by courts, the standard "is a highly deferential standard in the pantheon of appellate standards of review."<sup>184</sup> Most appellate courts have seized on the "any rational trier of fact" language in the Court's opinion and have employed it in the deferential fashion decried by Judge Newman.<sup>185</sup> Accordingly, opinions are littered with metaphors to the effect that the proponent of a sufficiency claim faces "a steep uphill battle"<sup>186</sup> and "bears a heavy burden."<sup>187</sup> Although I am unaware of any empirical studies directly addressing the issue, there appears to be universal agreement that appellate courts almost never reverse convictions on sufficiency grounds,<sup>188</sup> and the related empirical

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181. 443 U.S. at 319.

182. *Id.* at 335.

183. *See, e.g.*, Imwinkelreid, *supra* note 165, at 26-27 (discussing the impact of *Jackson* on drug identification evidence); Kutzko, *supra* 160, at 813; *Standard of Review*, *supra* note 178, at 215 n.50.

184. 2 CHILDRESS & DAVIS, *supra* note 1, at 9-2.

185. *Id.* at 9-7 to 9-10; Newman, *supra* note 17, at 988. The Supreme Court also has suggested that this application is consistent with its *Jackson*. "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt." *United States v. Powell*, 469 U.S. 57, 67 (1984).

186. *United States v. Graham*, 315 F.3d 777, 781 (7th Cir. 2003).

187. *See, e.g.*, *United States v. Almaraz*, 306 F.3d 1031, 1040 (10th Cir. 2002); *United States v. Richards*, 302 F.3d 58, 67 (2d Cir. 2002); *United States v. Gillespie*, 974 F.2d 796, 805 (7th Cir. 1992).

188. *See Jeffries & Stuntz*, *supra* note 42, at 726-27; Newman, *supra* note 17, at 989-90 (noting that appellate courts very rarely review convictions on sufficiency grounds). Though

research reporting the low rates of success for defendants in criminal appeals is not inconsistent with this assumption.<sup>189</sup> As a consequence, it is considerably easier for an obviously guilty defendant with, say, a strong Fourth Amendment claim to prevail on appeal than it is for a probably innocent defendant with no procedural claim.<sup>190</sup> That is a curious state of affairs.

### 3. Assessing the Alternative Justifications for Appellate Deference

In the criminal context, three alternatives to the institutional competence justification might support the near-complete appellate deference to trial-level fact finding. The first of these is simply that there is no practical need for searching appellate review because fact finders rarely make mistakes in criminal cases. The second has to do with the appropriate allocation of scarce judicial resources, and the third with the courts' authority and the virtues of finality. There is some interrelation among these justifications, but for ease of exposition this section considers them in turn.

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*Jackson* itself concerned federal habeas review of a state court conviction, its standard applies directly to states and thus governs direct appellate review of convictions. See 2 CHILDRESS & DAVIS, *supra* note 1, at 9-1 to 9-6; Imwinkelreid, *supra* note 165, at 25-26. Many state courts have expressly adopted the *Jackson* rule. See, e.g., *People v. Hatch*, 991 P.2d 164, 174 (Cal. 2000); *Coley v. State*, 616 So. 2d 1017, 1018 (Fla. Dist. Ct. App. 1993); *State v. Clay*, 290 S.E.2d 84, 85 (Ga. 1982); *People v. Spann*, 773 N.E.2d 59, 76 (Ill. App. Ct. 2002); *People v. Contes*, 454 N.E.2d 932, 933 (N.Y. 1983); *State v. Urbin*, 772 N.E.2d 1239, 1243 (Ohio Ct. App. 2002); *Staley v. State*, 887 S.W.2d 885, 888 (Tex. Crim. App. 1994). Other states follow standards that, though not express adoptions of *Jackson*, are similarly formulated. See, e.g., *State v. Josephs*, 803 A.2d 1074, 1094-95 (N.J. 2002) (noting that the *Reyes* standard accords with *Jackson*); *State v. Reyes*, 236 A.2d 385, 388 (N.J. 1967) (formulating the inquiry as "whether, viewing the State's evidence in its entirety, be that evidence direct or circumstantial, and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt"); *State v. Earnhardt*, 296 S.E.2d 649, 652 n.1 (N.C. 1982) (concluding that the *Jackson* standard is substantially the same as the longstanding test used in North Carolina); *Commonwealth v. Reid*, 626 A.2d 118, 122 (Pa. 1993) (articulating the standard as "whether the evidence, and all reasonable inferences deducible therefrom, viewed in the light most favorable to the Commonwealth as verdict-winner, are sufficient to establish all the elements of the offense beyond a reasonable doubt").

189. See, e.g., Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROC. 199, 218-21 (2001) (reporting extremely low rates of success for criminal appellants).

190. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 61-62 (1997) (observing that "the courts consistently have adopted more favorable standards of review for non-guilt-related claims than for those claims most likely to be tied to guilt and innocence").

a. *The Lack of a Need for Appellate Review of Facts*

One possible explanation for why courts and commentators consider searching appellate review unnecessary is that they hold an unstated assumption that juries and trial judges almost never err in their determinations of guilt and innocence. If the process never or rarely results in the conviction of the innocent, then a theoretically satisfactory justification of current institutional arrangements may be largely unnecessary. Put another way, if we do not need deeper appellate review in order to ensure that only the guilty are convicted, then there is little point to justifying the lack of such review. This justification, though rarely articulated,<sup>191</sup> may explain the relative paucity of anything but the cursory justifications that appear in almost all discussions of deferential review.

It is not difficult to see the attractiveness of such an assumption. As discussed below,<sup>192</sup> the jury system appears to be structured so as to provide us, as members of society, with easy grounds for believing that our individual conceptions of guilt and innocence, right and wrong, are being put into action daily by our proxies on juries. Moreover, little of what takes place after the jury delivers its verdict is likely to shake us from this belief. While it is no great or uncommon feat for an acquitted defendant to later be shown to be guilty by subsequently uncovered evidence, it is a much more difficult task to prove the negative that is innocence. The wrongly convicted innocent defendant and the guilty defendant who is a good liar will tell the same story—some version of “I didn’t do it”—that is plausible, if perhaps seemingly unlikely, on the facts of the case. Circumstances thus make it easy for us to imagine that the system

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191. Although jury infallibility is rarely, if ever, expressly advanced as a reason for appellate deference, the view that there simply are not many wrongful convictions is occasionally expressed. See, e.g., Ronald Earle & Carl B. Case, Jr., *The Prosecutorial Mandate: See that Justice Is Done*, 86 JUDICATURE 69, 73 (2002) (noting that, prior to the discovery of three wrongful convictions in Travis County, Texas, “[p]rosecutors had thought that the sun would come up in the West before an innocent person would have been convicted of a crime in their jurisdiction”); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1328-36 (1997) (reviewing authorities suggesting that the problem of wrongful convictions is virtually nonexistent); see also *Schlup v. Delo*, 513 U.S. 298, 321 (1995) (observing that “habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare”); LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 4-5 (1977) (asserting that wrongful convictions are “very rare” and typically the result of “a nonsystemic fault peculiar to the case,” against which it would be difficult to guard).

192. See *infra* text accompanying notes 233 - 239.

works as it should.<sup>193</sup> In contrast, the idea that we might with some regularity be convicting innocent people is obviously distasteful, the sort of possibility that it is easier for our collective peace of mind not to entertain.

Of course, to the extent this assumption has provided the basis for the lack of appellate involvement in jury fact findings, events of the past decade or so demonstrate that our confidence has been misplaced. It has become increasingly apparent that our system has done a much worse job of sorting the guilty from the innocent than had been imagined. News of wrongful convictions has almost become routine.<sup>194</sup> Since 1990, more than 120 prisoners have been released upon a finding that they were wrongly convicted,<sup>195</sup> and it seems reasonable to believe that these represent a mere fraction of the actual total.<sup>196</sup> Not surprisingly, these revelations have unleashed a torrent of commentary proposing ways to address the problem.<sup>197</sup> What is

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193. In addition, the incentives facing prosecutors do not encourage them to admit that they may have been mistaken in their identification of the perpetrator of a crime. See Earle & Case, *supra* note 191, at 73.

Prosecutors have been understandably reluctant to re-examine cases once thought to be over and done with. Cases in which the evidence proves the defendant's guilt beyond a reasonable doubt are difficult to put together, harder to hold together, and happily left behind once a conviction is obtained. The ongoing onslaught of current cases and opposition from victims certain of the identity of the perpetrator add to the pressure to let sleeping dogs lie. But perhaps the greatest hesitancy is the fear-based assumption that the public is intolerant of mistakes and unforgiving of those who admit to them.

*Id.*

194. See Givelber, *supra* note 191, at 1319 n.7 (compiling media reports of prisoner releases for wrongful conviction). See generally SCHECK ET AL., *supra* note 101.

195. See Edmund Higgins, Database: Complete List of Cases (listing a total of 315 revelations of wrongful convictions, 124 of which have occurred since 1990), at <http://www.dredmundhiggins.com/listofcases.htm> (last visited Nov. 30, 2003).

196. See, e.g., Givelber, *supra* note 191, at 1321 (arguing "that America's criminal justice system creates a significant risk that innocent people will be systematically convicted"); see also Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 336 (2002) (asserting that recent cases "have not only confirmed that wrongful convictions exist, and at a higher rate than ever acknowledged previously, but have shown that innocent people are often convicted in cases where innocence is least suspected"); Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 737 (2002) ("Potentially hundreds and thousands of unexplored wrongful convictions in the United States remain undiscovered, uninvestigated, and unchallenged."); Alan Barlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 68 ("Surely the number of innocent people discovered and freed from prison is only a small fraction of those still incarcerated.").

197. A non-exhaustive list includes statutes allowing for post-conviction DNA testing, structuring police lineups and other identification processes so as to minimize the possibility of erroneous identifications, video or audio taping all police interrogations, careful screening of jailhouse informant testimony, structuring forensic investigations so as to minimize the effects of fraud or bias, reconsidering the scientific bases of forensic tests, enhancing oversight of

remarkable is that, for all the attention given the problem of wrongful convictions, and all the remedies proposed, the discussion has included no consideration of a greater role for courts considering direct appeals from convictions.

In any case, the logic of *Jackson* suggests that whatever the standard of review the Court meant to adopt, it cannot be based, even implicitly, on an understanding that appellate scrutiny is not generally required because juries rarely make mistakes. *Thompson v. City of Louisville*<sup>198</sup> held that convictions based on no evidence cannot stand, and in so doing necessarily recognized that juries will sometimes convict even when there is a complete lack of an evidentiary basis for doing so.<sup>199</sup> If that is true, then it must also be true that juries err in less dramatic ways, such as by convicting when there is some (but not enough) evidence to satisfy the beyond a reasonable doubt standard, or when the evidence is qualitatively deficient. And so long as convictions are normally distributed along a wrongful convictions to wrongful acquittals axis,<sup>200</sup> juries will commit these latter sorts of errors more frequently than the former. *Jackson* at least recognizes the existence of both of these sorts of errors, even though it takes no firm position as to the extent to which appellate courts may remedy them.<sup>201</sup>

In the end, then, the supposition that wrongful convictions rarely occur, though psychologically appealing, provides neither a realistic nor analytically satisfactory justification for appellate deference.

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prosecutors, increasing the quality of resources available to defense lawyers, providing for compensation to the wrongfully convicted, placing a moratorium on the death penalty, and creating innocence commissions to investigate potential wrongful convictions. SCHECK ET AL., *supra* note 101, at 255-60. For a more comprehensive discussion of some of the proposals, see, for example, Charles I. Lugos, *Punishing the Factually Innocent: DNA, Habeas Corpus, and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233 (2002); Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343 (2001); Wayne T. Westling, *Something Is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537 (2001); David Defoore, Comment, *Postconviction DNA Testing: A Cry for Justice from the Wrongfully Convicted*, 33 TEX. TECH L. REV. 49 (2002); Michael R. Headley, Note, *Long on Substance, Short on Process: An Appeal for Process Long Overdue in Eyewitness Lineup Procedures*, 53 HASTINGS L.J. 681 (2002); Diana L. Kanon, Note, *Will the Truth Set Them Free? No, but the Lab Might: Statutory Responses to Advancements in DNA Technology*, 44 ARIZ. L. REV. 467 (2002).

198. 362 U.S. 199 (1960).

199. Indeed, *Thompson* itself is an example of such a situation. See *supra* text accompanying notes 172-177.

200. This generalization makes the point that there are almost certainly more convictions wrongfully based on some evidence than based on no evidence. The distribution need not be normal for the point to hold, though it seems intuitively likely that, at least on the wrongful convictions side, the distribution would resemble a bell curve.

201. See *supra* text accompanying notes 156-157.

*b. Efficient Allocation of Judicial Resources*

A second justification for appellate deference to lower court findings of fact has to do with the economical use of judicial resources. Caseloads have rapidly increased over the past half-century in both state and federal courts.<sup>202</sup> As a result, it has become increasingly important to allocate scarce judicial time wisely. Empowering appellate courts to review the factual underpinnings of criminal convictions, critics argue, would open the proverbial floodgates, resulting in even more work for already overburdened appellate courts.<sup>203</sup>

If we accept the assumption that appellate courts are universally inferior to trial-level fact finders, the investment of scarce judicial resources in enhanced fact review hardly seems prudent. In part, this is because our conception of appellate courts as dealing in matters of “law” includes an expectation that those courts will generate “law.” In other words, the role of appellate courts involves as much the construction and maintenance of a sensible set of legal rules as it does the resolution of individual disputes.<sup>204</sup> The adjudication of a claim that the evidence underlying any given criminal conviction was insufficient, in contrast, involves an inquiry that is necessarily dependent on the particular facts of that case. As a result, it will almost never lead to a decision that establishes meaningful precedent for future cases. This, in turn, suggests that establishing a greater role for appellate courts in assessing the sufficiency of evidence will require those courts to spend a greater proportion of their time engaged in a task that is not their primary role in our system.<sup>205</sup>

Perhaps more fundamentally, if appellate courts are always inferior to trial-level fact finders, assigning them a greater role in assessing the facts underlying criminal convictions will not result in more accurate fact finding, but instead may lead to less accurate fact finding across the range of cases. In other words, if appellate courts were to substitute their own, inferior assessment of the facts for that of the trial judge or jury, the direct result would most likely be more

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202. See MEADOR ET AL., *supra* note 148, at 329-64; RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 53-86 (1996).

203. See THOMAS M. MARVELL, *APPELLATE COURTS AND LAWYERS* 350 n.4 (1978) (stating that caseload problems, among other issues, restrict most courts from lessening or removing the “presumption of correctness applied to findings below”).

204. See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 453-54 (1963).

205. AM. BAR ASS'N, *supra* note 27, § 3.11, at 24; cf. *Gladney v. Pendleton Corr. Facility*, 302 F.3d 773, 774-75 (7th Cir. 2002) (stating that the factuality of a civil rights claim is reviewed for abuse of discretion based in part on the case-specific nature of the determination).



erroneous acquittals.<sup>206</sup> If appellate courts are less able than trial courts to ferret out cases where the defendant is not guilty, the set of convictions they overturn is likely to contain a greater number of appropriate than wrongful convictions.<sup>207</sup> Such a regime could also indirectly result in more erroneous convictions at the trial level, as trial judges might be more inclined to convict based on questionable evidence in the belief that the appellate court would make the ultimate determination.<sup>208</sup> In any case, it would be difficult to argue in favor of the deployment of judicial resources in such a manner as to reduce the aggregate accuracy of the criminal justice system absent some belief that other, less tangible benefits would result.

Paul Bator made the argument in a slightly different way.<sup>209</sup> Building from the observation that we will never be able to reconstruct the actual truth about what happened in any given case, he asserted that the system ought not to be engaged in a never-ending quest to do so, or at least not be involved in an attempt to get increasingly closer to doing so via multiple levels of review. Instead, “[t]he task of assuring legality is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts will be ‘true’ and the law applied ‘correct.’ ”<sup>210</sup> So long as we are confident that one institution is generating results in accordance with this norm, he argued, there is no justification for having other institutions perform the same inquiry.<sup>211</sup>

206. Since appellate courts can review only criminal cases that have resulted in convictions, the direct effect of their errors could not produce additional erroneous convictions, but only erroneous acquittals (together with some appropriate acquittals).

207. This analysis of course makes the assumption—though presumably one we can be quite confident in—that the universe of convictions includes more appropriate than wrongful convictions.

208. Judge Newman posits that the opposite effect—erroneous acquittals at the trial level—results from appellate courts taking a too limited role in reviewing the sufficiency of evidence. See Newman, *supra* note 17, at 1000 (suggesting that trial courts, knowing that convictions are not likely to be reversed on sufficiency grounds, “are reluctant to admit some evidence that is relevant to guilt but that also has some tendency to be prejudicial”).

209. Bator, *supra* note 204.

210. *Id.* at 448.

211. The presumption must be, it seems to me, that if a job can be well done once, it should not be done twice. If one set of institutions is as capable of performing the task at hand as another, we should not ask both to do it. The challenge really runs the other way: if a proceeding is held to determine the facts and law in a case, and the processes used in that proceeding are fitted to the task in a manner not inferior to those which would be used in a second proceeding, so that one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding “count”? Why should we duplicate effort?

*Id.* at 451; see also Wright, *supra* note 2, at 781 (stating that the “very heart of the issue” concerns whether there is “any reason to suppose that the result an appellate court reaches on

Although Bator made these points in the course of an argument regarding federal habeas review of state court convictions—in which case presumably at least one state appellate court will have performed sufficiency review—they are likewise applicable to direct appellate review. So long as we are confident that juries perform their task of weighing evidence in accordance with our acceptable norms of justice, the argument would run, there is no reason to have appellate courts replicate that task because there is no assurance that better results would follow.

Significantly, all of these justifications depend to a large degree on the validity of the conclusion that trial-level fact finders are superior (or at least not inferior) fact-finding instruments. The determination whether any particular deployment of judicial resources is sensible necessarily involves a cost-benefit analysis which takes into account the extent to which that deployment advances the goals of the system. If trial-level fact finders always, or almost always, do a better job than appellate courts, then the benefits of greater appellate court involvement would be minimal, yet would bear potentially significant costs.

If, however, one recognizes that appellate courts are in some respects better positioned to evaluate facts than trial-level fact finders, the judicial economy justification loses much of its force. Certainly juries and trial judges retain some of their long-assumed fact-finding advantages, and within that range of superiority, the need for conservation of judicial resources counsels against appellate reexamination of facts. But to the extent that appellate courts can evaluate the facts in a manner that does not merely duplicate the work of trial courts and juries, the calculus changes. If it turns out that there are accuracy gains to be had from increased appellate involvement, then we must assess the value of these gains, and weigh them against the likely costs of the additional layer of review.

As outlined above, in the context of the criminal justice system any gains in factual accuracy should be highly valued. We have always maintained that criminal convictions fall into a different, more serious category than civil sanctions, and we accordingly place a greater premium on the factual accuracy of guilty verdicts. Moreover, recent revelations about the frequency of wrongful convictions strongly suggest that the system is not performing as well as had been

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the kinds of issues discussed is more likely to be 'just' than was the opposite result reached by the trial court").

supposed in terms of sorting the guilty from the innocent.<sup>212</sup> Gains remain to be achieved.

In addition to the revelations about wrongful convictions, some have suggested that relatively recent structural changes to the system have resulted in a reduced focus on factual accuracy as contrasted with the historical norm. Steve Sheppard suggests that historical changes in the phrasing of jury instructions concerning the reasonable doubt standard have led to a situation in which current versions of the instruction may reverse the presumption of innocence.<sup>213</sup> In consequence, he argues, the government needs less evidence to obtain a conviction than it formerly needed.<sup>214</sup>

More broadly, Bill Stuntz has argued that expansions in the procedural protections afforded criminal defendants have resulted in less consideration of the merits of any given criminal case by all the participants in the system.<sup>215</sup> In doing so, Stuntz made three points that are relevant to the arguments under consideration here. First, he suggests that rising crime rates have allowed prosecutors to be more selective in deciding which cases to prosecute, because there are more crimes than there are resources to proceed on all of them.<sup>216</sup> He posits that as a result of this, prosecutors select cases that do not present defendants with strong procedurally based arguments, such as Fourth Amendment claims. Because the absence of a strong procedural claim is a poor proxy for evidence of guilt—and most likely the correlation between the two is negative (because a strong search and seizure claim, for example, can only exist when an unlawful search turned up damaging evidence)—the result is that increased procedural protections for defendants have led prosecutors to pursue cases that are, on average, weaker on the merits. Second, systems for representing indigent defendants are chronically under-funded.<sup>217</sup> They lack the resources to adequately investigate cases or to mount resource-intensive arguments on the facts. The natural result is that

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212. *See supra* note 194.

213. Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165, 1239 (2003) (arguing that the development of the standard toward a greater focus on reasonableness, and away from concepts like “moral certainty,” has resulted in a standard that encourages jurors to vote to convict unless the defense can convince them not merely to doubt the state’s case, but to do so in such a way that they entertain a doubt for which a reason can be given).

214. *Id.* at 1169, 1239.

215. Stuntz, *supra* note 190.

216. *Id.* at 23-27, 45-49.

217. *Id.* at 31-45. For additional discussion of the problem of underfunding, see Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 306 (2002); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995).

counsel tend to substitute procedural arguments, which are inexpensive to make, for innocence arguments. Thus, the defense likewise places too little emphasis on what ought to be the core question in any criminal case, namely, whether the defendant is guilty of the crime with which he was charged. Third, legislatures have responded to a perceived large number of defendants getting off on “technicalities” by increasing the scope of criminal liability, which makes proof of guilt easier and thereby turns what would otherwise be contestable cases into guilty pleas.<sup>218</sup> When the range of behavior that can be classified as criminal is expanded, so is the possibility for wrongful convictions. As elements of crimes are eliminated or watered down, the universe of evidence upon which juries can infer the presence of those elements expands. Yet, if Stuntz is correct, this has taken place in a world where counsel for both sides are paying less attention to the merits of the cases they handle. The result, he suggests, is “a criminal justice system that is less focused on the merits and hence more likely to convict innocents, a system that disproportionately targets the poor, and a system that convicts for ‘crimes’ that cover vastly more than anyone would wish to punish.”<sup>219</sup>

Taken together, all these factors—the existence of respects in which appellate courts can add value to the fact-finding process, the primacy of the criminal justice system’s stated concern with not convicting the innocent, the fact that it has become increasingly apparent that we do convict the innocent, and the suggestion that the system has evolved in ways that make the likelihood of erroneous convictions greater than in the past—suggest that the benefits arising from enhanced appellate review are substantial. These benefits arguably outweigh even a significant burden on the judicial system. If we value the avoidance of wrongful convictions as much as we purport to, there is a strong argument that we should support enhanced review no matter what the costs. As Judge Richard Arnold put the point, albeit in a different context: “[t]he remedy . . . is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.”<sup>220</sup>

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218. Stuntz, *supra* note 190, at 55-59. As Stuntz has argued elsewhere, the increasing depth and breadth of criminal law “utterly undo the accuracy-enhancing features of the law of criminal procedure. The result is that we are probably sending a large number of people to prison based on conduct that is technically criminal (though the ability to stack charges puts even that conclusion in doubt) but functionally innocent.” William J. Stuntz, *Reply: Criminal Law’s Pathology*, 101 MICH. L. REV. 828, 829 (2002).

219. Stuntz, *supra* note 190, at 75.

220. *Anastasoff v. United States*, 223 F.3d 998, 904 (8th Cir. 2000) (addressing workload-related objections to a requirement that all judicial opinions be viewed as precedential).

There is, moreover, reason to be suspicious of claims regarding the magnitude of the resource effects that might arise from enhanced factual review. As discussed below, appellate courts routinely engage in intensive review of sufficiency claims in the civil context.<sup>221</sup> On the criminal side, appellate courts already spend a great deal of their time considering claims that require fact-intensive evaluation, most notably in the context of assessing whether an error at trial was harmless.<sup>222</sup> In considering asserted constitutional errors, the stated mission of an appellate court is to determine whether the error “was harmless beyond a reasonable doubt.”<sup>223</sup> Determining whether an error was harmless necessarily requires the reviewing court to imagine how the trial would have gone—and what the result would have been—absent the error. In practice, this standard has developed to the point where appellate courts are required to act, as one set of commentators has put it, as “a super jury”:

[T]he burden has been shifted from requiring the *prosecution* to convince the appellate court beyond a reasonable doubt that the error did not significantly affect the verdict, to requiring the *defendant* to convince the court that, but for the error, he would have been entitled to a directed acquittal. That shift expands the review to the entire record and

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Addressing the point over sixty years ago, Professor Orfield opined that “the chief function of an appeal in a criminal case should be to see that justice is done to the appellant. . . . To lose sight of this purpose is to commit the ‘original sin of judicial procedure—the substitution of the actual ends of judicature for the ends of justice.’” ORFIELD, *supra* note 34, at 32-33 (quoting 2 JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 169 (Richard Doane ed., 1843)).

221. See *infra* Part II.B.2. Not only do the practices of American courts belie the purported justifications for extreme deference, but the practices in other countries provide further support for the conclusion that nothing inherent in the nature of appellate courts forces them to abstain from considering facts. English courts, for example, are expressly empowered to take a broad view of cases, to the extent of being able to consider new evidence. See DANIEL J. MEADOR, *CRIMINAL APPEALS: ENGLISH PRACTICES AND AMERICAN REFORMS* 7 (1973); see also ROBERT J. MARTINEAU, *APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS* 7 (1990) (noting the same powers in the context of civil appeals). As a consequence, English appellate courts focus more on the issue of guilt. See MEADOR, *supra*, at 7. But see Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241, 1267-70 (2001) (observing that English courts are somewhat reluctant to exercise these powers). For a discussion of practices in other countries, see Newman, *supra* note 17, at 1000-02.

222. See *infra* text accompanying notes 223-224.

223. *Chapman v. California*, 386 U.S. 18, 24 (1967). Review of non-constitutional errors in the federal system requires consideration of whether the error affected a “substantial right” of the defendant. See FED. R. CRIM. P. 11, 52(a); FED. R. EVID. 103. Here, too, the analysis seems inevitably to involve the appellate court in weighing the evidence. See, e.g., TRAYNOR, *supra* note 27, at 28 (stating that appellate courts are “constantly weighing evidence to determine whether an error is harmless or prejudicial”). For a review and analysis of the types of harmless error review, see generally Gregory Mitchell, Comment, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994).

requires a new fact finding of guilt or innocence on the record without the error—but by the appellate court, not by a jury.<sup>224</sup>

This review, notably, is not qualified to account for the institutional competencies of appellate courts. There is, in other words, no barrier to an appellate court weighing any aspect of the evidence in the case, from factual inferences to witness credibility.

Nor is there reason to believe that the absolute number of appeals would increase dramatically. Those criminal defendants who are inclined to appeal their convictions will probably do so anyway.<sup>225</sup> Most defendants are indigent, and consequently are represented by appointed counsel.<sup>226</sup> For them an appeal has no cost and, in most cases, no potential downside. They are already filing appeals, even when they have no legitimate basis on which to do so.<sup>227</sup> And even if many or most of these defendants included or substituted a sufficiency claim,<sup>228</sup> the nature of the adversary process would operate to exclude many of those claims from the need for serious consideration. Appellate courts rely primarily on counsel to raise and develop issues.<sup>229</sup> Realistically, no appellate court is going to consider a sufficiency argument in much depth unless appellant's counsel submits a brief that makes a plausible case for the validity of such a claim. So long as the appellate court's reviewing authority is directed so as to focus the court's scrutiny on factual matters that it is well suited to assess, the universe of cases in which such an argument could credibly be made will be circumscribed. In this respect, a sufficiency argument would be like any other sort of claim raised on appeal. That is, an appellant can always raise, for example, a claim of ineffective assistance of counsel. But he cannot always raise a *credible* claim of ineffective assistance of counsel. Just as experienced appellate judges can easily discern that an ineffective assistance claim

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224. 2 CHILDRESS & DAVIS, *supra* note 1, § 7.03.

225. “[I]n some jurisdictions, as many as 90% of the defendants who were convicted after trial and sentenced to prison will appeal their convictions.” LAFAVE ET AL., *supra* note 18, § 1.3(s).

226. *See supra* note 146.

227. What is more, these latter sort of appeals place an arguably greater burden on the appellate courts, requiring them to conduct “a full examination of all the proceedings” to determine whether they agree with counsel’s conclusion that “the case is wholly frivolous.” *Anders v. California*, 386 U.S. 738, 744 (1967); *see also* *Smith v. Robbins*, 528 U.S. 259 (2000) (approving withdrawal procedure for appellate counsel that similarly requires appellate court to independently examine the trial record for potential appellate issues); WAYNE LAFAVE ET AL., *CRIMINAL PROCEDURE* § 11.2(c) (3d ed. 2000 & Supp. 2001) (describing procedures in greater detail).

228. Many of them would have raised a sufficiency claim anyway, since such claims are among the most common on appeal. *See* ROBINSON, *supra* note 15, at 40.

229. *See* MARVELL, *supra* note 203, at 51, 120, 217-19.

has no merit if the appellant's brief fails to provide a legitimate basis for the claim, so would they be able to do so with sufficiency claims under an appropriate standard.

My point here has been simply to demonstrate that the judicial-economy argument for appellate deference is considerably less robust than previously recognized. Any argument about efficient use of judicial resources necessarily involves a cost-benefit analysis. To date, the analysis has largely assumed that appellate courts are not competent to evaluate facts, and consequently that the gains from enhanced appellate review of facts would be minimal while the costs would be substantial. Having earlier argued that that assumption is false, my point in this subpart has been to call assumptions about the accompanying costs into question. As I have shown, there is good reason to believe that those costs have been overstated.

*c. Authority Concerns and the Virtues of Finality*

The third justification for appellate deference to lower court fact finding finds its roots in concerns over the perceived authority of the courts. One component of this justification concerns the effect that empowering appellate courts to determine anew yet another set of issues would have on trial courts. Were appellate courts to routinely exercise such authority, both trial court morale and, arguably, effectiveness would be compromised.<sup>230</sup> While this may be correct as far as it goes, in this context it does not go very far. For all that might be unclear about what the Supreme Court meant to accomplish in *Jackson v. Virginia*, there is no doubt that the standard the Court adopted in that case not only allowed some room for appellate courts to reevaluate the evidence, but as a matter of logic required that that reevaluation take place.<sup>231</sup> Thus, even though appellate courts have perhaps not given full play to the *Jackson* standard,<sup>232</sup> they still retain and exercise the ability to conclude that the trial-level fact finder improperly based a conviction on evidence that was too weak to support it. Implementing a standard of review that allows appellate courts to take account of their institutional advantages would thus

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230. See Bator, *supra* note 204, at 451 ("I could imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."); see also Wright, *supra* note 2, at 779, 781 (suggesting that broadened appellate review "impairs the confidence of litigants and the public" in the judicial system).

231. See *supra* text accompanying notes 178-179.

232. See *supra* text accompanying notes 178-179.

only involve a change of degree, rather than a wholesale change of approach.

A second, and more significant, component of this justification relates to the public's perception of the system. Here, the argument is that society's regard for the judicial system will diminish if appellate courts routinely exercise the authority to disregard the conclusions of the trial-level fact finder. Although much of the language of the criminal justice system highlights the significance, to both society and the individual defendant, of correctly determining whether a given defendant in fact committed the crime with which he is charged, there is a sense in which society has an interest in, to use Bator's phrase, finding "repose."<sup>233</sup> In other words, there is an interest in reaching the point where we can comfortably conclude that "we have tried hard enough and thus may take it that justice has been done."<sup>234</sup>

Indeed, Charles Nesson has speculated that, although it is rarely acknowledged, this production of "authoritative finality"—rather than individualized determinations of guilt—may be the paramount goal of the system.<sup>235</sup> As a society, it may be that what we are most interested in is not getting to the "truth" of the matter, but rather in resolving the matter. Nesson draws an analogy to trial by ordeal, which "may have functioned effectively as a means of adjudication, not because it produced true results, but because the populace thought it did, and therefore respected its results."<sup>236</sup>

Under this view, deference to jury verdicts is critical to attaining the system's goals. The ambiguity of the reasonable doubt standard, coupled with both the secrecy of the jurors' deliberations and the public's perception that the jurors are as much its peers as the defendant's, creates confidence that the system is accurately determining guilt and innocence. This perception that the system is accurate may be more important than whether the system is in fact accurate. As Nesson put it:

The strategy of the system is to seek the observers' acceptance of the jury as surrogate decision maker, trusted because it is understood to be an impartial, responsible and representative body, operating in a fair and structured system and deciding according to an exceedingly strict standard of guilt. The trial system presents the jurors with an array of facts, assertions, contradictions, and ambiguities, and then obtains a verdict

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233. Bator, *supra* note 204, at 452.

234. *Id.*

235. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1194-95 (1979) [hereinafter Nesson, *Reasonable Doubt*]. See generally Charles Nesson, *The Evidence or the Event? Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985) (arguing that the production of "acceptable verdicts" is a critical function of the judicial process).

236. Nesson, *Reasonable Doubt*, *supra* note 235, at 1194.



difficult to disagree with because the secrecy of the jurors' deliberations and the general nature of the verdict make it hard to know precisely on what it was based.<sup>237</sup>

If this is correct, then any post-conviction review of the factual basis for a guilty verdict is of questionable value for reasons independent of the reviewing court's ability to make accurate factual determinations. In its extreme form, the argument suggests that we must be concerned with maintaining the appearance of justice, rather than justice itself.<sup>238</sup> Because frequent appellate meddling with factual determinations would suggest to the public that trial judges and juries are incapable of consistently delivering just resolutions, and thereby diminish the aura of justice, it should not be allowed. Even in a more moderated form, inclusion of the need to provide authoritative resolution among the primary goals of the criminal justice system would place a greater burden on those seeking to justify enhanced appellate scrutiny of jury verdicts, at least to the extent that authoritative resolution as used in this sense necessarily involves deference to jury verdicts.<sup>239</sup>

The assertion that the public's regard for the criminal justice system would be eroded by increased appellate involvement in reviewing the factual bases of convictions is subject to two objections. The first is that it is probably not all that realistic to suppose that the public cares very much. Though the popular imagination may be captured by the occasional high profile criminal case, in general it is fair to suppose that people's attention is elsewhere.<sup>240</sup> The public is simply not likely to know or care that much about whether appellate courts have the ability to examine the facts underlying convictions, and may believe that the ability already exists. Moreover, to the extent that the public does hold the opinion that the criminal justice system does a good job of sorting the guilty from the innocent,<sup>241</sup> it

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237. *Id.* at 1195.

238. Cf. David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 786 (1993) ("The appearance of justice, accurate or not, may be more important than justice itself.").

239. There is at least some reason to believe that the opposite may be true. That is, that the authoritative nature of the system's outputs would be enhanced by enhanced appellate review. See *infra* text accompanying notes 240-244.

240. See Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 996 n.12 (1999) ("As much as judges, lawyers, and legal academics would like to think otherwise, the general public is generally quite indifferent to the business of the courts."). But see Craig M. Bradley & Joseph L. Hoffman, *Public Perception, Justice, and the "Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1270-71 (1996) (noting the loss of public respect for the criminal justice system in the wake of the O.J. Simpson trial).

241. There is some reason to believe that the public does not hold such an opinion. A Harris Poll asking whether "you think that innocent people are sometimes convicted of murder, or that

seems questionable at best to suppose that that opinion rests on something as nuanced as an appreciation for the jury mechanism. In fact, it is common to see descriptions of juries being inclined to convict on the basis of their belief that the defendant would not be on trial unless he were guilty, which would support the conclusion that the source of the public's faith in the criminal justice system lies not with juries, but with police, prosecutors, or elsewhere.<sup>242</sup>

The second objection is that, to the extent that the public can be characterized as having a considered opinion on the legitimacy of the criminal justice system, it is by no means clear that the public's regard would decrease if appellate courts were more involved in reviewing the factual bases of convictions. Instead, public confidence might increase. Indeed, *Winship* was premised on this conclusion about the basis for the public's regard:

[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.<sup>243</sup>

In other words, to the extent that appellate review of the factual bases of convictions results in more accurate fact finding, we might expect that—to the extent the public is paying attention at all—it would likewise result in enhanced systemic legitimacy.<sup>244</sup> It hardly seems implausible to suppose that an informed public might welcome appellate review that addresses the core question of whether a criminal defendant actually committed the crime for which he was convicted rather than on procedural matters of the sort typically regarded as “technicalities.”

These may ultimately be unanswerable questions. “The public” is not a monolith, and it may be meaningless to speak of a single

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this never happens?” resulted in a “sometimes” response from 95 percent, 94 percent, 94 percent, and 95 percent of all respondents in 2003, 2001, 2000, and 1999, respectively. See Harris Poll (Dec. 10-16, 2003), <http://www.pollingreport.com/crime.htm>.

242. Research suggests that much of the public's “knowledge” of the criminal justice system comes from television, which, among other things, provides a distorted view of the effectiveness of police. See Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1, 1-2, 10 (1995).

243. *In re Winship*, 397 U.S. 358, 364 (1970).

244. See Bradley & Hoffman, *supra* note 240, at 1294 (arguing that one way to enhance the public's perception of the criminal justice system would be to turn the focus of appeals more toward substance, including “open[ing] the doors of the appellate courthouse to all colorable claims of actual innocence”).

source behind "its" regard for the criminal justice system. Even so, it is possible that there is a significant sense in which the public's faith in the criminal justice system is directly tied to the sanctity of trials as fact-finding mechanisms, and that it is a social belief in accurate fact finding (rather than accurate fact finding itself) that our system seeks to generate. If that is the case, then most of the arguments on which this Article is based, and indeed much of criminal law and procedure, are superfluous or badly misdirected. If, on the other hand, the articulated law is at least roughly equivalent to the rules and principles that actually govern in criminal cases, societal repose is only of tangential concern.<sup>245</sup> In that case, fact-finding accuracy holds a primary place regardless of whether its accomplishment negatively affects the public's perception of the system.

### *B. Insufficiency of the Evidence in Civil Appeals*

The Seventh Amendment provides that

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.<sup>246</sup>

This amendment, which reflects concerns at the very core of the Bill of Rights,<sup>247</sup> seemingly creates an insuperable obstacle to appellate evaluation of the sufficiency of the evidence supporting a jury verdict in a civil case. Indeed, at one point the Supreme Court held that no error could arise from a district court's refusal to allow for the transcription of witness testimony "to serve as a statement of facts in case of appeal"<sup>248</sup> because the only potential use of such a transcript—"to present the evidence here [to the Court] in order to establish the error of the verdict in matters of fact"<sup>249</sup>—was prohibited by the Seventh Amendment.<sup>250</sup>

Times have changed, however. The Court's jurisprudence has shifted from holding that the Seventh Amendment bars appellate courts from ordering entry of a judgment for a defendant after the jury

245. As noted above, the Court has made it clear that the right to a jury trial is the defendant's alone. See *supra* text accompanying note 140.

246. U.S. CONST. amend. VII.

247. See AMAR, *supra* note 138, at 81-118 (expounding on the centrality of trial by jury to the Bill of Rights).

248. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 443 (1830) (emphasis omitted).

249. *Id.* at 445.

250. *Id.* at 447-48. For a historical discussion of the Court's application of the Seventh Amendment, see *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 450-54 (1996) (Scalia, J., dissenting).

had returned a verdict for the plaintiff,<sup>251</sup> to dismissing that conclusion on grounds that “there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does.”<sup>252</sup> Consistent with these developments, Akhil Amar recently commented that “the present-day jury is only a shadow of its former self.”<sup>253</sup> More to the point of the present discussion, Stephen Landsman observed that “trends over the past thirty years suggest that reviewing judges have come to treat jury verdicts as fair game for the most exacting scrutiny.”<sup>254</sup> Similarly, Debra Bassett opined that, “[i]n just the last few years . . . the United States Supreme Court, in a sharp break with more than 150 years of Seventh Amendment jurisprudence, has transferred to federal appellate courts meaningful power to supplant jury verdicts.”<sup>255</sup>

### 1. The Formulation of the Standards

Whether the trial below was before a jury or a judge, the standards governing appellate review suggest that appellate courts in civil cases are to accord near-total respect to the fact finder’s assessment of the evidence. A common formulation of the standard to be used in evaluating a challenge to the sufficiency of the evidence following a jury trial is “whether the state of the proof is such that reasonable and impartial minds could reach the conclusion the jury expressed in its verdict.”<sup>256</sup> Under this standard, the jury’s “verdict

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251. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 399 (1913).

252. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967) (emphasis omitted). For a discussion of the transition from *Slocum* to *Neely* and beyond, see Robert A. Ragazzo, *The Power of a Federal Appellate Court to Direct Entry of Judgment as a Matter of Law: Reflections on Weisgram v. Marley Co.*, 3 J. APP. PRAC. & PROC. 107, 117-23 (2001).

253. AMAR, *supra* note 138, at 97.

254. Landsman, *supra* note 40, at 873.

255. Debra Lynn Bassett, “*I Lost at Trial—In the Court of Appeals!*”: *The Expanding Power of the Federal Appellate Courts to Examine Facts*, 38 HOUS. L. REV. 1129, 1131 (2001). This point of view is not unanimously held. Less than twenty years ago Martin Louis suggested that “[c]rowded appellate dockets and the temporal inability of appellate courts to immerse themselves in the record of every case have necessitated deference to most trial level determinations having a substantial factual component.” Louis, *supra* note 22, at 998. These differences in opinion may simply reflect a focus on different strands of doctrine coupled with uneven or inconsistent evolution among the various areas considered. One of the theses of this article is that the actual practice of appellate factual review does not comport with doctrine. Thus it may also be the case that Louis accurately describes doctrinal developments, at least insofar as they relate to the narrow issue of scope of review, but that that doctrine neither effectively restrains courts nor accurately depicts review as it actually occurs in a substantial portion of cases.

256. *Liberty Mut. Ins. Co. v. Falgoust*, 386 F.2d 248, 253 (5th Cir. 1967); see also 1 CHILDRESS & DAVIS, *supra* note 111, § 3.01 (quoting *Falgoust* and noting that it exemplifies the

must stand unless appellant can show that there is no substantial evidence to support it, considering the evidence in the light most favorable to appellees, and clothing it with all reasonable inferences to be deduced therefrom."<sup>257</sup> In the framework the courts have created, this is technically a legal question rather than a factual one, and thus appellate review does not run afoul of the Seventh Amendment.<sup>258</sup> But any inquiry into whether a jury's verdict was "reasonable" inevitably involves significant involvement with factual matters,<sup>259</sup> particularly among those courts that sanction appellate review of all the evidence in the case rather than review limited to that which favors the verdict.<sup>260</sup> Moreover, as an analytical matter, the standard of proof should be incorporated into the reviewing court's inquiry into reasonableness.<sup>261</sup> Thus the question is neither "could a reasonable jury have been certain that this was the right result" nor even "could a reasonable jury have been confident that this was the right result," but rather "could a reasonable jury have concluded by a preponderance of the evidence that this was the right result."

Linguistically, at least, a somewhat different standard governs when the trial was before a judge. That situation is governed by the "clearly erroneous" standard, pursuant to which "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."<sup>262</sup> The Court has cautioned that the reviewing court is not to "duplicate the role of the

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approach of the federal courts). These standards represent a gloss on Federal Rule of Civil Procedure 50.

257. *Liberty Mut. Ins. Co.*, 386 F.2d at 253.

258. See Sward, *supra* note 27, at 6 n.17 (providing a brief yet comprehensive summary of the governing law).

259. See Landsman, *supra* note 40, at 896 (The standard involves "a far more expansive mandate than one simply focused on legal questions. It allows courts to measure verdicts against their subjective ideal of a 'reasonable jury,' thereby diminishing respect for the actual jury."); Murphy, *supra* note 130, at 767. The analysis here parallels that in the criminal context, in which courts and commentators have also had to struggle with the implications of a "reasonable" jury for the form and content of appellate review. See *supra* text accompanying notes 166-170.

260. See 1 CHILDRESS & DAVIS, *supra* note 111, § 3.03; Landsman, *supra* note 40, at 897.

261. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) (holding that "the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits"); 1 CHILDRESS & DAVIS, *supra* note 111, § 3.06 ("[T]he standard of review on appeal should implicitly or explicitly include consideration of the standard of proof that was used at trial.").

262. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). For a comprehensive treatment of the "clearly erroneous" standard, see generally Sward, *supra* note 27. See also 1 CHILDRESS & DAVIS, *supra* note 111, §§ 2.02-2.12.

lower court.”<sup>263</sup> “If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.”<sup>264</sup> Even so, it is agreed that the standard allows, and very likely requires, the appellate court to engage in at least some reweighing of the evidence.<sup>265</sup>

The accepted wisdom is that these standards are analytically distinct, and that the standard applicable to jury fact finding requires more (perhaps considerably more) deference than does that applicable to trial-court fact finding.<sup>266</sup> Some, however, have questioned whether that analytical distinction really exists or, if it does, whether the difference between the two standards is “within the cognitive capacity of a reviewing court to discern.”<sup>267</sup> And, as the next section reveals, the actual practice of reviewing courts provides support for the assertion that, whatever logical differences may exist, the practical distinctions are negligible.

## 2. Application of the Standards in Practice

Despite the Seventh Amendment’s prohibition on reexamination of facts, and standards of review that appear to require considerable appellate deference, empirical evidence suggests that appellate courts are relatively willing to second-guess juries in civil cases. Eric Schnapper examined all federal appellate decisions published from October 1984 through October 1985, a set that included 208 cases in which a “court resolved one or more challenges to the sufficiency of the evidence supporting a jury verdict.”<sup>268</sup> Courts reached a holding that the evidence was insufficient in at least one of the senses alleged in 102 (49 percent) of these cases.<sup>269</sup> Although, as Schnapper acknowledges, these numbers certainly overstate the extent to which appellate courts are willing to set aside the work of

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263. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

264. *Id.*

265. 1 CHILDRESS & DAVIS, *supra* note 111, § 2.05 (discussing the extent to which the “clearly erroneous” standard involves appellate courts in reweighing the evidence).

266. *See, e.g., id.* § 2.05; Sward, *supra* note 27, at 5-6.

267. *Reynolds v. City of Chicago*, 296 F.3d 524, 527 (7th 2002).

268. *See* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 246-47.

269. *Id.* at 247. Broken down by the type of claim asserted, Schnapper found that claims for a new trial on the merits were successful 18.5 percent of the time. *Id.* at 248. Requests for judgment notwithstanding the verdict were successful over 38 percent of the time, and challenges to the amount awarded by the jury were successful fully 50 percent of the time. *Id.*

the jury,<sup>270</sup> they nonetheless provide strong evidence that the traditional view—that appellate courts leave factual determinations to juries except in rare cases—is an inaccurate description of reality.

Subsequent empirical research conducted by Kevin Clermont and Theodore Eisenberg has confirmed some of Schnapper's findings. Utilizing a database that enabled them to consider all federal civil cases terminating in fiscal years from 1988 to 1997, a set consisting of 21,415 judgments, they concluded that "contrary to the pronounced expertise, civil jury trials as a group are not so special on appeal."<sup>271</sup> Instead, they found that "the jury and judge trials both experience an appeal rate of about 21% and a reversal rate also of about 21%."<sup>272</sup> What is more, they found that defendants are more frequently successful on appeal than plaintiffs,<sup>273</sup> and that this effect is even more pronounced in the context of cases tried before a jury.<sup>274</sup> This pattern, which Clermont and Eisenberg attribute to appellate misperceptions about the treatment of plaintiffs in the trial courts,<sup>275</sup> is consistent with relatively frequent holdings that the evidence is insufficient to support a verdict, since such a claim will only arise on appeal if the plaintiff has won at the trial court. It also suggests that fact finding by trial judges is not likely to be treated any more favorably than that by juries.

Schnapper's more impressionistic findings are likewise revealing. Of the 208 cases involving sufficiency claims, only two even

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270. One reason for this discrepancy is that sufficiency claims with no chance of success are unlikely to be pursued on appeal. In addition, a sample consisting only of published opinions is likely to overstate the proportion of successful sufficiency claims because opinions rejecting such claims are considerably more likely to be unpublished. See Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71, 76-79 (2001) (discussing various courts' rules concerning the criteria for publishing opinions).

271. Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 127, 128, 131 (2001).

272. *Id.* at 130.

273. *Id.* at 135 (noting that, in total, "defendants reverse 28% of their losses but plaintiffs reverse only 15%."). In a subsequent publication, Clermont and Eisenberg report an even higher difference, concluding that "[d]efendants' trial losses are reversed in about 33% of their appeals, whereas plaintiffs' trial losses are reversed in about 12% of their appeals." Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 952.

274. Clermont & Eisenberg, *supra* note 271, at 138.

275. *Id.* at 142-45 (explaining that judges "imagine a biased and incompetent trial system handing vast sums over to undeserving plaintiffs"); Clermont & Eisenberg, *supra* note 273, at 949, 971 (noting that "appellate judges seem to act on their perceptions of the trial courts' being pro-plaintiff"). But see Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Uppercourts and Underdogs in the U.S. Courts of Appeals*, 36 AM. J. POL. SCI. 235, 254 (1992) (rejecting a judicial-attitude-based explanation for the success of stronger litigants in favor of an explanation based on superior litigation resources).

mention the Seventh Amendment.<sup>276</sup> Instead, “[t]he opinions read like the earnest efforts of judges attempting to decide what the facts really are, not like limited appellate review of a fact-finding process consigned to the jury.”<sup>277</sup> Commenting on the notion that sufficiency review is supposed to incorporate notions of reasonableness, he observes that “[i]f the language of these opinions is to be taken seriously, a large number of sitting federal appellate judges believe that a substantial portion of the American public simply is not competent to resolve the often mundane factual issues presented to civil juries.”<sup>278</sup> As for the “fiction” that consideration of the sufficiency of the evidence involves a question of law, he concludes that “appellate decisions regarding judgments n.o.v. bear absolutely no resemblance to an analysis of a question of law; these decisions are fact-bound analyses which focus exclusively on the evidence in the case and rarely if ever refer to any legal precedents in more than a perfunctory manner.”<sup>279</sup> Although the emphatic nature of these observations may be unique to Schnapper, their substance is not.<sup>280</sup> In the civil context, at least, appellate courts are not hesitant about involving themselves in factual analysis. “[T]he reality is one of robust review and frequent reversal.”<sup>281</sup>

### 3. A Critical Assessment

Constitutional considerations aside, the very nature of the civil justice system suggests that appellate courts ought to be comparatively less involved in reexamining trial-court fact finding in civil, as opposed to criminal, cases. As Justice Harlan noted,<sup>282</sup> by requiring civil plaintiffs to meet only a preponderance-of-the-evidence standard, we have adopted the position that the avoidance of factual errors is relatively less important than the resolution of cases and the fulfillment of other systemic goals.<sup>283</sup> As a policy matter, although

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276. Schnapper, *supra* note 268, at 253.

277. *Id.* at 258.

278. *Id.* at 259.

279. *Id.* at 310.

280. *See supra* note 259.

281. Landsman, *supra* note 40, at 898; *cf.* Lynne Liherato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 440, 443 (2003) (reporting that challenges to the legal sufficiency of the evidence constitute a relatively frequent ground for reversal in the Texas courts of appeals, while challenges to factual sufficiency account for four percent of reversals in civil cases).

282. *See supra* text accompanying notes 124-129.

283. To the extent there appears to be a significant number of cases of a given type in which plaintiffs prevail too often, a more appropriate fix would be to change the substantive law governing those cases. Such a change often would not be for the courts to undertake.



accuracy remains an important object, it is comparatively less prominent than in the criminal context. What is more, in civil cases we are not concerned with ensuring that the effects of any errors fall primarily, if not exclusively, on one side. The detriment that can result from inappropriate appellate intervention in a civil case is of a magnitude that is at least as great as the corresponding benefits of appropriate intervention. Even in a world where factually accurate verdicts were the only goal, this would counsel in favor of a more cautious approach to appellate factual review as contrasted with the criminal system.

We do not live in such a world, of course. The jury does not function merely as a fact-finding instrument, but instead serves other important ends. Stephan Landsman recently identified four broad categories of benefits that the jury provides to the civil justice system. First, the jury contributes to the working of democracy. It acts as a counterbalance to the undemocratic nature of the judiciary by helping to make the administration of justice a product of the people rather than of an elite.<sup>284</sup> Second, the jury facilitates the functioning of the adversary process, which requires a "neutral and passive arbiter."<sup>285</sup> Jurors are well positioned to fulfill this task by virtue of their lack of repeat participation in the system, which inclines them to treat each case as novel and therefore to give both sides' arguments full consideration. Third, the involvement of the jury helps to legitimize judicial activity.<sup>286</sup> Because jury decisions presumably reflect the beliefs and attitudes of the community, rather than of an elite, the citizenry is encouraged to believe that the courts speak for them and reflect their views. Finally, Landsman identified a category of practical benefits furnished by juries.<sup>287</sup> Juries, he argues, are generally good fact finders, ease the burden on trial judges, provide benchmark verdicts by which negotiation and settlement can be calibrated, and discipline the parties to simplify and shorten their

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284. Landsman, *supra* note 40, at 880-83 (noting many ways in which juries are "democracy-enhancing"). One conceivably could attack the assumption that the judiciary is a less democratic institution than juries. Cf Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781, 784-89 (2001) (arguing that, at the state and federal levels, the judiciary is not obviously less majoritarian than the legislature).

285. See Landsman, *supra* note 40, at 883-84 (finding that "the jury . . . is more likely to give each side the sort of careful and respectful hearing upon which the adversary system is premised").

286. See *id.* at 884-85 (arguing that because jurors' "decisions are manifestly based on the attitudes of the citizens of the community rather than the judicial elite," they bring legitimacy to judicial activity).

287. See *id.* at 885-86 (finding that juries "render the system far more secure and effective than it might otherwise be").

presentations. Appellate scrutiny of facts would—Landsman would say “does”—substantially impede the achievement of these ends.

Regardless of whether one is convinced by all of these arguments, at least some of them were among the foremost justifications for the Seventh Amendment. As Akhil Amar has explained, “[j]uries, guaranteed in no fewer than three amendments, were at the heart of the Bill of Rights.”<sup>288</sup> One of the primary jury functions animating the Bill of Rights was protection against government overreaching, since jurors, in contrast to judges, were ordinary citizens and not part of the government.<sup>289</sup> Recent research revealing the overwhelming advantage enjoyed by governmental litigants in the federal appellate courts suggests that this concern has continuing validity.<sup>290</sup> In addition, the Framers envisioned the jury as a tool through which the citizenry could be educated in self-government through action.<sup>291</sup> As well, the jury trial involved the people in the participation and administration of law.<sup>292</sup> In Amar’s words, “[t]he jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”<sup>293</sup>

The resource-related analyses developed in the consideration of the criminal system are relevant here as well. As noted in that context,<sup>294</sup> any argument about judicial economy involves a cost-benefit analysis. Here, as we have seen, the primary benefit of appellate fact-finding superiority (greater factual accuracy) is valued less highly than in criminal cases. At the same time, the additional resources necessary to provide such review might be higher. Because most criminal defendants already file appeals,<sup>295</sup> the possibility of more promising sufficiency claims would likely have little marginal effect on the rate of appeals. The same does not hold in civil cases, in which the costs of appeal do fall on the parties and thus the rate of appeal will likely vary with the perceived chance of success.<sup>296</sup> And while the analysis in the preceding section (which was based in part

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288. AMAR, *supra* note 138, at 83.

289. *Id.* at 84-88.

290. See Songer & Sheehan, *supra* note 275, at 241-43 (discussing the disparities in appellate success rates between governmental and other types of litigants); see also ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 188-89 (2001) (confirming this conclusion and noting its stability over time).

291. AMAR, *supra* note 138, at 93-94.

292. *Id.* at 94-96.

293. *Id.* at 97.

294. See *supra* Part II.A.3.b.

295. See *supra* notes 225-226 and accompanying text.

296. See Bassett, *supra* note 255, at 1191.

on the observation that courts seem to have little trouble performing factual reexamination in civil cases) questioned whether the burdens associated with factual review are as great as commonly believed,<sup>297</sup> there likely remains some truth to the argument that such burdens exist. Here again then, circumstances in the civil system require more appellate caution than in the criminal system.

### C. *Taking Account of Systemic Differences*

One way to account for the disjunction between the implications of standard descriptions of the civil and criminal justice systems (which suggest that appellate factual scrutiny is more appropriate in criminal cases than in civil cases) and the world in which we live (in which appellate courts are much more willing to scrutinize facts in civil than in criminal cases) is to suppose that those descriptions are merely a façade. Nesson's speculation that the aim of the criminal justice system is to achieve "authoritative finality" rather than individualized determinations of guilt represents one such theory.<sup>298</sup> It may simply be that we are not actually concerned with ensuring that this defendant committed this criminal act, but that it makes us collectively feel better about ourselves, or about the functioning of our criminal justice system, to tell ourselves that we are. One might create a similar story about the civil justice system, in which there are reasons we seek to maintain the illusion of jury supremacy while in reality regularly overturning jury verdicts.

Although the analysis thus far is consistent with such depictions, it is likewise consistent with a less dramatic interpretation. It may simply be that the standards governing appellate review of factual matters are inappropriately or insufficiently developed to provide meaningful guidance to the process. Thus, the inconsistency between standards and practice may not be a product of the disingenuousness of the prevailing characterizations of the respective systems so much as of the failure of the standards to prevent courts from being swayed by concerns outside the proper realm of consideration. Assume that Clermont and Eisenberg are correct in concluding that appellate judges tend to share the view that civil plaintiffs receive preferential treatment in the trial courts, and that they put this view into action by favoring defendants on appeal.<sup>299</sup> Judges need not be out to actively subvert the role of the jury in order

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297. See *supra* text accompanying notes 221-224.

298. See *supra* text accompanying notes 235-239.

299. See *supra* text accompanying notes 271-275.

to generate results consistent with this conclusion. A plausible alternative explanation is that the standards meant to connect larger, systemic aims to the adjudication of individual cases are not up to the task. In any given case, then, it becomes easy to lose sight of more abstract considerations such as the role of the jury or the desirability of finality, or to suppose that they can be sacrificed to some degree in the name of what appears to be justice in the individual case, or to give in to the temptation to avoid confronting the possibility that this convicted felon may be innocent. It is this latter explanation that the remainder of this article explores.

The analysis in the preceding sections suggests that the courts have at least one thing right, namely that, in the context of factual reexamination, criminal and civil cases should be treated differently. There are fundamental differences in the type of justice the two systems seek to achieve, as well as in the manner in which they go about that process. The problem is that the courts have their allocation of resources backwards. Both analytically and practically, the criminal justice system presents an appropriate context for appellate courts to exercise the superior aspects of their fact-assessing ability in a relatively aggressive fashion. By the same token, the civil system places a lesser premium on factual accuracy, while other systemic considerations like the simple need to resolve disputes are more to the fore, suggesting a more cautious approach.

I do not mean to suggest that appellate review of facts is, in some abstract and categorical sense, desirable in the criminal context and undesirable in the civil context. The point instead is that, although appellate courts are far better at fact assessment than previously acknowledged, there remain costs associated with appellate factual review, and those costs have to be balanced against any resulting accuracy gains in order to determine whether review is appropriate. Our criminal justice system places an asymmetric premium on factual accuracy, such that avoidance of wrongful convictions is (at least in most accounts of the system) of paramount importance. As such, the value that would flow from effective appellate scrutiny of facts is relatively high. Our civil justice system, in contrast, places a comparatively low value on factual accuracy and a relatively high value on the role of the jury. That suggests not that appellate courts should never get involved in factual reconsideration, but rather that they ought to do so only in situations where they enjoy a clear competence advantage.

It is beyond the scope of this article to attempt a detailed and comprehensive recalibration of appellate factual review. But the fact that the existing standards of review—which, as we have seen, at

least hint at what I suggest is appropriate—fail to bring about this allocation of resources suggests a need to reconsider the standards and, more generally, the relationship between trial and appellate courts. The next Part briefly takes up this task. It considers the nature and functions of standards of review, and suggests acknowledgement of the fact-assessing competencies of appellate courts, coupled with their inclusion as an express consideration in the review process.

### III. SOME IMPLICATIONS FOR THE FORMULATION AND USE OF STANDARDS OF REVIEW

#### A. *The Functions and Purposes of Standards of Review*

Standards of review are, as their name indicates, standards. They function not to compel a particular disposition of a given case, but rather to fix the relationship between, and allocation of power among, the appellate and trial courts.<sup>300</sup> A standard sets the reviewing court's mindset as it approaches the issue, and operates "to guide the process, to tip the balance to one side, to direct the court to common points of departure already deemed relevant."<sup>301</sup> This is a somewhat amorphous function, and consequently some have questioned whether there is any point to attempting too much refinement. As Judge Posner put it, "the cognitive limitations that judges share with other mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review."<sup>302</sup> Indeed, appellate courts often remark on the difficulties involved in attempting to divine the differences between similar, but purportedly distinct, standards of review.<sup>303</sup> For example, while there may be conceptual differences between the processes of reviewing a trial judge's findings of fact to determine whether they are

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300. See 1 CHILDRESS & DAVIS, *supra* note 111, § 1.01. For thorough analyses of the considerations that factor into the structuring of this dynamic in related contexts, see generally Louis, *supra* note 22, at 1046 (concluding that "adjudicative authority is divided between trial and appellate levels along rational . . . historically evolving lines and that the principal areas of contention between the two levels have remained constant"); Sward, *supra* note 27, at 4 ("focusing on the rationales for allocating authority between trial and appellate courts and on the sometimes conflicting values that underlie the rationales").

301. 1 CHILDRESS & DAVIS, *supra* note 111, § 1.02.

302. *School Dist. v. Z.S.*, 295 F.3d 671, 674 (7th Cir. 2002).

303. See, e.g., *United States v. Alvarez-Valenzuela*, 231 F.3d 1198, 1200-01 (9th Cir. 2000) (reflecting on whether there is any practical distinction between reviewing a criminal conviction to determine whether it was based on sufficient evidence versus review for a manifest miscarriage of justice).

“clearly erroneous” and reviewing a jury’s verdict to determine whether it has a reasonable evidentiary basis, the practical differences between the two are elusive.<sup>304</sup>

At the same time, courts routinely recognize that the same standard of review operates in different ways across the range of cases to which it applies. The “abuse of discretion” standard, for example, applies to a broad range of both procedural and substantive decisions, the primary responsibility for which is delegated to trial courts for reasons that vary from decision to decision.<sup>305</sup> Although all of these decisions are reviewed for abuse of discretion, the nature of appellate scrutiny varies depending on the “reason why that category or type of decision is committed to the trial court’s discretion in the first instance.”<sup>306</sup> Thus, “[e]ven if the different formulations of deferential review (substantial evidence, clear error, abuse of discretion, etc.) amount to the same thing . . . the actual amount of deference given the finding of a lower court or an agency will often depend on the nature of the issue.”<sup>307</sup>

Taken together, these observations suggest that, in general, efforts to refine appellate review are best directed not solely at trying to more precisely define the type or amount of scrutiny to which reviewing courts will subject issues in a broad sense. Instead, attention should also (and perhaps primarily) be directed toward identifying the sorts of determinations that appellate courts are suited to make and that thereby make appropriate candidates for more intensive examination.<sup>308</sup> Phrased in the traditional terms, there

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304. See, e.g., *Reynolds v. City of Chicago*, 296 F.3d 524, 526-27 (7th Cir. 2002) (noting that “there are limits to the fineness of the distinctions that judges are able to make”). Contrasting the standards applicable to findings of fact by judges, juries, and administrative agencies, Martin Louis had a similar, though distinct, reaction: “Although these differences probably can be demonstrated empirically and obviously can be expressed in terms of the reasons and policies that purport to justify them, in practice they are principally atmospheric and operate like the proverbial thumb on the scale.” Louis, *supra* note 22, at 1002. Writing four decades prior to Louis, Robert Stern agreed that “if the courts were guided only by the words in which the prevailing formulas are expressed, they might have considerable difficulty in determining whether there were any practical differences between the two rules.” Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 81 (1944). Stern nonetheless contended that historical and policy considerations reveal clear differences among the situations, such that measurably less deference toward the factual findings of trial judges (as opposed to juries and administrative agencies) is appropriate. *Id.* at 81-85.

305. *United States v. Criden*, 648 F.2d 814, 817 (3d Cir. 1981).

306. *Id.* at 817-18.

307. *School Dist.*, 295 F.3d at 675.

308. Cf. HART & SACKS, *supra* note 1, at 349 (discussing the argument that distinctions between “law” and “fact” should be discarded in favor of an analysis based on the appropriate division of function).

should be a greater linkage between standards of review and scope of review. The important task is not to attempt to more finely calibrate appellate consideration of certain issues (a task that runs the risk of making conceptual but not practical sense), but rather to better define the contexts in which a court ought to exercise a firmer hand in its review—or, to put it another way, to devote significant cognitive resources to the issue.<sup>309</sup>

*B. Express Consideration of Institutional Competence in Individual Cases*

We have seen that, in the context of reviewing sufficiency claims, the problem of appellate factual review is really two problems. In criminal cases there is (arguably) too little review, while in civil cases there is (arguably) too much. And given that broad-level consideration of the two systems leads to the conclusion that greater appellate scrutiny should occur, if anywhere, in the criminal system, at least one of the “arguably”s in the preceding sentence should be replaced with “certainly.” The task any revision to the governing standards must accomplish, then, is to constrain courts both from doing too much and doing too little. Incorporation of the notion of institutional competence into review at the case-by-case level would achieve this end.

Defining the appropriate parameters of appellate review involves a host of considerations. Institutional competence is the most fundamental. If there is not some sense in which an appellate court could do a better (or, at the very least, as good) job of evaluating a particular type of evidence or information, then the matter should remain exclusively for the trial-level fact finder.<sup>310</sup> Even if the appellate court can, in effect, add value to the process, there remains the question whether it ought to attempt to do so. This requires a consideration of the broader effects of appellate intervention, including its direct costs in terms of things like the consumption of judicial resources and the likelihood (and relative undesirability) of appellate error, as well as more indirect effects on systemic legitimacy, jury integrity, and the like.

Yet, at present, institutional competence figures as an express factor in the inquiry only at a general level. Because, for example, we

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309. Cf. Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 599, 599-602 (2003) (exploring the ways in which “bounded rationality,” the idea that each of us possesses a limited amount of cognitive resources, which we must constantly ration, affects lawmakers and thereby the law itself).

310. See *supra* text accompanying notes 209-211.

have assumed the superiority of the trial-level fact finder, we have deemed factual questions to be inappropriate for appellate reconsideration (even though courts tacitly recognize otherwise). In similar fashion, because we have concluded that trial courts are in the best position to deal with a certain broad array of decisions, we have deemed them fit for reversal only upon an abuse of discretion (even though courts recognize—almost always tacitly—that all of these decisions are not created equally). But the larger, more systemic considerations listed above<sup>311</sup> also factor relatively prominently in the analysis here, making this the sort of inquiry that does not lend itself well to resolution on a case-by-case basis. These are, instead, the sorts of considerations to be accounted for in making the basic determination of whether the court ought to engage in deference or some level of scrutiny, and are therefore best made at some level of generality. By taking these factors into account we can reach conclusions about, for example, whether we want (and the Seventh Amendment permits) appellate courts to engage in factual reexamination at all in civil cases, whether they should do so in circumstances where they enjoy a clear competence advantage, or whether they ought to operate according to some other formula.

At the level of the individual case, however, institutional competence remains largely outside the realm of express consideration. In the context of factual review, the previously presumed lack of any appellate competence perhaps explains this exclusion. In any event, once we recognize that appellate courts are competent in many respects to assess facts, and once we conclude that they ought to do so, the appropriateness of making express the analysis of competence in the individual case becomes clear. That is, while it is possible to make categorical conclusions about appellate courts' competence to review, say, circumstantial evidence, it is nearly impossible to say anything meaningful about the superiority of textual reasoning that can be applied across the board. We can recognize that the ability to reason from text will often put the appellate court in a superior position, and we can perhaps even develop categories of situations in which this is generally true. But the best way to put this insight to use is to structure the inquiry in such a way that a court confronted with a fact-based argument rooted in an assertion about its ability to reason from text must itself reason through that question. Ideally, in other words, the court would be required to work through the issue in the context of the case.

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311. See, e.g., *supra* Part II.A.3.



Assume, for example, a claim based on the assertion that the court's access to a transcript places it in a better position to assess the inconsistencies between a witness' testimony and her earlier statements to investigators. As a preliminary matter, the court would of course have to determine that the appellant's proposed resolution of the inconsistencies would be of consequence, an analysis that parallels consideration of whether an error was harmless.<sup>312</sup> From there, review of such a claim would have to take into account such things as the likelihood that what appear to be inconsistencies when viewed in a transcript might not have been if witnessed firsthand, because the words of the trial testimony were sufficiently ambiguous that a significant portion of their meaning may have been conveyed nonverbally. (Note that the reverse does not hold. If the ambiguities are in the earlier statements rather than the in-court testimony, the jury would not be privy to any information that the appellate court lacked.) A court considering such an argument would also have to account for the extent to which cross-examination brought any potential inconsistencies to light and, if not, whether the failure to conduct appropriate cross-examination amounted to a waiver of the argument.

Or consider an argument contending that the jury inappropriately credited one witness' testimony. Here again, the court would first ask whether, assuming it enjoys an advantage, exercise of any such advantage could reveal anything of consequence to the outcome of the case. From there, the analysis would have to account for the extent to which the witness' words were ambiguous, such that the meaning of the testimony might lie in paralinguistic cues to which the court lacks access.<sup>313</sup> Or perhaps the testimony concerned an eyewitness identification made under circumstances that the appellate court concludes rendered it unreliable.<sup>314</sup> As these examples demonstrate, the point is not to license courts to engage in open-ended factual analysis in every case, but rather to recognize that factual reexamination is often appropriate. Then, courts can bring the analysis out into the open, such that there actually is analysis conducted according to an articulated governing principle<sup>315</sup> rather than factual evaluation unconstrained by any consideration of

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312. See *supra* text accompanying notes 222-224.

313. See *supra* text accompanying notes 31-33.

314. See *supra* text accompanying notes 101-104.

315. It is the principle of institutional competence, rather than the examples of areas of appellate competency that I have identified, that should serve this purpose. It would be impossible and incompatible with the functions of standards of review to identify in a vacuum all the areas in which appellate courts might enjoy these advantages.

whether the reviewing court is likely to draw better or worse conclusions.

In this way, including a focus on institutional competence as an express component of factual review would resolve some of the dilemmas that exist in the standards of review as currently formulated and applied. In general terms, it would serve to guide the fluidity that inheres in any standard of review. Just as courts often recognize that the implementation of the abuse of discretion standard will vary depending on the nature of the decision under review, so should they recognize that review of the sufficiency of the evidence should vary along a similar dimension. The key consideration governing both inquiries is whether the nature of a particular sort of evidence in a particular case is such that the appellate court could do a better job of evaluating it than could the responsible actor at the trial level.<sup>316</sup>

In the criminal context, encouraging appellate courts to take their institutional competencies into account when considering claims of insufficient evidence would serve to provide a rational limit to the reach of *Jackson*. Courts' reluctance to implement any but the narrowest interpretation of *Jackson* is understandable. As noted above,<sup>317</sup> while *Jackson* may have been intended to change the traditional practice of extreme appellate deference, the absence of clear limits in both the standard the Court articulated and the logic underlying it left lower courts in the position of having to craft such limitations for themselves if they were to extend their role much beyond what had been the practice under *Thompson*. Without the emergence of some sort of limiting principle there exists no practicable basis on which to prevent *any* expansive reading of *Jackson* from creeping toward the *most* expansive reading. The choice courts have

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316. To some extent, the analysis I propose parallels that offered by George Christie:

If a determination depends on the direct observation of facts and the uncontradicted testimony of witnesses reporting their observation, the findings of the trial court should be upheld, unless they are clearly erroneous, regardless of what the fact in question is . . . . If the factual determination involves reflection on the evidence and the record adequately presents the evidence, then there is a basis for asserting that some greater scope of review is warranted . . . . Nevertheless, and again regardless of what the fact is, the finding of the trier of fact is entitled to some deference. Thus, it might be appropriate for a reviewing court to reject the trier of fact's evaluation of the evidence, even if the trier of fact's conclusions are reasonable, so long as the reviewing court felt that its contrary evaluation was a more reasonable view of the evidence. On the other hand, if the reviewing court cannot in good conscience maintain that its evaluation is a more reasonable evaluation than that of the trier of fact, a trial court's determination that is reasonable in the light of the whole record should be sustained.

Christie, *supra* note 3, at 56. Christie takes a more restrictive view of the institutional competence of appellate courts to evaluate facts than do I.

317. See *supra* text accompanying notes 173-177.

faced, then, is between the previous practice of minimal factual review and the realistic possibility of meaningful factual review of nearly every case. Given that it was undoubtedly easier and considerably more comfortable for courts to continue to operate under what amounted to the same standard as applied prior to *Jackson*, particularly in light of the uncertainty involved in the alternative, it is not surprising that that was the option they chose. A focus on institutional competence would provide a sort of bounded liberation, pursuant to which courts could engage in some factual review free from concern that it would inexorably lead to full factual review.

In civil cases, on the other hand, an express focus on institutional competence would have a constraining effect. Assuming—as many do not<sup>318</sup>—that some appellate reexamination of facts is appropriate, this focus would provide a rational limit to that exercise. A court inclined to reconsider factual issues would have grounds for determining which ones it can consider, with the resulting benefit being the flipside of that identified in criminal cases.

Note again that I am not suggesting that the two systems must operate under the same standard. The systems place different values on factual accuracy, and thus deference to the other systemic goals counsels broader factual deference in civil cases. Thus, our concern with avoiding wrongful convictions may counsel that we empower appellate courts in criminal cases to assess factual matters as to which they have any competency. In civil cases, in contrast, we might choose to limit factual evaluation to situations in which the reviewing court enjoys clear superiority. And there are, of course, strong arguments that appellate courts ought not to do any fact finding in civil cases, even if they are better equipped to do so.<sup>319</sup> But even if one allows for review as intensive as that in which the courts apparently engage at present, express focus on institutional competence will serve the important function of restricting appellate courts to tasks that they are actually suited to perform, thereby providing appropriate respect to the jury and facilitating the furtherance of other systemic aims.

### *C. Institutional Competence and the Broader Aims of Jurisprudence*

The effect of requiring express focus on institutional competence would be salutary in a more broadly jurisprudential sense as well. Another of the impressionistic findings from Schnapper's study was that appellate decisions

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318. *E.g.*, Bassett, *supra* note 255.

319. *See supra* Part II.B.3.

provide no substance to any of these vague formulations [of standards of review]. None of the opinions applying the “reasonable jury” standard explain how much evidence a reasonable jury would require; the relevant opinions are every bit as uninformative regarding how much evidence is “substantial evidence.” Equally significant, there is no perceptible correlation between the standard which a panel applies and the result which it reaches. Indeed, a review of the appellate decisions strongly suggests that these formulations do not function as legal standards at all, but are merely rhetorical flourishes which open or close each opinion.<sup>320</sup>

Less dramatically, judges have forthrightly acknowledged that there is a less tangible sense in which the court’s assessment of the facts is incorporated into its review of a case. Karl Llewellyn wrote of “the court’s ‘smell’ for the ‘facts’ beneath the officially given ‘facts’ [being] frequently, not just semi-occasionally, a factor in the deciding.”<sup>321</sup> Thomas Marvell’s extensive study of appellate judges revealed that judges consistently take what Marvell termed the “fireside equities” of the case into account, often stretching the law as necessary to accommodate their sense of the defendant’s guilt or innocence.<sup>322</sup>

Once the factual competencies of appellate courts are recognized, it follows that those capabilities should be accounted for in the law. Llewellyn again: “Any frequently occurring phenomenon which is capable of isolation into a pattern or into an issue-focus repays bringing out into the open for conscious study, conscious and reckonable use, and possible conscious guidance or control . . .”<sup>323</sup> In other words, so long as it is clear that appellate judges can (and do) account for the facts, the system will function better, in terms of delivering better-reasoned, more consistent results, if we develop mechanisms for courts to do so openly, coupled with doctrine limiting the scope of those mechanisms to appropriate situations. The core notion of ensuring that “like cases are decided alike” requires criteria by which to determine which cases are alike. A standard of review that required appellate courts to openly grapple with the question of institutional competence in the context of assessing factual matters would provide such criteria.

Indeed, precisely what Llewellyn advocated has long been a feature of the law’s development. In the civil context, one can trace back at least to the 1930s complaints about appellate courts’ assumption of what had previously been regarded as “factual”

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320. Schnapper, *supra* note 268, at 279.

321. LLEWELLYN, *supra* note 34, at 28 n.20.

322. See MARVELL, *supra* note 203, at 144.

323. LLEWELLYN, *supra* note 34, at 28-29 n.20.

questions.<sup>324</sup> In a 1957 article on the subject, Charles Wright discussed four situations in which he determined that appellate courts had devised what he termed "new procedural devices by which their mastery of the litigation process can be made direct rather than devious."<sup>325</sup> Situations, in other words, where the appellate courts stopped accounting for their own assessments of the facts beneath the surface of their review, and began to do so in the open. These included:

review by the appellate court of the size of verdicts; orders for a new trial where the verdict is thought to be contrary to the clear weight of the evidence; refusal to be bound by findings of fact of the trial judge based on documentary evidence; and expanded use of the extraordinary writs of mandamus and prohibition to control the trial court in its discretionary actions as to the procedure by which a case is to be handled.<sup>326</sup>

The point is not that the specific developments that these commentators have identified are either sensible or not when viewed from a broad perspective,<sup>327</sup> but rather that the transformation of factual issues into legal issues is a natural part of the evolution of a system of law.<sup>328</sup> We now know that appellate courts enjoy certain advantages over trial judges and juries when it comes to the evaluation of facts, and we have a basic sense of the extent of those advantages. All that remains is to put these ideas into practice.

#### IV. CONCLUSION

Contrary to long-held assumptions, appellate courts enjoy significant fact-assessing advantages over trial-level fact finders. These advantages are based both on the nature of the materials with which trial and appellate courts must work as well as on their differences in perspective. Incorporation of these superiorities in the process of appellate review would not only serve to correct the present imbalance in the appellate tendency to review facts in the civil system as opposed to the criminal system, but would also advance the larger goals of facilitating judicial candor and ensuring that like cases be treated alike.

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324. See Wright, *supra* note 2, at 778 (placing Dean Green's complaints about "the centralization of power in the appellate courts" at least twenty-five years prior to the 1957 publication of Wright's article).

325. *Id.* at 751.

326. *Id.* at 751-52.

327. Indeed, Wright was highly critical both of these specific developments and more generally toward the trend. *Id.* at 780-81.

328. Cf. Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 527-29 (1969) (taking the position that the trends decried by Wright were instead a positive development).