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Innocence Protection in the Appellate Process

Keith A. Findley

INNOCENCE PROTECTION IN THE APPELLATE PROCESS

KEITH A. FINDLEY*

I. INTRODUCTION

To both lay and professional observers, the most fundamental purpose of the appellate process in criminal cases is to guard against erroneous outcomes and, in particular, to guard against wrongful conviction of the innocent.[1] Lay participants in the justice system naturally expect that the appeal is the mechanism for vindicating claims of factual error in the trial courts. While lawyers and judges understand that appeals evaluate cases for procedural fairness and regularity more than factual accuracy, legal doctrine also establishes that direct appeals are indeed an integral part of the system for finally adjudicating guilt or innocence.[2] Indeed, over the past several decades the Supreme Court has increasingly emphasized that our elaborate system for appeals is intended to guard against wrongful conviction of the innocent.[3] Appellate review is thus considered the system's failsafe against wrongful conviction. In this sense, the appellate process is an essential part of the

* Clinical Professor, University of Wisconsin Law School; Co-Director, Wisconsin Innocence Project; President, Innocence Network. J.D., Yale Law School, 1985; B.A., Indiana University, 1981. I am grateful to Brandon Garrett for providing some of the data analyzed in this Article. I also wish to thank Brandon Garrett, D. Michael and Leslie Risinger, and Meredith Ross for helpful comments on a draft of this Article, Michael O'Hear for inviting me to participate in this symposium, and Matthew Wuest and Peggy Hacker for invaluable research assistance.

1. Erroneous acquittals, by contrast, are not of significant concern in the appellate process in criminal cases, given that the Double Jeopardy Clause prohibits the government from appealing acquittals. *See* Ross v. Moffitt, 417 U.S. 600, 610 (1974) ("[I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below."). That is not to say that the truth-serving functions of the appellate process are completely detached from concerns about erroneous acquittals. While the government cannot appeal acquittals, it can seek interlocutory review of pretrial rulings when necessary to protect the government's right to a fair trial. To the extent that those appeals serve the interests in fair and accurate trial procedures, they serve truth-seeking goals. Because such interlocutory appeals are relatively rare, however, the primary concern for truth in the appellate process is a concern about wrongly convicting the innocent.

2. *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("Appellate review has now become an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant.").

3. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 107 (2008). *Cf.* Schlup v. Delo, 513 U.S. 298, 325 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."); Evitts v. Lucey, 469 U.S. 387, 399–400 (1985) (finding that the direct appeal process is necessary to ensure "that only those who are validly convicted have their freedom drastically curtailed").

justice system's apparatus for finding the truth.[4]

While the appellate process is intended to facilitate the search for the truth in both criminal and civil cases, that purpose is especially important in criminal cases. In criminal cases, fact-finding accuracy is the driving objective, and preventing wrongful conviction of the innocent is a paramount concern.[5] While truth also matters in civil cases, society generally has less interest in the accuracy or outcome of most cases than it does in providing a mechanism for efficiently and peacefully resolving disputes between private parties.[6] Providing a failsafe against erroneous judgments about factual guilt is thus a uniquely important core function of the appellate process in criminal cases.

If protecting against mistaken conviction of the innocent is indeed a primary objective in criminal appeals, it is fair to ask how well the system serves that function. Unfortunately, judging by the recent evidence, especially the empirical evidence from cases in which postconviction DNA testing has proved that an innocent person was wrongly convicted, the appellate process in criminal cases is largely a failure on this most important score. In four parts, this Article examines that record of failure, explores some of the reasons for that failure, and proposes possible reforms that might enhance the appellate system's ability to protect against wrongful convictions.

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4. *See Griffin*, 351 U.S. at 18 ("All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence.").

5. *See* GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 2 (2008); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 593 (1990); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133, 134–38 (2008).

6. *See* Mirjan Damaska, *Truth in Adjudication*, 49 HASTINGS L.J. 289, 304 (1998) (noting that in civil cases, where "the goal of resolving a private controversy takes center stage," "[n]eutral arbitration is more central than the search for truth"); Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937, 937–38 (1975).

Justice Harlan summarized the different societal interests in civil and criminal cases in this way:

> [T]he reason for different standards of proof in civil as opposed to criminal litigation [is] apparent. In a civil suit between two private parties for money damages, for example, 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 . . . .
>
> 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.

In re Winship, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring).

II. APPELLATE FAILURE

Until recently, we have taken it on faith that the appellate system does what it purports to do—ensures largely error-free trials that accurately sort the guilty from the innocent. We have taken it on faith because we have had no real mechanism for testing that proposition. The jury verdict (or guilty plea) and the appellate court judgment affirming the conviction represented at once the final judgment in the case and the proof that the judgment was accurate; the judgment was itself the ultimate measure of its own truth and accuracy. If the jury said so, especially if the judgment was affirmed on appeal, then it must be so.

Postconviction DNA testing has changed that. With hundreds of cases in which postconviction DNA testing has proven that an innocent person was wrongly convicted,[7] we now have a body of cases with known errors that can be studied to understand the nature of error in the criminal justice system.[8] And, indeed, much has been learned from these cases about the causes of wrongful convictions.[9] Most of that scholarly attention has been focused on the kinds of evidence and trial errors that produce wrongful convictions, but scholars are now beginning to examine the DNA cases to derive lessons about the appellate process as well. The lessons learned include the discomfiting realization that the system has not performed well as a safety net for the innocent.

A. Failures to Recognize Innocence

Most significantly, that lesson is made clear by the analysis undertaken by Professor Brandon Garrett, in which he examined the appellate histories of the first 200 postconviction DNA exoneration cases.[10] These are all rape, murder, and rape-murder cases—all among the most serious crimes with the most onerous punishments available in the criminal justice system.[11] And they are

7. As of this writing, at least 254 individuals wrongly convicted of serious crimes have been exonerated by postconviction DNA testing, and the number continues to grow. The Innocence Project, Mission Statement, http://www.innocenceproject.org/about/Mission-Statement.php (last visited May 18, 2010).

8. *See* Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 335–39 (2002) (highlighting the importance of studying the wrongful conviction cases).

9. For a listing of some of the early scholarship that sought to draw lessons from the DNA exonerations, see Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 232–33 n.4 (2006). More recently, Professor Brandon Garrett has analyzed the first 200 postconviction DNA exonerations to identify the factors that contributed to the wrongful convictions. Garrett, *supra* note 3, at 58–59; *see also* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009).

10. *See* Garrett, *supra* note 3, at 58–59.

11. *Id*. at 60, 73.

all cases in which postconviction DNA testing proved that the trial courts convicted an innocent person. If the appellate system does indeed function effectively to detect and protect innocence, it should be reflected in this group of cases. But it is not.

Although every one of the defendants in these cases was innocent, Garrett found that, among the 133 cases in this dataset that produced a written appellate opinion, only 14% of defendants won reversal of their convictions on appeal.[12] Considering only non-capital cases, because the reversal rate in capital cases is notoriously higher than in non-capital cases,[13] the reversal rate for these innocent defendants dropped to just 9%.[14] Stated differently, of the 133 cases in which known innocents appealed their convictions, reviewing courts failed to recognize innocence or grant any relief in 86% of the cases, or 91% if only non-capital cases are counted.

The failure to correct for innocence becomes even more apparent when this reversal rate is compared to the data Garrett derived from a matched comparison group—a randomly selected set of cases that shared the same characteristics as the DNA exoneration cases, except that none had been proven innocent by postconviction DNA testing.[15] While some in the matched comparison group might in fact have been innocent, they were no more likely to have been innocent than any other randomly drawn group of convicted defendants. Assuming that most individuals in prison for rapes and murders are in fact guilty, the matched comparison group serves as a rough, albeit imperfect, proxy for guilty defendants convicted of such crimes.

Garrett's data show that the reversal rates for the known innocents group and the matched comparison group were identical. Both groups had reversal rates of 14%.[16] This reversal rate is also comparable to rates found in other empirical studies of appeals in criminal cases.[17] For non-capital cases only,

12. *Id*. at 61.

13. *See* James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, at 8 (Columbia Law Sch. Pub. Law & Legal Working Paper Group, Paper No. 15, 2000), *available at* http://ssrn.com/abstract=232712, *reprinted in part in* James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1849–50 (2000) (citing reversal rates in capital cases, considering appeals at all levels of state and federal court, of 68%).

14. Garrett, *supra* note 3, at 61.

15. *Id*. at 69–70. As Garrett explains, "Use of a matched comparison group is a technique accepted in scientific research when a randomized control group is not available, as is the case here, because one could not practically (or ethically) conduct experiments observing randomly selected actually innocent and guilty defendants during real criminal trials through appeals." *Id*. at 60 n.17.

16. *Id*. at 61.

17. A 1999 study found that the Tennessee Court of Criminal Appeals reversed in 12% of criminal appeals, modified the sentence in 8%, filed a mixed decision in 3%, and modified the outcome in some other way in 2%. Daniel J. Foley, *The Tennessee Court of Criminal Appeals: A Study and Analysis*, 66 TENN. L. REV. 427, 451 (1999). Another study found that a California

the reversal rate for the known innocents was 9%, while the reversal rate for the matched comparison group was 10% (a statistically insignificant difference).[18] Appellate courts simply failed to distinguish between actually innocent appellants and the general populace of appellants, most of whom are likely guilty. Drawing on this data, Garrett concludes that "[t]he innocence cases . . . suggest that [the appellate system] may not serve its intended purpose of sorting the guilty from the innocent."[19]

While appellate courts largely failed to recognize innocence in these cases, that does not mean they refrained from opining about guilt and innocence. Garrett found that of the eighteen cases from his study in which courts issued written opinions reversing the conviction, judges made statements in eight cases (6% of the cases with a written decision) suggesting that the defendant might be innocent.[20] More typically, however, when affirming convictions, courts referenced their (incorrect) perceptions of the defendant's guilt. In nearly a third of the cases (32%), courts found error, but affirmed nonetheless because the error was deemed "harmless," a judgment that typically involves an assessment of likely guilt.[21] Courts actually found harmless error in a higher percentage of the innocence cases (32%) than in the matched comparison cases (26%).[22] Moreover, 10% of the courts (8% in the

appellate court granted some type of relief in 14% of criminal appeals, although it reversed the conviction in only 4.8%. Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 551. And, a 1989 study of appellate courts in California, Colorado, Illinois, Maryland, and Rhode Island showed reversals in about 20% of cases—a new sentencing hearing or corrected sentence in 7%, a new trial in 6.6%, acquittal on appeal in 2%, and other relief, such as overturning one conviction out of several, in 4.8%. JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS 34–35 (1989).

18. Garrett, *supra* note 3, at 61.

19. *Id*. at 107. It is possible this data overstates to some extent the degree to which appellate courts failed to grant relief to innocent defendants. Undoubtedly, appellate courts have granted relief in other cases involving actually innocent defendants without benefit of any postconviction DNA testing, and those "success" cases might not be fully reflected in the 200 cases comprising Garrett's primary dataset. Two considerations, however, make it unlikely that this alters the numbers derived from Garrett's study in any significant way. First, Garrett's study includes cases in which courts granted relief on direct appeal; it is not just a skewed dataset comprised only of cases in which appellate courts by definition failed to recognize innocence. Second, the matched comparison group—which is not in any way limited to cases in which DNA proved appellate failure—suggests that the numbers derived from the 200 DNA exoneration cases are not aberrant but are indeed typical of appellate cases. If the selection of these 200 postconviction DNA exonerations skews the numbers, it is probably not by much; the reality remains that the appellate courts have failed miserably in protecting innocent defendants in this group of cases where we now know the defendant was in fact innocent, a group of cases that *should* reflect a very high reversal rate if the system were operating effectively.

20. *Id*. at 105.

21. *Id*. at 107–08.

22. *Id*. at 109.

matched comparison group) described the evidence of guilt against the actually innocent defendant in the case as "overwhelming."[23] And, addressing the evidence against these actually innocent appellants, fully half of the courts referred to the likely guilt of the defendant.[24]

The failures of the appellate system are even more apparent when one considers how the appellate courts have responded to the kinds of factual errors—the proven false evidence—as well as the kinds of procedural errors that consistently contribute to wrongful convictions. Repeatedly, studies of the DNA exonerations have shown that the most common types of evidence that have produced wrongful convictions fall generally into four categories: eyewitness identification errors, false confessions, false or misleading forensic science evidence, and perjured testimony from jailhouse informants.[25] Studies have also repeatedly identified particular types of procedural error—most prominently ineffective assistance of counsel and prosecutorial misconduct, such as *Brady*[26] violations—that have frequently led to wrongful convictions. Yet the data show that the courts in the first 200 DNA exonerations did not recognize these types of evidence or procedural claims as red flags.

B. Failures to Recognize False Evidence

Garrett's analysis of the first 200 DNA exonerations shows that eyewitnesses offered mistaken identification evidence in 79% of these cases.[27] That figure is consistent with other examinations of wrongful convictions in the criminal justice system.[28] We now know, with the hindsight of DNA testing, that every one of those eyewitness identifications in Garrett's dataset was mistaken. Yet not a single conviction in this dataset was reversed on the basis of a direct challenge to the reliability, and hence admissibility, of the eyewitness identification evidence.[29] The appellate system was simply unable

23. *Id*.

24. *Id*.

25. *See id*. at 122; BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 186 (2008).

26. Brady v. Maryland, 373 U.S. 83, 86 (1963).

27. Garrett, *supra* note 3, at 76.

28. *See* SCHECK, NEUFELD & DWYER, *supra* note 25, at 246 (analysis of the first sixty-two DNA exonerations found eyewitness error in 84% of the cases); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 605 (1998).

29. Garrett, *supra* note 3, at 81. Four exonerees indirectly raised problems with the identification evidence in their case and won reversals on grounds such as failure under state law to instruct the jury about the dangers of cross-racial misidentification. *Id*. at 105 n.181. But no exonerees successfully challenged the identification evidence under constitutional reliability standards or succeeded in winning exclusion of the evidence. E-mail from Brandon L. Garrett, Associate Professor of Law, University of Virginia School of Law, to Keith A. Findley, Clinical

to detect the flawed evidence. Indeed, most appellants did not even raise challenges to the eyewitness identification evidence, even though these innocent defendants obviously knew it was mistaken.[30] Forty-five percent brought a challenge of some kind to the eyewitness evidence, while a majority, 55%, did not even try to challenge the evidence.[31] Most defendants simply could not even find a viable claim to make to challenge the actually mistaken, false identification evidence in their cases.

False confessions have also long been recognized as a significant contributor to wrongful convictions, and Garrett's data confirm their role. Among the first 200 DNA exonerations, 16% had false confessions, and another 9% involved allegedly self-incriminating statements that came up short of a full confession.[32] Again, these numbers are consistent with the data from previous studies of wrongful convictions.[33]

Yet again, not a single innocent defendant whose confession we now know was false won relief on a claim that the confession should have been suppressed.[34] And again, not all of these false confessors could even find a legal claim to bring to challenge their false confessions. Only half of these defendants challenged their false confessions—35% brought Fifth Amendment voluntariness challenges, and 15% brought *Miranda*[35] challenges.[36]

Recent research has exposed flaws in many of the types of forensic science evidence that have been used to convict criminal defendants.[37]

Professor, University of Wisconsin Law School (Sept. 10, 2009 9:17 CDT) (on file with author) [hereinafter Garrett E-mail].

30. Garrett, *supra* note 3, at 76–77.

31. *Id*. at 77. Of the total cases, 28% brought constitutional claims specifically challenging the reliability of the eyewitness evidence. *Id*.

32. *Id*. at 88 & n.124.

33. Scheck, Neufeld, and Dwyer's analysis of the first sixty-two postconviction DNA exonerations found false confessions in 24% of the cases. SCHECK, NEUFELD & DWYER, *supra* note 25, at 246.

34. Garrett, *supra* note 3, at 90. While no exonerees won relief on direct challenges to the admissibility of the confession evidence, some did win relief on indirect challenges to confession evidence. For example, Ron Williamson received relief on an ineffective assistance of counsel claim related to the purported confession in his case, among other failures of trial counsel. Garrett E-mail, *supra* note 29. The absence of appellate challenges to the admissibility of the confession evidence is particularly interesting given that almost all exonerees' trial lawyers did move to suppress the confessions, and thereby did preserve the claims for appeal. *Id*.; *see also* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1099–1102 (2010).

35. Miranda v. Arizona, 384 U.S. 436, 471 (1966).

36. Garrett, *supra* note 3, at 90.

37. *See* ERICA BEECHER-MONAS, EVALUATING SCIENTIFIC EVIDENCE: AN INTERDISCIPLINARY FRAMEWORK FOR INTELLECTUAL DUE PROCESS 94–95 (2007); Michael J. Saks, *The Aftermath of* Daubert*: An Evolving Jurisprudence of Expert Evidence*, 40 JURIMETRICS J. 229, 237–40 (2000); Garrett & Neufeld, *supra* note 9; NAT'L RESEARCH COUNCIL, COMM. ON

Garrett's data show that forensic science evidence was presented in 57% of the first 200 DNA exoneration cases. Again, only a fraction of appellants challenged the forensic science evidence that contributed to their wrongful convictions—just 32% brought challenges.[38] And while a few did obtain relief on these challenges, the vast majority failed—nineteen of twenty-five forensic science-based claims were rejected.[39]

Finally, courts and litigators have long recognized that jailhouse informant testimony—derisively known as jailhouse snitch testimony—is unreliable.[40] Typically, such testimony takes the form of a jail or prison inmate—a witness of dubious character with an obvious incentive to fabricate testimony he can offer to the prosecution in hopes of favorable treatment in his own case—claiming that the defendant confessed to him while they were confined together.[41] Garrett's data confirm that such testimony is a significant contributor to wrongful convictions. Eighteen percent of the 200 postconviction DNA exoneration cases included informant testimony, and 12% included jailhouse informant testimony in particular.[42]

Garrett's data also confirm that, although DNA later proved that the informant testimony in these cases was perjured, appellate courts did not

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IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCE COMMUNITY, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 184–91 (2009), *available at* http://www.nap.edu/catalog/12589.html.

38. Garrett, *supra* note 3, at 85.

39. *Id.*; *see also* Garrett & Neufeld, *supra* note 9.

40. Chief Justice Warren wrote that the incentives facing jailhouse informants create "a serious potential for undermining the integrity of the truth-finding process in the federal courts." Hoffa v. United States, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting); *see also* United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence."); Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996); Alexandra Natapoff, Comment, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107 (2006); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 645 (2004); REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY, INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY (1990), *available at* http://www.ccfaj.org/documents/reports/jailhouse/expert/1989-1990%20LA%20County%20Grand%20Jury%20Report.pdf [hereinafter LOS ANGELES GRAND JURY]; CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS REGARDING INFORMANT TESTIMONY (n.d.), *available at* http://www.ccfaj.org/documents/reports/jailhouse/official/Official%20Report.pdf.

41. *See* LOS ANGELES GRAND JURY, *supra* note 40; ROB WARDEN, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW (2005), *available at* http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf. For a description of how jailhouse snitches manufacture their evidence, see Steve Mills & Ken Armstrong, *The Inside Informant*, CHI. TRIB., Nov. 16, 1999, at A1.

42. Garrett, *supra* note 3, at 86. Scheck, Neufeld, and Dwyer's analysis of the first sixty-two DNA exonerations found that informant testimony played a role in 21% of exoneration cases. SCHECK, NEUFELD & DWYER, *supra* note 25, at 246.

recognize it. Thirty-four percent of the appellants in those cases brought challenges to the false informant testimony—none claiming a due process violation for fabrication—and none were successful.[43]

To the extent that the wrongful conviction cases have presented insights into the types of flawed evidence that appear most often in wrongful convictions, those insights have not yet had any impact on appeal. Appellate courts have largely failed to recognize flawed and false evidence in cases where it has in fact contributed to convicting the innocent.

C. Failures to Recognize Process Errors

The study of wrongful convictions has identified not only the types of evidence that frequently contribute to wrongful convictions, but also the types of errors committed in the trial process that often lead to erroneous conviction of the innocent. These process errors come in a potentially infinite variety of forms, involving violation of any number of constitutional and statutory trial rights.[44] Many of the alleged process errors involve claims about admitting unreliable or illegally obtained evidence of the types discussed above—claims challenging admissibility of eyewitness evidence, confession evidence, forensic science evidence, or informant evidence. As discussed, those process claims did not fare well on appeal, even for these actually innocent defendants. Beyond those kinds of process challenges, two other alleged error types appear with notable frequency in the DNA exoneration cases. Those claims are ineffective assistance of counsel and violation of the prosecutor's duty to disclose exculpatory evidence under *Brady v. Maryland*.[45]

Research has long shown that, together, ineffective assistance and *Brady* claims constitute the largest proportion of postconviction challenges to convictions.[46] Scheck, Neufeld, and Dwyer's analysis of the first sixty-two postconviction DNA exoneration cases revealed that ineffective assistance of

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43. Garrett, *supra* note 3, at 86–87.

44. Garrett found that the winning claims in his dataset of actually innocent defendants included: state evidentiary claims (six cases); ineffective assistance of counsel (four cases); *Brady* claims (three cases); jury instruction errors (two cases); unconstitutional joinder (two cases); prosecutorial misconduct (two cases); insufficiency of the evidence (one case); due process and right to counsel violations (one case); and fabrication of evidence (one case). Garrett, *supra* note 3, at 97.

45. 373 U.S. 83, 91 (1963). Professor Samuel Gross has referred to these combined factors—faulty eyewitness identification, false confessions, jailhouse informant testimony, failures of forensic science, prosecutorial misconduct, perjury, and ineffective defense counsel—as the "canonical list of factors" that lead to wrongful convictions. Gross, *supra* note 25, at 186.

46. *See* VICTOR E. FLANGO, NAT'L CTR. FOR STATE COURTS, HABEAS CORPUS IN STATE AND FEDERAL COURTS 45–47, 53–54 (1994), *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/criminal&CISOPTR=0; ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUSTICE, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14–15 (1995), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=861.

counsel played a role in 27% of the cases, and prosecutorial misconduct—which most commonly involves withholding *Brady* material—was present in 42% of the cases.[47]

Garrett's subsequent analysis reveals that 29% of innocent defendants in his dataset claimed ineffective assistance of counsel.[48] While sizable, that percentage is lower than the rate at which previous studies have suggested that criminal defendants typically raise ineffective assistance of counsel claims in their state and federal postconviction challenges. A 1994 study by the National Center for State Courts found that 41% to 45% of postconviction litigants raised such claims.[49] A 2007 study funded by the U.S. Department of Justice examined a random sample of 2,384 non-capital federal habeas cases filed by state prisoners in 2003 and 2004, and 368 habeas filings in capital cases initiated in 2000–2002.[50] That data showed that 81% of the capital litigants and 50.4% of the non-capital litigants claimed ineffective assistance of counsel in their federal habeas petitions.[51] Garrett's figure is consistent, however, with an earlier Department of Justice study that found that 25% of petitioners in federal habeas corpus cases claimed ineffective assistance.[52]

Although prevalent, most claims of ineffective assistance of counsel, even for the defendants proved innocent by postconviction DNA testing, have failed. Of the thirty-eight postconviction DNA exonerees who claimed ineffective assistance of counsel, only four, or less than 11% of those who made such a claim, were granted relief on this ground; more than 89% of these claims were rejected.[53]

Garrett's data show that 17% of the DNA exonerees claimed *Brady* violations.[54] Four such claims were successful—a success rate of 17%.[55]

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47. SCHECK, NEUFELD & DWYER, *supra* note 25, at 246.

48. Garrett, *supra* note 3, at 114.

49. FLANGO, *supra* note 46, at 45–47.

50. Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, *Habeas Litigation in U.S. District Courts: An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, at 2 (Vanderbilt Univ. Pub. Law & Legal Theory Working Paper Group, Working Paper No. 07-21, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1009640.

51. *Id*. at 5.

52. HANSON & DALEY, *supra* note 46, at 14.

53. Garrett, *supra* note 3, at 97, 114. This data is based on the percentage of such cases in which appellate courts issued written decisions. Of the first 200 DNA exonerations, 133 produced written opinions. *Id*. at 76. Professor Giovanna Shay has provided a helpful in-depth analysis of one of the DNA exonerees in Garrett's dataset whose ineffective assistance of counsel claim was denied. *See* Giovanna Shay, *What We Can Learn About Appeals from Mr. Tillman's Case: More Lessons from Another DNA Exoneration*, 77 U. CIN. L. REV. 1499 (2009).

54. E-mail from Brandon L. Garrett, Associate Professor of Law, University of Virginia School of Law, to Keith A. Findley, Clinical Professor, University of Wisconsin Law School (Aug. 20, 2009 10:34 CDT). This represents twenty-three claims, out of a total of 133 cases in which courts issued

Even for actually innocent defendants, courts rejected claims that the prosecutor improperly withheld material exculpatory evidence 83% of the time.

This is not to say, of course, that every one of the claims of ineffective assistance of counsel or *Brady* error was legally meritorious. No doubt many, perhaps most, such claims were decided correctly under governing legal standards. But it does highlight that such procedural claims have not served well the goal of protecting innocent defendants from wrongful conviction.

In sum, the DNA exoneration cases demonstrate that the appellate system simply did not detect or protect the innocence of these individuals. The appellate system failed to recognize the kinds of false or erroneous evidence that led to these mistakes. And the appellate system largely failed to recognize the procedural errors that typically led to these miscarriages of justice.

If protecting the innocent is truly a paramount goal of the appellate process, then these data are truly alarming. They indicate massive failure of appellate review to act as the system's failsafe. This record demands that we consider why the system is so prone to failure, and what, if anything, might be done to improve it.

III. SOURCES OF APPELLATE FAILURE

Multiple explanations exist for the failure of the appellate process to protect innocence. Principal among these is the way that appellate courts are designed to operate in the United States. Appellate courts generally do not directly address fact-bound questions like guilt or innocence, or truth.[56] For the most part, innocence is not a cognizable claim on appeal.[57] Although innocence protection is the primary goal of the process, the system permits appeals to approach innocence protection only indirectly, by assessing whether the trial process, rather than the outcome, was error-free. If appellate courts vindicate actually innocent people on appeal, it is almost always by an indirect path.

Appellate courts pay extreme deference to trial-level fact finders on factual determinations and related questions like credibility. It is axiomatic

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written decisions. This percentage includes two cases not reported in Garrett's original analysis because the records were not discovered until after he published his article. *Id*.

55. Four claims out of twenty-three were successful. *Id*. This figure includes one successful claim discovered after Garrett published his initial analysis of the data. *Id*.

56. The only real exception to this is that, under the Due Process Clause, courts must determine whether the evidence is legally sufficient to permit a jury to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979).

57. In 1993, the Supreme Court infamously refused to hold that actual innocence creates a freestanding due process claim under the Constitution. *See* Herrera v. Collins, 506 U.S. 390, 411 (1993).

that appellate courts do not decide facts, and will affirm a trial-level fact finder's factual conclusion if there is essentially any evidence in the record that supports a factual determination.[58] More specifically, appellate courts defer to trial courts almost completely on ultimate factual questions regarding guilt and innocence. The due process standard for evaluating the sufficiency of a conviction under *Jackson v. Virginia* is itself a highly deferential standard.[59] The *Jackson* standard permits appellate courts to acquit on the basis of legally insufficient evidence only if, taking the evidence in the light most favorable to the prosecution, there is insufficient evidence upon which a rational jury could find guilt.[60] Although the Supreme Court in *Jackson* cautioned against equating this rule with a "no-evidence" standard,[61] most courts have applied the standard so deferentially that in practice they uphold convictions unless there is essentially no evidence supporting an element of the crime.[62]

Garrett's data on the DNA exoneration cases confirm that the *Jackson* standard is a weak protection against convicting the innocent. Of the actually innocent defendants in his study, 45% raised *Jackson* sufficiency-of-the-evidence claims, but only one of these innocent defendants obtained relief that was ultimately upheld on that basis.[63] In every other case, the courts ultimately ruled that the evidence was legally sufficient to convict, even though the defendant was in fact innocent. Deferential fact review by design makes it difficult for an innocent defendant to prevail on a claim of innocence on appeal.

Professor William Stuntz has argued that procedural claims dominate postconviction and appellate practice in the United States because they are easier to litigate than fact-based claims of innocence.[64] The latter require resource-intensive factual investigations, which are often not possible for resource-deprived providers of defense services to indigent criminal defendants. Professor Garrett agrees:

> Locating an alibi witness, obtaining experts to challenge

58. *See, e.g.*, Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 989–90 (1993); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 348–49.

59. *Jackson*, 443 U.S. at 326.

60. *Id.* at 319.

61. *Id.* at 320.

62. Findley & Scott, *supra* note 58, at 348–49; Garrett, *supra* note 34, at 51; John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 726–27 (1990); Newman, *supra* note 58, at 989–90.

63. Garrett, *supra* note 3, at 112.

64. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 32 (1997).

> forensic evidence or undermine eyewitness identifications, or presenting evidence of defendants' lack of capacity requires substantial resources and time. Where neither law enforcement nor defense counsel develop crucial facts, perhaps due to underfunding, reviewing courts may be placed in a difficult position, tasked with judging innocence based on an inadequate record.[65]

Doctrine in other respects also makes it difficult to protect innocence on appeal. Appellate courts routinely avoid substantive review of potentially meritorious claims based on the defendant's failure to preserve the issue or make an adequate record.[66]

Moreover, a number of legal doctrines encourage courts to overlook error, even when they find that it exists. Chief among them, of course, is harmless error.[67] As discussed above, even when addressing cases in which the defendant was subsequently proved innocent by DNA testing, courts have frequently found the errors in their trials to be harmless beyond a reasonable doubt.[68] Even more directly, other legal standards, such as the standard for ineffective assistance of counsel and for establishing a *Brady* violation, encourage courts to ignore possible impediments to accuracy by imposing on the defendant a burden of proving prejudice from the errors of defense counsel or the prosecutor.[69] Again, Garrett's data confirm that doctrine imposes such a high burden that most defendants—even actually innocent defendants—cannot meet the burden. My own review of the data underlying Garrett's article, for example, reveals that 89% of the decisions rejecting ineffective assistance of counsel claims were based at least in part upon a finding that the defendant could not prove prejudice.[70]

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65. Garrett, *supra* note 3, at 126 (footnote omitted).

66. *See* Shay, *supra* note 53, at 1539.

67. *See id.* at 1543 ("The danger of harm and prejudice type analyses is that their application rests, all too often, on the appellate court's instinct about the defendant's guilt or innocence, which in turn can be shaped by psychological and institutional influences."); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 59 (noting that harmless-error analysis has become a guilt-presuming standard in which courts ask whether other evidence of guilt could support the jury's verdict, rather than looking to whether the error at trial actually "contributed" to the jury's verdict); Hilary S. Ritter, Note, *It's the Prosecution's Story, but They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825 (2005).

68. *See* Shay, *supra* note 53.

69. *See* Strickland v. Washington, 466 U.S. 668, 696 (1984); United States v. Agurs, 427 U.S. 97, 112 (1976); Brady v. Maryland, 373 U.S. 83, 86 (1963).

70. This figure is drawn from my own analysis of the cases in Professor Garrett's dataset. In many of the cases included in this total, the courts did not specifically distinguish between the deficient performance and prejudice prongs of the ineffective assistance of counsel test established in *Strickland*. 466 U.S. at 687. But, they all analyzed the case in terms of assessing whether the errors

Doctrine governing the admissibility of potentially false evidence also contributes to the ineffectual response of appellate courts. For example, social science research has established that the factors the Supreme Court requires courts to consider when evaluating the reliability of eyewitness evidence are not in fact effective predictors of reliability and lead inevitably to the admission of significantly flawed identification evidence.[71] Applying those flawed standards on appeal, courts are bound to reject the claims of actually innocent and misidentified defendants.

Supreme Court doctrine similarly fails to provide meaningful safeguards against false confessions. In *Colorado v. Connelly*, the Supreme Court shifted the analysis under the Fifth Amendment's Self-Incrimination Clause away from any consideration of the reliability of a disputed confession.[72] After *Connelly*, police coercion is all that matters, and the defendant must prove that police engaged in misconduct that rendered the confession involuntary. Considerations about reliability of the confession play no role in the analysis.[73]

The Supreme Court has made it clear that no special rules govern the admissibility of jailhouse informant testimony, despite widespread recognition that such testimony is especially unreliable.[74] Doctrine simply provides no adequate mechanism for screening against the most common types of false evidence.

Appellate courts are limited in their capacity to recognize evidence of innocence in another way as well: in almost every jurisdiction in the United States, there is no mechanism that ensures litigants a right to introduce new evidence of innocence during the direct appeal process. Appellate courts do not hear new evidence, and limit their review to the evidence in the record—that is, to the evidence introduced in the trial court proceedings. While most states have statutes permitting motions for a new trial based on newly discovered evidence, or permitting challenges to fact-based constitutional claims such as ineffective assistance or *Brady* claims, those proceedings are almost always collateral proceedings; they are not a part of the direct appeal

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alleged might have made any difference—i.e., whether there was prejudice.

71. *See* Findley & Scott, *supra* note 58, at 347–48; Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite *Revisited: Towards a New Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures*, 41 VAL. U. L. REV. 109, 112 (2006); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 LAW & HUM. BEHAV. 1 (2009), *available at* http://www.springerlink.com/content/p768m22542h2644q.

72. *See* Colorado v. Connelly, 479 U.S. 157, 170 (1986).

73. *Id.*

74. *See* Kansas v. Ventris, 129 S. Ct. 1841, 1847 n.* (2009).

process.[75] As such, they usually come after the direct appeal, after the defendant has served significant time or even the full sentence in prison, and, most importantly, after the defendant no longer has a right to the assistance of counsel to present those claims.[76] To the extent a claim of innocence requires evidence not already in the record, most appellate systems are not equipped to hear it, at least not as part of the direct appeal.

Innate cognitive distortions or biases add to the difficulty that appellate courts have in recognizing innocence.[77] Confirmation bias, for example, leads people to seek, recall, and interpret information in a way that is consistent with preexisting theories or beliefs.[78] On appeal, confirmation bias is likely to lead reviewing courts—which begin with the knowledge that the defendant has been found guilty beyond a reasonable doubt—to interpret information about the case in a manner that is consistent with that conclusion.[79] In a related way, hindsight bias and outcome bias tend to lead people to believe that the eventual outcome of a situation was more likely, more inevitable, and even more correct than it really appeared at the outset.[80] On appeal in a criminal case, these biases can make it more likely for a court to find harmless error, or a lack of prejudice in an ineffective counsel or *Brady* violation case, because the defendant's guilt looks more inevitable in hindsight than it might have actually appeared prior to trial.[81] Research has confirmed that, indeed, judges (like all human beings) are susceptible to such biases.[82] These biases

75. Christopher Flood, *Closing the Circle:* Case v. Nebraska *and the Future of Habeas Reform*, 27 N.Y.U. REV. L. & SOC. CHANGE 633, 643 (2002) ("Habeas opens the door to claims that cannot be raised on appeal; therefore, postconviction review plays a central role in protecting important constitutional rights. For example, postconviction remedies generally provide the sole means of raising suppression of evidence claims under *Brady v. Maryland* . . . .") (footnote omitted). *Cf.* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 659 (2002) ("It is important . . . to recognize *Brady* as less of a discovery mechanism and as more of a post-trial due process safety check where information surfaces after trial that exculpatory evidence was suppressed.").

76. Capital cases are an exception because in most capital jurisdictions, by statute defendants are provided counsel to assist with collateral challenges to the conviction and death sentence. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 719 (2007).

77. In the social sciences, "bias" is a value-neutral term. It simply means that any errors that are made are skewed in one direction or another, rather than randomly.

78. *See* Findley & Scott, *supra* note 58, at 307–16; Alafaire S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006); THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 33 (1991).

79. *See* Findley & Scott, *supra* note 58, at 316.

80. *Id.* at 317; Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 PSYCHOL. BUL. 311, 311 (1990).

81. *See* Findley & Scott, *supra* note 58, at 317–23.

82. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 24–29 (2007).

are likely reflected in the many cases in which appellate courts have expressed confidence that the defendants before them were guilty, or that the evidence of guilt was "overwhelming," even where DNA later proved that the defendants were in fact innocent.[83]

In addition to these innate cognitive distortions, political pressures make it difficult for courts to reverse convictions, especially in serious cases. No court wants to be responsible for releasing a defendant convicted of a serious crime and risk the fallout should the defendant commit another crime.[84] The empirical evidence indicates that pressures to be "tough on crime" do have a significant impact on judges, especially in jurisdictions, like most, where the judges are elected.[85]

Part of the problem with truth and innocence protection on appeal may be that courts simply believe they lack epistemological access to truth about innocence in the criminal justice system.[86] Without epistemic access to truth, or any readily apparent way to apply standards and principles to the case-specific determinations about truth and veracity, appellate courts naturally prefer to defer to those deemed better positioned to make such judgments.[87] Particularly in jury trial cases, it is comforting to defer to the unexplained and secretive jury decision-making process; it permits ascribing almost mystical

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83. *See supra* note 67 and accompanying text.

84. Federal District Court Judge Lynn Adelman recently noted the kinds of pressures that can disincline judges to grant relief in criminal cases:

> The fact that many state court judges must run for reelection may also sometimes affect their ability to address federal constitutional issues dispassionately. Judges know that political opponents can exploit decisions supporting the rights of criminal defendants, and that such decisions can jeopardize their careers. Increasingly, state court judges function in a highly politicized atmosphere.

Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 23–24 (2009) (footnote omitted). For a general discussion of elected judges' use of tough-on-crime campaigns, see Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1102 (2006); *see also* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 727 (1995). In this sense, judges, especially elected judges, are likely subject to many of the same political and community pressures, recently catalogued by Professor Daniel Medwed, that make it difficult for prosecutors to accept the possibility of innocence in postconviction proceedings. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 150–69 (2004).

85. *See* Weiss, *supra* note 84, at 1101–02; Croley, *supra* note 84, at 728.

86. *See* THOMAS, *supra* note 5, at 1; Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 413, 415–18 (2009) (reviewing THOMAS, *supra* note 5).

87. I argue below that there are in fact standards that can be applied to some factual questions, especially those involving the types of evidence that frequently contribute to wrongful convictions, such as eyewitness evidence, confessions, scientific evidence, and jailhouse informant testimony. *See infra* Part IV.B.2.

truth-divining power to the jury.[88] And it permits appellate courts to avoid dealing with slippery, hard-to-grasp questions of historical fact.

In this sense, it ultimately may be that accuracy and protecting against convicting the innocent are not really the paramount objectives of the appellate system. Rather, the ultimate goal may be simply to resolve the matter before the court. That is to say, it may be that, for the appellate process (and indeed the criminal justice system in general), finality, or "repose," is the most important objective.[89] If so, that means that the *perception* of accuracy, produced by deference to the inaccessible jury deliberation process, is what really matters.[90] Extreme deference to trial-level fact finders may reflect the belief that such deference creates confidence that the system is accurately determining guilt and innocence, regardless of whether it really is.

While this may be a powerful explanation for past deference, it is becoming increasingly less tenable as a justification. The innocence cases of the past two decades, and the DNA exonerations in particular, are piercing the perception of accuracy in the criminal justice system. Given the parade of exonerations generated by the Innocence Movement, the perception of accuracy is becoming increasingly difficult to maintain.[91] The reality of accuracy is becoming more important than the mere perception engendered by extreme deference to trial-level fact finders. Searching inquiries into truth are, and likely will continue to be, increasingly important, not just as a matter of justice to the innocent, but also for protecting confidence in the process.

IV. PATCHING THE SAFETY NET

If innocence protection is indeed the primary, or at least a significant, objective of the appellate system, this record of failure demands attention. Numerous reforms are possible, some that would require only modest shifts in current practices, others more radical overhauls of the way the appellate system does business.

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88. *See* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1195 (1979) ("[T]he secrecy of the jurors' deliberations and the general nature of the verdict make it hard to know precisely on what it was based."); THOMAS, *supra* note 5, at 11 ("The principal way our process conceals uncertainties is by assuming that juries are virtually infallible as lie detectors.").

89. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

90. Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil–Criminal Distinction*, 57 VAND. L. REV. 435, 491–92 (2004). Professor Charles Nesson has argued that the "instrumentalist" goal of the adjudicative system might be simply "authoritative resolution . . . , with ascertainment of the truth but a useful means to that end." Nesson, *supra* note 88, at 1194–95; *cf.* David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and the 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.").

91. *See* Findley, *supra* note 5, at 142; Gross, *supra* note 25, at 174.

To begin, to the extent that doctrine interferes with innocence protection, it can be revamped. Professor Giovanna Shay argues, for example, that the wrongful conviction cases caution against overreliance on waiver-type arguments to avoid substantive review of viable claims.[92] And if harmless error, ineffective assistance of counsel, and the *Brady* doctrine forgive too many trial errors by permitting or requiring courts to overlook too many convictions of the innocent, the doctrines can be revised. Others have written extensively about the need for reforming doctrine in these areas.[93] I make no attempt to add to those discussions here. Instead, I want to focus on systemic reforms in the appellate process itself that might make the system more responsive to claims of innocence.

To better protect innocence, the appellate system must find a way to undertake more substantive review of guilt and innocence questions. Rather than continuing to almost exclusively address process, the system can more directly address substance. This can happen in two ways. First, the appellate process can be altered to make it easier to introduce new facts supporting a claim of innocence during the direct appeal process. Second, appellate courts can begin to undertake more rigorous review of facts on appeal. Neither proposal is as radical as it might sound at first blush.

A. Introducing New Facts in the Review Process

While direct appeals of criminal convictions are limited in the United States almost exclusively to considering just the facts developed on the record in the trial court proceedings leading up to conviction, they need not be so circumscribed. Most European judicial systems have mechanisms for introducing "fresh evidence" during appellate review.[94] As Professor Garrett has suggested, if the appellate system is going to more effectively sort the innocent from the guilty, more attention must be paid—at every step in the process—to developing the factual predicates needed for a claim of

92. Shay, *supra* note 53, at 1541 (noting that wrongful convictions "provide[] a reason to back away from over-reliance on rules that penalize defendants for lawyers' imperfect litigation").

93. *See, e.g.*, Harry T. Edwards, *To Err Is Human but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1172 (1995); Garrett, *supra* note 67; William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 164–71 (1995); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986); Shay, *supra* note 53, at 1543–44; Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053 (2005); Stuntz, *supra* note 64, at 20; Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 440–46 (2003).

94. *See, e.g.*, FLOYD FEENEY & JOACHIM HERRMANN, ONE CASE—TWO SYSTEMS: A COMPARATIVE VIEW OF AMERICAN AND GERMAN CRIMINAL JUSTICE 446 (2005) (pointing out that German appellate courts engage in independent review of the evidence in criminal cases, "hearing the witnesses, considering afresh the evidence and the law, and giving [their] own independent conclusions").

evidence.[95] Despite the limited role for such fact review in the United States, Garrett notes that "[m]ost of those [innocent defendants] who did receive relief did so during the direct appeal, which bolsters the notion that factual review during direct appeals can play a crucial role in remedying miscarriages."[96]

Structurally, appellate courts are not suited to receiving live testimony or other kinds of new evidence directly. But there are other mechanisms for introducing new facts and claims on appeal, without radically restructuring the appellate courts.

Recognizing that the inability to introduce new facts on appeal is a serious impediment to raising claims of ineffective assistance of counsel, Professor Eve Brensike Primus has proposed a structural reform in criminal appeals to permit appellate attorneys, in limited circumstances, "to open trial records in order to develop ineffective assistance of trial counsel claims."[97] Without that option, she observes, "[d]efendants are generally not permitted to raise ineffective assistance of counsel claims until collateral review"—after the defendant has already served years of his sentence, and no longer has a right to appointed counsel.[98]

Such a structural reform is neither unworkable nor unprecedented. Indeed, a much broader variation of that proposal—which applies not just to ineffective assistance of counsel claims, but to any kind of claim that requires new fact development—has been employed with tremendous success in Wisconsin for decades. Virtually alone among the states, Wisconsin provides a mechanism by which criminal defendants can return to the circuit court (the trial-level court) after conviction and sentencing, but before taking the case to the court of appeals, with a postconviction motion that is part of the direct review process.[99] Upon sentencing, defendants who wish to appeal do not file

95. Garrett, *supra* note 3, at 127.

96. *Id*. Of the DNA exonerees who won relief from the courts, 10% obtained relief on direct appeal, while 1% obtained relief during state postconviction proceedings, and 3% were granted federal habeas relief. *Id*. at 101.

97. Primus, *supra* note 76, at 679. In a related way, Professor Shay has argued that appellate courts should use procedures, such as remands, to permit them to generate "detailed fact-finding on issues that appear potentially meritorious, or troubling, but about which the lawyer has failed to create an adequate record." Shay, *supra* note 53, at 1541–42.

98. Primus, *supra* note 76, at 679.

99. *See* WIS. STAT. § 809.30(2)(h) (2007–2008). Some states provide a mechanism for obtaining a stay of the appeal to permit a criminal defendant to file a postconviction motion raising non-record claims. *See, e.g.*, N.Y. C.P.L.R. § 440 (Consol. 1996) (permitting appellants in New York to move to stay the direct appeal process so the defendant can file a postconviction motion prior to appeal). But the process is not automatic and routine, as it is in Wisconsin. Some other states provide a mechanism for obtaining a remand to raise claims like ineffective assistance of counsel. Remands, however, are the exception, not the rule, and typically involve significant delay and onerous burdens. Under Oklahoma rules, for example, a defendant, on direct appeal, may offer

a notice of appeal, as in most jurisdictions; in Wisconsin, that comes later. Instead, defendants file a Notice of Intent to Pursue Postconviction Relief.[100] Filing the notice entitles the defendant to assignment of new postconviction and appellate counsel, and to a copy of the transcripts of the proceedings.[101] Once the transcripts are filed, postconviction/appellate counsel then has sixty days—extendable by motion in and liberally granted by the court of appeals if more time for investigation is needed[102]—to review the record and determine if the case presents issues with arguable merit for postconviction or appellate review. If so, and if all issues in the case are already adequately preserved and developed in the trial court record, counsel can then file a notice of appeal, which sends the case directly to the court of appeals for appellate review of those issues.[103] If, however, counsel identifies issues that are not adequately preserved or developed in the trial court—and hence would be deemed waived or meritless on appeal—counsel can file a postconviction motion in the circuit court to develop those issues.[104] If the circuit court denies relief, the defendant can then file a notice of appeal to obtain simultaneous appellate review of the conviction and related postconviction claims.[105]

The advantage of Wisconsin's process from an innocence protection perspective is that it provides a mechanism for introducing new evidence of innocence, and new facts underlying claims of innocence-related error, into the direct appeal process. Appellate counsel for an innocent defendant can undertake new or additional investigation to determine if exculpatory witnesses or other evidence was overlooked at trial, and can then seek a new trial based on such newly discovered evidence. New counsel can also investigate and present the facts necessary to establish a viable claim of ineffective assistance of counsel, or a claim that the prosecutor violated the *Brady* duty to disclose exculpatory evidence. And all of this can be litigated

non-record evidence in support of an ineffective assistance of trial counsel claim and request a remand. Only if the Oklahoma Court of Criminal Appeals (OCCA) finds "by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence" will the OCCA remand to the trial court for an evidentiary hearing based on the claims raised in the application. OKLA. STAT. tit. 22, ch. 18, App. Rule 3.11(B)(3)(b) (2003); Dewberry v. State, 954 P.2d 774, 775–76 (Okla. Crim. App. 1998). "It is the record from this evidentiary hearing which . . . supplements the trial court record on appeal." *Dewberry*, 954 P.2d at 776. Any affidavits or other evidence filed in support of the evidentiary hearing are not part of the record on which the OCCA bases its ineffective assistance of counsel ruling unless they are properly introduced at the evidentiary hearing. *Id*.

100. WIS. STAT. § 809.30(2)(b).

101. *Id*. § 809.30(2)(e), (g).

102. *Id*. § 809.82(2).

103. *Id*. § 809.30(2)(h).

104. *Id*.

105. *Id*. § 809.30(2)(j).

promptly after sentencing, as part of the direct appeal when the defendant is entitled to appointed counsel,[106] access to transcripts,[107] and funding for essential defense experts.[108] Thus, an innocent defendant in this system has the right to raise in a timely fashion, and with the assistance of counsel, the kinds of fact-based claims that are most critical to his ability to obtain substantive review of his claim of innocence.

To assess the effects of a procedure like Wisconsin's, I collected a random selection of Wisconsin cases to track the appellate process employed, and the outcomes of those proceedings. The data show that approximately half of the defendants who wished to appeal their convictions in Wisconsin first employed the postconviction motion procedure, which enabled them to introduce new facts or issues (including claims like newly discovered evidence, ineffective assistance of counsel, and *Brady* violations) into the case before taking the case to the court of appeals. And the data, at least preliminarily, suggest that this procedure is indeed producing more favorable results for criminal defendants. At the same time, this procedure is reducing the number of cases taken to the court of appeals by resolving a high percentage of postconviction challenges at the postconviction motion stage.

For this analysis, I randomly selected 1,000 felony case filings, spread equally among Wisconsin's four appellate court districts. The cases were all filed in 2005 or 2006.[109] Of these 1,000 felony case filings, twenty-three (2.3%) had not yet reached an ultimate disposition at the time of my analysis. The remaining 977 cases produced twenty-three extraditions (2.4%), one "reverse waiver" in which a juvenile was referred to juvenile court (0.1%), 182 dismissals (18.6%), 764 guilty judgments (78.2%), and seven acquittals (0.7%).[110] Excluding the dismissals, extraditions, and reverse waiver, a total of 771 cases were adjudicated, producing either a judgment of guilty or an acquittal—764 guilty judgments (99.1% of adjudicated cases) and seven acquittals after trial (0.9% of adjudicated cases). Of the 771 adjudicated cases, 752 (97.5%) were adjudicated by plea, and nineteen (2.5%) by trial. Twelve (63.2%) of the trials produced guilty verdicts, and seven (36.8%) produced acquittals. Of the 764 guilty judgments, 752, or 98.4%, were obtained by a guilty or no contest plea, while only twelve, or 1.6%, were

106. Evitts v. Lucey, 469 U.S. 387 (1985); Douglas v. California, 372 U.S. 353, 357 (1963).

107. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

108. *See* Ake v. Oklahoma, 470 U.S. 68, 78 (1985).

109. Data for each of the randomly selected cases was obtained by pulling up the online Public Records on Wisconsin's Consolidated Court Automation Programs (CCAP), http://wcca.wicourts.gov/index.xsl.

110. Of those guilty judgments, twenty-one (2.7%) ended in referral to the first offender program. Thirteen of those defendants successfully completed the first offender program and charges were accordingly dismissed, despite the defendant's admission of guilt.

obtained by trial.[111]

Sixty-six of the 764 convicted defendants—or 8.6%—took the first step to initiate the appellate process by filing a notice of intent to pursue postconviction relief. In just over half of those cases—a total of thirty-four, or 51.5%—the case went no further. The defendant filed neither a postconviction motion nor a notice of appeal within the prescribed time limits, and the appellate process ended without further action. Assuming those cases were handled properly, they reflect situations in which defense counsel concluded there was no merit to further postconviction or appellate proceedings, and the defendant consented to closing the file without further action, or in which counsel concluded there was merit, but the defendant chose not to pursue that relief, usually given the risks inherent in seeking, for example, to withdraw a guilty plea.[112]

In the remaining thirty-two cases (48.5%) the defendant filed either a postconviction motion or a notice of appeal. Slightly more than half—seventeen—filed a postconviction motion before going to the court of appeals. Fifteen defendants initiated an appeal without first seeking trial court postconviction relief.

The power of the trial-level postconviction process can be discerned from the fact that those defendants who filed a postconviction motion in the circuit court were much more successful than those who proceeded straight to the court of appeals. In the fifteen cases appealed without a postconviction motion in the circuit court, fourteen convictions (93.3%) were affirmed, and only one (6.7%) was reversed. For those defendants who filed a circuit court postconviction motion, by contrast, half of those for which a ruling was available (three of the seventeen cases reported no ruling at the time of this analysis) won full or partial relief—six of fourteen motions were granted in full, and one was granted in part and denied in part, while seven were denied in full. Of the eight that were denied in whole or in part (seven full denials and one partial denial), six (75%) of the defendants pursued the case further by filing a notice of appeal. The court of appeals affirmed the denial of relief in five of those six cases (83.3%), and reversed in one (16.7%). Thus, of the fourteen defendants who filed a postconviction motion, ultimately 50% won the full relief they sought, and eight of fourteen (57.1%) won full or partial relief. And, in most of the cases—seven of the eight cases in which full or partial relief was granted—the system was able to correct its own errors at the

111. Nationwide, more than 95% of all convictions are obtained by plea, rather than trial, and the percentage of cases taken to trial has diminished over time. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 493 (2004).

112. *See* State *ex rel*. Flores v. State, 516 N.W.2d 362, 368 (Wis. 1994).

trial court level without incurring the cost and time of a full-blown appeal in the court of appeals.

Without this type of process, defendants in most jurisdictions usually cannot raise claims of newly discovered evidence, ineffective assistance of counsel, or *Brady* violations during the direct appeal process. In most jurisdictions, for example, appellants cannot raise claims of ineffective assistance of counsel on direct appeal unless the errors of trial counsel, and the prejudice from those errors, are apparent on the face of the record.[113] But most claims of ineffective assistance of counsel—especially those that would support a claim of innocence—are not apparent on the face of the record. Failure to present available exculpatory evidence, or even to object to improper and prejudicial evidence, for example, can almost never be raised on the trial court record alone because that record will not show what the missing exculpatory evidence was, or whether counsel had a strategic reason for electing not to object to the objectionable evidence.

My analysis of data from the first 200 DNA exonerations (the Garrett data) confirms the point.[114] Of the 133 cases in that group that produced a written appellate opinion, twenty-five innocent defendants attempted to raise claims of ineffective assistance of counsel on direct appeal. Of those defendants, only three were successful with those claims, and one was in Wisconsin, where he claimed that counsel was ineffective for failing to seek the DNA testing that exonerated him; the defendant was able to introduce the exonerating DNA evidence in his postconviction motion brought as part of the

113. Primus, *supra* note 76, at 680, 690–91. *See, e.g.*, Massaro v. United States, 538 U.S. 500, 504 (2003) ("[I]n most cases a motion brought [during collateral review] is preferable to direct appeal for deciding claims of ineffective assistance [of counsel]."); United States v. Stevens, 487 F.3d 232, 245 (5th Cir. 2007) (claim of ineffective assistance of counsel not reviewable when first raised on appeal); United States v. Maldonado-Garcia, 446 F.3d 227, 233 (1st Cir. 2006) (same); United States v. Garcia-Meza, 315 F.3d 683, 687 (6th Cir. 2003) (same); United States v. Stantini, 85 F.3d 9, 20 (2d Cir. 1996) (same); United States v. Brooks, 438 F.3d 1231, 1242 (10th Cir. 2006) (claim of ineffective assistance of counsel not reviewable when first raised on appeal unless record is sufficiently developed to consider the issue; both parties ask appellate court to resolve matter, question has been briefed and argued, and entire trial record is before court of appeals; or issue is sufficiently clear cut); United States v. Wells, 394 F.3d 725, 733 (9th Cir. 2005) (same); Green v. United States, 323 F.3d 1100, 1103 (8th Cir. 2003) (same); United States v. Bradford, 78 F.3d 1216, 1224–25 n.11 (7th Cir. 1996), *cert. denied*, 517 U.S. 1174 (1996) (same); United States v. Le, 256 F.3d 1229, 1241 (11th Cir. 2001) (claim of ineffective assistance of counsel generally not considered first on direct appeal unless record is sufficiently developed); United States v. Combs, 369 F.3d 925, 940–41 (6th Cir. 2004) (claim of ineffective assistance of counsel may be reviewable even when first raised on appeal only if record adequate to permit review of counsel's performance); United States v. Montoan-Herrera, 351 F.3d 462, 465 (10th Cir. 2003) (claim of ineffective assistance of counsel reviewable even though first raised on appeal only when the record is adequate to permit review of counsel's performance and the claim did not "'merit further factual inquiry'") (quoting United States v. Gordon, 4 F.3d 1567, 1570 (10th Cir. 1993)).

114. Again, I am grateful to Professor Brandon Garrett for providing me the raw data for my own analysis.

direct appeal process.[115] But twenty-two of twenty-five innocent defendants (88%) who claimed ineffective assistance of counsel on direct appeal were unsuccessful. Two were denied relief expressly because their claims could not be raised on direct appeal,[116] and in at least another nine cases, the courts made statements suggesting that the record was inadequately developed to support the claims of ineffective assistance of counsel.[117] Thus, at least half of the innocent appellants who lost their claims of ineffective assistance of counsel on direct appeal lost in part because they had been unable to develop a sufficient factual record to support their claims.

Likewise, newly discovered evidence of innocence, or newly discovered *Brady* material, can almost never be addressed on appeal because there is no record of the new evidence or *Brady* material in the trial court. While mechanisms exist in most jurisdictions for raising such claims in collateral proceedings, those proceedings usually are not part of the direct appeal process.[118] Consequently, appellate counsel in those systems has neither the capacity, institutional obligation, nor incentive to find and raise claims related to newly discovered *Brady* material during the direct appeal.

Raising those claims later, in a postconviction motion or habeas corpus proceeding after direct appeal, is no substitute for raising them on direct appeal. In most, if not all, jurisdictions, non-capital defendants in collateral

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115. State v. Hicks, 549 N.W.2d 435, 438 (Wis. 1996). The other two who were granted relief on an ineffective assistance of counsel basis on direct appeal were codefendants Willie Rainge and Dennis Williams in Illinois, and the courts in their cases expressly noted that they were granting relief under extremely unusual circumstances because they did not follow the typical rules for assessing claims of ineffective assistance of counsel. People v. Williams, 444 N.E.2d 136, 142–43 (Ill. 1983) (Illinois Supreme Court reversed its prior ruling that counsel was not ineffective after it learned of facts outside the record related to the disbarment of Williams's attorney); People v. Rainge, 445 N.E.2d 535, 546–47 (Ill. App. Ct. 1983) (quoting *Williams*, 444 N.E.2d at 143) (granting relief to Williams's co-defendant on facts outside the record based on the Illinois Supreme Court's decision in Williams's case, under "the unique circumstances and sequence of events in this capital case, which will rarely, if ever, be duplicated").

116. In Victor Ortiz's case, for example, the New York Appellate Division held: "The defendant's claim that he was not afforded the effective assistance of counsel is based largely on facts dehors the record. Thus, his remedy is to bring a post-conviction proceeding pursuant to [Criminal Procedure Law §] 440.10 if so advised." People v. Ortiz, 531 N.Y.S.2d 607, 608 (N.Y. App. Div. 1988) (citations omitted).

117. For example, in Josiah Sutton's case, the court held:

> Appellant's counsel on appeal asserts the "independent DNA analysis in this case is very important to the entire case and the only viable defense available to defendant." But in arguing that the absence of independent DNA analysis prejudiced appellant's case under *Strickland*, appellate counsel does not produce any evidence of independent DNA analysis that would vindicate appellant or raise questions about his innocence.

Sutton v. State, No. 14-99-00951-CR, 2001 WL 40349, at *2 (Tex. App. Jan. 18, 2001).

118. Primus, *supra* note 76, at 680.

proceedings have no right to counsel, to obtain necessary transcripts, or to court-appointed experts.[119] Years later, witnesses are also often difficult to locate, memories may have faded, and physical evidence may have been lost or spoiled.[120] By then, many defendants will have fully served their sentences, or at least will have served years longer than they should have.[121] Moreover, the burden for obtaining relief in such collateral proceedings is often higher than on direct appeal.[122] The passage of time generally makes courts less inclined to grant relief, both because of concerns that the passage of time makes a retrial more difficult, and because the more time that passes, the stronger the inclination to enforce finality.[123]

My review of Garrett's data from the DNA exoneration cases confirms the inadequacy of the current postconviction procedures in most states for addressing claims of this type. Despite the incompatibility of the direct appeal process for bringing claims dependent on new facts, most defendants who raised those claims tried to raise them on direct appeal nonetheless, probably because the prospect of waiting to go it alone with those issues at a later date in collateral attack is so unattractive. Of the first 133 DNA exonerees whose cases produced a written decision, a total of seventeen (12.8%) attempted to raise *Brady* claims on direct appeal, while only five (3.8%) brought *Brady* claims in state postconviction proceedings, and six (4.5%) brought *Brady* claims in federal habeas.[124] Among those 133 exonerees, twenty-five (18.8%) raised ineffective assistance of counsel claims on direct appeal, while ten (7.5%) claimed ineffective assistance in state postconviction proceedings, and eleven (8.3%) made such a claim in federal habeas.[125] Ten (7.5%) of the exonerees tried to introduce newly discovered evidence in the direct appeal process, eight (6%) offered new evidence in state

119. *See* Murray v. Giarratano, 492 U.S. 1, 10 (1989) (no right to counsel in collateral attack in capital cases); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (no right to counsel in collateral attack).

120. Primus, *supra* note 76, at 695.

121. *Id*. at 680.

122. The Supreme Court has held, for example, that the harmless error standard is less favorable to defendants in habeas corpus review than on direct appeal. *See* Brecht v. Abrahamson, 507 U.S. 619, 622–23 (1993).

123. *See, e.g.*, State v. Escalona-Naranjo, 517 N.W.2d 157, 163–64 (Wis. 1994) (declaring that "[w]e need finality in our litigation," as a partial rationale for restricting the availability of postconviction relief to prisoners seeking to attack their convictions after the conclusion of the direct appeal process); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142, 145 (1970) (arguing that the government has no finality interest in preventing collateral challenges to convictions in cases where the defendant might be innocent).

124. I am grateful to Professor Brandon Garrett for sending me the raw data on ineffective assistance of counsel and *Brady* claims from his analysis of the first 200 DNA exoneration cases, which allowed me to glean these numbers.

125. *Id*.

postconviction proceedings, and one (0.8%) sought relief based on newly discovered evidence in federal habeas.[126]

Thus, although the direct appeal process in most jurisdictions is not designed to address claims of ineffective assistance, *Brady* violations, or newly discovered evidence, far more innocent defendants tried to raise those claims on direct appeal than in state or federal collateral challenges. Quite likely, the issues were litigated more frequently on direct appeal because defendants simply lacked the resources to muster such claims after the direct appeal process was over, when they no longer had a right to counsel, transcripts, or experts.

Compare that to a direct appeal process like Wisconsin's, which allows defendants to pursue at least some of the claims most likely correlated with substantive justice, and which so often require consideration of facts not already in the record. Illustrative is a case in the dataset of Wisconsin cases I developed in which the Wisconsin Court of Appeals reversed a conviction after the circuit court denied postconviction relief. In that case, *State v. Aguirre*, the defendant was convicted of sexual assault.[127] As part of the direct appeal process, Aguirre filed a postconviction motion claiming ineffective assistance of counsel, which the trial court denied. The court of appeals in a per curiam decision reversed, holding that counsel's performance was deficient and prejudicial because, among other things, he had failed to interview or subpoena several witnesses who would have provided important evidence supporting Aguirre's claim of innocence.[128] That issue was available for appellate review solely because Wisconsin's procedure permitted a postconviction motion as part of the direct appeal process.

Also illustrative is the Wisconsin case of Anthony Hicks, one of the defendants included among the first 200 DNA exonerees studied by Brandon Garrett. Unlike most of the other DNA exonerees, Hicks was exonerated by postconviction DNA testing that was conducted as a part of the direct appeal process, not a subsequent postconviction proceeding.[129] Because Hicks's appellate lawyer had the option of filing a postconviction motion as part of the direct appeal process, appellate counsel had both the incentive and the ability to obtain the DNA testing that proved his innocence. On direct appeal, the Wisconsin Court of Appeals reversed Hicks's conviction because Hicks's trial counsel had been ineffective for failing to obtain the exonerating DNA results

126. *Id*.

127. State v. Aguirre, 2008 WI App 36U, ¶ 1.

128. *Id*., ¶¶ 1, 11.

129. *See* State v. Hicks, 536 N.W.2d 487, 491 (Wis. Ct. App. 1995), *aff'd*, 549 N.W.2d 435, 436 (Wis. 1996).

before trial.[130] Without rejecting that conclusion, the Wisconsin Supreme Court affirmed on a different basis—the new DNA results were so important to a fair trial on the question of Hicks's guilt that Hicks was entitled to a new trial in the interest of justice.[131]

If Wisconsin had not permitted a postconviction motion as part of the direct appeal process, appellate counsel would not have had any reason to pursue these truth-revealing facts that lay outside the record. Appellate counsel likely instead would have been left with little to do but to file a process-related appeal on issues not directly related to substantive justice in the case. And Hicks would have had to leave for a later date his attempt to obtain the exonerating DNA test results, when he would have been without a right to appointed counsel or funding for experts and DNA testing.[132]

B. Invigorated Fact Review on Appeal

In addition to permitting the introduction of new facts to enable more substantive review of convictions, other reforms also could enhance the ability of the appellate process to protect innocence. Even without new facts, appellate courts can more rigorously review factual questions. Such enhanced review can be accomplished through minor, incremental changes in emphasis by appellate courts, or more dramatically with revised standards of appellate review for some issues.

1. Deconstructing Deference

As is now obvious, trial-level fact finders can be and sometimes are wrong. This reality makes it important to consider why our current appellate system defers almost completely to those fact finders on questions of facts and ultimate questions of guilt and innocence.

The first objection to enhanced fact review by appellate courts might be a constitutional concern—that the Sixth Amendment (in criminal cases) and the Seventh Amendment (in civil cases) give the fact-finding power exclusively to juries. Indeed, the Seventh Amendment includes language constraining judicial reexamination of fact-finding. The Seventh Amendment provides, in part, that "no fact tried by a jury shall be otherwise re-examined in any court, other than according to the rules of the common law."[133] But the common law

130. *Hicks*, 536 N.W.2d at 492.

131. *Hicks*, 549 N.W.2d at 444–45.

132. At that time, Wisconsin had no law providing a right to postconviction DNA testing at state expense in cases where the testing might prove innocence. In 2001, Wisconsin adopted a statute that provides a right to such testing. WIS. STAT. § 974.07(2) (2001–2002). While the law authorizes the State Public Defender to make discretionary appointments of counsel in such cases, it does not entitle the defendant to counsel for purposes of seeking postconviction DNA testing. *See id*. §§ 974.07(11), 977.05(4)(j).

133. U.S. CONST. amend. VII.

did permit courts to review jury verdicts and overrule them if they were deemed improper, and the Supreme Court has held that judicial reexamination of facts is permissible.[134] In any event, the Sixth Amendment, which applies in criminal cases, contains no similar constraining language. The Supreme Court has accordingly ruled that courts may reverse convictions in criminal cases on reconsideration of the *weight* of the evidence, not just the *sufficiency* of the evidence.[135] Under weight-of-the-evidence review, courts reevaluate the facts and can reverse if they believe the greater weight of the evidence contradicts the jury's findings, even if the jury's verdict was supported by legally sufficient evidence.[136] Moreover, and perhaps most fundamentally, the Sixth Amendment poses no barrier to review of guilty verdicts because the right to a jury trial is a criminal defendant's alone.[137]

Indeed, the Sixth Amendment may provide an additional reason why courts *should* engage in more rigorous review of jury verdicts. For centuries, eminent authorities have argued that the judicial authority to overturn verdicts and grant a new trial before a new jury is an important safeguard that *protects* the jury trial right.[138] Blackstone contended that the right to jury trial includes the right to invoke the discretion of the court to decide whether the injustice of the verdict is such that the litigant ought to have an opportunity to take the case before another jury.[139] In any event, at least under settled constitutional principles, the Sixth Amendment poses no real obstacles to more rigorous factual review of convictions in criminal cases.

The more substantial rationale for near-total deference on factual questions is grounded in assumptions about institutional competence. Trial-level fact finders, the argument goes, are in a far superior position to assess the credibility and weight of the evidence because they are not limited to the cold record. Trial-level fact finders "can assess not only what a witness says, but also how she says it."[140] Appellate courts, by contrast, are limited to the

134. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 418–19 (1996).

135. Tibbs v. Florida, 457 U.S. 31, 42–43 (1982).

136. *Id*. at 37–38.

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

138. *See* Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 177–78 (2008); *see also* Felton v. Spiro, 78 F. 576, 581 (6th Cir. 1897) ("[T]he motion for a new trial . . . is one of the most important rights which a party to a jury trial has. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury."); Albert D. Brault & John A. Lynch, Jr., *The Motion for New Trial and Its Constitutional Tensions*, 28 U. BALT. L. REV. 1, 114 (1998) ("Until recently, most American jurisdictions viewed grant of a new trial as posing no threat to the right to trial by jury. This is because the grant of this motion was followed by another jury trial.") (footnote omitted).

139. Robertson, *supra* note 138, at 178 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 391 (Oxford, Eng., Clarendon Press 1768)).

140. Oldfather, *supra* note 90, at 445.

cold record—the transcripts of testimony and the documentary and physical exhibits introduced at trial. Indeed, as Professor Bowman has shown in his contribution to the symposium issue, historically, some appellate courts did not even have the benefit of transcripts,[141]—and that may help explain the near total deference to trial courts on factual questions. And it is true, much meaning is conveyed not just by what is said, but also by how it is said. So there is much to the institutional competence argument; trial courts do indeed have significant advantages over appellate courts in this regard.

But, as Professor Chad Oldfather has shown, the trial-level fact finder's institutional advantage is not as complete as the accepted theory assumes.[142] In some respects, appellate courts enjoy an institutional advantage over trial courts, even when it comes to fact determinations. The comparative institutional advantage analysis simply does not support the nearly absolute deference now accorded to trial courts.

As Oldfather explains, it turns out that some information is communicated better in writing than through oral testimony. Some information is simply not communicated effectively in the mode of trials, which involves oral and visual productions.[143] Oral testimony can be difficult to grasp or remember because it is inherently fleeting or evanescent. As Oldfather puts it, oral testimony "is present only for an instant, [and] then [it] disappears."[144] Hence, jurors are apt to forget what may turn out to be important testimony, fail to understand it, or miss it altogether. Or, jurors are likely to fail to connect one piece of information with the rest of what they have heard; they may fail to make important connections, or to notice important gaps or inconsistencies in the testimony. The bottom line is that, when considering oral testimony, jurors have little opportunity to review, reorder, or reflect on what they have heard.[145]

Oldfather points out that these challenges are exacerbated by the mechanism of the trial. Evidence is presented witness by witness. It is not presented as a cohesive narrative, organized chronologically or along some other logical organizing scheme.[146] Good appellate lawyers understand this; they work hard to take apart the many narrative lines in a trial transcript and reconstruct them in a meaningful sequence. While jurors can try to reconstruct the evidence into coherent narratives, it is much more difficult to

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141. Frank O. Bowman, III, *Stories of Crimes, Trials, and Appeals in Civil War Era Missouri*, 93 MARQ. L. REV. 349 (2009).

142. Oldfather, *supra* note 90, at 451.

143. *See id.*

144. *Id*.

145. *Id*.

146. *Id*. at 456.

do that on the fly, without aid of written transcripts.

Moreover, as Oldfather notes, oral communication encourages an intuitive and emotional thought process, which tends toward what he calls "concrete and imagistic, as opposed to abstract and logical, expression."[147] Yet it is the latter that tends to be the hallmark of the legal process, and which is believed to produce more reliable judgments about historical facts.[148]

Finally, and perhaps most importantly, social science research shows that witness demeanor—observable to trial-court fact finders but not appellate courts—can actually mislead. Empirical research shows that people—including professional fact finders like police officers and judges—are simply not good at using demeanor to assess veracity.[149] In experimental settings, people perform at little better than chance levels when assessing credibility.[150] The experimental evidence on lay assessment of demeanor casts serious doubt on the ability of human subjects to assess witness credibility.[151] "It turns out that the best method for detecting lies is to listen without looking."[152] A great deal of the information that people naturally assess when evaluating demeanor and credibility is ambiguous and indeed misleading. Accordingly, the research shows that people reading a transcript perform nearly twice as well at detecting deceit as those exposed to both audio and visual information.[153]

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147. *Id*. at 453–54.

148. *Id*. at 451; *see also* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1295–1311 (2004) (explaining why "binary empirical 'brute fact' decisions, such as cases in which the only practically triable issue is whether the defendant was or was not the perpetrator of the charged crime," are best decided by fact-finding separated from emotionally gripping facts and moral and normative judgments, which jurors are particularly adept at making).

149. *See* Saul M. Kassin, Christine C. Goldstein & Kenneth Savitsky, *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 LAW & HUM. BEHAV. 187, 189 (2003); Samantha Mann, Aldert Vrij & Ray Bull, *Detecting True Lies: Police Officers' Ability to Detect Suspects' Lies*, 89 J. APPLIED PSYCHOL. 137, 137 (2004); Christian A. Meissner & Saul M. Kassin, *"He's Guilty!": Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469, 470 (2002); Christian A. Meissner & Saul M. Kassin, *"You're Guilty, So Just Confess!": Cognitive and Behavioral Confirmation Biases in the Interrogation Room*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 85, 99 (G. Daniel Lassiter ed., 2004) [hereinafter *You're Guilty*]; Oldfather, *supra* note 90, at 440, 457; Leif A. Strömwall & Pär Anders Granhag, *How to Detect Deception? Arresting the Beliefs of Police Officers, Prosecutors and Judges*, 9 PSYCHOL. CRIME & L. 19, 19–36 (2003); *see generally* Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809 (2002).

150. Oldfather, *supra* note 90, at 458; Paul Ekman, *Why Don't We Catch Liars?*, 63 SOC. RES. 801, 801 (1996); Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913, 913 (1991); *You're Guilty*, *supra* note 149, at 90.

151. Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1101 (1991).

152. Oldfather, *supra* note 90, at 459 (citing 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 (1993)).

153. Oldfather, *supra* note 90, at 459.

Thus, it is clear that, contrary to conventional wisdom, appellate courts actually enjoy some institutional advantages when it comes to some types of fact-finding. Appellate courts have the advantage of written transcripts. Words in a transcript are not fleeting; they can be reread and reconsidered. With a transcript, appellate judges can put connected or related pieces of evidence side by side, so they can be considered together. Conflicting or inconsistent information can be directly compared and contrasted.[154]

Moreover, as Oldfather notes, "written text triggers a different thought process than oral language, one that is considerably more amenable to logical and abstract operations."[155] Written text, for example, is more useful in constructing syllogisms, "which are a primary tool of logical thought."[156]

Perhaps Oldfather's most important contribution is his recognition that analysis of the comparative institutional advantages of trial and appellate courts means not that one court should always have primacy over the other on factual questions, but that primacy ought to depend on the type of facts at issue, and an assessment of which court truly has the advantage with respect to that kind of fact-finding.[157] Oldfather does not argue that trial courts have no claim to fact-finding supremacy. Rather, Oldfather notes more modestly that that claim is unsustainable with regard to some kinds of facts.

For example, he contends that appellate courts ought not defer so completely on assessment of circumstantial evidence, because trial courts have no real advantage with such evidence. Evaluating circumstantial evidence involves a process of reasoning from the circumstantial evidence to a conclusion about what happened. That task, however, requires only reasoning, a skill that appellate courts possess at least equal to trial fact finders. It requires none of the kinds of weighing and assessing of evidence thought to be within the special competence of juries.[158]

Likewise, juries have no special competence when it comes to evaluating documentary evidence. Documentary evidence has no demeanor. Appellate courts are at least as well equipped to evaluate it as are juries—and probably more so, given the greater time they have to work with and reflect upon the documentary evidence.[159]

Hearsay is analogous to documentary evidence.[160] Because the out-of-court declarant—the source of the hearsay—is not in the courtroom to be

154. *Id*. at 455.
155. *Id*. at 456.
156. *Id*.
157. *Id*. at 508–09.
158. *Id*. at 463–64.
159. *Id*. at 464–65.
160. *Id*. at 465–66.

evaluated, juries have no special access to information about the declarant's credibility (although they do have access to information about the witness communicating the hearsay in the courtroom).

Professor Michael Risinger makes a similar point, and contends that some courts have recognized that the jury has no special competence in evaluating evidence of these types:

> [T]o the extent that deference to the jury regarding testimony has any rational basis, it must focus on veracity and the related phenomena of exaggeration, resistance, et cetera. This is because the jury is not in even an arguably superior position in regard to the facial plausibility of the information given when viewed against other information. When no live testimony is involved, the case against the defendant otherwise being circumstantial, courts have developed a less deferential standard, "reasonable doubt as a matter of law," which allows both the trial court and the appellate court to determine that the evidence is insufficient to support a conviction beyond a reasonable doubt—and therefore to acquit the defendant in the face of a jury verdict—when, viewing the evidence "in the light most favorable to the prosecution" the evidence at most provides "equal or nearly equal circumstantial support" for the competing inferences of innocence and guilt.[161]

Finally, Oldfather contends that appellate courts have one other advantage over juries: experience and perspective.[162] Judges can be educated and through case law can develop a body of wisdom and principles to guide some kinds of factual determinations.[163] No doubt that kind of experience and perspective can itself lead to errors, if the lessons that appellate judges draw from their experiences are counterfactual. But at least the potential is there for accumulating a body of knowledge that can guide and improve fact-finding on some kinds of issues.

2. Beyond Deference: Meaningful Review of Factual Errors that Produce Wrongful Convictions

This is where the data from the wrongful conviction cases come in. If we are serious about preventing wrongful convictions, judges can be educated, and case law developed, to incorporate wisdom about the kinds of factual

161. Risinger, *supra* note 148, at 1314 n.166 (quoting United States v. Cassese, 290 F. Supp. 2d 443, 452 (S.D.N.Y. 2003)).

162. Oldfather, *supra* note 90, at 459–63.

163. *See* Robertson, *supra* note 138, at 204.

issues that we know, empirically, often lead to wrongful convictions, and that we know, empirically, jurors are not well-equipped to evaluate. Appellate judges can then use that training—that acquired institutional advantage—to engage in more meaningful factual review of cases involving that kind of evidence.[164]

Recall that the wrongful convictions research consistently identifies the kinds of evidence that frequently leads to convicting the innocent—that is, evidence that jurors are, at least in a meaningful number of cases, misapprehending. That evidence includes eyewitness identification evidence, confession evidence, jailhouse informant evidence, and forensic science evidence.[165]

These are all factual matters on which common sense is frequently wrong. One of the reasons we employ a jury system is that it serves as an expression of community values and shared understandings.[166] Juries bring to the justice system a kind of community common sense.

But it turns out that, on matters such as these, common sense is frequently demonstrably wrong. That justification for deference to juries simply does not work with regard to these issues. Rather, the experience and learning of professional fact finders like judges might be made to be more accurate at evaluating such facts, if handled appropriately.[167] In other words, these factual issues are ones from which learning and experience can be developed by appellate courts that can give them a significant institutional advantage and

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164. *See* George C. Thomas III, *Bigotry, Jury Failures, and the Supreme Court's Feeble Response*, 55 BUFF. L. REV. 947, 973 (2007) (noting that proven wrongful conviction cases "suggest the wisdom of a meaningful review of convictions when defendants claim to have been innocent").

165. *See* Garrett, *supra* note 3, at 76 tbl.2 (charting the evidence upon which convictions later overturned by DNA evidence were based).

166. *See* Risinger, *supra* note 148, at 1291 ("[W]e sometimes use juries to perform some value judgment functions beyond pure factfinding.").

167. I recognize that this is a big "if." But the potential is at least there, and the current system is demonstrably failing, so there is a possibility for improvement. Moreover, many, although certainly not all, appellate courts are demonstrating an ability to learn from the social science research about factual matters such as these. *See, e.g.*, State v. Dubose, 2005 WI 126, ¶¶ 29–31, 285 Wis. 2d 143, 699 N.W.2d 582 (incorporating the lessons of social science research to modify the standards for evaluating eyewitness identification evidence); Brodes v. State, 614 S.E.2d 766, 770 (Ga. 2005) (relying on the social science research to reject "certainty" as a reliability factor for evaluating eyewitness evidence); Commonwealth v. Santoli, 680 N.E.2d 1116, 1116 (Mass. 1997) (same); State v. Ramirez, 817 P.2d 774, 779–80 (Utah 1991) (same); State v. Hunt, 69 P.3d 571, 574 (Kan. 2003) (limiting the factors used to assess eyewitness reliability to those that have a grounding in social science); State v. Cromedy, 727 A.2d 457, 461–62 (N.J. 1999) (special jury instruction on cross-racial identifications should be given when identification is a critical issue in the case, and an eyewitness's cross-racial identification is uncorroborated by other evidence); State v. Long, 721 P.2d 483, 488–92 (Utah 1986) (requiring cautionary instruction on fallibility of eyewitness identifications); *In re* Jerrell C.J., 2005 WI 105, ¶¶ 25–26 & n.6, 283 Wis. 2d 145, 699 N.W.2d 110 (incorporating the lessons from the false confession cases to mandate electronic recording of custodial interrogations of juveniles).

can improve the truth-finding functions of the process. Examination of these four types of evidence demonstrates how this is so.

a. Eyewitness Identification Evidence

Considerable social science research shows that laypeople routinely misperceive the ways in which human perception and memory work.[168] This is one of the key areas in which common sense is often wrong, and can mislead jurors (and untrained judges), who apply standards of community common sense. These misperceptions frequently lead jurors to systematically overvalue identification evidence and to fail to recognize factors that are actually related to reliability.[169]

For example, common sense tells us that eyewitness confidence or certainty is a good indicator of reliability.[170] But the social science research establishes that it is in fact a very weak indicator of reliability—there is only a very modest correlation between confidence and reliability—and that confidence is highly malleable.[171] That is, a witness's own perception of her

168. *See* Sandra Guerra Thompson, *Judicial Blindness to Eyewitness Misidentification*, 93 MARQ. L. REV. 639 (2009); ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 6-4 (4th ed. 2007); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9–11 (1996); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 20 (1983) (potential jurors are generally unaware of the unreliability of eyewitness identification evidence); Kenneth A. Deffenbacher & Elizabeth F. Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 LAW & HUM. BEHAV. 15, 24 (1982) (college students and Washington, D.C. citizens underestimated problems associated with the reliability of identifications); R.C.L. Lindsay et al., *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. APPLIED PSYCHOL. 79, 80 (1981) (mock jurors "over-believed" witnesses in low-accuracy-eyewitness scenarios); Richard S. Schmechel et al., *Beyond the Ken? Testing Jurors' Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 195–204 (2006) (survey data shows that potential jurors misunderstand how memory generally works and how particular factors affect the accuracy of eyewitness testimony); Gary L. Wells & Michael R. Leippe, *How Do Triers of Fact Infer the Accuracy of Eyewitness Identifications? Using Memory for Peripheral Detail Can Be Misleading*, 66 J. APPLIED PSYCHOL. 682, 682 (1981) (mock jurors incorrectly assumed a positive correlation between accurate identification and memory of peripheral details).

169. Lindsay et al., *supra* note 168, at 80.

170. *See* Schmechel et al., *supra* note 168, at 198–99; Wells et al., *supra* note 28, at 619–20 (surveys and studies show that people believe a strong relation exists between eyewitness confidence and accuracy); Amy L. Bradfield & Gary L. Wells, *The Perceived Validity of Eyewitness Identification Testimony: A Test of the Five* Biggers *Criteria*, 24 LAW & HUM. BEHAV. 581, 582 (2000). Indeed, misguided "common sense" led the Supreme Court to incorporate that factor into its standards for evaluating the reliability, and hence admissibility under the Due Process Clause, of eyewitness evidence. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 199–200 (1972).

171. Steven Penrod, Elizabeth Loftus & John Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective*, *in* THE PSYCHOLOGY OF THE COURTROOM 119, 155 (Norbert L. Kerr & Robert M. Bray eds., 1982); Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, *in* EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155, 169 (Gary L. Wells & Elizabeth F. Loftus eds., 1984).

certainty is easily influenced by any suggestiveness in the identification process or confirming feedback the witness receives after the identification.[172] And witnesses always receive significant confirming feedback by the time of trial, even if they are told nothing more than that the defendant has been charged and is standing trial, because that fact alone officially confirms the identification in a powerful way.

Research also reveals that laypeople, relying solely on common sense, typically believe that stress sharpens a witness's observational skills and therefore makes the witness more reliable.[173] But the research shows that high levels of stress—like that experienced during a crime—seriously impairs a witness's ability to take in data and to make accurate identifications after the event.[174] In a related way, jurors are often unaware that the presence of a weapon has a deleterious effect on an eyewitness's reliability, as a result of what psychologists call "weapon focus."[175]

Jurors lack understanding about other important aspects of identification evidence as well. For example, laypeople often misunderstand "race effects"—the fact that witnesses are less reliable when identifying the faces of strangers from other racial groups than their own.[176] What constitutes suggestiveness in an identification procedure—and the effects of suggestiveness—are also not always readily apparent to laypeople.[177] People also misunderstand the effects of time on memory, failing to recognize that memory drops off rapidly and virtually instantly after a witnessed event, rather than slowly at first and then accelerating over time.[178] And without

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172. Amy L. Bradfield, Gary L. Wells & Elizabeth A. Olson, *The Damaging Effect of Confirming Feedback on the Relation Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112, 115 (2002); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 366 (1998).

173. *See* Schmechel et al., *supra* note 168, at 197; Richard A. Wise & Martin A. Safer, *What US Judges Know and Believe About Eyewitness Testimony*, 18 APPLIED COGNITIVE PSYCHOL. 427, 432 (2004).

174. Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687, 694 (2004); Charles A. Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT'L J.L. & PSYCHIATRY 265, 274–77 (2004); Tim Valentine & Jan Mesout, *Eyewitness Identification Under Stress in the London Dungeon*, 23 APPLIED COGNITIVE PSYCHOL. 151, 159 (2008).

175. Schmechel et al., *supra* note 168, at 196–97; Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapon Focus Effect*, 16 LAW & HUM. BEHAV. 413, 419–21 (1992).

176. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001); Schmechel et al., *supra* note 168, at 200; *see also* Shay, *supra* note 53, at 1506 ("[C]ourts should be careful with single eyewitness cases, particularly those involving cross-racial identifications.").

177. Wise & Safer, *supra* note 173, at 428.

178. Laypeople tend to believe that memory decays slowly at first, and then gradually begins to

guidance, laypeople often do not understand the effects of instructions given to eyewitnesses by police officers,[179] the significance of employing or failing to employ double-blind identification procedures,[180] and the impact of presenting photographs or participants in a corporeal lineup sequentially or simultaneously.[181]

The social science in the area of eyewitness identification evidence is rich and deep, and the list of examples on which common sense is wrong is much longer than presented here. The point is, these are all matters in which judges can develop an institutional advantage over jurors. While jurors can, and should, be educated by expert testimony on such matters, many courts still refuse to admit such evidence.[182] Moreover, presenting expert evidence requires resources that are not always available. Judges over time can develop a deeper knowledge of the science than can one-time players like jurors.

Significantly, jurors have no real advantage over appellate judges when it comes to assessing eyewitness reliability. Typically, the question with an eyewitness is not veracity, but reliability. Demeanor evidence, to the extent it is useful for assessing credibility, is useless, or worse, when it comes to assessing eyewitness testimony. An eyewitness who is mistaken is not lying. He will appear credible, because he believes everything he is saying. He is just wrong. Demeanor evidence under those circumstances will lead to incorrect judgments, not accurate fact-finding.

b. False Confessions

Research also demonstrates that common sense about false confessions can be quite wrong. Simply put, it is counterintuitive to believe that a person

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fade at an increasing rate. The actual "forgetting curve," however, is quite different. Memory actually drops off quickly right after a witnessed event, and the rate of forgetting then continues over time, but at a diminishing rate. *See* Peter N. Shapiro & Steven Penrod, *Meta-Analysis of Facial Identification Studies*, 100 PSYCHOL. BULL. 139 (1986).

179. Schmechel et al., *supra* note 168, at 201–02; Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 LAW & HUM. BEHAV. 283 (1997).

180. Melissa B. Russano et al., *"Why Don't You Take Another Look at Number Three?": Investigator Knowledge and Its Effects on Eyewitness Confidence and Identification Decisions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 355, 357 (2006); Schmechel et al., *supra* note 168, at 203–04; Wells et al., *supra* note 28, at 627; Mark R. Phillips et al., *Double-Blind Photoarray Administration as a Safeguard Against Investigator Bias*, 84 J. APPLIED PSYCHOL. 940, 941 (1999).

181. R.C.L. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556, 559 (1985); Schmechel et al., *supra* note 168, at 202–03; Nancy Steblay et al., *Eyewitness Accuracy Rates in Sequential and Simultaneous Lineup Presentations: A Meta-Analytic Comparison*, 25 LAW & HUM. BEHAV. 459, 459 (2001).

182. *See* Tanja Rapus Benton et al., *On the Admissibility of Expert Testimony on Eyewitness Identification: A Legal and Scientific Evaluation*, 2 TENN. J. L. & POL'Y 392, 404 (2006).

would confess to a crime, especially a serious crime, that she did not commit.[183] Yet the empirical evidence is there: people do confess falsely and to the most heinous of crimes.[184]

Research confirms that potential jurors do not understand this reality about confessions. Survey data indicate that potential jurors do not believe false confessions are much of a reality; they believe both that they are counterintuitive and unlikely.[185] They believe false confessions are unlikely even if the suspect has been subjected to psychologically coercive interrogation tactics that have been shown to lead to false confessions from the innocent.[186] Jurors recognize that psychological pressure and persuasion can be psychologically coercive, but they do not recognize that such techniques and coercion are capable of producing and are in fact associated with false confessions.[187] In other words, the popular belief is that people do not falsely confess unless they are tortured or mentally ill.[188] Potential jurors also harbor significant misconceptions about matters such as subtle interrogation pressures, the characteristics that make a person susceptible to confessing falsely, and the fact that police are "unskilled . . . at detecting truthful and untruthful statements."[189] Truth-seeking is therefore not well served by deferring almost completely to juries and the lay understandings that they bring about false confessions.

c. Informant Testimony

Jailhouse informants, or snitches, are inherently unreliable witnesses, and

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183. Findley, *supra* note 5, at 161; Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1280 (2005).

184. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 891 (2004).

185. Iris Blandón-Gitlin, Kathryn Sperry & Richard A. Leo, Jurors Believe Interrogation Tactics Are Not Likely to Elicit False Confessions: Will Expert Witness Testimony Inform Them Otherwise? 3, 27 (June 16, 2009) (unpublished manuscript, on file with the Psychology, Crime & Law Accepted Paper Series), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1420206; *see also* Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 5 (2008); McMurtrie, *supra* note 183, at 1280.

186. Blandón-Gitlin, Sperry & Leo, *supra* note 185, at 27.

187. Such tactics include, among others, lying to the suspect to make her believe police have evidence of guilt that they do not actually have, isolating and interrogating suspects for long hours, and implicitly or explicitly promising leniency in exchange for a confession. *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 10–21 (2003); Richard A. Leo, *The Third Degree and the Origins of Psychological Interrogation in the United States*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT, *supra* note 149, at 37, 72–73; AMINA MEMON, ALDERT VRIJ & RAY BULL, PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY 58–65 (2d ed. 2003).

188. Blandón-Gitlin, Sperry & Leo, *supra* note 185, at 27.

189. Chojnacki, Cicchini & White, *supra* note 185, at 4, 40.

obviously so. Courts have long acknowledged the dangers of testimony from such witnesses.[190] Informants are often individuals of dubious character, incarcerated for their own alleged misdeeds. And they have every reason to curry favor with the government, even if that means fabricating testimony. Despite these obvious reasons to doubt an informant's testimony, research suggests that their testimony is typically persuasive to juries because it sounds like confession evidence.[191] The testimony typically involves the informant testifying that, while confined with the defendant, the defendant confessed to the crime for which she is on trial. As with any other confession, it is hard for jurors to imagine why anyone would confess to a crime she did not commit.

Moreover, despite its suspect source, informant testimony often sounds credible because informants can be very good liars. Savvy informants embellish their tales with details that only an insider should know, thereby making it appear that the defendant must have filled them in on the crime. Jurors often do not recognize, however, that accomplished snitches can and do obtain such case detail from media accounts of the crime, another inmate's legal papers, even phone calls from the jail phone to law enforcement authorities while posing as a law enforcement officer to request case information.[192]

d. Forensic Science Evidence

Recently exposed errors in forensic science evidence have rocked the criminal justice system, leading to a new awareness that most forensic identification sciences lack a solid scientific foundation and can be quite

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190. *See* Natapoff, *Beyond Unreliable*, *supra* note 40, at 109; *see also* Hoffa v. United States, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting) (arguing that use of a jailhouse informer posed "a serious potential for undermining the integrity of the truth-finding process in the federal courts" and that "[g]iven the incentives and background of [the informer], no conviction should be allowed to stand when based heavily on his testimony").

191. Jeffrey S. Neuschatz et al., *The Effects of Accomplice Witnesses and Jailhouse Informants on Jury Decision Making*, 32 LAW & HUM. BEHAV. 137, 142 (2008).

192. Mills & Armstrong, *supra* note 41. Mills and Armstrong explain how informants get their information:

> Informants who fabricate stories can glean details of a crime from newspapers or another inmate's legal papers and stitch them together into a compelling confession. In the most notorious cases, prosecutors and police have been accused of providing them with false stories to tell. In Los Angeles, Leslie Vernon White was such a prolific jailhouse informant that in 1988 he demonstrated for jailers how simple it was to concoct a confession and convince prosecutors it was genuine. Using a jail telephone, White—a convicted kidnapper, robber and car thief—posed as a police officer, prosecutor and bail bondsman to obtain information about a murder suspect he had never met, then falsified jail records to show he had shared a cell with the suspect.

Id.

fallible.[193] In February 2009, after in-depth study, the nation's preeminent scientific authority, the National Academy of Sciences, issued a scathing report on the state of forensic sciences, exposing the lack of scientific foundation for most forensic identification sciences and calling for much-needed research, scientific validation, coordination, and oversight.[194] As noted, forensic science evidence has contributed to more than half the wrongful convictions overturned by postconviction DNA testing.[195] Despite these problems, however, forensic science evidence tends to be very compelling, impressing jurors with an aura of scientific authority and infallibility.[196]

There is no reason to believe that jurors have a comparative advantage over appellate judges when it comes to evaluating scientific evidence. Again, credibility is usually not at issue; reliability and validity of the scientific evidence is the issue. But scientific evidence can be extremely complex, and therefore beyond the grasp of lay jurors. With little ability to critically evaluate the soundness of the scientific evidence presented to them, jurors are often left with little to fall back on except impressionistic credibility determinations. In the end, that means that the expert with the best communication skills—the expert who can put on the most impressive show—can be more convincing than the expert with the best science.[197] While judges suffer similar scientific deficits[198]—and therefore judicial

193. Saks, *supra* note 37, at 237–40; BEECHER-MONAS, *supra* note 37, at 1, 94–95 ("Many time-honored methods of criminal identification, such as hair analysis, voice spectography, and bitemark identification, to name a few, have turned out to have no better foundation than ancient divination rituals."); Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 934–39 (2008).

194. *See* NAT'L RESEARCH COUNCIL, *supra* note 37.

195. *See* Garrett, *supra* note 3, at 76 (forensic evidence contributed to 57% of convictions overturned by postconviction DNA testing).

196. Richard H. Underwood, *Evaluating Scientific and Forensic Evidence*, 24 AM. J. TRIAL ADVOC. 149, 166 (2000) ("Given their lack of scientific sophistication and innumeracy, jurors are likely to overestimate the significance of [expert testimony].") (footnote omitted).

197. Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 133 (1996) ("An advantage lies with the party whose expert has the most persuasive forensic skills rather than the most authoritative and meritorious testimony."). Jurors, who are generally ill-equipped to evaluate scientific claims, default to "either deferential acceptance when only one expert testifies, or selection between the experts as attractive persons and apparently authoritative figures when two experts oppose each other." Mark P. Denbeaux & D. Michael Risinger, Kumho Tire *and Expert Reliability: How the Question You Ask Gives the Answer You Get*, 34 SETON HALL L. REV. 15, 29 (2003); *see also* Findley, *supra* note 193, at 949.

198. David L. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 817 (1977); Findley, *supra* note 193, at 945; Jennifer L. Groscup et al., *The Effects of* Daubert *on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 PSYCHOL. PUB. POL'Y & L. 339, 339–41, 367 (2002) (noting research indicating that judges "lack understanding . . . of scientific reliability in general"); Marilee M. Kapsa & Carl B. Meyer, *Scientific Experts: Making Their Testimony More Reliable*, 35 CAL. W. L. REV. 313, 319, 326 (1999).

review of scientific determinations is far from a panacea[199]—experience and training can help make them at least marginally more reliable evaluators of scientific evidence.

While judges, as well as juries, are susceptible to errors, the point is that, at least on factual matters that we now know juries often misunderstand, and that we know contribute to wrongful convictions, appellate courts ought not defer so completely to juries. Professor Oldfather's institutional competence analysis leads him to recommend that appellate review should no longer involve reflexive deference to trial court fact finders on factual questions.[200] Instead, he contends, appellate courts should, on a case-by-case basis, evaluate the institutional competence of both the trial court and court of appeals to determine how much, if any, deference ought to be accorded on specific factual questions.[201] The wrongful conviction cases add to that analysis by recommending that the factual issues that ought to be open to more serious appellate scrutiny include those on which juries enjoy no special competence, about which jury common sense is often wrong, and which are significant contributors to wrongful convictions. Those factual issues include at least eyewitness identification evidence, confession evidence, jailhouse informant testimony, and forensic science evidence.

3. Methods of Enhanced Fact Review

a. Revitalized Jackson *Review*

More substantive review of these and other issues related to innocence can be accomplished in a number of ways. Most simply, courts can revitalize sufficiency-of-the-evidence review under *Jackson v. Virginia*. *Jackson* review has largely lost its bite (if it ever had any). It is widely recognized now that *Jackson* review for *sufficient* evidence has become almost indistinguishable from review for *any* evidence; that is to say, courts will generally affirm convictions if there is any evidence supporting the conviction, without undertaking much if any effort to weigh the evidence to determine if it is sufficient to permit a reasonable jury to find guilt beyond a reasonable doubt.[202] As Oldfather has put it,

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199. Indeed, elsewhere I have argued that, because scientific evidence is largely beyond the capabilities of juries, lawyers, and judges, the only real solution to the problem of forensic science errors is to improve the quality of forensic science evidence upstream from the judicial process, so that the judicial system has to do as little sorting as possible between valid and junk science. Findley, *supra* note 193, at 945–49.

200. *See* Oldfather, *supra* note 90, at 506.

201. *Id*.; *see also* Robertson, *supra* note 138, at 216.

202. Jackson v. Virginia, 443 U.S. 307, 335 (1979) (Stevens, J., concurring) (noting that "in practice there may be little or no difference between" the "no evidence" standard and the standard adopted by the Court in *Jackson*); *see also* Findley & Scott, *supra* note 58, at 348–49; Risinger,

> [T]here appears to be universal agreement that appellate courts almost never reverse convictions on sufficiency grounds . . . . 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. That is a curious state of affairs.[203]

Yet *Jackson* itself expressly rejected the "no evidence" standard, which had previously been articulated in *Thompson v. City of Louisville*.[204] Under the *Thompson* standard, courts affirmed convictions unless there was "no evidence" supporting the judgment. The *Jackson* Court held that the due process requirement of proof beyond a reasonable doubt, established in *In re Winship*,[205] carried with it the demand that reviewing courts determine not only whether some evidence in the record supported the conviction, but also whether the evidence satisfied *Winship*'s demand for proof beyond a reasonable doubt.[206] The Court emphasized that the "no evidence" standard "is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt."[207] If courts are to assess not only whether some evidence exists, but also whether that evidence is qualitatively sufficient to meet the requirement of proof beyond a reasonable doubt, *Jackson* had to have envisioned that reviewing courts engage in some weighing of the evidence.[208]

More substantive review of guilty verdicts therefore requires no formal change in doctrine. Rather, it requires a change in attitude or approach by reviewing courts, involving a renewed commitment to ensuring that shaky evidence truly meets the requirement of proof beyond a reasonable doubt.[209] To ensure that such review has a stopping point, it can be anchored by principles such as those underlying Oldfather's institutional competence

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supra note 148, at 1314 (observing that, because the *Jackson* standard requires courts to "accept[] at face value all testimonial evidence in favor of the verdict and assum[e] all testimonial evidence to the contrary to have been rejected on credibility grounds," courts rarely find the evidence insufficient).

203. Oldfather, *supra* note 90, at 478–79 (footnote omitted).

204. 362 U.S. 199, 206 (1960). *Thompson* held that a conviction could not be sustained if the record was completely void of evidence, but did not address the question, resolved in *Jackson*, about the standard that governs when some evidence has been introduced. *Id*. at 205–06.

205. 397 U.S. 358, 372 (1970).

206. *Jackson*, 443 U.S. at 317–18.

207. *Id*. at 320.

208. *See* Oldfather, *supra* note 90, at 477.

209. *See, e.g.*, Newman, *supra* note 58, at 989–90 ("If appellate courts were taking seriously the legal standard of proof that persuades beyond a reasonable doubt, we should expect to see at least a modest number of cases in which a reviewing court says, 'The evidence perhaps suffices to persuade a reasonable trier by the "preponderance" standard but it does not suffice to persuade beyond a reasonable doubt.'").

analysis. Courts should at least be more substantive in their review of guilt determinations dependent on facts about which juries can claim no special competence—such as those based on circumstantial evidence, hearsay, and documentary evidence. And courts should be more substantive in their review of evidence that is associated with wrongful convictions, and about which juror intuition is often wrong, such as eyewitness identifications, confessions, informant testimony, and forensic science evidence.

b. Weight-of-the-Evidence Review

Beyond reviewing the *sufficiency* of the evidence under the *Jackson v. Virginia* due process standard, courts could more directly engage substantive justice by reviewing the *weight* of the evidence—that is, reviewing jury verdicts to determine if they are against the great weight of the evidence. Judicial review of the weight of the evidence is hardly a novel or radical idea.[210] Indeed, courts routinely engage in such re-weighing of the evidence when reviewing jury verdicts in civil cases.

Empirical research reveals that appellate courts in the United States uphold sufficiency-of-the-evidence challenges in up to half of all civil appeals—a rate that far exceeds such holdings in criminal cases.[211] And when courts overturn the factual determinations of juries in civil cases, they typically do so on the basis that, while the evidence was legally sufficient to support the judgment, the verdict was nonetheless against the great weight and clear preponderance of the evidence.[212] Courts simply do not feel so constrained against meaningful review of factual determinations—seeking to achieve substantive justice—in civil cases, as they do in criminal cases. That is a curious state of affairs, given that life and liberty are at stake in criminal cases, and that the government has an overriding interest in protecting the innocent in criminal cases, while the government typically has no institutional interest in the outcome of the private disputes in most civil cases.

But weight-of-the-evidence review is not novel in criminal cases either. Some states permit their courts to weigh the evidence on review of convictions in criminal cases.[213] A number of federal courts have recognized the authority to review and reverse guilty verdicts if the verdict is against the

210. *See* Robertson, *supra* note 138, at 161–62, 166, 169–70, 180–181 (describing the authority to review the weight of the evidence supporting verdicts in federal and state courts).

211. Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 127–28, 131 (2001); Oldfather, *supra* note 90, at 441, 497–502; Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 246–47.

212. Oldfather, *supra* note 90, at 441, 497–502.

213. *See, e.g.*, Risinger, *supra* note 148, at 1315; Robertson, *supra* note 138, at 169–70.

great weight of the evidence.[214] And the Supreme Court has sanctioned such review in criminal cases. In *Tibbs v. Florida*, the Supreme Court recognized that weight-of-the-evidence review is different than *Jackson* sufficiency-of-the-evidence review.[215] The Court held that, because weight-of-the-evidence determinations do not mean that the evidence was legally inadequate under the Due Process Clause to convict, such a reversal does not bar retrial under the Double Jeopardy Clause.[216] Incongruously, however, such searching review in criminal cases is diminishing, even as recognition of the problem of wrongful convictions is increasing.[217]

The *Tibbs* rule that a weight-of-the-evidence reversal does not implicate double jeopardy concerns to bar retrial, whatever its doctrinal or analytical merit, at least has the advantage of permitting appellate courts to engage in aggressive fact review without having to shoulder full responsibility for acquitting an accused person. Some observers, however, have questioned the purpose of a retrial after a weight-of-the-evidence reversal on the theory that, absent new evidence, any subsequent conviction on the same evidence would also have to be reversed on the weight of the evidence, ad infinitum.[218] *Tibbs* rejected that argument, reasoning that even if a single jury verdict might appear against the weight of evidence and hence be unjustified, the same verdict from a subsequent jury based upon the same evidence might not look so aberrant to the court the second time around.[219]

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214. *See* Robertson, *supra* note 138, at 159–64. In addition, both state and federal appellate courts are accustomed to deciding factual questions underlying constitutional claims. Federal constitutional law requires courts addressing "constitutional fact[s]" to review such facts independently. *See* Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1430 (2001). "Under constitutional fact doctrine, '[i]n determining whether [a] constitutional standard has been satisfied, the reviewing court must consider the factual record in full.'" *Id*. (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989)).

215. Tibbs v. Florida, 457 U.S. 31, 37 (1982).

216. *Id*. at 42–43.

217. Indeed, in a subsequent opinion in *Tibbs*, the Florida Supreme Court withdrew the authority it had previously recognized to reverse verdicts as against the weight of the evidence. State v. Tibbs (*Tibbs II*), 397 So. 2d 1120, 1127 (Fla. 1981); *see also* Norman Silverman, *Crime Labs: Scape Goats for a Culture of Indifference*, 30 T. MARSHALL L. REV. 429, 429–30 (2005) (explaining that Texas recently "abolished the long standing practice of reviewing convictions based upon circumstantial evidence for the presence of outstanding reasonable hypotheses inconsistent with guilt").

218. *See* Risinger, *supra* note 148, at 1320–21.

219. The Court reasoned as follows:

> The dissent suggests that a reversal based on the weight of the evidence necessarily requires the prosecution to introduce new evidence on retrial. Once an appellate court rules that a conviction is against the weight of the evidence, the dissent reasons, it must reverse any subsequent conviction resting upon the same evidence. We do not believe, however, that jurisdictions endorsing the

Professor Michael Risinger has suggested a variation on the weight-of-the-evidence review standard, which he proposes specifically to target innocence protection. Risinger's suggestion draws on a concept from British law—the "unsafe verdict."[220] The British Criminal Appeal Act of 1966 was intended expressly to make courts feel freer to interfere with verdicts about which there is a considerable measure of doubt. To do so, the Act provided that the Court of Criminal Appeal could either quash a conviction or order a new trial whenever it concluded that the verdict was "unsafe and unsatisfactory."[221] When courts failed to apply that standard vigorously, Parliament sought to reinvigorate appellate review by eliminating the word "unsatisfactory," and providing that courts should overturn guilty verdicts whenever the court found the conviction "unsafe."[222] According to Risinger, "It is clear that the change was intended to be liberalizing, and so the courts have understood."[223]

Risinger proposes a similar standard for American appellate courts. He envisions that standard to be like the against-the-weight-of-the-evidence standard, but with more bite. He explains:

> It would be similar to the traditional "against the weight of the evidence" standard, in that the court would not be limited in its ability to evaluate and discount the face value of witness testimony and would be morally obligated to do so when rationally appropriate. It would carry a special obligation when a conviction was undergirded primarily with evidence known to be of questionable reliability, such as stranger-on-stranger eyewitness identification or "jailhouse snitch" testimony. As in Britain, it would oblige a court to

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> "weight of the evidence" standard apply that standard equally to successive convictions. In Florida, for example, the highest state court once observed that, although "[t]here is in this State no limit to the number of new trials that may be granted in any case, . . . it takes a strong case to require an appellate court to grant a new trial in a case upon the ground of insufficiency of conflicting evidence to support a verdict when the finding has been made by two juries." Blocker v. State, 110 So. 547, 552 (1926) (en banc). The weight of the evidence rule, moreover, often derives from a mandate to act in the interests of justice. Although reversal of a first conviction based on sharply conflicting testimony may serve the interests of justice, reversal of a second conviction based on the same evidence may not. While the interests of justice may require an appellate court to sit once as a thirteenth juror, that standard does not compel the court to repeat the role.

Tibbs, 457 U.S. at 43 n.18 (some internal citations omitted).

220. Risinger, *supra* note 148, at 1313–21.

221. *Id*. at 1319 (citing RICHARD NOBLES & DAVID SCHIFF, UNDERSTANDING MISCARRIAGES OF JUSTICE: LAW, THE MEDIA, AND THE INEVITABLY OF CRISIS 69 (2000)).

222. *Id*. at 1320.

223. *Id*.

> consider any relevant fresh evidence, including research results casting doubt on the kind of evidence relied upon at trial, as long as that evidence was not "in hand" and intentionally bypassed by trial counsel. Thus, it would dispense with the necessity of proving the theoretical undiscoverability that underlies the current notion of "newly discovered evidence," or the alternative requirement of having to establish "ineffective assistance of counsel."[224]

These existing models and proposals show that rigorous appellate review for substantive justice is possible. However accomplished, courts should not be prohibited from re-weighing the evidence underlying a guilty verdict, at least when the evidence is in substantial part made up of the kinds of facts over which juries do not enjoy an institutional advantage. Especially when a verdict depends on circumstantial evidence, hearsay, and documentary evidence, reflexive deference is indefensible. Likewise, appellate courts can and should more aggressively weigh the kinds of evidence that are frequently associated with wrongful convictions—evidence like eyewitness identifications, confessions, informant testimony, and forensic science evidence.

V. CONCLUSION

The empirical record shows that the American system for appealing criminal convictions regularly fails in its most important role of protecting against erroneous conviction of the innocent. Substantive doctrine, procedural barriers, cognitive biases, institutional pressures, and a demand for extreme deference to trial-level factual determinations conspire to prevent courts from directly guarding against erroneous judgments of guilt. Appellate courts by design focus on procedural justice, rather than substantive justice. For a system dedicated to guarding against wrongly convicting the innocent, that roundabout approach is an oddity. As Professor Joseph Hoffman has observed,

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224. *Id*. at 1332 (footnotes omitted). Risinger also proposes that the preclusive effects of an "unsafe verdict" reversal should depend on whether the state proffered new evidence at the retrial.

> If the unsafety results from fresh evidence concerning adjudicative facts that would be admissible at a new trial, a new trial should generally result. If the new evidence is such that a review after a new trial would have to be quashed because actual innocence was clearly established (as in many DNA exonerations), the case should be dismissed with double jeopardy effect. Finally, if the determination is (with or without fresh evidence) that the original record was necessarily subject to a reasonable doubt, the result should be to quash the verdict with no retrial possible without application to a court after development of significant new evidence of guilt.

Id. at 1332–33.

> In most other countries, substantive appellate review is viewed as an essential component of a fair criminal justice system. Our modern focus in America on procedural justice has all too often left us unwilling or unable to recognize the simple reality that even perfect procedures cannot entirely guarantee perfect outcomes.[225]

The American appellate process need not be that way. The appellate process can be made to more directly and effectively respond to claims of innocence. Permitting litigants to introduce new facts and claims, through a procedure like Wisconsin's postconviction motion procedure, *as a part of the direct appeal process*, can permit direct consideration of the kinds of facts and claims that can be most responsive to serious claims of innocence. At the same time, such a procedure can actually save appellate court resources, by permitting trial courts to correct their own errors without needing to involve the appellate courts. In addition, appellate courts can more aggressively protect substantive justice by taking more seriously their constitutional duty to ensure that the evidence is sufficient to permit a verdict of guilt beyond a reasonable doubt. And appellate courts can reduce their deference to trial-level factual determinations, especially on issues about which trial-level fact finders enjoy no real institutional advantage and which often contribute to wrongful convictions.

The criminal justice system is learning a great deal about itself by studying DNA exoneration cases. Police, prosecutors, defense attorneys, and trial courts are actively reevaluating what they do in light of those lessons. Appellate courts too can learn from those cases. If the ideal of protecting the innocent is truly a guiding purpose of the appellate system, then it is incumbent upon appellate courts to find ways to improve their performance and to minimize the risks of overlooking innocence in the criminal justice system. Fortunately, there are ways that appellate courts can do that.

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225. Joseph L. Hoffman, *Protecting the Innocent: The Massachusetts Governor's Council Report*, 95 J. CRIM. L. & CRIMINOLOGY 561, 578 (2005) (footnotes omitted).