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Some of the worst abuses of state criminal due process, the author believes, result from anachronistic and artificial restraints which prevent the trial judge from directing acquittals. Therefore, he advocates for all states a uniform policy and practice recognizing and authorizing directed acquittals where the evidence is legally insufficient to support a conviction.

I. Introduction

The giant growth of the nation in the twentieth century has put an enormous strain upon the administration of justice in its criminal courts. Statistics released by the Federal Bureau of Investigation stress the fact that for the past several years we have been subjected to a "crime explosion" four times as potent as our notorious population explosion.[1] In most instances the impact of these statistics has fallen on state courts, already overworked, understaffed and underfinanced.[2] Certainly it would be unrealistic to expect the criminal courts to match every indictment with a conviction. Nevertheless, there are alarming indications that our machinery of criminal justice is grinding exceedingly slow, if not exceedingly coarse, and small doubt remains that an ever-widening efficiency gap exists in most criminal courts today.[3]

Today it is common enough for criminal trials to drag on for weeks before the issue of guilt or innocence is settled; and it is almost routine for indigent prisoners who cannot raise even nominal bail to languish

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1. FBI, Uniform Crime Reports for the United States 1 (1960).

2. In the State of Tennessee alone, the cost of administering criminal justice has spiraled to new peaks since the end of World War II. The following statistics were graciously furnished the author by the Judicial Expense and Criminal Cost Bureau of the State of Tennessee; they graphically illustrate the soaring costs of operating the Tennessee criminal courts:

1946-47—$242,872.28	1954-55—$444,878.91
1947-48—$284,468.88	1955-56—$438,690.47
1948-49—$288,655.32	1956-57—$449,716.39
1949-50—$313,868.22	1957-58—$456,765.60
1950-51—$324,324.55	1958-59—$494,139.76
1951-52—$340,457.00	1959-60—$530,703.88
1952-53—$304,115.97	1960-61—$550,098.48
1953-54—$351,543.56	

3. In the period 1950-1959 despite the fact that a 60% rise in the crime ratc was conntered with 53% more arrests, convictions were up only 36%, or slightly more than one-half the increase in crime. FBI, Uniform Crime Reports for the United States 10 (1954). See also FBI, Uniform Crime Reports for the United States 12 (1960).

in jail for weeks and sometimes months before they realize their constitutional birthright to a speedy trial. But the real misfortune is that a defendant must endure the stress and ordeal of successive prosecutions; because the trial judge, bound by awkward precedent and obsolete policy, cannot conscientiously approve the jury's verdict, but is not authorized to terminate the injustice. Some of these illustrations are the cause, others the effect, but all underscore the insidious infringement of state criminal due process resulting from antiquated practices still followed by many American jurisdictions.

It is the general theme of this article that some of the worst abuses of our criminal courts result from anachronistic and artificial restraints which prevent the trial judge from directing acquittals even though a guilty verdict could not be sustained, thus upsetting the vital balance between the provinces of the judge of the law and the judge of fact.

Under our system, the trial court is divided into two tribunals. Generally, the court must answer all questions of law and the jury must answer all questions of fact. It is the province of the court to determine the admissibility, materiality, competency, relevancy and legal sufficiency of the evidence. The jury must assess the credibility of the witnesses, weigh the evidence, and resolve all conflicting testimony by its verdict. This, of course, is the classic distribution of functions in the Anglo-American system of justice. It is also well settled that the court has full authority to withdraw the issues from the jury and direct a verdict in a civil case where the evidence is insufficient as a matter of law.

But the parallel authority in a criminal action presents an entirely different picture. A survey of the American jurisdictions lays bare a puzzling disunity on the question of the court's right to direct a verdict in a criminal case. The upshot of this disagreement is that a defendant on trial in a Tennessee state court cannot fairly look to the judge to stop a legally insufficient prosecution by directing an acquittal, while a defendant in the federal courts in Tennessee, and the courts of the majority of states, can rely on this timely relief when he is victimized by equally insufficient evidence. Thus the question is raised: Should there be a uniform policy and practice in all states recognizing and authorizing directed acquittals where the evidence is legally insufficient to support a conviction?

It is with this question in mind that we now turn to the authorities. Although the federal courts and the majority of state courts either expressly or impliedly accept the authority of the court to direct an acquittal in a criminal case, acute and often diametrical differences have cropped up among the states on this question. These differences have spawned active and conflicting doctrines which, in turn, have frustrated an orderly solution of this problem. The first doctrine is the previously mentioned majority rule. The second is the intermediate or compromise rule, repre-

sented by states which have passed advisory acquittal statutes. Finally, there is the rock-ribbed minority doctrine which totally rejects the authority of the court to direct an acquittal.

All of these doctrines will be explored, but as we shall soon see, even in the federal courts and among the states which purportedly follow the majority doctrine, the nature and application of the authority is quite another matter.

II. The Majority Rule

A. The Nature of the Power—Discretionary Authority or Mandatory Duty?

Is the trial judge duty bound to direct a verdict of acquittal where, in his opinion, the evidence warrants such action? The federal courts and the overwhelming majority of the states respond in the affirmative![4] However, there is another side to the majority rule. This view defines the power to direct an acquittal as resting solely in the discretion of the trial judge who can never be put in error for refusing to exercise it.[5]

As the following illustration will show, the distinction between the two interpretations can be extremely crucial in the light of their respective consequences. Suppose that a man is indicted for murder, and at the trial his defense is legal insanity at the time of the offense. The arresting officer testifies that in his opinion the defendant was entirely normal at the time of his arrest, minutes after the crime. The defense calls several witnesses, including two eminent psychiatrists who testify that, although the defendant is mentally competent to stand trial, he is suffering from an incurable mental illness which develops gradually and that, in their opinion, at the time of the homicide the defendant was mentally irresponsible and completely incompetent to discriminate between right and wrong. Assume further that once the defense introduces any evidence of insanity, the state is required to prove sanity beyond a reasonable doubt. The prosecution rests on the testimony of the arresting officer; the defendant moves for a directed verdict at the close of all the evidence; the trial court overrules the motion.

Finally, let us assume that state *A* follows the rule which permits the defendant to assign error on the judge's denial of a motion for directed verdict and that state *B* is controlled by the rule which holds that the court's refusal to direct an acquittal is never error. If the defendant is fortunate enough to prosecute his appeal through the courts of state *A* he will probably gain a reversal of his conviction, because the court will consider the sufficiency of the evidence of his insanity to support a con-

4. See Abbott, Criminal Trial Practice 1206 (4th ed. 1939).
5. *E.g.*, Winford v. State, 213 Ga. 396, 99 S.E.2d. 120 (1957).

viction. On the other hand, if the defendant should appeal in state *B*, he cannot charge error against the action of the trial court because the power, being purely discretionary, disappears upon the court's refusal to exercise it. The arresting officer's testimony has created a technical conflict in the evidence; thus the appellate court will not pass upon its sufficiency. The defendant is further handicapped because his presumption of innocence has been displaced by the presumption of guilt and has put upon him the burden of showing that the evidence preponderates against guilt and in favor of innocence. His last slender hope hangs on a possible erroneous ruling of the trial court which will grant him a new trial. But a new trial may mean only additional months of incarceration with the ominous prospect of a second and final conviction at the hands of an "educated" prosecutor.

Happily, the situation in our hypothetical state *B* reflects the law in only one state—Georgia.[6] And there are encouraging signs that this state is attempting to ease the effects of this rule. In recent years the Georgia Legislature has enacted a statute permitting the losing party on motion for directed acquittal to move for judgment notwithstanding the verdict within thirty days of final judgment.[7] The statute further provides that the losing party can predicate error upon the trial court's refusal to grant a judgment n.o.v.

Although passed originally as civil procedure legislation, this act has been construed to apply to criminal cases.[8] But this reform is at best only piecemeal. In a late case, the Georgia Supreme Court held squarely that this statute did not change the rule that it is not error to refuse to direct an acquittal in Georgia trial courts.[9]

A realistic analysis shows that the so-called discretionary rule offers less security to the defendant than the advisory acquittal statutes which will be discussed later. And in point of comparison, it would appear that, while the minority rule illogically stores too much authority in the jury, the discretionary interpretation of the majority rule clothes the trial judge with virtual appellate immunity on his decision concerning the merits of a motion for directed acquittal.

B. The Timing and Scope of the Motion

In the federal courts and in jurisdictions which authorize directed verdicts of acquittal, the timing of the defendant's motion often is conclusive of his rights. It is a general principle that if the entire evidence is sufficient to sustain a conviction, the introduction of evidence by the

6. *Id.* at 121.
7. GA. CODE ANN. § 110-13 (1959).
8. Crowe v. State, 98 Ga. App. 185, 188, 105 S.E.2d 353 (1958).
9. Albert v. State, 111 S.E.2d 215 (Ga. 1959).

defense, after the court has overruled a motion for directed acquittal at the close of the case for the prosecution amounts to a waiver of the motion for directed verdict.[10] Thus, in *Loftin v. State*,[11] where the defendant elected to introduce evidence on her behalf after a motion for directed verdict was overruled, and then failed to renew the motion at the conclusion of all the evidence, she had waived her rights to except to the court's action on her initial motion. The Mississippi Supreme Court was sympathetic: "It is manifest from the entire proof that the evidence was wholly insufficient to establish the guilt of the appellant and she would have been entitled to a directed verdict at the conclusion of all evidence if she had requested it . . . ." But the court was likewise firm: "[B]ut there was no such request and, therefore, the trial court can not be put in error for failure to so instruct the jury."[12]

The federal courts substantially follow this rule, and unless exceptional circumstances supervene or it is necessary to prevent a miscarriage of justice, the federal appellate courts will not review the evidence where the defendant has allowed his case to drift to the jury without renewing his motion for acquittal at the close of all the proof.[13] However, Federal Rule of Criminal Procedure 29(b) provides the defendant an extra margin of security when he does renew his motion. This section permits the defendant to renew his motion within five days after the jury is discharged, and on such well-taken motion, the court can elect to set aside the verdict and order a new trial or enter a judgment of acquittal.

Rule 29 (b) further provides that the court may reserve decision on the motion when it is made at the close of all the evidence. The next question is whether this rule can be extended to cover the situation where the court seeks to reserve its decision on a motion made at the close of the government's case. A case from the Fifth Circuit says "No!"[14] In this case, after the government had rested, the defendant moved for a directed verdict which the court at first overruled, then announced that the ruling was reserved. The trial court next inquired as to whether the defendant rested, and upon being advised that both sides rested, the court heard arguments on motion for acquittal and then denied the motion. Although the case was reversed on other grounds, Judge Jones, writing for the majority, held that the trial court could not reserve its ruling on a motion made at the close of the government's case, pointing out that it would be a "futile thing if the court could reserve its ruling and force the

10. *E.g.*, Robins v. United States, 262 Fed. 126 (8th Cir. 1919); State v. Gibbs, 105 Kan. 52, 181 Pac. 569 (1919).

11. 51 So. 2d 921 (Miss. 1951).

12. *Id.* at 922.

13. Cooper v. United States, 256 F.2d 500 (5th Cir. 1958). *But see* Knight v. United States, 213 F.2d 699 (5th Cir. 1954).

14. Jackson v. United States, 250 F.2d 897 (5th Cir. 1958).

defendant to an election between resting and being deprived of the benefit of the motion."[15]

Judge Rives disagreed in part with his colleague and reasoned that if the court was of the opinion that the evidence was insufficient to sustain a conviction it may not reserve its motion at the close of the government's case; but that where the court thinks the evidence is sufficient it may properly reserve its decision for the same reasons that it could at the close of all the evidence.[16] Judge Jones seems to have the stronger argument. Surely, if the government's case is sound, the motion should be promptly overruled. But if the motion is not well taken, would it not work a serious injustice to shift the responsibility of going forward with the evidence to the defendant with the likely possibility that he will be lured into making out a case against himself? Unfortunately, Judge Rives' view overlooks the trial court's continuing responsibility to expedite the trial by ruling promptly and clearly on all procedural questions.

As a general practice the trial court will seldom, if ever, entertain a motion for acquittal or directed verdict before the prosecution has completed its proof.[17] This point was readily conceded by District Judge Holtzoff in *United States v. Maryland Cooperative Milk Producers, Inc.*[18] But this federal judge recognized an exception to the standard rule and sustained a motion for judgment of acquittal shortly after the government commenced its proof. Judge Holtzoff went on to define his position:

> An exception is proper, however, if at an earlier stage basic facts appear inescapably leading to the conclusion that, irrespective of whatever other evidence may be introduced, the prosecution must fail. In that event, it is proper to stop the further introduction of evidence and entertain a motion for judgment of acquittal.[19]

How do the trial courts deal with a motion filed jointly by two or more defendants? The orthodox practice requires the court to find a verdict for a defendant jointly prosecuted with others where there is no evidence against him.[20]

However, there is another view which drastically affects the scope of a joint motion for directed acquittal. This view holds that a joint motion by

15. *Id.* at 901.
16. *Id.* at 901-02.
17. *E.g.*, State v. May, 153 N.C. 600, 68 S.E. 1062 (1910).
18. 145 F. Supp. 151 (D.D.C. 1956).
19. *Id.* at 152. If he had so desired, Judge Holtzoff could have cited impressive authority for his action. The United States Supreme Court passed on this question in United States v. Weissman, 266 U.S. 377 (1924). There Mr. Justice Holmes speaking for the Court said: "[W]e do not mean to imply that an opening by counsel or the offer of evidence is necessary in order to justify directing a verdict . . . ; there are other cases in which it is done." *Id.* at 379.
20. TEX. CODE CRIM. PROC. art. 654 (1954); Jones v. State, 13 Tex. 168, 62 Am. Dec. 550 (1854).

co-defendants for a directed acquittal is properly denied where there is some evidence tending to connect one of them with the commission of the offense, although there is no evidence tending to implicate the other defendant. The leading case expounding this view is an 1894 Alabama decision.[21] There, in a curious result, the Alabama Supreme Court ruled that even though one of the defendants was clearly entitled to a directed verdict, if the motion was not well taken as to the other defendant it must be denied as to both because it was not "good as a whole." It is impossible to reconcile this decision with the vast weight of authority. Perhaps the Alabama Supreme Court some day will reconsider this decision.

C. Standards To Test the Sufficiency of the Evidence

Rather varied standards have been adopted by the majority jurisdictions to justify directed acquittals. Most states which follow the general rule permit directed verdicts of acquittal where the evidence is so defective or weak that a verdict based on it could not stand.[22] Others require directed acquittals where there is an utter failure to prove one or more of the essential elements of the crime or where the evidence is simply "insufficient to support the verdict."[23] There is an important distinction between the power of the court to direct an acquittal for insufficient evidence and its duty to act where there is no evidence at all to support the prosecution. In the latter instance even jurisdictions which require the jury to pass on the legal sufficiency of the evidence do not hesitate to authorize a directed verdict.[24]

It is generally agreed that the scintilla rule has no application in a criminal case.[25] The reasoning supporting this conclusion is that the presumption of innocence commands such evidentiary force that it must be rebutted and overcome by substantial evidence.[26] However, in the states which recognize directed acquittals, the quantum and quality of

21. Randolph v. State, 100 Ala. 139, 14 So. 792 (1894).
22. State v. Sullivan, 146 Me. 381, 82 A.2d 629 (1951).
23. State v. Perez, 126 Mont. 15, 243 P.2d 309 (1952).
24. Tennessee follows the strict minority rule and hence does not authorize direct acquittals on the sufficiency of the evidence. But the following account appearing in Chattanooga News-Free Press, June 23, 1961, p. 5, col. 1 reveals a different practice in that state where there is no evidence at all to support the conviction: "The judge then sustained the motion to suppress the evidence . . . The judge then inquired . . . whether the state had any more evidence to present in its case. The Assistant Attorney General said no, and Judge Carden directed a verdict of not guilty . . . on grounds there was no legal evidence whatsoever in the case to submit to the jury." Although unauthorized under Teunessee law the finality of a directed verdict has been conceded by the Tennessee Supreme Court. See State v. Vincent, 147 Tenn. 458, 249 S.W. 326 (1922).

For cases in states following advisory acquittal statutes see State v. McCarthy, 47 Idaho 117, 272 Pac. 695 (1928).
25. *E.g.*, Lewis v. State, 27 Ala. App. 155, 167 So. 608 (1936).
26. Sec State v. Stone, 224 N.C. 848, 32 S.E.2d 651 (1945).

evidence necessary to overcome a timely motion for directed verdict are subject to shifting and elastic definitions. For example, one state requires its courts to reject a directed verdict of acquittal where there is any "proper" evidence before the jury on which to sustain a conviction.[27] Another state denies the motion where the evidence is "legal" and raises an "inference of guilt."[28] The general standard applied by most courts in testing the soundness of a motion for directed acquittal prescribes that before sustaining such motion the court must consider all competent and legal evidence in the light most favorable to the prosecution.[29] Some jurisdictions have outlined statutory standards of proof by which the court must measure motions for directed verdicts. While most of these states accept as a rule of thumb the phrase "legal insufficiency," a few codify the standard of proof with great particularity. To illustrate, a Texas statute provides that where by law two witnesses are required to authorize a conviction, if this requirement is not met by the prosecution, the court must direct an acquittal.[30] This statute has been interpreted as forbidding the court from ever shifting to the jury its responsibility to pass upon the sufficiency of the evidence.[31]

This suggests inquiry into the latitude of the court in considering evidence attacked by a motion for directed verdict. It is a basic precept that the court has no right to weigh the evidence in passing on a motion for directed acquittal.[32] What then is the function of the court? A South Carolina case gives us one answer:

> The office and function of the Court when considering a motion for a directed verdict in favor of the defendant, is not to pass upon the weight of the evidence, but to determine its sufficiency to support the verdict. Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, . . . the issues should be submitted to the jury.[33]

Critics of the majority rule have argued that the judge must necessarily pass upon the weight of the evidence and the credibility of witnesses in deciding motions for directed verdicts of acquittal and that such reasoning process would perforce usurp the function of the jury. This argument was repudiated in the case of *Isbell v. United States*.[34] There the Eighth Circuit stated:

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27. Chisley v. State, 202 Md. 87, 95 A.2d 577 (1953).
28. State v. Buffa, 51 N.J. Super. 218, 143 A.2d 833 (1958).
29. *E.g.*, State v. Lawrence 280 S.W.2d 842 (Mo. 1955); United States v. Horton, 180 F.2d 427 (7th Cir. 1950).
30. TEX. CODE CRIM. PROC. art. 722 (1954).
31. *E.g.*, Water v. State, 30 Tex. Ct. App. R. 284, 17 S.W. 411 (1891).
32. *E.g.*, United States v. Weinberg, 129 F. Supp. 514, (M.D. Pa. 1955).
33. State v. Brown, 205 S.C. 514, 32 S.E.2d 825, 827 (1945).
34. 227 Fed. 788 (8th Cir. 1915).

> Nor does the duty of the court to consider and determine whether or not there is substantial evidence of facts which exclude every other hypothesis but that of guilt require the court, in our opinion, to pass upon the weight of the evidence, the credibility of the witnesses, or to direct an acquittal unless he believes the defendant guilty beyond a reasonable doubt. It requires nothing of him but the performance of the ordinary duty which, upon request, devolves upon him in every jury trial, the duty to determine whether or not at the close of the trial there is any substantial evidence against the defendant, and if there is none to direct a verdict in his favor. The judge is to consider and determine, not whether or not the weight of conflicting evidence or the preponderance of the credibility of contradictory witnesses establishes facts which exclude every other hypothesis but that of guilt, but only whether or not there is any substantial evidence whatever of such facts, and, if there is none, to direct a verdict in favor of the defendant.[35]

1. Circumstantial Evidence

The *Isbell* case has become controversial not so much for its reasoning concerning the judge's function in acting upon a motion for directed verdict, but for its rule that, in a circumstantial evidence case, unless a reasonable mind might fairly conclude either guilt or innocence and unless every other hypothesis, save guilt, is excluded, it is the duty of the trial judge to direct an acquittal.[36] This holding was flatly contradicted in *Curley v. United States*.[37] There Judge Prettyman, speaking also for Judge Edgerton, disputed the rationale of *Isbell* and found that "if the judge were to direct an acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury."[38] Moreover, the appellate judge asserted that if this were the law, the jury would be relegated to a "device for checking upon the conclusion of the judge."[39] In a strong dissenting opinion, Judge Miller, disturbed because the majority had overturned "a sound rule based . . . upon the presumption of innocence," made a very effective argument against the view of the majority.[40] The dissenting judge contended that "reasonable doubt is not eliminated by evidence from which the jury may draw either of two irreconcilable inferences." He then invoked the analogy of the burden of proof in civil cases where the proven facts lend equal support to each of two inconsistent inferences. The rule in these cases is that because neither inference has been established, judgment as a matter of law must go against the party with the burden of proof.

As Judge Miller correctly pointed out, it seems only logical that if

35. *Id.* at 792.
36. *Ibid.*
37. 160 F.2d 229 (D.C. Cir. 1947).
38. *Id.* at 233.
39. *Ibid.*
40. *Id.* at 240.

this rule obtains in civil cases where there is no initial presumption in favor of the defendant, a fortiori, it should control similar situations in criminal cases.[41] To give additional strength to his argument that the *Isbell* court gave thorough and learned consideration to its decision, Judge Miller stressed the point that the *Isbell* dissent was virtually identical with the majority opinion in the case at bar.[42] However, a comparative reading of the two opinions reveals that the *Isbell* dissent is not as well supported as the majority opinion in the *Curley* case. In *Isbell*, dissenting Judge Carland took the untenable position that, if the *Isbell* test were strictly followed, the trial judge would become the trier of fact in every criminal case because when the Government offered "five witnesses who testified to facts showing guilt" and the defense put on "five witnesses who testified directly contrary" to the Government's witnesses and who testified as to facts showing innocence, the court would have to reverse every conviction because then the evidence would be as consistent with guilt as innocence.[43] This argument completely disregards the criterion laid down by the *Isbell* majority—that the test applies to *all* the evidence.[44] Hence if the Government's evidence revealed a hypothesis of innocence the trial judge would act on the sufficiency of the Government's evidence as well as the defendant's proof.

The status of the reasonable hypothesis issue remains uncertain. To illustrate, examine the situation in the Ninth Circuit. In 1954, in a tax prosecution, the court, speaking through Chief Judge Denman, announced that "the theory upon which appellants rely, that in a circumstantial evidence case a conviction cannot be supported if the evidence is as consistent with innocence as with guilt, has been laid to rest in this circuit . . . at least where, as here, the question arises on a motion for judgment of acquittal."[45] However, two years later, in another circumstantial evidence case, the same chief judge, acting as spokesman for a different court, held that "the trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence."[46]

41. *Ibid.*
42. *Id.* at 241.
43. Isbell v. United States, *supra* note 34, at 795.
44. *Id.* at 793.
45. Schino v. United States, 209 F.2d 67, 72 (9th Cir. 1953).
46. Elwert v. United States, 231 F.2d 928, 933 (9th Cir. 1956). Because there is no appeal from a directed acquittal in a federal criminal case each circuit has independently determined its own standards of sufficiency where the prosecution is based on circumstantial evidence. If this were not true, how could the *Elwert* court ignore the Supreme Court decision in Holland v. United States, 348 U.S. 121 (1954) which was handed down two years earlier? There the Court acknowledged differences among the lower courts on this question but went on to say: "[T]he better rule is that where the jury is properly instructed on the standards for reasonable doubt,

It almost goes without saying that states recognizing the trial court's right to direct or advise an acquittal where the circumstantial evidence is not sufficient as a matter of law have had their difficulties with the reasonable hypothesis rule. But it is astonishing that some states, which ostensibly recognize this rule, evidently have gone out of their way to avoid the use of it. As a good example of this, consider the facts of *State v. Peschon*,[47] a Montana case. There the defendant was convicted of grand larceny exclusively on circumstantial evidence. The prosecuting witness, a ranch hand on a holiday drinking spree at a series of Montana taverns, passed out on a bar stool and slumped unconscious over the counter. At the trial, evidence was introduced that the prosecutor had carried his wallet in his shirt pocket and that, after making change for drinks, the barmaid had replaced the billfold in this shirt pocket shortly before he collapsed. The evidence further showed that the defendant, a simultaneous patron of the tavern, had been seen passing close to the unconscious form of the prosecutor and purportedly was seen to "touch his hind pockets." The defendant also had sat at the bar with the prosecutor but was at all times sitting with at least one stool between them. All this allegedly had occurred on a busy night at the tavern and in the full view of many other patrons. This was the sum and substance of the state's case. Missing was any evidence showing: (1) that the prosecutor recognized defendant or had ever seen him before; (2) that the prosecutor had checked his billfold to ascertain the amount of money he was carrying, or that he had any idea how much he lost; (3) that the prosecutor or any other witness had examined the floor to determine whether the billfold had fallen from the prosecutor's pocket; (4) that the defendant had in his possession bills in the denominations of those stolen from the prosecutor.

Finally, there was no witness to the vital and indispensable element of asportation—the touching, taking and carrying away of the victim's property by the accused. Despite these glaring and seemingly fatal deficiencies, the Montana Supreme Court, by majority decision, held that the state had made out a prima facie case and that there was evidence of guilt sufficient to support the verdict of the jury. Justice Adair, in a blistering dissent in which he probed these gaping weaknesses, attacked the evidence as insufficient as a matter of law to support a conviction and insisted that the motion for a directed verdict should have been sustained. With ringing logic the dissenting justice reminded the majority that:

> A defendant may not be convicted on conjectures, however shrewd, ... on probabilities however strong, but only upon evidence which establishes

such an additional instruction on circumstantial evidence is confusing and incorrect . . . ." *Id.* at 139-40. *Accord,* United States v. Young, 291 F.2d 389 (6th Cir. 1961). See also Note, *Sufficiency of Circumstantial Evidence in a Criminal Case,* 55 COLUM. L. REV. 549, 550-51 (1955).

47. 131 Mont. 330, 310 P.2d 591 (1957).

> the guilt beyond a reasonable doubt; that is, upon proof such as to logically compel the conviction that the charge is true.[48]

If *State v. Peschon* stretched insufficient circumstantial evidence to thwart a logical acquittal it would appear that *State v. Satterfield* disregarded sufficient circumstantial evidence to prevent a logical conviction.[49] In that case the North Carolina Supreme Court set aside the conviction of the clerk of the State House of Representatives for negligently enrolling a tabled bill. The evidence revealed that the defendant was approached in the corridor of the state house by a legislator, who, upon ascertaining that the defendant had in his hand the questioned bill indorsed "tabled," informed the defendant of the disposition of the bill and advised him to make the proper entry. At the trial the defendant offered no evidence to explain what he did with the tainted bill. In a split decision, the court held that the evidence was such as would not satisfy an "impartial mind" of the defendant's guilt and dismissed the prosecution. Two justices disagreed sharply with the majority's position and ably argued that the evidence was ample to justify a conviction on criminal negligence because it patently showed that the defendant did not use "one particle of care to prevent the enrollment of this tabled bill."[50]

2. *Uncorroborated Testimony of an Accomplice*

Another situation which invites a motion for directed acquittal is one where the state's case rests entirely upon the uncorroborated testimony of an accomplice. Although the better view requires corroboration of such testimony before a conviction can be had, some states follow the common law rule and hold that a defendant may be convicted on the uncorroborated testimony of an accomplice if such testimony is clear and convincing and shows guilt beyond a reasonable doubt.[51]

Colorado follows the no-corroboration rule and the case of *People v. Urso*[52] is particularly instructive because of its treatment of the court's function under these circumstances. There the prosecuting attorney admitted that the only evidence he had to connect the defendant with the crime was the testimony of an accomplice. The issue expressly facing the court was whether a judge may direct an acquittal as a matter of law because he does not believe the testimony of an essential witness which is manifestly sufficient to convict although the witness was an accomplice who had turned state's evidence. The trial court acted in the affirmative and was upheld by the Colorado Supreme Court in no uncertain terms:

48. *Id.* at 608. Remember, the Montana courts, at least theoretically, were committed to the reasonable hypothesis rule. *Id.* at 609.
49. 121 N.C. 558, 28 S.E. 491 (1897).
50. *Id.* at 492.
51. *E.g.*, Schechtel v. People, 105 Colo. 513, 99 P.2d 968 (1940).
52. 129 Colo. 292, 269 P.2d 709 (1954).

> It is our opinion, and we so state, that if it is within the power of a trial court to set aside a verdict, not supported by competent legal evidence, then it is equally within the province and power of the court to prevent such verdict ever coming into existence. In either position, before or after the verdict, the trial court is compelled to survey and analyze the evidence, and from the same evidence, his analysis would undoubtedly be the same before or after a verdict. If it is to the end that the evidence is insufficient or incompetent, . . . then he should be courageous enough to prevent a miscarriage of justice by a jury. When we have before us the finding of a competent trial judge who had the opportunity . . . to arrive at an honest conclusion that the testimony of the only witness that would implicate defendant was unworthy of belief, then he certainly had the right to say, and it was his duty to say, that it was unbelievable, and in law, was not competent to support a verdict of guilt, then we must uphold the evidence of such courageous action by affiming his judgment.[53]

Undoubtedly, the court reached the right result in the *Urso* case. But there are some troublesome aspects in the reasoning of the court. Chiefly, the court's assessment of the testimony of the accomplice as "unworthy of belief" is a judgment on credibility. This case would have been supported by a better rationale if the court had adopted the widely accepted rule that the testimony of an accomplice must be corroborated or a directed acquittal will lie. There is a line of decisions, usually arising from charges of rape or statutory rape, which holds that a directed verdict is mandatory where the prosecutrix's evidence is "incredible."[54]

It is suggested that these decisions and the *Urso* case are not analogous.[55] Obviously, while "incredible" evidence is always "impeachable" the reverse does not necessarily hold true. Thus it would seem extremely unwise for any court to make the terms synonomous with respect to the merits of a motion for directed acquittal. The contrast of the *Urso* case with the Tennessee case of *State v. Sherrill,* which will be discussed with the minority rule, is startling.

III. The Compromise States

We now shift our discussion to the intermediate doctrine represented by states which provide by statute that if the trial court in a criminal case

53. *Id.* at 711.

54. *Cf.* State v. Merryman, 79 Ariz. 73, 283 P.2d 239 (1955).

55. In the *Urso* case the Colorado Supreme Court ruled that it was proper for the trial judge to consider the "background, record and all other things" of and concerning the witness. 269 P.2d at 711. Is the Colorado court seeking to do indirectly that which it could never do directly—judge the credibility of the witness? As noted, the standard test of "incredible" evidence has been evidence that would compel a conclusion of a physical impossibility, or in the language of a Virginia case, evidence that would require judges to forget what they know as men. Legions v. Commonwealth, 181 Va. 89, 23 S.E.2d 764 (1943). In *Urso* the testimony of the accomplice from the witness stand apparently was sufficient to convict. Did the Colorado court intend to break new ground in this case?

decides that the evidence is insufficient to uphold a conviction, he may advise the jury to acquit the defendant, but the jury is not bound by such advice. This statute is a compromise between the hard and fast refusal of the minority states to recognize a judicial acquittal where the evidence is patently insufficient to make out a prima facie prosecution—a refusal to countenance even a recommendation of acquittal by the court—and the commitment of the majority of states and the federal courts to the right and duty of the court to direct a verdict for the defendant under identical circumstances. A typical advisory type statute reads:

> If, at any time after the evidence on either side is closed, the court deem it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice, nor can the court for any cause, prevent the jury from giving a verdict.[56]

The effect of this statute does not vest the trial court with authority to direct an acquittal. In this respect it has been compared to the hard core minority jurisdictions. Another similarity is the mutual proposition that the refusal of the trial court to give advisory instructions to acquit is neither reviewable nor reversible error.[57] It has been submitted that the theory of this rule is that such refusal to direct or advise an acquittal would not prejudice the defendant because the jury is at liberty to disregard the evidence.[58]

On the other hand, the use of the word "may" in the statute does not necessarily mean that the power is purely discretionary. In the proper case, in some jurisdictions, the refusal to advise an acquittal constitutes reversible error.[59] The test is whether the refusal to advise an acquittal is prejudicial.[60] Because of the powerful influence the trial judge exerts by virtue of the dignity of his office, the answer must be that, invariably, the failure to advise is prejudicial. There is growing evidence that the advisory states are enlarging upon authority of this statute. South Dakota discarded its advisory statute long ago and empowered the trial court to direct acquittals outright.[61] Some other states have pointedly ignored the statute and have held that "it is made the duty of the trial judge to direct a verdict for the defendant when he deems the evidence insufficient to substantiate the charge."[62]

The main criticism of the typical advisory acquittal statute is sum-

56. OKLA. STAT. ANN. tit. 22, § 850 (1958).
57. *E.g.*, State v. Dickens, 69 Idaho 497, 210 P.2d 384 (1949); Cook v. State, 74 Nev. 51, 321 P.2d 587 (1958).
58. See 20 IOWA L. REV. 686 (1935).
59. People v. Ward, 145 Cal. 736, 79 Pac. 448 (1905); McLaughlin v. State, 18 Okla. Crim. App. 137, 193 Pac. 1010 (1920).
60. 20 IOWA L. REV. 686 (1935).
61. S.D. CODE § 34.3650 (1939).
62. Snow v. State, 325 P.2d 754, 756 (Okla. 1958).

marized in the familiar quotation: "Small reforms are enemies of great reforms." While it makes a promising start, this statute does not satisfy fully the ends of elemental justice. The independence of the trial judge is still compromised by technicalities and the way is still virtually clear for an inflamed jury to force a groundless conviction against the seasoned and impartial advice of the court. There is one shining grace. And that is the recognition, implicit in the language of these statutes, that the trial judge should assume a role more influential in the progress and outcome of a criminal trial than that of a referee or a judicial sphinx.

IV. The Minority Rule

Considering now the class of cases which constitute the minority rule we go to the heart of the dilemma. Briefly stated, this rule denies the authority of the trial court to direct a verdict of acquittal but requires the jury to pass exclusively on the sufficiency of the evidence. The rationale of this doctrine is vague and diffuse. Its fundamental explanation is found in the ancient maxim that the jury is the judge of the law and the facts in a criminal case.[63] Although the practice in England at the time of American independence required the court to judge the law and the jury to apply the law to the facts, this practice was condemned by many of the Republic's founding fathers, notably, John Adams. After posing a rhetorical question as to whether a juror is obliged to give his verdict according to the directions of the court, Adams asserted:

> Every man of any feeling or conscience, will answer no. It is not only his right, but his duty, in that case to find the verdict according to his own best understanding, judgment and conscience though in direct opposition to the direction of the court. . . . The English law obliges no man . . . to put his faith on the sleeve of any mere man.[64]

In some of the New England colonies the function of the judge was not to decide causes, for the jury decided all questions of both law and fact, but merely to keep order and fairly restate the issues.[65] Thus for many years after the Revolution, juries were specifically instructed that they could ignore the judge's charge and decide the law for themselves.[66] But in 1835 Mr. Justice Story wrote a milestone opinion in the case of *United States v. Battiste*.[67] He admitted that the jury had the power to disregard the law as laid down to them by the court but he rejected the

63. See Howe, *Juries as Judges of Criminal Law*, 52 Harv. L. Rev. 582 (1939); Warvelle, *The Jurors and the Judge*, 23 Harv. L. Rev. 123 (1910).

64. 2 Life and Works of John Adams 254-55 (C.F. Adams ed. 1856), quoted in Howe, *supra* note 63, at 605.

65. Howe, *supra* note 63, at 605.

66. *Id.* at 591.

67. 24 Fed. Cas. (No. 14545) (C.C.D. Mass. 1835).

theory that they had the moral right to decide the law according to their own whims or pleasure. Moreover, he ruled that it was the duty of the jury to follow the instructions of the court in a criminal case. Nevertheless, the states have been reluctant to deny the jury's "prerogative" to judge the law in criminal cases. As late as 1919 there were at least ten states in which it was provided by the state constitution or by statute that the jury in criminal cases were judges of both law and facts.[68]

This is the paramount argument advanced by two of the three remaining states which do not authorize directed acquittals. In 1898 the Tennessee case of *Ford v. State* held it error for the trial judge in a criminal case to charge the jury that the court is the judge of the law.[69] In 1956 this decision was reaffirmed and cited with approval by the Tennessee Supreme Court.[70] The Louisiana Supreme Court also brought this rationale to the surface in the case of *State v. Broussard*:[71] "Directed verdicts are unauthorized under our law; the jury is the judge of the law and the facts . . . . "

But other considerations account for the minority doctrine. For example, in another Tennessee case the Supreme Court said:[72] "The practice of directing verdicts in criminal cases is without statutory authorization . . . ." Is statutory authorization an indispensable precondition to a directed acquittal? Evidently not in Louisiana. There, a statute provides that in cases tried before the judge alone, the defendant may be granted a motion for directed verdict of acquittal after the state's evidence is completed.[73] But subsequent case law makes it abundantly clear that no form of directed verdict is available in cases tried before a Louisiana jury.[74] The Louisiana statute makes bad matters worse by creating a legal paradox. Its *reductio ad absurdum* is that a trial judge has less authority on ultimate questions of law when a jury is in the box than he would if the jury box were empty. Such a situation defeats the high purposes of the jury system and, conceivably, could make it advisable for the defendant to waive trial by jury in order to guarantee full protection of his rights.

Turning to Virginia, the third minority jurisdiction, it is apparent that this state also is influenced by statutory sanction. Virginia has a civil statute directing that in no action tried before a jury shall the trial judge order a directed verdict unless he first grants a motion to strike the evi-

68. Slansky v. State, 192 Md. 94, 63 A.2d 599, 603 (1949).
69. 101 Tenn. 454, 457, 458, 47 S.W. 703 (1898).
70. Dykes v. State, 201 Tenn. 65, 296 S.W.2d 861 (1956).
71. 217 La. 90, 46 So. 2d 48, 50 (1950).
72. Stinson v. State, 181 Tenn. 172, 180 S.W.2d 883, 886 (1944).
73. LA. REV. STAT. § 15.402.1 (1950).
74. State v. Haddad, 221 La. 337, 59 So. 2d 411 (1951); See Bennett, *Louisiana Criminal Procedure—A Critical Appraisal*, 14 LA. L. REV. 11 (1953).

dence of a plaintiff or defendant.[75] The Virginia courts, in denying the trial court's authority to direct an acquittal, have consistently taken notice of this statute, while carefully basing their refusal on other grounds.[76] Furthermore, the Virginia cases have mentioned some interesting alternatives to directed verdicts. One suggestion noted is the "hypothetical instruction."[77] This simply means that the court instructs the jury that if they are of the opinion that the facts do not support the indictment they should acquit, but if they believe that the facts do support the charge, they must convict.

Perhaps the basic explanation of Virginia's position lies in the realization that the commonwealth has no appeal in criminal cases and "hence has no means of correcting the error if such an instruction is erroneously given . . . ."[78]

This objection has become commonplace with opponents of the majority rule. In 1959 a bill was introduced in the Tennessee Legislature to authorize directed verdicts but, at the same time, allow the state to appeal the action of the court.[79] If this bill had passed it would have raised a serious question concerning the safety of this procedure with respect to the double jeopardy clause of the Tennessee Constitution. There is, however, authority that this procedure is not repugnant to double jeopardy. Wisconsin has a statute which provides that the state may appeal from an adverse ruling or decision on all questions of law, with the permission of the presiding judge, in the same manner and to the same effect as if the defendant had appealed.[80] A directed verdict in a jury trial on the grounds that the evidence is insufficient as a matter of law is, of course, a decision on the law of the case. It is quite significant that the Wisconsin courts have held that this statute does not violate the double jeopardy clause of that state's constitution.[81] To reconcile this apparent constitutional conflict, jeopardy is construed not as one trial but as a procedure which continues until all errors of law which arose at the trial are corrected.[82] However, it should be emphasized that appeals by the prosecution

75. VA. CODE ANN. § 8-218 (1959).

76. See Myers v. Commonwealth, 132 Va. 746, 111 S.E. 463, 470 (1922).

77. *Cf.* Small v. Virginia Ry., 125 Va. 416, 99 S.E. 525, 527 (1919). Once again this dicta appears in a civil case but criminal cases are also noted. *Id.* at 527. Other dicta implies that in Virginia a demurrer to the evidence is an adequate substitute for a directed verdict. But, in the past, this procedural device has proved dangerous for the unwary defendant because the state may be granted an appeal from an adverse decision. *Cf.* State v. Gillespie, 110 Okla. Crim. 637, 150 Pac. 96 (1915).

78. Myers v. Commonwealth, *supra* note 76, at 470.

79. Senate Bill No. 553, introduced at the 1959 session of the Tennessee General Assembly.

80. WIS. STAT. § 958.12 (Supp. 1961).

81. State v. Witte, 243 Wis. 423, 10 N.W.2d 117 (1943).

82. Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1 (1960).

are not authorized under the federal practice and are strictly prohibited by the overwhelming majority of the states.[83]

Some authorities indicate that the Tennessee rule is based upon the constitutional mandate of the Fox Libel Law.[84] But provisions that the jurors are the judges of the law and facts in libel prosecutions are found in the constitutions of many other states, which, unlike Tennessee, fully recognize the court's authority to direct a verdict of acquittal where the evidence is insufficient as a matter of law.[85]

Another misconceived objection advanced by certain Tennessee authorities is that motions for directed verdicts of acquittal were not recognized at common law.[86] This is incorrect and at odds with the settled rule that at common law the trial judge had the same right to give a peremptory instruction in criminal proceedings as he had in a civil action.[87]

What relief do the restrictionist states offer in lieu of a directed acquittal? Decisions indicate that two of the three minority jurisdictions rely on the conscience of the prosecuting attorney to protect the defendant from official harassment. Louisiana authority says this: "[N]or is the trial judge authorized to order the district attorney to nolle prosequi a case. This is a matter solely within the discretion and control of the district attorney."[88]

History has shown that the "discretion" of the prosecuting attorney often has been colored by prevailing public prejudice. This is especially true in a case where the facts are exceptionally lurid. Also it is well known that sensational crimes often provoke the "mob psychology" which can turn a criminal trial into a "manhunt" with the defendant as the "prey." In the Tennessee case of *State v. Sherrill*, the defendant was accused of a

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83. *E.g.*, United States v. Weisman, 266 U.S. 367 (1924); People v. Barber, 348 Ill. 40. See Annot., 157 A.L.R. 1065 (1945).

84. CARUTHERS, HISTORY OF A LAWSUIT § 363, at 402 (7th ed. 1951); TENN. CONST. art I, § 19. This section reads as follows:

> "*Freedom of speech and press.*—That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases."

85. *E.g.*, Alabama, California, Colorado, Mississouri. See 2 BUSCH, LAW AND TACTICS IN JURY TRIALS 335 n.5 (1959).

86. CARUTHERS, *op. cit. supra* note 84, at 401-40. Approved in Oliver v. State, 348 S.W.2d 325, 327 (Tenn. 1961).

87. *E.g.*, Commonwealth v. Murphy, 33 Ky. L. Rep. 141, 109 S.W. 353 (1908).

88. State v. Broussard, *supra* note 71, at 50.

crime against nature with two young boys.[89] Tennessee law requires corroboration of the testimony of an accomplice, and the Tennessee Supreme Court properly reversed a conviction based upon the uncorroborated testimony of the child accomplices. But instead of ending a legally insufficient prosecution, the Supreme Court merely recommended that "the court as a matter of law should declare a mistrial and if the state cannot produce corroborative evidence the District Attorney General should nolle the case, the court having no authority to direct a verdict."[90] It is assumed that the district attorney in *State v. Sherrill* followed the court's "advice," but reliance upon the judgment of the prosecuting attorney might, in another case, where the crime was extremely brutal, precipitate a grave injustice to the rights of an innocent defendant. In the language of an early North Carolina decision this grim prospect is exposed:

> Although the prisoner, if unfortunately guilty, may escape punishment in consequence of the decision this day made in his favor, yet it should be remembered, that the same decision may be a bulwark of safety in those, who, more innocent, may become the subjects of persecution, and whose conviction, is not procured on one trial, might be secured on a second or third, whether they were guilty or not.[91]

Virginia, which likewise does not allow directed acquittals in the trial court, has taken more direct and reliable action in its high court. In *Day v. Commonwealth* the Virginia Supreme Court reversed a conviction with these directions:

> Inasmuch as we have no reason to think that the commonwealth will be able to strengthen its case by the introduction of additional evidence should a new trial be awarded, we reverse the judgment, set aside the verdict, and remand the case with directions to dismiss the accused from further prosecution under indictment.[92]

The contrast between the security of the accused at Virginia's appellate level and at the same stage in the Louisiana and Tennessee courts should give pause to those concerned with effective procedural due process in the criminal courts. But, in any of these states, why should relief be withheld until the case reaches the appellate level?

V. Some Conclusions

Reviewing the whole matter, one is struck by the confusion among the states on the extent of the trial judge's authority in a criminal case. Should

89. 204 Tenn. 427, 321 S.W.2d 811 (1959).
90. *Id.* at 816.
91. *In re* Spier, 12 N.C. 491, 493, 494, 498, 499, 502 (1828) is quoted in Mr. Chief Justice Vinson's dissenting opinion in Brock v. North Carolina, 344 U.S. 424, 433 (1953).
92. 187 Va. 457, 47 S.E.2d 362, 364 (1948).

the law be laid down by the court or the jury? If the concept that all acquittals must spring exclusively from jury verdicts is carried to its logical conclusion the result would be chaotic. When a new trial is ordered by the court, upon the succeeding trial the jury would be warranted in returning a verdict based upon the assumption that what the court has instructed as the law is not the law. Clearly, the most harmful repercussion of this view is the possibility of unlimited prosecution. Professor Edmund Morgan has expressed this concern in his writings:

> [I]f an accused is once put to trial under a sufficient indictment, he must take the risk of an adverse verdict regardless of the sufficiency of the evidence against him and must rely for partial protection upon later action by the trial judge or the supreme court or both. How many trials must he endure in a situation where the prosecutor is stubborn and the issue is one on which the settled prejudices of the community are for all practical purposes controlling?[93]

The choice should not be limited to the extreme alternatives of judicial absolutism or jury license. Either is repugnant to a fair trial. What is needed is a restoration of balance and perspective between the two tribunals. It is almost a truism that the very survival of the jury system depends to a great extent on the intelligent and discriminating use of its powers.

The jury was never meant to be anything other than a fact finding body. Held exclusively to this function, it is one of the most effective guardians of individual rights. But it would be almost as foreign to the jury's intended function to ask twelve laymen to decide on the sufficiency of evidence necessary to maintain a prima facie prosecution as it would be to ask them to rule on the admissibility of evidence or the constitutionality of a criminal statute.

Aside from historical considerations the objections to directed verdicts of acquittal can be summed up in two major points: (1) possible abuse by the courts, and (2) prejudice to the prosecution resulting from an unappealable acquittal. The first objection has been answered before:

> Our judiciary has not always been everything it should be . . . . However, courts, like most other social institutions, must depend for their ultimate success upon the integrity of the human beings who compose them; because a few judges have failed is no reason for tying the hands of all.[94]

The second objection has little basis in the experience of the states which authorize directed acquittals. Indeed, statistics have demonstrated that such motions are seldom granted.[95] But in the event further reserva-

93. Morgan, *Procedure and Evidence–1958 Tennessee Survey*, 11 VAND. L. REV. 1339, 1356 (1958).

94. Johnson, *Province of the Judge in Jury Trials*, 7 TENN. L. REV. 107, 117 (1929).

95. In Missouri, during one survey period, "out of the total number of 4,969 felony

tions remain they can be satisfied by the enactment of a Wisconsin-type statute permitting the state to appeal a directed acquittal—although this is an undeniable distortion of the constitutional concept of "speedy trial."

Under our adversary system of criminal justice, neither side is obliged to give quarter, but, almost without exception, the prosecution commands a superiority of strength and resources. More often than not, the defendant must entrust his cause to inexperienced counsel appointed by the court. And because of financial distress, appeals are often out of the question. Thus the defendant must depend primarily upon the authority of the trial judge to keep the scales of justice in balance.

If the trial court has the power to set aside a conviction on the grounds that it is contrary to the law, it would be supreme irony to indulge the dangerous fiction that the determination of the law belongs to the jury, and not the court. The American criminal law based on interstate interdependence is only as sound as the most inadequate procedure in any one of the states. In the past, the states have reached an accord on uniform laws of far less moment. It is high time they lay to rest this historical contradiction and agree once and for all on the fundamental powers of the judge and jury in a criminal case.

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cases in the circuit courts, only 18 were dismissed owing to the failure of the state to make out a prima facie case." *Missouri Crime Survey (1926)*, in ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 435 (1947).