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2017

Invisible Error

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50 Connecticut Law Review (Forthcoming)

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Invisible Error

When trial becomes a luxury, retrial can start to look downright decadent. Scholars have documented the “vanishing trial” in recent decades, exploring the various causes and effects of declining trial rates. Retrial, if mentioned at all, is portrayed as a relatively inefficient vehicle for error correction at best. At worst, it is seen as a threat to the sanctity of the ever-rarer jury verdict.

But the jury trial is only endangered, not yet extinct. And continuing to protect the constitutional right to a jury requires appreciating the role of retrial within the due-process framework. When the jury’s verdict contradicts the great weight of the evidence, the trial judge is authorized to set aside that verdict and order a new trial. This power, sometimes called the “thirteenth juror” rule, dates back to the Blackstonian era. It exists in both civil and criminal cases, in both state and federal court. Over time, however, the trial court’s power to review the weight of the evidence has fallen into a state of doctrinal disorder and inconsistency.

This Article argues that the judge’s ability to order a new trial on the weight of the evidence should be understood as a safeguard against invisible error. Invisible error arises when improper jury decision making hides behind the shroud of rules protecting the jury’s deliberative secrecy. Invisible error can be caused either by the jury’s innocent misunderstanding (of the court’s instruction or of an attorney’s presentation of evidence) or by more egregious juror misconduct or undisclosed bias. The attorneys and the court see only the result of the jury’s decision making, not the erroneous procedure that led to that result. The possibility of such error, however, is no reason to jettison the jury altogether. The jury has strengths that cannot be matched by judges alone, including the power of group decision making, a greater diversity in its members, and a more accurate reflection of the community. Judges, by contrast, possess greater experience with a range of cases and a better understanding of how the facts and the law interrelate in the case.

The judge’s power to review the weight of the evidence complements the jury’s role and protects the integrity of the trial process. Even when the judge cannot identify a particular process error, the judge may have an intuitive sense that a jury has gone astray. Weight-of-the-evidence review protects both of these complementary roles: the jury is given the independence to allow full, free, and confidential deliberation, while the judge is permitted to exercise the discretion gained from experience to prevent a miscarriage of justice. Even in the era of the endangered jury and vanishing trial, judges should embrace their power to order a new trial when justice demands it.

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Invisible Error

Cassandra Burke Robertson*

I. INTRODUCTION

First year law students learn that there are two primary bases on which a losing party can request a new trial: process errors, such as erroneously admitted evidence or improper attorney argument, and weight-of-the-evidence points, where the trial judge concludes that the evidence at trial weighed strongly against the jury's verdict.¹ This article argues that those seemingly different grounds for retrial are really two sides of the same problem. What we think of as "weight of the evidence" review is also an attempt to correct for process errors.

But unlike typical process errors that can be raised by the attorney and corrected through ordinary trial and appeal mechanisms, invisible error arises when improper jury decision making hides behind the shroud of rules protecting the jury's deliberative secrecy. Invisible error may arise from the ordinary failures of communication between the court and members of the jury—an innocent misunderstanding—or it may arise

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¹ See, e.g., JOSEPH W. GLANNON, ANDREW M. PERLMAN, & PETER RAVEN-HANSEN, CIVIL PROCEDURE: A COURSEBOOK 1106 (2011) (defining "process errors" as errors that "occurred in the conduct of trial or the jury's deliberations" and "weight-of-the evidence errors" as cases in which the judge finds the jury's verdict to be "clearly wrong" and unsupported by the evidence). The casebook authors call Federal Rule of Civil Procedure 59 "coily unhelpful," in revealing the proper grounds for a new trial, as the rule provides broadly that a new trial may be ordered "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." *Id.* (quoting FED. R. CIV. P. 59).

from more egregious juror misbehavior or undisclosed bias. In some cases, it may even arise at a subconscious level, as when the court instructs the jury to disregard trial testimony but the jurors are unable to forget what they have heard.² Because these errors are invisible to both the judge and to the lawyers who could otherwise object, they are correctable only indirectly through the grant of a new trial on the weight of the evidence.

A case recently decided by the Supreme Court shows the danger of invisible error,³ offering what Justice Kagan referred to as “the best smoking-gun evidence you’re ever going to see about race bias in the jury room.”⁴ The underlying case dealt with a contested eyewitness identification. Two teenagers, daughters of a horse-racing jockey, were subjected to harassment and were groped in a racetrack bathroom.⁵ After they reported the assault to their father, he connected their description of the assailant to racetrack worker Miguel Peña-Rodriguez, and the girls later identified the worker to police.⁶ A coworker provided alibi testimony, asserting that Peña-Rodriguez was with him elsewhere at the

² Similar to how the admonition “Don’t think about an elephant!” typically backfires, jurors may be unable to put such information aside when they begin deliberations. *United States v. Moreno*, 991 F.2d 943, 951 (1st Cir. 1993) (“In fact, juries are even more likely to consider such evidence if admonished by the court not to consider it, than if no specific instruction is given.”); SAUL KASSIN AND LAWRENCE WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 108–09 (1988); Meir Dan-Cohen, *Skirmishes on the Temporal Boundaries of States*, *LAW & CONTEMP. PROBS.*, Spring 2009, at 95, 100 (“[D]eliberate attempts at forgetting are notoriously counterproductive (“don’t think about an elephant”) and precarious, easily reversible by anyone who cares to provide a reminder.”)

³ *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 860, 197 L. Ed. 2d 107 (2017).

⁴ *Peña-Rodriguez v. Colorado*, 136 S. Ct. 1513, Transcript of Oral Argument at 44, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-606_5iel.pdf (Oct. 11, 2016).

⁵ Amended Opening Brief, *Peña-Rodriguez v. Colorado*, 2013 WL 12140027 at 1.

⁶ *Id.*

time the assault occurred.⁷ Nonetheless, Peña-Rodriguez was charged with unlawful sexual contact and was convicted at trial.⁸

After the verdict was final, Peña-Rodriguez learned that a juror had stated during deliberations that he “believed that [the defendant] was guilty because in his experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women.”⁹ On appeal, both sides agreed that the juror’s statement erroneously injected racial bias into the jury’s decision making. However, evidentiary prohibitions against jurors impeaching their own verdict prevented the defendant from seeking relief from the discriminatory verdict.¹⁰ All parties acknowledged that some injustice necessarily arises from the combination of deliberative secrecy and a rule forbidding jurors from later impeaching their verdicts, as cases involving jury misunderstanding or misconduct will go unremedied. But the question before the Court was whether that no-impeachment rule violated the defendant’s constitutional right to a fair trial.

In a 5-3 opinion authored by Justice Kennedy, the Supreme Court provided a remedy to the petitioner. The Court acknowledged that the Colorado rules of evidence—like the federal rules—contain a strict no-impeachment rule that extends even to factual testimony about the jury’s deliberation.¹¹ Nevertheless, the Court held this no-impeachment rule violated Peña-Rodriguez’s constitutional right to an impartial jury and it remanded the case for further proceedings. The Court specified that such a remedy was available only to remedy a case of “overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s

⁷ *Id.*

⁸ *Id.*

⁹ *Pena-Rodriguez v. People*, 2015 CO 31, ¶ 6, 350 P.3d 287, 289, reh’g denied (June 15, 2015), cert. granted sub nom. *Pena-Rodriguez v. Colorado*, 136 S. Ct. 1513, 194 L. Ed. 2d 602 (2016), withdrawn from bound volume (Apr. 15, 2016).

¹⁰ *Id.*; FED. R. EVID. 606(b).

¹¹ *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869, 197 L. Ed. 2d 107 (2017)

deliberations and resulting verdict” and further required the racial animus have been “as significant motivating factor” in the juror’s vote.¹² At the same time, the Court distinguished other cases where the no-impeachment rule would prevail (including other types of juror bias and misconduct), holding that although such cases were “troubling and unacceptable,” they did not represent the same systemic threat to the justice system as a whole, but instead “involved anomalous behavior from a single jury—or juror—gone off course.”¹³

Thus, although Peña-Rodriguez was able to obtain a remedy, his case shows the risk of hidden bias and misconduct. First, although the Court grants relief for “overt” racial bias that ultimately came to light after the trial, it cannot remedy covert bias. It is likely that some number of other jury verdicts are similarly tainted, but remain shrouded by secrecy. Second, although the Court is certainly correct that racial bias is a uniquely potent threat to judicial legitimacy, any systemic unfairness can also threaten the administration of justice. And while a single case of misconduct may be “anomalous behavior,” a series of such cases represents a more significant problem.

Thus, in spite of the Court’s remedy in Peña-Rodriguez, the underlying tension remains: the deliberative process requires protecting juror privacy and encouraging openness, but those same values of privacy and openness create room for verdicts to be infected by prejudice, bias, and misunderstanding. The Peña-Rodriguez case is unusual (and therefore potentially remediable) only because information about the jury’s deliberation was later revealed. In most cases the parties, lawyers, and judge will never know what happened in the jury room.¹⁴ And even if the biased statements in Peña-Rodriguez had never come to light, the case would have been a good candidate for retrial on the weight of the

¹² *Id.*

¹³ *Id.*

¹⁴ See Advisory Committee Note, FED. R. EVID. 606(b) (“Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.”).

evidence. Because there was direct eyewitness testimony of the defendant's guilt, a directed verdict of acquittal would have been improper—there was legally sufficient evidence to get to a jury because it is well within the jury's purview to credit the victim's testimony. But because that evidence was relatively weak—research has shown eyewitness testimony to be often unreliable, after all, and the victim's testimony was rebutted by an alibi witness with no motive to lie¹⁵—the judge could well have found that the jury's verdict was contrary to the great weight of the evidence. It is not clear, however, whether such an argument was pursued in the trial court; on appeal, the defendant appeared to focus solely on the later-revealed racial bias.¹⁶

The Supreme Court has identified a number of procedural safeguards to ensure that the jury competently performs its role, including active pretrial questioning and jurors' ability to report problems prior to reaching a verdict.¹⁷ And for the most part, these safeguards work. Studies have found that the judge would have reached the same verdict as the jury in approximately four out of every five cases.¹⁸ Nonetheless, we know that there is a subset of cases in which the process goes off track. Researchers authorized to record jury deliberations found that “[e]ven with the camera rolling, jurors compromised on verdicts, allowed personality conflicts to interfere with the deliberations, and oversimplified the judge's instructions.”¹⁹

¹⁵ There was additional evidence of bias in the jury's evaluation of the witness's testimony; one juror found the witness to be less credible because he was, in the juror's words, “an illegal.”

¹⁶ See Appellant's Opening Brief, Miguel PENA-RODRIGUEZ, Petitioner, v. PEOPLE OF THE STATE OF COLORADO, Respondent., 2013 WL 12140027 (Colo.) (arguing for reversal based on racial bias).

¹⁷ *Tanner v. United States*, 483 U.S. 107, 127 (1987) (noting that such safeguards include (1) voir dire; (2) juror observation “by the court, by counsel, and by court personnel”; (3) jurors' ability to “report inappropriate juror behavior to the court *before* they render a verdict”; and (4) post-verdict impeachment not nonjurors).

¹⁸ Neil Vidmar & Valerie P. Hans, *American Juries: The Verdict* 148-51 (2007).

¹⁹ Diane E. Courselle, *Struggling with Deliberative Secrecy, Jury Independence, and Jury Reform*, 57 S.C. L. REV. 203, 229 (2005).

The trial judge's power to evaluate the weight of the evidence and to order a retrial helps to fill the gap created when deliberative secrecy and post-verdict anti-impeachment rules conceal the presence of what would otherwise be reversible error. Even when the judge cannot identify a particular process error, he or she may have an intuitive sense that a jury has gone astray.²⁰ Ordering a new trial on the weight of the evidence thereby allows for the correction of biased or mistaken verdicts even when jury-room secrecy prevents the judge from knowing the source of that injustice.

Judicial power to order a new trial on the weight of the evidence exists in both civil and criminal cases and in both state and federal court.²¹ Different jurisdictions refer to the trial judge's review of evidentiary weight by different names: in some states it is called the judge's power to act as a "thirteenth juror,"²² while other states refer to it as the power to

²⁰ This sense is likely to arise in a subset of the 20% of the cases where the judge disagrees with the jury's verdict. See Vidmar & Hans, *supra* note 18, at 148-51 (describing the rate of disagreement). In many cases where the judge and jury disagree, it is easy to characterize the result as merely a case where reasonable minds can disagree. But in other cases, although there is sufficient evidence to support the ultimate result, the jury's verdict may be so strongly against the overall weight of the evidence that the judge is convinced that a miscarriage of justice has occurred. It is this subset of cases where the judge may suspect that the jury's finding is based on something other than a thorough analysis of the evidence. See Hilborn v. Metropolitan Group Property & Cas. Ins. Co., 306 F.R.D. 651 (D. Idaho 2015) (awarding a new trial on the weight of the evidence in an insurance coverage case; the jury found that the insured husband had conspired with his wife to willfully misrepresent relevant facts on the insurance application, but the judge was convinced after seeing the husband's trial testimony that he was "a man of limited cognitive abilities" who "evidenced a less than complete understanding of the process for submitting an insurance claim and the court proceedings" and thus the evidence weighed strongly against finding a willful misrepresentation).

²¹ Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 162 (2008) (noting that the procedure applies in both civil and criminal cases, and that state courts tend to depend upon the remedy more than federal courts, though both include it in the trial judge's power).

²² Norton v. Norfolk S. Ry. Co., 567 S.E.2d 851, 854 (S.C. 2002) ("South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts.").

review the “manifest weight”²³ or “factual sufficiency”²⁴ of the evidence.²⁵ Federal courts generally refer to it as “weight of the evidence” review.²⁶ But by whatever name it is known, it is a long-running power, recognized at common law in Blackstone’s *Commentaries on the Laws of England* and integrated into state and federal practice at the time of the founding of the United States.²⁷

Over the last century, however, the trial court’s power to review the weight of the evidence has fallen into a state of doctrinal disorder and inconsistency, becoming an afterthought (at best) in the trial process.²⁸ At the same time, trials themselves have become less common. The use of alternative dispute resolution and a more managerial style among judges

²³ See, e.g., *Eastley v. Volkman*, 972 N.E.2d 517, 523 (Ohio 2012) (“[E]ven if a trial court judgment is sustained by sufficient evidence, an appellate court may nevertheless conclude that the judgment is against the manifest weight of the evidence.”).

²⁴ *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 622 (Tex. 2004) (“Under traditional factual sufficiency standards, a court determines if a finding is so against the great weight and preponderance of the evidence that it is manifestly unjust, shocks the conscience, or clearly demonstrates bias.”).

²⁵ Of course, the various state and federal doctrines are not identical. *Norton v. Norfolk S. Ry. Co.*, 567 S.E.2d at 854 (“Although the state and federal standards use some similar language, we do not believe the standards, compared on the whole, are “substantially similar,” or similar enough to be used interchangeably.”). Nevertheless, they share a commonality: the trial judge’s power to grant a new trial on the weight of the evidence.

²⁶ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 433, (1996) (“The trial judge in the federal system,’ we have reaffirmed, ‘has ... discretion to grant a new trial if the verdict appears to [the judge] to be against the weight of the evidence.’”) (quoting *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 540 (1958)).

²⁷ 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 387 (1768) (“[I]f it appears by the judge’s report, certified to the court, that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith; or if they have given exorbitant damages; or if the judge himself has misdirected the jury, so that they found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the court to award a new, or second, trial”). Blackstone noted that if two juries agreed, however, then a third trial should not be granted. The presumption against a third trial likewise carries over into modern practice. See, e.g., *Eastley v. Volkman*, 972 N.E.2d 517, 526 (Ohio 2012) (noting that an appellate court may reverse “only once on manifest weight of the evidence”).

²⁸ See *infra* Parts II and III.

encourage pretrial settlement, and an increased reliance on summary judgment (in civil cases) and plea bargaining (in criminal cases) divert even more cases away from trial.²⁹ As trials declined, so too did the number of cases decided by a jury.³⁰

These two trends may be causally interrelated: as trials became less common, it makes sense that courts would grow reluctant to order a second trial on the weight of the evidence. After all, if one trial is a luxury, then two trials would appear unaffordably decadent. In addition, judges may unconsciously respond to the rarity of jury trials by attempting to protect the remaining jury verdicts against encroachment from the bench—a fear of “invading the province of the jury.”³¹

But regardless of the reason for it, it is clear that the trial judge’s power to review evidentiary weight remains significantly undervalued in the contemporary era of the vanishing trial. In the federal courts, litigants often fail to raise weight-of-the-evidence challenges.³² Even when the parties do challenge the weight of the evidence, the courts often apply

²⁹ See *infra* Part IV; see also Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 179 (2007) (arguing that the growth of summary judgment contradicts the Seventh Amendment right to a jury trial in civil cases); Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 760 (1998) (describing the “rise in plea bargaining”).

³⁰ See SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES 2* (2016) (noting that, in federal court, the percentage of criminal cases tried by jury declined from 8.2% in 1962 to 3.6% in 2013, and the percentage of civil cases tried by jury declines from 5.5% in 1962 to 0.8% in 2013).

³¹ See *Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105, 1113 (9th Cir. 2012) (“We invade the province of the jury only ‘if the verdict is contrary to the clear weight of the evidence, is based upon false or pernicious evidence or to prevent a miscarriage of justice.’”); Michael Seward, *The Sufficiency-Weight Distinction - A Matter of Life or Death*, 38 U. MIAMI L. REV. 147, 161 (1983) (“When ruling that a verdict is contrary to the weight of evidence, the judge does not invade the province of the jury; he simply transfers the defendant from the province of an unfair or inept jury to the province of a new jury.”).

³² Robertson, *supra* note 21, at 170; see also, e.g., *Morfiah v. City of Philadelphia*, No. 15-2139, 2016 WL 4151209, at *1 (3d Cir. Aug. 5, 2016) (finding that a litigant had waived the opportunity to seek a new trial on the weight of the evidence by failing to raise it in the trial court).

inconsistent standards in ruling on the motion, sometimes conflating the standard for a new trial with the standard for judgment as a matter of law.³³ In the state courts, both litigants and judges tend to have greater experience with weight-of-the-evidence review, and the standards are more likely to be applied consistently within a given state.³⁴ However, there is significant variation in the standards applied by different states, and there are still occasions where courts seem to confuse the standard for a directed verdict (based on insufficient evidence) with the standard for a new trial (based on the weight of the evidence, not on its sufficiency).³⁵

This Article argues in favor of a greater recognition of the trial judge's power to review the evidentiary weight and to order a new trial when the jury's verdict contradicts the great weight of the evidence. Following this introduction, Part II traces the doctrinal variations in the trial judge's power to review the weight of the evidence. It looks at conflicting precedent in three areas: how strongly the evidence must contradict the verdict; whether the trial judge should view the evidence neutrally or more favorably to the verdict winner; and whether the trial judge can independently assess witness credibility. It further considers the underlying source of these doctrinal variations: to what extent are the courts consciously diverging from one another versus mistakenly applying different standards? When there is little judicial attention given to the varying standards, it becomes very hard to tell the difference.

Part III explores the procedural forces that led to the doctrinal divergence and confusion. Normally, the process of appellate review

³³ See *infra* Part II; see also Robertson, *supra* note 21, at 170 (noting that the federal courts ruled on sufficiency points approximately ten times as often as weight points, which "suggests that attorneys are appealing sufficiency points far more often than weight points," but concluding that "if the attorneys think that there is insufficient evidence to support the verdict, they would presumably also have a strong argument that the verdict goes against the great weight of the evidence").

³⁴ See *infra* Part II.

³⁵ See *infra* Part II; see also Robertson, *supra* note 21, at 172 ("Courts have treated such arguments instead as sufficiency points, seeming to ignore their own precedent about the difference between weight and sufficiency.").

promotes the standardization of procedural application within a single jurisdiction, and the “gravitational force” of federal law promotes consistency (though not uniformity) between state and federal practice.³⁶ However, due to a historical quirk, the federal circuit courts of appeals did not begin widely reviewing trial judge rulings on the weight of the evidence until the Supreme Court’s 1996 decision in *Gasperini v. Center for the Humanities*.³⁷ As a result, the new-trial remedy largely escaped the traditional forces that promote procedural standardization.

Part IV then examines how—and why—the trial judge’s power to act as a thirteenth juror should be safeguarded even in the era of the vanishing trial. I argue that the judge’s power to review the weight of the evidence improves decisional accuracy by ensuring that the evidence as a whole is not just legally sufficient, but is also strong enough to allow the factfinders to have confidence in the ultimate verdict. Furthermore, the trial judge’s power to review the weight of the evidence protects the deliberative process itself, guarding against the risk that the jury’s deliberations might be infected by bias, prejudice, or any other non-evidentiary basis for decision making. Finally, I consider whether the review of evidentiary weight is protected by the constitutional guarantee of due process, and I conclude that it should be.

II. JUDICIAL REVIEW OF EVIDENTIARY WEIGHT: CONFUSION, VARIATION, AND DISAGREEMENT

When invisible error within the jury process leads to a fundamentally unjust verdict, trial judges have the power to overturn that verdict and order a new trial. This power to re-weigh the evidence has a long pedigree. By the time of the 1768 publication of Blackstone’s *Commentaries on the Laws of England*, it was already well established that the judge could

³⁶ Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 706 (2016) (“[F]ederal law exerts a widespread gravitational pull on state actors”); Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1225 (2013) (explaining that the appellate system serves to “increase[e] uniformity and standardization in the application of legal rules”).

³⁷ *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 435 (1996).

and should grant a new trial if convinced that the jury's verdict was contrary to the "clear weight" of the evidence.³⁸ This responsibility—often known as the "thirteenth juror"³⁹ rule—was incorporated into the early common law of the original colonies, and subsequently became part of both state and federal procedure throughout the United States. By 1899, the Supreme Court recognized that the judge's power to set aside a jury verdict as against the weight of the evidence was an essential safeguard of the jury-trial process:

'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) *to set aside their verdict, if, in his opinion, it is against the law or the evidence.*⁴⁰

This power has continued into the modern era, as trial judges may exercise the authority to grant a new trial on the weight of the evidence in both criminal and civil cases. In criminal cases, of course, the review is one-sided: if the jury votes to acquit the defendant, then double jeopardy prevents further review.⁴¹ Only when the jury votes to convict does the trial judge's responsibility come into play, and then the judge must

³⁸ William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1719 (2001) ("The power of trial judges to grant new trials because verdicts or particular jury findings are contrary to the clear weight of the evidence is universally recognized and supported by ample common law precedent.") (citing 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 387 (1768)).

³⁹ *Hudson v. Louisiana*, 450 U.S. 40, 45 (1981) ("Whether a state trial judge in a jury trial may assess evidence as a "13th juror" is a question of state law.").

⁴⁰ *Capital Traction Co. v. Hof*, 174 U.S. 1, 13–14 (1899) (emphasis added).

⁴¹ *Harris v. Rivera*, 454 U.S. 339, 346 (1981) (acknowledging "the unreviewable power of a jury to return a verdict of not guilty [even] for impermissible reasons").

normally make two findings: first, whether there was sufficient evidence to support the conviction (that is, was there sufficient evidence to allow a reasonable juror to conclude beyond a reasonable doubt that the defendant was guilty), and second, even if the evidence is sufficient such that a reasonable juror could potentially find the defendant guilty, does the overall weight of the evidence support that finding?⁴² If the judge concludes that the evidence is legally insufficient, then the remedy is acquittal.⁴³ If, on the other hand, “the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred,” then the court “may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.”⁴⁴

In civil cases, the trial judge’s review of the weight of the evidence is more balanced. Regardless of whether the jury’s verdict favored the plaintiff or defendant, the judge can award a new trial upon finding that the weight of the evidence preponderated heavily in the opposite direction.⁴⁵ In civil cases, this power allows the judge to consider the overall amount of the verdict as well and to suggest a remittitur if the damage award is “entirely disproportionate” to the injury.⁴⁶

⁴² *People v. Danielson*, 880 N.E.2d 1, 5 (N.Y. 2007) (nothing that the judge should decide “[b]ased on the weight of the credible evidence . . . whether the jury was justified in finding the defendant guilty beyond a reasonable doubt”).

⁴³ *Burks v. United States*, 437 U.S. 1, 18, (1978) (“Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only “just” remedy available for that court is the direction of a judgment of acquittal.”).

⁴⁴ *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980).

⁴⁵ 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2806 (3d ed. 2016) (“On a motion for a new trial—unlike a motion for a judgment as a matter of law—the judge may set aside the verdict even though there is substantial evidence to support it.”).

⁴⁶ MOORE’S *FEDERAL PRACTICE*, 59.13[2] [f] & [g] (3d ed. 1997 & Supp. 2010); see also Jeffrey W. Stempel, *Shady Grove and the Potential Democracy-Enhancing Benefits of Erie Formalism*, 44 AKRON L. REV. 907, 975 & n.202 (2011) (noting that “anyone who has ever practiced in federal court knows that a jury verdict is in great danger of being set aside as against the

Thus, in both state and federal courts, and in civil and criminal cases, trial judges have long possessed the power to grant a new trial when the jury's findings run counter to "the clear weight of the evidence."⁴⁷ In spite of the long history of this practice and its near-universal adoption, however, the standards by judges weigh the evidence and determine when to grant a new trial are chaotic and inconsistent.⁴⁸

In this Section, I explore the various standards applied in different state and federal courts, seeking to tease out the varying approaches. Courts rarely address these varying approaches explicitly. Their opinions tend to fall within three different categories. The first—but rarest—category is "open disagreement," where courts explicitly disagree with one another, intentionally and explicitly applying different standards. In the second category, "implicit doctrinal variation," different courts and circuits apply different standards without acknowledging that they are doing so.⁴⁹ These differences may either stem from confusion or they may be fully intentional, but because they remain latent in the court's holding they often fall below the radar of advocates or reviewing courts that might otherwise seek greater standardization.⁵⁰ Finally, the third category is one of "doctrinal confusion"; that is, where the same courts, or the

weight of the evidence if the presiding federal trial judge views the amount awarded as unreasonable," and pointing out the same logic applies "to review of verdict size as well as verdict direction").

⁴⁷ William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1719 (2001) ("The power of trial judges to grant new trials because verdicts or particular jury findings are contrary to the clear weight of the evidence is universally recognized and supported by ample common law precedent.").

⁴⁸ WRIGHT *et al.*, *supra* note 45, at § 2806 ("The power of a federal judge to grant a new trial on the ground that the verdict was against the weight of the evidence is clear. The standard that is to control in passing on motions of this kind is not.").

⁴⁹ See, e.g., Robert Anderson IV, *Measuring Meta-Doctrine: An Empirical Assessment of Judicial Minimalism in the Supreme Court*, 32 HARV. J.L. & PUB. POL'Y 1045, 1076 (2009) (discussing how a judicial philosophy of minimalism can give rise to generalist, non-detail-specific opinions and thus "allows people with diverse doctrinal preferences to bury their differences and compromise").

⁵⁰ See, e.g., Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1903 (2015) (explaining that "the existing doctrinal landscape . . . often reflects valuable normative choices, even if implicit and sometimes imperfectly executed")

same circuits, apply inconsistent standards without realizing that they are doing so, based on an underlying “lack of conceptual clarity.”⁵¹ The boundaries between these three categories are necessarily indistinct and mutable. Thus, for example, implicit doctrinal variation may stem either from underlying confusion and misunderstanding of existing doctrine or from an intentional (though not explicit) decision to apply a differing standard.⁵²

A. How Strongly Must the Evidence Contradict the Verdict?

One area of significant disagreement is the degree of injustice the judge must find before ordering a new trial. That is, how heavily must the evidence weigh against the jury’s verdict, and how strongly convinced must the judge be that the jury erred? On this question, court decisions appear to fall primarily within the category of “implicit doctrinal variation,” as courts apply different standards without explicitly acknowledging the variation, only rarely acknowledging any differences. In some of these “implicit variation” cases, courts will articulate the same overall standard of review, but will then apply it so differently that an inconsistent result is achieved even while the same standard is ostensibly used.

In theory, therefore, the federal circuits should be applying the same test—or at least should be applying the same test within the broad categories of civil or criminal cases. The Federal Rules of Civil Procedure allow the judge to grant a new trial “after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court,”⁵³ and that rule has been held to include situations in which “the district court finds the verdict is against the weight of the evidence,

⁵¹ See, e.g., Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 124 (2012) (describing similar confusion in the intellectual-property context, and explaining that “[t]he doctrinal confusion reflects a lack of conceptual clarity about the conduct that is regulated by” different intellectual property doctrines).

⁵² See, e.g., Benjamin C. Sassé, *Note, Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681, 698 (2000) (analyzing whether a circuit split over the right to travel arose from “doctrinal disagreement” or “sloppy rights talk”).

⁵³ Fed. R. Civ. P. 59.

the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course.”⁵⁴ The Federal Rules of Criminal Procedure similarly authorize a district judge to grant a new trial when “the interest if justice so requires.”⁵⁵ Scholars have explained that although the text of the rule “does not mention this ground [evidentiary weight] explicitly . . . courts have long recognized this foundational reason for a new trial.”⁵⁶

In practice, however, there is significant variation even in similar cases. A majority of federal courts appear to require that the judge find the verdict to be against the “great weight,” “clear weight” or “manifest weight,” of the evidence.⁵⁷ Thus, in a close case, where the evidence is “profuse, somewhat fragmentary, and conflicting in critical areas,” then the trial judge should not grant a new trial even if he or she ultimately disagrees with the jury’s conclusion.⁵⁸ Instead, the courts following this position have held that jury verdicts should be overturned only “in an egregious case, to correct a seriously erroneous result, or to prevent a miscarriage of justice.”⁵⁹

A minority of federal decisions apply a more lenient standard, however, allowing the trial judge to exercise unfettered discretion in ordering a new trial on the weight of the evidence upon mere

⁵⁴ *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985).

⁵⁵ FED. R. CRIM. P. 33 (2016).

⁵⁶ 3 CHARLES ALAN WRIGHT *et al.*, FED. PRAC. & PROC. CRIM. § 582 (4th ed. 2011).

⁵⁷ Steven Alan Childress, *Standards of Review Primer: Federal Civil Appeals*, 229 F.R.D. 267, 318–19 (2005) (“Such new trial motions, it is traditionally stated, should not be granted by the trial court unless the verdict is against the ‘great weight of the evidence,’ or the ‘clear weight of the evidence’” (citing *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 931 (5th Cir. 1982); *Conway v. Chemical Leaman Tank Lines*, 610 F.2d 360, 363 (5th Cir. 1980); *Taylor v. Fletcher Properties, Inc.*, 592 F.2d 244, 247 (5th Cir. 1979); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251, 61 S.Ct. 189, 85 L.Ed. 147 (1940); *Wassell v. Adams*, 865 F.2d 849, 854 (7th Cir. 1989)).

⁵⁸ *Conway v. Chem. Leaman Tank Lines, Inc.*, 610 F.2d 360, 367 (5th Cir. 1980)

⁵⁹ *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418–19 (2d Cir. 2012).

disagreement with the jury's verdict.⁶⁰ In a rare case of explicit acknowledgement of the different standards, the Third Circuit has pointed to these varying lines of authority without clearly adopting either of them.⁶¹ Scholars have pointed out that these decisions are older and do not seem consistent with modern trends.⁶² It may well be that the standards have shifted over time, slowly restricting the judge's discretion to grant a new trial and reallocating authority between judge and jury in federal court. Nonetheless, because these cases remain in the "implicit variation" category, it is unclear whether and to what extent this is a significant shift in authority or merely a change of nomenclature.

State-court decisions reflect a similar split. Most states apply a rule similar to the majority of federal courts, allowing a new trial only when the judge finds the jury's verdict to be contrary to the "manifest weight" or the "great weight" of the evidence, or when the jury's verdict would result in a "manifest injustice."⁶³ Like their federal counterparts, they hold that "[a] new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion."⁶⁴

⁶⁰ See, e.g., *Murphy v. U.S. Dist. Court for Northern Dist. of Cal., Southern Division*, 145 F.2d 1018, 1020 (9th Cir. 1944); *Fortenberry v. New York Life Ins. Co.*, 459 F.2d 114, 116 (6th Cir. 1972) (upholding the grant of a new trial based on the trial judge's statement that he was "not satisfied that the evidence supports the verdict," and stating that the decision was "within the discretionary power of the judge").

⁶¹ *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) ("What we have stated demonstrates that there is no consensus of opinion as to the exact standards to be used by a trial court in granting a new trial and that the criteria to be employed by an appellate tribunal charged with reviewing the trial judge's decision in this respect are equally indefinite.").

⁶² Wright, *supra* note 45, at § 2806 ("The unlimited-discretion standard, however, seems to have fallen out of favor with modern courts, as evidenced by its absence from recent opinions.").

⁶³ See, e.g., *Rohde v. Farmer*, 262 N.E.2d 685, 691 (Ohio 1970) (holding that a new trial is appropriate when "it appears to the trial court that a manifest injustice has been done, and that the verdict is against the manifest weight of the evidence").

⁶⁴ *Com. v. Widmer*, 744 A.2d 745, 751-52 (Pa. 2000).

In these states there is a high evidentiary threshold for granting a new trial. The Mississippi Supreme Court, for example, has stated that “the power to grant a new trial should be invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.”⁶⁵ The Virginia Supreme Court has held that a new trial should be granted only when “the evidence should be plainly insufficient to warrant the finding of the jury.”⁶⁶ The Ohio Supreme Court has gone even further, holding that in a civil case, as long as there is “some competent, credible evidence going to all the essential elements of the case,” then the judgment “will not be reversed by a reviewing court as being against the manifest weight of the evidence.”⁶⁷ An Arizona intermediate court similarly suggested that a new trial should be denied as long as “substantial evidence supports the jury verdict,”⁶⁸ though the Arizona Supreme Court recently overturned that decision, holding that the “trial judge has broad discretion . . . to find the verdict inconsistent with the evidence and grant a new trial, so as to guard against arbitrary verdicts.”⁶⁹

Nerveless, the state courts—again, like their federal counterparts—have split on the question of how much discretion the trial judge can exercise in granting a new trial. Unlike their federal counterparts, some states continue to apply a much more lenient standard even in the modern era. Rhode Island, for example, allows the trial court to grant a new trial “when it determines that the verdict is against the fair preponderance of the evidence and fails to do substantial justice.”⁷⁰ North Dakota has held that “when [the trial judge’s] judgment

⁶⁵ *Bush v. State*, 895 So. 2d 836, 844 (Miss. 2005).

⁶⁶ *Leigh v. Com.*, 66 S.E.2d 586, 593 (Va. 1951).

⁶⁷ *State v. Wilson*, 865 N.E.2d 1264, 1269 (Ohio 2007). The court has applied a broader standard in criminal cases, concluding that a criminal conviction could be overturned on the weight of the evidence if the reviewing court concludes that the defendant’s evidence was “more persuasive” than the state’s. *Id.*

⁶⁸ *State v. Fischer*, 238 Ariz. 309, 314-15, 360 P.3d 105, 110-11 (Ct. App. 2015), as amended (Oct. 8, 2015), rev’d, *State v. Fischer*, 242 Ariz. 44, 392 P.3d 488, 494 (2017).

⁶⁹ *State v. Fischer*, 242 Ariz. 44, 392 P.3d 488, 494 (2017).

⁷⁰ *State v. Mondesir*, 891 A.2d 856 (R.I. 2006).

tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury.”⁷¹ Iowa “allows the court to grant a motion for new trial only if more evidence supports the alternative verdict as opposed to the verdict rendered.”⁷²

Likewise, the Florida Supreme Court has emphasized that the trial judge’s experience should be employed to avoid an “unjust verdict.”⁷³ It reversed an intermediate court decision that had applied a stricter standard, holding that “[t]he trial judge’s discretion permits the grant of a new trial [even when it] is not ‘clear, obvious, and indisputable that the jury was wrong,’” and that “[t]he fact that there may be substantial, competent evidence in the record to support the jury verdict does not necessarily demonstrate that the trial judge abused his or her discretion.”⁷⁴

Because the states are separate sovereigns, there is less incentive for state courts to examine precedent outside their jurisdiction and there is no reason why individual states should not apply different standards. Nonetheless, it is striking both that the split among the states reflects a similar split in the standards applied by federal courts and also that opinions from both states and federal courts only rarely discuss the varying standards. It has often been said that the states may perform a “vital function” as “laboratories of democracy,”⁷⁵ but that function can

⁷¹ State v. Kringstad, 353 N.W.2d 302, 307 (N.D. 1984) (quoting Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 145, 152 (1876)).

⁷² State v. Ary, 877 N.W.2d 686, 706 (Iowa 2016)

⁷³ Brown v. Estate of Stuckey, 749 So. 2d 490, 497 (Fla. 1999).

⁷⁴ *Id.*

⁷⁵ Arizona State Legislature v. Arizona Indep. Redistricting Comm’n, 135 S. Ct. 2652, 2673, 192 L. Ed. 2d 704 (2015) (“This Court has ‘long recognized the role of the States as laboratories for devising solutions to difficult legal problems.’”) (quoting Oregon v. Ice, 555 U.S. 160, 171 (2009) and citing United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”);

only be served if those laboratories acknowledge that they are, in fact, applying different standards and record the results of their experiments with those standards.⁷⁶

B. In What Light Should the Evidence be Viewed?

There are also conflicting holdings from both state and federal courts about whether the trial judge should view the evidence in the “light most favorable” to the verdict in ruling on a motion for a new trial. Variance on this issue, however, appears to be a clearer case of doctrinal confusion. In particular, courts requiring the judge to view the evidence in the “most favorable light” are likely conflating the standard for a directed verdict with the standard for granting a new trial.⁷⁷ Certainly, a court may grant judgment as a matter of law only if, after viewing the evidence in the light most favorable to the verdict, the court determines that no reasonable juror could have reached the relevant conclusion.⁷⁸ Thus, if a directed verdict is inappropriate, then there logically must be some legally sufficient evidence to support the jury’s verdict. Viewing the evidence in the light most favorable to the jury’s decision would seem to foreclose the possibility of ever granting a new trial on the weight of the evidence: if the evidence is viewed in the light most favorable to the

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”)).

⁷⁶ E.g., Adam Savage, *Titanic Survival*, MYTHBUSTERS (2012) (“Remember kids, the only difference between screwing around and science is writing it down.”) (available at <https://www.youtube.com/watch?v=BSUMBBFjxrY>).

⁷⁷ 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2806 (3d ed. 2016) § 2806 (not that generally taking the “most favorable view” is not required, but that “[t]here are erroneous statements to the contrary in a few cases that have confused the standard on a new-trial motion with that on a directed-verdict motion.”).

⁷⁸ See, e.g., Moore v. Singh, 755 S.E.2d 319, 321 (Ga. App. 2014) (“A directed verdict is authorized only when there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict. A grant of directed verdict is a ruling that the evidence and all reasonable deductions therefrom demand a particular verdict.”).

verdict, then either the court should grant a judgment as a matter of law or allow the jury's verdict to stand.⁷⁹

Nonetheless, there continues to be disagreement. These opposing views can be seen in the contrasting opinions of the Mississippi Supreme Court and the Alaska Supreme Court. In Mississippi, the court held that "the evidence should be weighed in the light most favorable to the verdict."⁸⁰ In Alaska, by contrast, the court reversed the underlying judgment because the judge had mistakenly viewed the evidence in the light most favorable to the verdict instead of "independently weigh[ing]" the evidence.⁸¹

Federal courts tend to more consistently agree that the trial judge should weigh the evidence neutrally in ruling on a motion for a new trial.⁸² The Fourth Circuit—like the Alaska Supreme Court—has at least twice reversed trial court judgment that used the "most favorable light" language.⁸³ Even among the federal circuits, however, there is occasionally loose language that suggests that the "most favorable light"

⁷⁹ Robertson, *supra* note 21, at 187 ("The court's stated task is to determine if the evidence preponderates heavily against the verdict. Thus, if it views the evidence in the light most favorable to the verdict, it is presuming the answer to the very question it seeks to answer.").

⁸⁰ Bush v. State, 895 So. 2d 836, 844 (Miss. 2005).

⁸¹ Kava v. Am. Honda Motor Co., 48 P.3d 1170, 1176 (Alaska 2002) ("In deciding a motion for a new trial on this basis, the court must use its discretion and independently weigh the evidence. A court may set aside a verdict as being against the weight of the evidence even when 'there is substantial evidence to support it.'").

⁸² Robertson, *supra* note 21, at 181 (citing Song v. Ives Lab., 957 F.2d 1041, 1047 (2d Cir. 1992) ("In contrast to the standard applied in considering a motion for judgment n.o.v., a trial judge hearing a motion for a new trial is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner.") (citation and internal quotations omitted); Smith v. Tidewater Marine Towing, 927 F.2d 838, 843 (5th Cir. 1991); United States v. Martinez, 763 F.2d 1297, 1312 (11th Cir. 1985); Altrichter v. Shell Oil Co., 263 F.2d 377, 380 (8th Cir. 1959); Williams v. Nichols, 266 F.2d 389 (4th Cir. 1959); Magee v. General Motors Corp., C.A.3d, 1954, 213 F.2d 899, 900 (3d Cir. 1954)).

⁸³ *Id.* (citing Gill v. Rollins Protective Services Co., 773 F.2d 592, 595 (4th Cir. 1985); Williams v. Nichols, 266 F.2d 389, 393 (4th Cir. 1959)).

standard should apply even in reviewing a motion for a new trial on the weight of the evidence.⁸⁴

C. Can the Trial Judge Independently Assess Witness Credibility?

Finally, courts have also taken different positions about what evidence the judge should consider in deciding whether the evidence against the verdict is strong enough to warrant a new trial. Assessing credibility is, of course, one of the primary functions of the jury—as is the responsibility to weigh the evidence.⁸⁵ The vast majority of federal courts have held that the trial judge may consider witness credibility in determining whether the great weight of the evidence contradicted the jury’s verdict.⁸⁶ The First Circuit has held, for example, that “[t]he trial judge, upon considering a motion for new trial, may consider the credibility of the witnesses who had testified and, of course, will consider the weight of the evidence.”⁸⁷

⁸⁴ *Id.* (citing *Ellsworth v. Tuttle*, 148 Fed. Appx. 653, 669-670 (10th Cir. 2005); *Sherman v. Chrysler Corp.*, 47 Fed. Appx. 716, 724 (6th Cir. 2002) (not designated for publication); *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004); *Brown v. City of McComb Miss. Police Dep’t*, 84 Fed. Appx. 404, 406 (5th Cir. 2003) (not designated for publication).

⁸⁵ *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000) (“Credibility determinations, the weighing of the evidence, and the drawing of the legitimate inferences from the facts are jury functions, not those of a judge.”).

⁸⁶ *Robertson*, *supra* note 21, at 181.

⁸⁷ *MacQuarrie v. Howard Johnson Co.*, 877 F.2d 126, 132 (1st Cir. 1989). The Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have made similar statements. *United States v. Hernandez*, 433 F.3d 1328, 1335 (11th Cir. 2005) (“On a motion for a new trial based on the weight of the evidence, the court need not view the evidence in the light most favorable to the verdict. It may weigh the evidence and consider the credibility of the witnesses.”); *United States v. Tarango*, 2005 U.S. App. LEXIS 2170, 12-13 (5th Cir. 2005); *United States v. Garcia*, 182 F.3d 1165, 1170 (10th Cir. 1999); *United States v. Washington*, 184 F.3d 653, 658 (7th Cir. 1999); *Song v. Ives Laboratories, Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992) (noting that, in ruling on a motion for new trial, the district court “was in a unique position to assess the credibility of the witnesses and to determine the weight which should be accorded their testimony”); *United States v. Rogers*, 918 F.2d 207, 213 (D.C. Cir. 1990); *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989) (“The judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party in ruling on a motion for a new trial.”); *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988); *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir.1980).

Again, however, there is variation in holdings. Opinions from both the Third and the Fourth Circuits have overturned district-court new-trial rulings for failing to defer to jury determinations of credibility.⁸⁸ Neither case went so far as to say that the trial judge could not consider credibility. Nonetheless, their holdings at least implicitly restrained the trial judge's authority to do so. The Third Circuit, for example, concluded that when "litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices," the trial court will abuse its discretion by "substitut[ing] its judgment for that of the jury" on matters of credibility. Likewise, the Fourth Circuit similarly held that greater deference should be given to the jury "where the subject matter of the trial is easily comprehended by a lay jury," and "minor inconsistencies" in a witness's testimony are not significant enough to overcome the jury's decision to find the witness credible.⁸⁹

States also vary as to whether they allow the trial judge to independently evaluate witness credibility in determining whether the jury's verdict goes against the great weight of the evidence. The majority view is that judges can (and should) assess witness credibility. Thus, for example, the Florida Supreme Court has held that a trial judge "must necessarily" consider witness credibility in evaluating the weight of the evidence.⁹⁰ Likewise, the Ohio Supreme Court has stated that the court "in reviewing the entire record, weighs the evidence and all reasonable inferences [and] considers the credibility of witnesses."⁹¹ Iowa, Mississippi and Rhode Island both follow the same rule that trial judges may assess credibility, although, as noted above, the evidentiary standard

⁸⁸ *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 91 (3d Cir. 1960); *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 201 (4th Cir. 2000); *see also* Robertson, *supra* note 21, at 183.

⁸⁹ *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 201 (4th Cir. 2000)

⁹⁰ *Smith v. Brown*, 525 So. 2d 868, 870 (Fla. 1988).

⁹¹ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983); *see also* *State v. McKnight*, 837 N.E.2d 315, 334 (Ohio 2005) (noting that in Ohio, the trial judge may consider witness credibility in ruling on a motion for new trial based on the manifest weight of the evidence).

for a new trial appears to be somewhat lower in Iowa and Rhode Island than in Mississippi.⁹²

Other states, however, restrict the trial judge's consideration of credibility. A Texas court conducting a similar review, for example, must defer to the jury's credibility determinations as long as those determinations are not unreasonable.⁹³ And in Illinois, the Supreme Court has held that a trial court's decision to set aside a jury verdict should be reversed because "it is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony."⁹⁴ The court was therefore at least implicitly restricting the trial judge's authority to independently assess witness credibility.

III. THE EVOLUTION OF DOCTRINAL DISORDER

The doctrinal confusion described in the prior section hinders the administration of justice and gives rise to systemic procedural inequalities. Some of its consequences are obvious: for example, how easy or difficult it is for a verdict loser to obtain a new trial can vary both by geographic location and by the choice of federal or state forum.⁹⁵ Other consequences of the doctrinal disorder are more covert, but still real: when the review of evidentiary weight is available only inconsistently, it loses salience, as courts and litigants alike come to rely on it less.⁹⁶ But when a new trial is unavailable to remedy a manifestly unjust jury

⁹² *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016); *Butera v. Boucher*, 798 A.2d 340, 348 (R.I. 2002); *Miley v. State*, 935 So. 2d 998, 1002 (Miss. 2006) (noting that a new trial is appropriate when the judge disagrees with the "jury's resolution of conflicting testimony" such that an "unconscionable injustice" would result from the verdict).

⁹³ *Sw. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 625 (Tex. 2004). Texas courts use the term "factual sufficiency review" to refer to weight-of-the-evidence challenges.

⁹⁴ *Redmond v. Socha*, 837 N.E.2d 883, 900 (Ill. 2005).

⁹⁵ *See supra* Part I.

⁹⁶ Robertson, *supra* note 21, at 172 ("Perhaps because federal courts so rarely apply the new-trial remedy on the weight of the evidence, they often overlook the very existence of such a remedy.").

verdict, one of two consequences will result: either the unjust jury verdict will stand, denying the wronged litigant relief altogether, or the court will take the case away from the jury entirely by granting summary judgment.⁹⁷ Both results are problematic.

This Part discusses the evolution of the doctrine in both federal and state court and explores how and why the normal processes that bend toward procedural uniformity failed to gain significant convergence in how judges review the weight of the evidence after a jury verdict. There are three converging trends that lead to an overall impression of doctrinal disorder. First, an historical lack of appellate review in the federal court system meant that there was less standardization and the new-trial remedy become underutilized.⁹⁸ Second, although the states made a much more robust of use of the new-trial remedy, the lack of unified federal approach meant that what Professor Scott Dodson has called the “gravitational force of federal law”⁹⁹ could not draw the varying states closer together, and the different state approaches diverged greatly over the last two and a half centuries.¹⁰⁰ Finally, the changing relationship between appellate courts and trial courts—especially on matters of trial judge discretion—has complicated the underlying analysis.¹⁰¹

A. The Historical Lack of Appellate Review in Federal Court

In federal court, weight-of-the-evidence review remains vastly underutilized as compared to its presence in the state courts. This is likely due, at least in part, to the historical limitation on appellate oversight in the federal courts. In the nineteenth century, the Supreme Court held that

⁹⁷ In some cases, the court may rely on summary judgment or judgment as a matter of law, thereby cutting out the jury entirely, rather than applying a lesser standard of review and granting a new trial on the weight of the evidence. See Robertson, *supra* note 21, at 181. (“If the rule authorizing new trials on the weight of the evidence is not to be superfluous, then the standard for granting a new trial cannot be as strict as the standard for granting judgment as a matter of law.”).

⁹⁸ See *infra* Part III.A.

⁹⁹ Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 752 (2016).

¹⁰⁰ See *infra* Part III.B.

¹⁰¹ See *infra* Part III.C.

the Seventh Amendment's Re-Examination Clause prevented appellate courts from reviewing the trial judge's decision to grant or deny a new trial on the weight of the evidence.¹⁰² As a result, trial judges applied very different standards to decide whether and when to grant a new trial on the weight of the evidence.

Ordinarily, appellate review of lower court judgments serves a standardizing function.¹⁰³ This is not just a matter of articulating consistent rules. Instead, appellate courts do more than simply resolve disputes about the proper rule to be applied; they promote uniformity in how legal rules are applied to particular factual situations.¹⁰⁴ This role is particularly important in delimiting the scope of the district court's discretion.¹⁰⁵ Without such a standardizing influence, litigants become less able to predict the outcome of their cases and their trust in the judicial system diminishes.¹⁰⁶

¹⁰² *United States v. Laub*, 37 U.S. 1, 5 (1838).

¹⁰³ Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. Rev. 1219, 1224–25 (2013) (“Legal scholars have identified a number of different functions that a robust appellate system serves, including correcting legal and factual errors; encouraging the development and refinement of legal principles; increasing uniformity and standardization in the application of legal rules; and promoting respect for the rule of law.”).

¹⁰⁴ Cassandra Burke Robertson, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 WASH. L. REV. 733, 771 (2006); Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 SW. J. INT'L L. 445, 455 (2012) (“The classic remedy for inconsistent application of the law is appellate review.”).

¹⁰⁵ Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 638 (1971) (explaining that appellate review can help define what types of discretionary decisions are “decision liberating,” where the judge has full freedom to decide, and which types of decisions are “review limiting,” where “there may be law constraining the trial court’s decision, but there will be [almost] no appellate review of that decision”).

¹⁰⁶ See Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 SW. J. INT'L L. 445, 455 (2012) (“When plaintiffs’ access to an effective remedy is inconsistent, unpredictable, and varies according to seemingly random geographic districts, parties will lose trust in the system and in the rule of law more broadly.”).

Without the standardizing effect of appellate review, the historical insulation of the trial judge’s decision meant that the standards for review were never clearly articulated. As a result, attorneys and courts alike often failed to distinguish between weight-of-the-evidence and sufficiency-of-the-evidence challenges.¹⁰⁷ In the absence of clearly articulated grounds for granting a new trial on the weight of the evidence, parties often failed to raise the issue in federal court—even appellees who alleged a complete lack of evidence to support the jury’s verdict and sought entry of a directed verdict often failed to raise the easier claim that the manifest weight of the evidence contradicted the verdict and thus necessitated a new trial.¹⁰⁸

At the same time, two parallel movements in the federal courts helped to obscure the underutilization of the new-trial remedy. First, parties more often accepted remedies short of a jury trial. Civil claims were more often settled, and criminal cases more often resulted in a plea bargain.¹⁰⁹ Second, there was a significant growth in the use of involuntary dismissal. The “summary judgment trilogy” of cases made it easier for civil defendants to obtain a favorable judgment without going to trial.¹¹⁰ As lawyers and judges saw jury trials less frequently, there

¹⁰⁷ Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 172 (2008) (“This confusion is not limited to the attorneys who may overlook weight points when they draft their appeal. Instead, appellate courts sometimes overlook weight-of-the-evidence points even when a party clearly raises such a point of appeal. Courts have treated such arguments instead as sufficiency points, seeming to ignore their own precedent about the difference between weight and sufficiency.”); see also 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2806 (3d ed. 2016) (“There are . . . a few cases that have confused the standard on a new-trial motion with that on a directed-verdict motion.”).

¹⁰⁸ Id.

¹⁰⁹ See Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 1018 (1994) (“In addition to the growth of ADR, more and more cases are resolved pretrial by settlements and pleas. . . . [F]ewer and fewer cases are actually being tried.”).

¹¹⁰ Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 82–83 (2006) (“Collectively, the trilogy is viewed as a ‘celebration of summary judgment’ and a mandate for federal courts to embrace the use of summary judgment to dispose of cases before trial”) (quoting Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other*

were fewer opportunities to raise the claim that the jury's verdict contradicted the weight of the evidence.

In 1996, the Supreme Court reversed course and held that the appellate courts could review the trial judge's decision for an abuse of discretion.¹¹¹ At that time, some onlookers expected that appellate review of the weight of the evidence would become commonplace in federal court, as it is in a number of states.¹¹² The Supreme Court's decision to make rulings of the weight of the evidence reviewable on appeal was said to represent a "dramatic" shift in the law.¹¹³

In the twenty years since *Gasperini*, however, trial judge decisions on the weight of the evidence are still appealed far less often in federal court than they are in most state courts. The federal circuit courts of appeals typically reverse just over 2000 judgments each year, but only a handful of those reversals—less than one-half of one percent—are based on the weight of the evidence.¹¹⁴ In Texas, by contrast, where the right to review is much more systematized, four percent of reversals are based on the weight of the evidence.¹¹⁵

B. The Missing Gravitational Pull of Federal Procedure

The Texas position is not entirely unusual among the state courts, though it does have a better-developed procedure to review weight of the

Examples of Equilibrating Tendencies in the Antitrust System, 74 GEO. L.J. 1065, 1114-15 (1986)). The "trilogy" refers to *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

¹¹¹ *Gasperini v. Ctr. for Humanities*, 518 U.S. 415, 435 (1996).

¹¹² Donald F. Paine, *Paine on Procedure: Federal Judges As 13th Jurors*, TENN. B.J., July 1999, at 20, 32 (expecting that in the aftermath of *Gasperini*, "weight of evidence motions will become routine" in federal court).

¹¹³ 11 Charles Alan Wright et al., *Federal Practice and Procedure: Civil* § 2819 (3d ed. 2016).

¹¹⁴ Robertson, *supra* note 21, at 171.

¹¹⁵ *Id.* Texas jurisprudence refers to verdicts contrary to the great weight of the evidence as "factually insufficient," as opposed to the "legal insufficiency" that would support a directed verdict. Robertson, *supra* note 21, at 171.

evidence than most states.¹¹⁶ In general, state courts are more comfortable with weight-of-the-evidence review than are federal courts. Even though state constitutions typically protected the right to a jury trial, they did not include re-examination clauses similar to the federal one. As a result, the states allowed a consistent history of appellate review.¹¹⁷ To the extent that the states had any limit on appellate review of jury verdicts at all, they tended to give the intermediate appellate courts the exclusive power to review the “factual sufficiency” or “manifest weight” of the evidence.¹¹⁸ As a result, the state standards for granting new trials are better developed and much more commonly applied than the federal standards, and the new-trial remedy is not underutilized in state court to the extent that it is in federal court.¹¹⁹

¹¹⁶ See W. Wendell Hall et al., *Hall’s Standards of Review in Texas*, 42 ST. MARY’S L.J. 3, 40 (2010) (providing an overview of factual sufficiency review); W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 605 (2008) (describing “Texas’ heritage as a dual-standard state” where both factual and legal sufficiency review have a well developed history).

¹¹⁷ Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 871 (2014) (“Language similar to the first clause of the Seventh Amendment, the Preservation Clause, was ubiquitous in state constitutions. The second clause, the Re-examination Clause, was unique to the Federal Constitution.”).

¹¹⁸ See, e.g., TEX. CONST. art. V, § 6 (providing that judgments of the intermediate courts of appeals in Texas “shall be conclusive on all questions of fact brought before them on appeal or error,” a clause that has been interpreted to mean that weight-of-the-evidence points can be raised in the intermediate appellate courts but not in the Supreme Court); *State v. Moore*, 689 N.E.2d 1, 18 (Ohio 1998) (“This court does not ordinarily evaluate the manifest weight of the evidence in cases evaluated by the courts of appeals.”); *Liska v. Chicago Rys. Co.*, 149 N.E. 469, 476 (Ill. 1925) (“The provisions of the Practice Act that judgments of the Appellate Court shall be final as to all matters of fact in controversy in actions at law are not unconstitutional, because the right of trial by jury guaranteed by the Constitution does not include the right to a review of the facts by this court.”).

¹¹⁹ See, e.g., Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 440, 443 (2003); *People v. Cahill*, 2 N.Y.3d 14, 57-58 (N.Y. 2003) (noting that in New York, the Court of Appeals applies weight-of-the-evidence review in death-penalty cases, which are appealed directly to the highest court, and the intermediate courts routinely conduct weight-of-the-evidence review in other cases); *York v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 222 Ill. 2d 147, 179 (Ill. 2006) (“A new trial should be granted only when the verdict is contrary to the manifest weight of the evidence. . . . A reviewing court will not reverse a circuit court’s decision with respect to a

However, even though new trials on the weight of the evidence may be granted more often in state court, there is still significant disagreement about the role that weight of the evidence review should play within the overall framework of the state justice system, and disagreement—both within and among states—about the standards to be applied in reviewing jury verdicts.¹²⁰ This divergence is not, by itself, problematic; the states, after all, have their own procedural rules appropriate for their own circumstances.¹²¹ But it is nevertheless significant, as a unified federal procedure generally exerts a significant “gravitational pull” on state practice.¹²²

Federal procedure in other areas—including the adoption of the federal rules in general,¹²³ the expansion of summary judgment practice thereafter,¹²⁴ and more recently (though perhaps to a lesser degree) with

motion for a new trial unless it finds that the circuit court abused its discretion.”); *State v. Scott*, 800 N.E.2d 1133, 1140 (Ohio 2004) (“[A] challenge to the sufficiency of evidence is different from a challenge to the manifest weight of the evidence.”).

¹²⁰ See *supra* Part II.

¹²¹ See *Dodson*, *supra* note 99, at 707 (“In the post-1938 world, federal and state courts independently develop and apply their own procedures. . . . Thus, states are free to adopt their own rules of procedure, and state courts are free to interpret their state rules independently of federal rules and federal judicial opinions.”); see also Joseph A. Wickes, *The New Rule-Making Power of the United States Supreme Court*, 13 TEXAS L. REV. 1, 8 (1934) (explaining how the ABA’s creation of a Committee on Uniform Judicial Procedure came about as a response to the “utter failure of the Conformity Act to bring about uniformity in federal and state procedure in civil cases”).

¹²² *Id.* at 710 (“In every state, federal rulemakers have exerted an extraordinary gravitational pull on state rulemakers.”).

¹²³ John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986) (finding that approximately half of American states had based their procedural rules almost entirely on the federal rules, and that even in the other states, the federal rules had been highly influential).

¹²⁴ Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 326-29 (2001) (noting the influence of federal summary-judgment practice on the states).

“plausibility” pleading¹²⁵—encouraged the convergence of state practice.¹²⁶ States tended to at least consider the adoption of federal procedural rules—and even when a state opted not to follow the federal rule, judicial explanations of the decision to diverge from federal practice helped clarify the contours of, and reasons for, the continued application of a differing state practice.¹²⁷

But with regard to new trials on the weight of the evidence, there has been no push for convergence among the states. The evolving application of the rule over two and half centuries has led to a significantly different application of the practice.¹²⁸ As described earlier, new trials on the weight of the evidence date back at least to the time of Blackstone, and were engrained within the founding of the states.¹²⁹

¹²⁵ See Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 111 (2010) (suggesting that “the splintering of pleading standards in the wake of *Iqbal* has the potential to usher in a new era of procedural diversity”) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009), “a case that radically transformed federal civil litigation by abolishing notice pleading in favor of plausibility pleading”); Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1470 (2008) (“The *Twombly* decision presents Conley states with perhaps the most critical civil procedure decision since they chose to adopt the Federal Rules.”) (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007)).

¹²⁶ *Dodson*, *supra* note 99, at 710.

¹²⁷ This process is occurring now as states consider whether to adopt the federal “plausibility pleading” framework found in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). See, e.g., *Warne v. Hall*, 373 P.3d 588, 595 (Co. 2016) (“Because we understand our prior cases as reflecting the merit of interpreting our rules of civil pleading harmoniously with the corresponding federal rules, wherever that can be accomplished without violating our own interpretative rules or interfering with important state policy, and because we find the interpretative gloss added by the Supreme Court in *Twombly* and *Iqbal* to be very much in line with the direction our rule-making has taken and the current needs of the civil justice system in this jurisdiction, we join those other states already embracing the plausibility standard articulated in those cases as a statement of the pleading requirements of their own analogs to Federal Rule 8.”); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 424 (Tenn. 2011) (“We decline to adopt the new *Twombly/Iqbal* “plausibility” pleading standard and affirm the judgment of the Court of Appeals.”).

¹²⁸ See *supra* Part II.

¹²⁹ *Id.*

Given the tremendous changes that have occurred over the last two and half centuries, in society in general as well as the justice system in particular, it is not surprising that the law and doctrine surrounding the new-trial motion would face significant evolution in the states.

Without the influence of a standard federal-court approach, there has been little attention paid to the divergence of state standards. It is rare for state courts to refer to decisions of other states in developing or applying the standards by which they review the weight of the evidence after a jury trial.¹³⁰ The divergences expand over time and run deep: in addition to differences in nomenclature, states disagree about the same fundamental aspects of the standard that have caused fractures in federal practice, including the degree of “wrongness” of the jury’s verdict; whether the trial judge should view the evidence in the light most favorable to the jury’s verdict; and whether the trial judge can independently assess witness credibility. However, the longer history of appellate standardization within (though not among) the individual states causes the state differences to be more entrenched and less likely to result from confusion or unfamiliarity with the governing standard.¹³¹

C. The Changing Appellate Court View of Deference and Discretion

A compounding factor that inhibits uniformity in both state and federal courts is the changing relationship of appellate courts and trial courts over the last half century. As appellate review has grown in importance, appellate courts’ deference to the trial court has diminished.¹³² Interestingly, this shift occurred even as the trial judge’s role grew overall, as judges took a notably more “managerial” role in the pretrial and trial process—especially in pushing the parties toward

¹³⁰ *Id.* at II.A.

¹³¹ *See supra* note 117 (noting that the state constitutions did not contain a provision paralleling the Re-Examination Clause).

¹³² Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1237 (2013) (explaining that “[i]n the early days of the United States, the right to appellate review was significantly limited,” and tracing the growth of appellate remedies).

settlement.¹³³ But at the same time the trial judge grew more powerful in relation to the parties and their lawyers, the trial judge also faced more exacting appellate scrutiny.¹³⁴

In federal court, this changing relationship was largely obscured by the pre-*Gasperini* reluctance of appellate courts to review weight-of-the-evidence decisions.¹³⁵ But in the post-*Gasperini* era in federal court—and in the state courts more generally—appellate scrutiny of weight-of-the-evidence challenges has grown increasingly complex as appellate review has taken a larger role in the justice system as a whole. This has led to even greater doctrinal disorder in the federal courts, as the passage of two decades since *Gasperini* has not been enough time for the appellate courts to offer greater standardization. The states have taken a more organized approach, but it is nevertheless an approach that has evolved toward giving the appellate court a greater role in assessing weight-of-the-evidence challenges.¹³⁶

The role of appellate review has grown significantly in the modern era.¹³⁷ At the time of the founding, trials were the predominant

¹³³ Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982) (“In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation.”).

¹³⁴ Samuel P. Jordan, *Irregular Panels*, 60 ALA. L. REV. 547, 576 (2009) (“The federal appellate caseload has increased dramatically in the last fifty years, and the increase in the number of judges authorized to decide those cases has not come close to keeping pace. As a result, the number of dispositions per judge has increased steadily over time, giving rise to concerns about the effect of judicial strain on the quality of justice delivered by the federal appellate system.”).

¹³⁵ See *supra* Part III.A; see also 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2819 (3d ed. 2016); U.S. v. Laub, 37 U.S. 1, 12 Pet. 1, 9 L. Ed. 977, 1838 WL 3936 (1838) (stating that it is “a point too well settled to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial, and cannot be made a ground of objection on a writ of error.”).

¹³⁶ See *infra* this Part.

¹³⁷ See Robertson, *supra* note 132 at 1237.

way to resolve cases.¹³⁸ Under this system, both judges and juries had a significant role. The jury would hear evidence, pass judgement on witness credibility, and resolve questions of fact.¹³⁹ The judge could exercise significant discretion in instructing the jury before the start of deliberations and in ordering a new trial upon disagreement with the jury's verdict.¹⁴⁰ Appellate courts had only a very limited role in correcting legal error.¹⁴¹

Over time, appellate courts began more closely scrutinizing the exercise of trial court discretion.¹⁴² Some scholars supported this trend, suggesting that when the appellate court has access to the same record evidence as the trial court, there is little if any reason to defer to the trial judge's decision.¹⁴³ However, as the scope of appellate review expanded

¹³⁸ Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 883 (2002) ("The civil jury is virtually the only Anglo-American adjudicatory device to have functioned serviceably for more than 900 years. Its long history reflects not the endurance of a sanctified relic but the adaptability of a decision-making mechanism that affords society substantial and unique benefits.").

¹³⁹ *Id.* at 874 ("By the middle of the fourteenth century, however, the English had adopted procedures which made it clear that the jury was not simply a collection of witnesses, but a deliberative body. . . . [T]he jury gradually shifted from reliance on its own knowledge to dependence on the testimony of witnesses in open court. The jury was thus transformed into an evaluator of proofs.").

¹⁴⁰ *Id.* at 888 ("[U]ndoubtedly, new trials had a role to play in mid-eighteenth century English courtrooms. . . . The new trial mechanism thus imported into American practice was one vested in the trial court to overturn a clearly unjust decision. It was to be employed to set the stage for the submission of the case to a second jury.").

¹⁴¹ *See id.* at 889 ("During the nineteenth century, appellate court judges were not permitted to consider the question of new trials."); *see also* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1000 (1986) ("The only exception to free review of questions of law is in the area of administrative law, in which appellate courts occasionally defer to agency declarations of general legal principles.").

¹⁴² Louis, *supra* note 141, at 999–1000 (noting that "[a]ppellate courts today more readily find abuses of procedural discretion").

¹⁴³ Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 184 (1978) ("When the appellate court has as much before it as the trial judge did, and when the matter is not one of those issues in which the circumstances are so diffuse that no rule or

into areas traditionally reserved for the jury,¹⁴⁴ other academic commentators expressed concern about this expansion, especially when that appellate review increased the overall scrutiny given to jury verdicts.¹⁴⁵

By the time the Supreme Court ruled in *Gasperini* that appellate courts could review new trial rulings on the weight of the evidence for “abuse of discretion,” that very concept was in the middle of a transition, as appellate courts were more closely scrutinizing trial court discretion in other areas.¹⁴⁶ The lack of earlier appellate systematization already clouded the scope of the trial judge’s discretion to grant a new trial. Now, there was a compounding factor: once appellate courts started to review trial judges’ rulings on evidentiary weight, how should the appellate court determine whether the trial court had abused its discretion?

standard can be fashioned, the appellate court should not defer to the trial judge’s choice in the absence of some particular and cogent reason for doing so.”).

¹⁴⁴ See *Scott v. Harris*, 550 U.S. 372 (2007) (noting that the Supreme Court justices had viewed a video of the police chase that gave rise to the case, and concluding based on that viewing that “no reasonable jury” could have believed the plaintiff’s account of the case”); David Kessler, *Justices in the Jury Box: Video Evidence and Summary Judgment in Scott v. Harris*, 127 S. Ct. 1769 (2007), 31 HARV. J.L. & PUB. POL’Y 423, 434–35 (2008) (“*Harris* raises the concern that the seductive quality of video evidence may lead courts to conclude too quickly that genuine issues of material fact are absent, thereby usurping the jury’s fact-finding role. The precedent set by *Harris* allows appellate courts to decide more cases involving video evidence during summary judgment.”).

¹⁴⁵ E.g. Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 474–75 (2014) (“Judicial encroachment on the jury’s role in drawing inferences violates an important tenet of our judicial system: ensuring that disputes are resolved by a group of people whose diverse attributes and experiences accurately reflect the community.”); Dan M. Kahan, *et al.*, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 904 (2009) (“There were multiple avenues available to the Court for reversing in *Scott*, we have suggested. But the justification it chose was the one that maximized the experience of exclusion for a recognizable segment of the American citizenry, needlessly infusing the decision with culturally partisan overtones that detracted from the law’s legitimacy.”).

¹⁴⁶ See Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 758–763 (1957) (charting the rise of appellate scrutiny of trial court rulings and expressing a pre-*Gasperini* concern that appellate courts improperly reviewing decisions to grant or deny a new trial on the weight of the evidence).

Unsurprisingly, federal courts have split over the question of how much deference to give to trial court decisions granting or denying a motion for a new trial and what exactly an “abuse of discretion” looks like in this context.¹⁴⁷ Courts generally agree that a trial court abuses its discretion by stating and applying the wrong standard.¹⁴⁸ But if the trial court believed the jury’s verdict to be against the weight of the evidence, and therefore granted a new trial, and the appellate court disagrees—does that necessarily mean that the trial court abused its discretion?¹⁴⁹ What if the trial court refused to grant a new trial, and the appellate court concludes that the jury’s verdict was against the great weight of the evidence?¹⁵⁰ On these points, the federal circuits continue to disagree.¹⁵¹

The state courts, by contrast, tend to be more comfortable with appellate review of the trial court’s decision. In part, this comfort level may stem from the fact that state courts have not historically been forbidden from reviewing the weight of the evidence.¹⁵² Perhaps as a

¹⁴⁷ Robertson, *supra* note 21, at 197-99 (noting that some federal courts apply an abuse of discretion standard very close to de novo review, while others will review the decision to grant a new trial more strictly than the decision to deny it, and that some courts have issued conflicting opinions from time to time without noting the different standards).

¹⁴⁸ See Gill v. Rollins Protective Services Co., 773 F.2d 592, 595 (4th Cir. 1985); Williams v. Nichols, 266 F.2d 389, 393 (4th Cir. 1959) (both reversing judgments in which the district court had mis-stated the standard for reviewing the weight of the evidence).

¹⁴⁹ See Urti v. Transport Commercial Corp., 479 F.2d 766 (5th Cir. 1973); Georgia-Pacific Corp. v. U.S., 264 F.2d 161 (5th Cir. 1959) (both overturning the grant of a new trial).

¹⁵⁰ Robertson, *supra* note 21, at 197-99 (explaining the some circuits will give greater deference to a trial court’s denial of a new trial than to the grant of a new trial).

¹⁵¹ Compare Bank of Am., N.A. v. JB Hanna, LLC, 766 F.3d 841, 851 (8th Cir. 2014) (“We conclude that the district court committed a clear abuse of discretion by denying the Bank’s motion for a new trial, because the verdict was against the great weight of the evidence.”) with Baker v. Dorfman, 239 F.3d 415, 422 (2d Cir.2000) (“[A] district court deni[al] [of] a motion for a new trial made on the ground that the verdict was against the weight of the evidence ... is not reviewable on appeal.”) (quoting Dailey v. Societe Generale, 108 F.3d 451, 458 (2d Cir.1997)) but see Hughes v. Town of Bethlehem, No. 15-1758-CV, 2016 WL 1129993, at *3 (2d Cir. Mar. 23, 2016) (noting that the Second Circuit had been inconsistent in forbidding appellate review of the denial of a new trial on the weight of the evidence).

¹⁵² Federal courts, on the other hand, could not review such rulings until 1996. Gasperini v. Ctr. for Humanities, 518 U.S. 415, 435 (1996).

result, states have developed mechanisms to assist in that review—typically by requiring the trial judge to explain the decision to grant a new trial, even requiring a detailed explanation of the evidence supporting or contradicting the verdict.¹⁵³ Indiana, for example, requires that the trial judge explain why he or she is granting a new trial. A judge who grants a new trial on the weight of the evidence must detail the evidence supporting and opposing the jury’s verdict and must explain why the new trial is warranted.¹⁵⁴ The court has held that “[i]t is compliance with the arduous and time-consuming requirements of the Rule which provides assurance to the parties and the courts that the judge’s evaluation of the evidence is better than the evaluation of the jury.”¹⁵⁵ Georgia likewise suggests a need for the trial judge to explain the decision, or at least to specifically state that the court had “exercise[d] its discretion” by independently weighing the evidence in response to a motion for a new trial.¹⁵⁶ These procedures help clarify the role of appellate court review in the state courts. Unfortunately, no real parallel exists in the federal system.¹⁵⁷

IV. CURING INVISIBLE ERROR IN THE ERA OF THE VANISHING TRIAL

As a result of the lack of judicial divergence and doctrinal disorder described above, trial judges across the judicial system have been unable to consistently review unjust jury verdicts and correct for

¹⁵³ See, e.g., *In re Columbia Med. Ctr. of Las Colinas, Subsidiary LP*, 290 S.W.3d 204, 207 (Tex. 2009) (“We direct the trial court to specify its reasons for disregarding the jury’s verdict and granting a new trial, to the extent it did so.”)

¹⁵⁴ IND. R. TRIAL P. 59(J) (“[I]f the decision is found to be against the weight of the evidence, the findings shall relate the supporting and opposing evidence to each issue upon which a new trial is granted.”).

¹⁵⁵ *Nissen Trampoline Co. v. Terre Haute First Nat’l Bank*, 358 N.E.2d 974, 978 (Ind. 1976).

¹⁵⁶ *Gomillion v. State*, 769 S.E.2d 914 (Ga. 2015).

¹⁵⁷ Robertson, *supra* note 21, at 211-12 (arguing that trial courts should do more to explain their rulings when granting or denying a new trial); see also *Stafford v. Neurological Medicine, Inc.*, 811 F.2d 470, 474 (8th Cir. 1987) (“A district court does not properly exercise its discretionary authority when it fails to articulate the analysis utilized to justify upsetting a jury’s verdict.”).

invisible error hiding behind veil of deliberative secrecy.¹⁵⁸ The power to order a new trial on the weight of the evidence arose long ago, when jury trials were the legal system's dominant mode of resolving cases. In the modern era, increased appellate scrutiny of trial court rulings have created an opportunity for a more systematized review of new-trial motions.¹⁵⁹ Even as other forms of judicial power increased—including a trend toward “managerial judging,” which expanded the trial judge's sphere of authority—weight of the evidence review has continued to be treated as an afterthought in federal court and as a local quirk of state procedure in state court.¹⁶⁰

At the same time as appellate scrutiny of trial rulings has increased, however, the overall number of trials (especially jury trials) has markedly decreased.¹⁶¹ Jury trials have gone from relatively rare to an endangered species.¹⁶² The ABA's “Vanishing Trial” has documented the decline in jury trials over the last half-century, finding that by the early part of the twenty-first century, less than two percent of civil cases in federal court (and less than one percent of civil cases in state court) ever get to trial.¹⁶³ On the criminal side, approximately two percent of felony cases go to trial; the rate is even lower for misdemeanors.¹⁶⁴

Given the modern rarity of jury trials, it may seem superfluous and inefficient to allow not just one trial, but two. This is especially true in light of evidence that juries typically exercise their responsibilities faithfully, and reach the same result the judge would have reached in

¹⁵⁸ See *supra* Parts II and III.

¹⁵⁹ See *supra* Part III.C.

¹⁶⁰ See *supra* Part III.A.

¹⁶¹ Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1807 (2015) (“Even when trials were thought to be the norm, the rate of actual trials ranged from 12-20%.”).

¹⁶² *Id.*

¹⁶³ Patricia Lee Refo, *The Vanishing Trial*, 30 ABA LITIGATION 2 (2004).

¹⁶⁴ See M. Clara Garcia Hernandez, Carole J. Powell, *Valuing Gideon's Gold: How Much Justice Can We Afford?*, 122 YALE L.J. 2358, 2364 (2013) (noting that “[o]ur trial rate the past two years has been 1.1% for felonies, and less than 0.5% for misdemeanors,” which was somewhat lower than the 2.3% felony trial rate reported in a study of nine states).

approximately 78% of both civil and criminal cases.¹⁶⁵ Courts know that juries generally reach the right result, and even when a jury verdict might reasonably be questioned, judges often express a need to protect the jury's verdict against intrusion from above.¹⁶⁶ The Sixth Circuit, for example, has cautioned that when a trial judge decides to grant a new trial on the weight of the evidence without a finding that the jury process was tainted by an "undesirable or pernicious element," the judge thereby "effects a denigration of the jury system" and potentially usurps the jury's role.¹⁶⁷

Unfortunately, however, deliberative secrecy means that the judge may not have seen or known that such an "undesirable or pernicious element" had influenced the jury's decision. What if the juror's statements in Peña-Rodriguez had never come to light? The judge would never have known that pure racial bias was injected into the jury's decision, though that is as "undesirable or pernicious" an element as one can imagine. As a result, even in this era of the vanishing trial the trial judge's power to review the weight of the evidence remains an important structural safeguard of the trial process.

In the absence of the traditional factors pushing toward procedural standardization, doctrinal coherence requires that courts work harder to adopt a coherent theory of the new-trial remedy and its role in protecting due process. As Professor Gregory Sisk has observed in academic legal research, "theory provides the context," showing what is worthy of further study and offering guidance in "interpreting what has been observed."¹⁶⁸ In the absence of a history of federal appellate attention guiding the exercise of the trial judge's discretion, it becomes even more important to explicitly articulate the goals and purposes of the trial judge's power to review the weight of the evidence. This Part

¹⁶⁵ NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 148-51 (2007).

¹⁶⁶ WRIGHT *et al.*, *supra* note 45, at § 2806.

¹⁶⁷ *Holmes v. City of Massillon*, 78 F.3d 1041, 1047 (6th Cir. 1996); *see also* *Static Control Components, Inc. v. Lexmark Intern., Inc.*, 749 F. Supp. 2d 542 (E.D. Ky. 2010).

¹⁶⁸ Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 891 (2008).

examines the two largest functions of that review: protecting the deliberative process and promoting decisional accuracy. It concludes that these functions are significant enough that the trial judge's authority to review evidentiary weight should be afforded procedural due process protection.

A. Protecting the Deliberative Process

Is deliberative secrecy even worth the risk of jury misconduct or error? In general, restrictions on jury secrecy, as well as Federal Rule of Evidence 606(b)'s prohibition on allowing jurors to impeach their own verdict, forbid the court from inquiring into the basis of the jury's decision.¹⁶⁹ Allowing greater communication between judge and jury would seem to alleviate many of the grounds for error within the jury process. Without a strict rule protecting deliberative secrecy, attorneys could inquire whether the jurors improperly based their decisions on matters outside the evidence. And certainly, some limits on deliberative secrecy may be desirable, necessary, and even constitutionally required.¹⁷⁰ At the Supreme Court's oral argument in the Peña-Rodriguez case, the Court questioned the attorneys extensively about various state rules that make an exception to deliberative secrecy in order to allow evidence of racial bias or animus. Both the justices and the attorneys arguing the case struggled to draw a line between the defendant's right to a jury trial free of racial bias and the tradition of jury secrecy.¹⁷¹ Ultimately, the Court drew a line that allowed inquiry into juror deliberation only for cases of racial bias (not for other types of bias or misconduct) and only when that racial bias was "overt."¹⁷² There are few cases that meet both of these

¹⁶⁹ FED. R. EVID. 606(b) (providing that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith").

¹⁷⁰ *Peña-Rodriguez v. Colorado*, 136 S. Ct. 1513, Transcript of Oral Argument, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-606_5iel.pdf (Oct. 11, 2016).

¹⁷¹ *Id.*

¹⁷² *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 871, 197 L. Ed. 2d 107 (2017).

requirements; as the justices pointed out in oral argument, Peña-Rodriguez is a highly unusual case.

As a result, courts will continue to struggle to reconcile due process protection with the policies behind jury secrecy. These goals are not always in opposition. Rule 606(b) was enacted to protect due process by encouraging full and open deliberation among jurors. In general, encouraging free and open deliberation is essential to the jury process. If jurors self-censor, hiding the thoughts that motivate their ultimate votes in the jury room, then the deliberative process cannot work effectively. As the Texas Supreme Court stated in an earlier case raising issues of juror secrecy:

[J]ury deliberations must be kept private to encourage jurors to candidly discuss the case. A verdict is a collaborative effort requiring individuals from different backgrounds to reach a consensus. A juror should feel free to raise and consider an unpopular viewpoint. To discharge their duties effectively, jurors must be able to discuss the evidence and issues without fear that their deliberations will later be held up to public scrutiny.¹⁷³

These rules protect the jury's independence and reflect "the determination that the value of deliberative secrecy outweighs the risk that some juror misconduct during deliberations will be beyond the court's power to remedy."¹⁷⁴

In particular, the advisory committee notes note that the practice of forbidding juror impeachment evidence promotes other factors beyond the "freedom of deliberation," including both the "finality of verdicts," and "protection of jurors against annoyance."¹⁷⁵ These considerations are important: if juror impeachment evidence were freely available, a losing litigant would have every incentive to question the

¹⁷³ Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 367 (Tex. 2000).

¹⁷⁴ Courselle, *supra* note 19, at 229.

¹⁷⁵ FED. R. EVID. 606, Advisory Committee Notes.

jurors after the verdict, seeking not just information to help improve their trial technique for future trials (as lawyers may do even now¹⁷⁶), but seeking to discredit the jurors themselves. Even under the current system, where post-trial contact with jurors is entirely voluntary (and information learned from such interviews is inadmissible), jurors report feeling intruded upon and pressured by inquiries from the parties and the media.¹⁷⁷ It is not clear that the jury system could survive the pressure and scrutiny that would be applied by attorneys seeking to uncover error in the jury process.

Furthermore, improper jury decision making is not always a one-way street. Certainly in some cases (as in Peña-Rodriguez's case) an improper jury verdict comes from outside the evidence—more specifically, from considering extraneous, irrelevant, or inadmissible factors. However, this failure in jury deliberations is also associated with an evidentiary presentation that fails to meet overall confidence levels—that is, if the jurors are not confident that the evidence as a whole is strong enough to reach a firm belief, they may turn to other proxies in arriving at their decision.¹⁷⁸

¹⁷⁶ Amanda R. Wolin, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 294 (2012) (explaining that “the Rule’s prohibition only bars a juror from conveying testimony in court, but it does not prohibit jurors from speaking to other people,” and noting that jurors may voluntarily speak with the attorneys or others after the verdict has been issued).

¹⁷⁷ David Weinstein, *Protecting A Juror’s Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 2–3 (1997) (“Jurors do not volunteer for service; they are compelled, on pain of contempt, to perform their necessary function. . . . [O]pinion surveys have found invasion of privacy to be a frequent complaint registered by jurors about their service.”).

¹⁷⁸*Id.*; see also Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1963 (2008) (recommending the use of “rules of weight” to reduce the harm of juror reliance on heuristics and biases); Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 244–45 (2006) (explaining that decision heuristics may help explain why juries overvalue direct evidence and undervalue circumstantial evidence); Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 93 (2000) (discussing hindsight bias and the “representativeness heuristic,” and noting that judges can better identify errors in jury decision making).

Of course, this emphasis on juror privacy and independence does not mean that jury misconduct is not a problem—and it certainly does not mean that juror misconduct that infects a verdict should not go unremedied. But even if, as seems likely, the Supreme Court rules that a juror’s overt racial discrimination violated the defendants right to a fair trial, the underlying structural problems remains. There are still many other types of jury behavior that are also problematic, even if they do not rise to the level of racial discrimination.¹⁷⁹ And even racially biased decision making itself will not always be apparent; in many cases, it may fly under the radar, unapparent to the judge or to the parties, but still influencing the ultimate verdict. If the threat were only one of racism, better pre-trial screening of venire members might minimize the risk of a biased jury and reduce the pressure to inquire into deliberations.¹⁸⁰ But as one observer has noted, “cases involving affirmative misconduct by jurors are legion in number and variety.”¹⁸¹ There are many other prejudices and irrationalities that can come into play, and no way to predict them all ahead of time.¹⁸²

Therefore, even though overt racial discrimination is carved out as an exception to a the general rule that jury-room evidence is inadmissible, there is a need for the trial judge to take an active role in reviewing the

¹⁷⁹ At oral argument, the Court raised the possibility that jurors might simply toss a coin to decide a verdict. Such a procedure would be fundamentally arbitrary, but it would not be addressed by a narrow rule that allowed evidence of improper decision making only when allegations of racial bias were raised.

¹⁸⁰ See Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 169 (2011) (“By honestly and systematically acknowledging, addressing, and excising juror biases prior to deliberation, overt acts of bias during deliberations, and the consequent pressure to carve a broad exception to the evidentiary prohibition, can be reduced.”).

¹⁸¹ Edward T. Swaine, Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 190 (1988) (citing instances of intoxication, sleeping through testimony, and undisclosed conflicts of interest).

¹⁸² Lee Goldman, *Post-Verdict Challenges to Racial Comments Made During Juror Deliberations*, 61 SYRACUSE L. REV. 1, 19 (2010) (“[I]n a case where a defendant testifies on her own behalf, comments such as, ‘I don’t trust anyone with beady eyes,’ or, ‘What difference does it make if the defendant is guilty, he is a bad guy,’ seem to demonstrate partiality or unfairness as much as “statements particularly referencing race.”).

weight of the evidence after a jury verdict. Logic suggests that a verdict tainted by prejudice, stereotypes, and extraneous, irrelevant information runs a higher risk of not being supported by the evidence; after all, if the evidence alone were strong enough to support the ruling, jurors would not need to look elsewhere for arguments to buttress their position. Because the judge cannot directly find out why the jury ruled as it did—and cannot ask directly whether the jury engaged in improper decision making—allowing the judge to make an independent assessment that the verdict was against the great weight of the evidence acts as safety valve. It allows the trial judge to grant a new trial “when the judge believes, but does not know for certain, that the jury based its verdict on something other than a rational review of the evidence.”¹⁸³ In this way, the jury’s independence is maintained, but the party subjected to a potentially unjust verdict may still seek relief from the trial court.

B. Promoting Decisional Accuracy

Perhaps the most important reason for the judge to review evidentiary weight is the goal of obtaining a higher level of accuracy—and thus a higher level of confidence in the result of the judicial process. It is true that at the time the practice was adopted there were serious deficiencies in the jury process that left open a need for further review. Courts in the Blackstonian era, for example, would forbid jurors from eating or drinking until they were able to reach a verdict—which had the perverse result that verdicts were more likely to reflect the wishes of those who were physically strongest, rather than those who could persuade the others through logic or reason.¹⁸⁴ Under these conditions, it was not surprising that the trial judge would need to have the power to undo a manifestly unjust verdict.

¹⁸³ Robertson, *supra* note 21, at 161.

¹⁸⁴ *People v. Olcott*, 2 Johns. Cas. 301 (N.Y. Sup. Ct. 1801) (“The doctrine of compelling a jury to unanimity, by the pains of hunger and fatigue, so that the verdict, in fact, be founded not on temperate discussion, and clear conviction, but on strength of body, is a monstrous doctrine, . . . altogether repugnant to a sense of humanity and justice. A verdict of acquittal or conviction, obtained under such circumstances, can never receive the sanction of public opinion.”).

Counterintuitively, however, the new-trial right may be even more important in the era of the vanishing trial. We have procedural tools to eliminate clearly meritless cases early on, and alternative dispute resolution mechanisms to encourage settlement in the vast majority of remaining cases.¹⁸⁵ This means that for the few cases that do go to trial, the evidence is unlikely to be completely one sided.¹⁸⁶ At the same time, it is also more likely that there are non-evidentiary issues hampering settlement: perhaps outrageous or emotionally compelling facts, perhaps significant emotional investment by one or more of the litigants, or perhaps a widely divergent estimate between the plaintiff and defendant of the recoverable damages.¹⁸⁷ The new-trial right protects against the risk that jurors will be overly influenced by extralegal considerations.

In most cases, the jury-trial process works very well to arrive at a fair-minded and rational result. The high concordance between the judge's view of the evidence and the jury's view certainly evokes confidence in the jury system as a whole.¹⁸⁸ But that same interplay of

¹⁸⁵ See Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1810 (2015) (“[T]he presumptions about a judge’s role have switched from one focused on deciding issues when parties requested the intervention to one focused on shepherding the case to its end. This end is no longer presumed to be resolution on the merits and preparation for trial, but is instead presumed to be a non-trial exit.”).

¹⁸⁶ This evidence is not likely to be completely balanced, however; there is some evidence that defendants may be better able to evaluate the merits of the case, resulting in better outcomes for the cases that fail to settle. Geraldine Soat Brown, *What Happens to Cases That Don’t Settle?*, DISP. RESOL. MAG., Spring 2005, at 25 (noting that of the cases ultimately going to trial, “eight were tried to a jury, three were tried to a judge; plaintiffs prevailed at trial in three of these cases (one jury trial and two bench trials) and defendants prevailed in seven trials (six jury trials and one bench trial); one case resulted in a split verdict”).

¹⁸⁷ See Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 343 (1999) (conducting an empirical study on settlement and finding that factors discouraging settlement included “the importance of differences in the parties’ estimations of the likely outcome at trial, the importance of information and the influence the judge can have on party estimates and strategic behavior”); Peter H. Huang & Ho-Mou Wu, *Emotional Responses in Litigation*, 12 INT’L REV. L. & ECON. 31, 41 (1992) (“We have shown how certain emotional responses can increase the number of cases brought to trial and serve to make the threat of going to trial be a credible one. . . . [A]nger or pride can lead to a higher frequency of trials . . .”).

¹⁸⁸ See *supra* note 165.

broad agreement between judge and jury in the majority of cases suggests that something problematic might be going on in the 22% of cases where judge and jury disagree: certainly in some cases, it may simply be a matter of “reasonable minds” differing.¹⁸⁹ In other cases, however—that is, the ones where the trial judge is convinced that a “manifest injustice” has been done—it may suggest that the jury based its conclusion on something other than the evidence put before it.

One explanation for this subset of cases is what Professor Luke Meier has described as the difference between “confidence” and “probability” in the trial evidence.¹⁹⁰ In a civil case where the evidence is disputed enough to avoid summary judgment (that is, there is a genuine question of material fact for the jury to resolve¹⁹¹), the jury may reasonably and properly decide that one side’s evidence was stronger than the other side’s.¹⁹² But a reasonable factfinder may also believe, on the same evidence, that the overall evidence presented at trial is not strong enough to form a confident belief that the facts presented by the side with the stronger evidence are in fact true.¹⁹³ Thus, when the jury is asked to apply the “preponderance of the evidence” standard to pick a winner, it can do so—but the individual jurors would not be confident enough in the overall case to be willing to wager their own money on the result.¹⁹⁴ Meier recommends assigning the “confidence analysis” to the

¹⁸⁹ *Id.*

¹⁹⁰ Luke Meier, *Probability, Confidence, and the “Reasonable Jury” Standard*, 84 *MISS. L.J.* 747, 750 (2015).

¹⁹¹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (“[T]he trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law.”) (citing *FED. R. CIV. P.* 56).

¹⁹² Meier, *supra* note 190, at 814.

¹⁹³ *Id.* at 796 (“Simply put, when the available evidence on a disputed question of fact is too generic, there can be very little confidence in any probability conclusion drawn from that evidence.”).

¹⁹⁴ See Luke Meier, *Probability, Confidence, and Twombly’s Plausibility Standard*, 68 *SMU L. REV.* 331, 341 (2015) (“[A]lthough George thinks that his probability estimate is accurate based on the limited information he has considered, he concludes that the amount of information he has considered is not adequate for the purpose of deciding whether to

judge and the “probability” analysis to the jury.¹⁹⁵ The judge’s power to review the weight of the evidence is at least in part just such a confidence analysis—is the evidence as a whole not just sufficient to allow a reasonable juror to reach the proffered conclusion, but also strong enough that the judicial system should have confidence in the conclusion?

An emphasis on evidentiary weight can also improve decisional accuracy when the evidence is unbalanced enough that the judge is tempted to grant summary judgment. Trial judges’ reliance on summary judgment has grown, even as their power to review evidentiary weight has gone underused and under-appreciated.¹⁹⁶ A recent study of cases in which the district court granted summary judgment and the appellate court reversed demonstrated that for at least a small subset of those cases, the jury ultimately returned a verdict for the non-moving party.¹⁹⁷ In these cases, a focus on evidentiary weight would have avoided the initial error. Because this discrepancy happened “more frequently in civil rights cases,” review of evidentiary weight may be especially important to protect litigants’ rights in this area.¹⁹⁸

Finally, the trial judge’s review of evidentiary weight is needed to protect against wrongful conviction. DNA testing has vividly

wager a bet with his friend or not. Before a wager is placed, additional information is desired . . .”).

¹⁹⁵ Luke Meier, *Probability, Confidence, and the “Reasonable Jury” Standard*, 84 MISS. L.J. 747, 814 (2015) (“Because the confidence analysis requires a legal or policy determination, the confidence principle should be assigned to a trial court judge only and not to the jury.”).

¹⁹⁶ See Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998) (calling summary judgment “a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain”).

¹⁹⁷ Michael W. Pfautz, Note, *What Would A Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals*, 115 COLUM. L. REV. 1255, 1287 (2015) (“In these cases, the trial judge granted summary judgment for the movant, the court of appeals reversed, and the case was tried to a jury who returned a verdict for the nonmoving party.”).

¹⁹⁸ *Id.* (“These cases prove that judges sometimes err in their determination of what a jury could reasonably find, and they also suggest that these mistakes occur more frequently in civil rights cases.”).

demonstrated that innocent people can be convicted.¹⁹⁹ The popular media, including podcasts like *Serial* and *Undisclosed*, as well as television shows like *Making a Murderer*, have brought national attention to the shortcomings of the jury-trial process for protecting against wrongful conviction.²⁰⁰ The appellate system has likewise not been sufficiently protective.²⁰¹ Encouraging the trial court to exercise review over the strength and weight of the evidence as a whole (and thus ensuring that the evidence meets the requisite confidence level²⁰²) can help guard against the conviction of the innocent.

¹⁹⁹ The Innocence Project records 343 convicted individuals who were later exonerated by DNA evidence, including 13 people on death row. Innocence Project, <http://www.innocenceproject.org/cases/> (last visited Aug. 20, 2016). Including non-DNA reasons for exoneration brings the numbers of to “more than 600 known wrongful convictions since 1973. One hundred forty of those exonerations involved citizens who had been sentenced to death.” Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 142 (2012).

²⁰⁰ See Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 DUKE L.J. 697, 725–26 & n. 171 (2016) (“Furthermore, as popular accounts of the incidence, causes, and impact of wrongful convictions have proliferated, they have also raised broader awareness of the potential for error. . . . The enormous success of the “Serial” podcast -- which attracted millions of listeners and raised awareness about potential inaccuracies -- exemplifies the emerging concern with reliability.”); see also Mariam Khan, *The Reasons ‘Serial’ Subject Adnan Syed May Receive a New Trial*, abcNEWS.com (July 7, 2016) at <http://abcnews.go.com/US/reasons-serial-subject-adnan-syed-receive-trial/story?id=40373228> (explaining the influence of the *Serial* podcast, as well as the subsequent *Undisclosed* podcast that took a “deeper dive” into the case); Amelia McDonnell-Parry, *‘Making a Murderer’: What Brendan Dassey Decision Means for Steven Avery*, ROLLINGSTONE.COM (August 15, 2016) at <http://www.rollingstone.com/culture/features/what-brendan-dassey-decision-means-for-steven-avery-w434421> (“[T]here were very few heroes in *Making A Murderer*’s first season, and not a single one among the many law enforcement officers who were featured; the police, forensic experts, prosecutors and, yes, both trial judges earned their fair share of contempt from viewers. Perhaps Judge Duffin was seizing upon an opportunity to kick off season two on a more positive note – and with better PR.”).

²⁰¹ Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 637 (2009) (“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.”).

²⁰² See *supra* note 190.

C. *Procedural Due Process and the Right to a New Trial*

The protections offered by a robust application of the thirteenth-juror rule suggest that the trial judge’s power to review the weight of the evidence fits within the constitutional scheme of procedural due process. It is true that some federal district courts have held that it is not.²⁰³ But the Supreme Court has certainly not foreclosed the possibility that the trial judge’s review of evidentiary weight is protected by procedural due process—and, in fact, some of its early authority suggests that the power to review evidentiary weight is an essential safeguard of the trial process.²⁰⁴

The Supreme Court’s test for procedural due process requires conducting “what is in essence a cost-benefit analysis, weighing the risk that the plaintiff will be erroneously deprived of liberty against the cost of providing additional procedures to safeguard against such error.”²⁰⁵ On the cost side, the Supreme Court held in *Mathews v. Eldridge* that a court must consider “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”²⁰⁶ These costs are then weighed against a litigant’s “private interest that will be affected by the official action,” along with “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”²⁰⁷

²⁰³ See, e.g., *Spence v. Sheets*, 675 F. Supp. 2d 792, 802 (S.D. Ohio 2009) (“The Due Process Clause does not provide relief for defendants whose convictions are against the manifest weight of the evidence, but only for those who have been convicted without enough proof to allow a rational trier of fact to find guilt beyond a reasonable doubt.”). This language has been repeated in numerous district court opinions, most from the northern and southern districts of Ohio.

²⁰⁴ See *supra* note 40 (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 13–14 (1899)).

²⁰⁵ Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313, 1331 (2016).

²⁰⁶ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

²⁰⁷ *Id.*

Here, the bulk of the costs would be relatively straightforward. They include the effort that the trial judge puts into reviewing the evidentiary weight, plus the delay and financial expense caused by the instances in which the judge orders a new trial on the weight of the evidence. The litigants' private interests, of course, are the substantive rights protected by the judicial system: an interest in liberty and the avoidance of wrongful imprisonment on the criminal side, and an interest in civil recourse and corrective justice on the civil side (as well as the avoidance of wrongful liability). The hard question is to estimate the value of the new trials resulting from the judge's ruling—is the value of the new-trial safeguard high enough to offset its cost?²⁰⁸

This question goes back to the standard applied for new trials—just how convinced must the judge be that there was a serious miscarriage of justice?²⁰⁹ If the standard is merely that the judge disagrees with the verdict, then it is unlikely that the value of a new trial would outweigh its cost. After all, if it is simply a matter of reasonable minds disagreeing, then the outcome of the second trial is unlikely to change. But if, on the other hand, the trial judge is convinced that the evidence weighed strongly against the jury's verdict and that the verdict was manifestly unjust, then a new trial is likely to be much more valuable. It may suggest that the evidence, though legally sufficient, was not enough to give confidence in the verdict. It may also suggest that impermissible factors such as juror bias played a role in the verdict.

Especially when the judge does not know what led the jury to rule as it did—and this “invisible error” is information the judge typically

²⁰⁸ Of course, this analysis is not an either-or equation; as a federal judge and a legal scholar have noted in regard to the Federal Rules of Civil Procedure, “we are not to choose between quality, speed, and cost-effectiveness. We are to work toward achieving them all.” Steven S. Gensler & Hon. Lee H. Rosenthal, *Measuring the Quality of Judging: It All Adds Up to One*, 48 *NEW ENG. L. REV.* 475, 492 (2014). In criminal cases, in particular, protecting against wrongful conviction outweighs even substantial costs. See Matthew Bova, *A Sufficiency-of-the-Evidence Exception to the New York Appellate Preservation Rule*, 19 *CUNY L. REV.* 1, 24 (2015) (“Stripped of its underlying justifications, the finality theory amounts to nothing more than an argument that convicted people should stay convicted.”).

²⁰⁹ See *supra* Part II.A.

cannot know, given the needs of deliberative privacy—the judge should be encouraged to exercise broad discretion to order a retrial. In order to exercise this discretion, the trial judge must be able to weigh the evidence as a whole, re-examining questions of credibility, and viewing the evidence as a neutral observer.²¹⁰ Of course, the judge’s power is not unlimited. Importantly, most jurisdictions limit the judge to granting a single new trial on the weight of the evidence.²¹¹ If the judge was right that invisible error infected the process, then a second jury is unlikely to return the same verdict—given the safeguards that now exist, it would be highly unusual for the same bias, misunderstanding, or misconduct to influence a second verdict.²¹² If a second jury in fact returns the same verdict that the judge originally thought weighed strongly against the evidence, then that is a sign that the judge was more likely to have been wrong than the jury.²¹³

Perhaps one of the most interesting natural experiments with weight-of-the-evidence review occurred in Tennessee, which had a long history of “thirteenth juror” review.²¹⁴ In 1985, however, the Tennessee Supreme Court abandoned the practice in criminal cases.²¹⁵ The Court

²¹⁰ Robertson, *supra* note 21, at 210-17 (recommending unified standards for judicial review of evidentiary weight in the federal district courts).

²¹¹ Robertson, *supra* note 21, at 208 (“If a judge could order new trials consecutively until a jury returns a verdict with which the judge can agree, then it is true that the verdict is effectively rendered by the judge instead of the jury.”); *see also* Massey-Ferguson Credit Corp. v. Webber, 841 F.2d 1245 (4th Cir. 1988)).

²¹² Tanner v. United States, 483 U.S. 107, 127 (1987) (referring to voir dire, juror observation “by the court, by counsel, and by court personnel,” jurors’ ability to “report inappropriate juror behavior to the court *before* they render a verdict,” and post-verdict impeachment not nonjurors).

²¹³ Robertson, *supra* note 21, at 208-9 (“There is a general presumption that if a second jury agrees with the first, it was the trial judge and not the jury who was mistaken about the weight of the evidence.”).

²¹⁴ State v. Johnson, 692 S.W.2d 412, 415 (Tenn.1985) (Drowota, J., dissenting) (“Under Tennessee law, the thirteenth juror rule was long seen as the best safeguard against jury error.”).

²¹⁵ State v. Johnson, 692 S.W.2d 412, 415 (Tenn.1985). The Tennessee Court had earlier concluded that such review was not required by the United States Constitution. State v.

explained that it did not see a need for thirteenth-juror review in criminal cases, where the high standard of proof combined with legal sufficiency review already seemed to offer protection enough:

The distinction between the “weight” of the evidence and the “legal sufficiency” of the evidence has little substance in criminal cases, where the State has the burden of proving the defendant's guilt beyond a reasonable doubt. It is difficult to accept the proposition that a trial judge can reasonably determine that the evidence is legally sufficient to support a finding of guilt beyond a reasonable doubt but that such a verdict is against the weight of the evidence. We find the weight of the evidence standard to be difficult, if not impossible, to apply rationally and uniformly in criminal cases.²¹⁶

Two of the justices on the court joined a dissenting opinion, warning that the court overlooked important protections offered by the thirteenth-juror power. The dissent noted that review for evidentiary weight included attention to witness credibility and demeanor, and argued that it provided that it “may be the only safeguard available against a miscarriage of justice by the jury.”²¹⁷

It took only six years for the Tennessee Supreme Court to reverse course and adopt a formal rule reinstating the trial judge’s ability to review the weight of the evidence.²¹⁸ An advisory committee charged with studying the issue had recommended the rule change.²¹⁹ In 2015, the Court acknowledged the safeguards offered by the rule and quoted the earlier dissent with approval and even adding its own emphasis, adopting the former dissent’s argument that the new-trial right

Cabbage, 571 S.W.2d 832 (Tenn.1978). In *Johnson*, the court ruled that it “should not be reinstated as a part of Tennessee criminal procedure.”

²¹⁶ *Id.*

²¹⁷ *Id.* (Drowota, J., dissenting).

²¹⁸ *State v. Carter*, 896 S.W.2d 119, 121–22 (Tenn. 1995).

²¹⁹ *Id.*

performed an important role in safeguarding “against a *miscarriage of justice by the jury.*”²²⁰

Thus, although courts may express concern that granting a new trial on the weight of the evidence may “usurp the jury’s role” in fact-finding, the judge is actually playing a very different role. The judge is not acting as a super-juror, or even as a true “thirteenth juror,” even though the judge may be making a similar determination about the credibility of witnesses and the overall weight of the evidence. Instead, the judge and jury are both given the opportunity to exercise their complementary strengths: for the jury, this is the power of group decision making, the greater diversity of its members, and a more accurate reflection of the community.²²¹ The judge, on the other hand, has greater experience with a range of cases and an understanding of how the facts and the law interrelate in the case, giving the judge an intuitive sense of when the jury might have misunderstood the court’s instructions even when the judge cannot directly inquire into the basis of the jury’s decision. Weight-of-the-evidence review protects both of these complementary roles: the jury is given the independence to allow full, free, and confidential deliberation, while the judge is permitted to exercise the discretion gained from experience to prevent a miscarriage of justice.

V. CONCLUSION

The trial judge’s authority to order a new trial on the weight of the evidence is an important, though underappreciated, aspect of the right to a jury trial. The power to grant a new trial acts as a safeguard against invisible error—that is, error that arises from improper jury decision making that hides behind the shroud of deliberative secrecy. Invisible error can be caused by the jury’s innocent misunderstanding or by more egregious juror misconduct or undisclosed bias. But in either case, the

²²⁰ *State v. Ellis*, 453 S.W.3d 889, 899 (Tenn. 2015) (quoting *State v. Johnson*, 692 S.W.2d 412, 415 (Tenn. 1985) (Drowota, J., dissenting), but with added emphasis).

²²¹ Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 216 (1998).

attorneys and the court see only the result of the jury's decision making, not the erroneous procedure that led to that result.

The possibility of such error, however, is no reason to jettison the jury altogether. The jury has strengths that cannot be matched by judges alone, including the power of group decision making, a greater diversity in its members, and a more accurate reflection of the community. Nor should the judiciary eliminate the jury's right to deliberate in secrecy. The jury process and the power of deliberation work only when jurors are afforded the privacy and independence to fully air all points of view, free from harassment or scrutiny.

Instead, courts should recognize review of evidentiary weight as part of the constitutional guarantee of due process. This view plays to the traditional strengths of the judicial role: that is, a greater experience with a range of cases and a better understanding of how the facts and the law interrelate in the case. Even when the judge cannot identify a particular process error, the judge may have an intuitive sense that a jury has gone astray. The judge's power to review the weight of the evidence thus complements the jury's role and protects the integrity of the trial process. The jury is given the independence to allow full, free, and confidential deliberation, while the judge is permitted to exercise the discretion gained from experience to prevent a miscarriage of justice. Even in the era of the endangered jury and vanishing trial, judges should embrace the power to order a new trial when justice demands it.