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## The Appellate Judge as the Thirteenth Juror: Combating Implicit Bias in Criminal Convictions

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# THE APPELLATE JUDGE AS THE THIRTEENTH JUROR: COMBATTING IMPLICIT BIAS IN CRIMINAL CONVICTIONS

*Andrew S. Pollis*<sup>†</sup>

## ABSTRACT

*Research has documented the role that implicit bias plays in the disproportionately high wrongful-conviction rate for people of color. This Article proposes a novel solution to the problem: empowering individual appellate judges, even over the dissent of two colleagues, to send cases back for retrial when the trial record raises suspicions of a conviction tainted by the operation of implicit racial bias.*

*Factual review on appeal is unwelcome in most jurisdictions. But the traditional arguments against it, which highlight the importance of deference to the jury's fact-finding powers, are overly simplistic. Scholars have already demonstrated the relative institutional competency of appellate judges to review jury verdicts gone awry, even when the evidence is legally sufficient. The operation of implicit bias in jury deliberations only enhances the need for this review.*

*But the review must be more robust than traditional three-judge panels can offer. Judges, too, fall victim to implicit bias, including bias in favor of affirming trial-court results. And the demographics of judges do not reflect those of the populations they serve. So requiring two of three judges to concur in reversing on a factual review is too high a burden to achieve the necessary reduction in bias-influenced wrongful convictions. Each individual judge should have that power. The benefits to the justice system outweigh the costs.*

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<sup>†</sup> Professor, Case Western Reserve University School of Law. Thanks to Mikah Thompson for her scholarship, inspiration, and guidance; to my colleague Cassandra Burke Robertson for her prior work in this important area; and to colleagues Jonathan Adler, Jessica Berg, Jonathan Entin, Ayesha Bell Hardaway, Jessie Hill, and Dale Nance for workshopping an early conception of this Article.

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“I went on trial about nine o’clock in the morning. Within two hours the jury had come back with a conviction. I was convicted in their minds before I went on trial. . . . All that spoke for me on that witness stand was my black skin – which didn’t do so good.”

– Haywood Patterson<sup>1</sup>

## INTRODUCTION

Many scholars, policymakers, and practitioners have drawn attention to the untenably high rate of wrongful convictions.<sup>2</sup> DNA-based exonerations have exposed the

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<sup>1</sup> HAYWOOD PATTERSON & EARL CONRAD, SCOTTSBORO BOY 13 (1950). Haywood Patterson was one of nine African-American teenagers convicted in Alabama in 1931 for raping two white women in a railroad boxcar, despite the complainants’ demonstrated credibility problems and physical evidence that contradicted their stories. At one point, a trial judge granted a new trial based on the weight of the evidence – and in so doing ended his legal career. See DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 243–73 (rev. ed. 2007). The case also spawned two Supreme Court decisions: *Powell v. Alabama*, 287 U.S. 45 (1932), an early iteration of the constitutional right to counsel in state-court criminal proceedings; and *Norris v. Alabama*, 294 U.S. 587 (1935), addressing the systematic exclusion of African-American citizens from jury service. The Scottsboro trials also have been the subject of many historical and creative works, including several books, e.g., CARTER, *supra*, a television drama, JUDGE HORTON AND THE SCOTTSBORO BOYS (Tomorrow Entertainment 1976), an Oscar-nominated documentary film, SCOTTSBORO: AN AMERICAN TRAGEDY (PBS 2001), and a Tony Award-nominated Broadway musical, DAVID THOMPSON, JOHN KANDER & FRED EBB, THE SCOTTSBORO BOYS (2010). Though racism in the criminal-justice system is not always as overt today as it was in 1931 Alabama, this Article demonstrates that implicit bias continues to play an insidious role in wrongful conviction. An individual judge’s power to grant a new trial to combat implicit bias remains as important today as invoking that power to combat explicit bias was a century ago.

<sup>2</sup> See, e.g., Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 634 (2009) (“Incongruously . . . searching review in criminal cases is diminishing, even as recognition of the problem of wrongful convictions is increasing.”).

numbers: trial courts routinely convict individuals of crimes they did not commit.<sup>3</sup> We know two additional things about these wrongful convictions: (1) people of color are over-represented in the populations of wrongfully convicted individuals;<sup>4</sup> and (2) appellate courts have largely failed to ferret out the mistaken trial results.<sup>5</sup>

The causes of wrongful convictions are obviously manifold. But we know that race plays a significant role.<sup>6</sup> And we know that people who serve on juries – and judges too – harbor implicit biases against people of different races. The scholarly literature is replete with evidence establishing the ways in which implicit bias influences outcomes.<sup>7</sup> So it is impossible not to infer a strong causal connection between these biases and high rate of wrongful convictions among defendants of color. We also can infer that many appellate

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<sup>3</sup> See, e.g., D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1282 (2004) (“DNA analysis has resulted in a troubling number of exonerations in both capital and noncapital cases.”).

<sup>4</sup> See, e.g., Montré D. Carodine, “*The Mis-Characterization of the Negro*”: *A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 567 (2009) (“The very act of a Black defendant coming into court has some probative value; that is, race has a tendency to prove or disprove something in the American justice system just as it does in society at large.”).

<sup>5</sup> See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 129 (2008) (The disproportionate number of convicted minorities later exonerated by DNA evidence “should only elevate our unease over how effectively our system judges innocence.”).

<sup>6</sup> See, e.g., Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1267 (2018) (“Legal scholars have argued that where holes exist in the prosecution’s case, jurors tend to fill in the gaps or ‘complete the story’ by turning to racial stereotypes”).

<sup>7</sup> See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 11 (2007); see also Jeffrey J. Rachlinski & Andrew J. Wistrich, *Implicit Bias in Judicial Decision Making: How it Affects Judgment and What Judges Can Do About It*, in ENHANCING JUSTICE: REDUCING BIAS 87, 91–92 (Sarah E. Redfield ed., 2017).

judges are themselves unable to overcome their implicit biases, including an “affirmation bias” that results in unwarranted deference to even erroneous trial-court results.<sup>8</sup>

We value the role that appellate courts play in guarding against wrongful convictions,<sup>9</sup> but the currently available remedies on appeal are inadequate.<sup>10</sup> The standard to challenge evidentiary sufficiency assumes the credibility of trial-court witnesses (leaving to the jury the job of selecting whom to believe) and indulges all inferences consistent with the verdict.<sup>11</sup> It asks not whether the verdict was *correct*, but instead whether there was sufficient evidence that, if believed, *supports* it.<sup>12</sup> The aim of a sufficiency challenge is to intercept a wrongful conviction, but by design it focuses on the mere existence of evidence supporting guilt, not on its quality.<sup>13</sup> And that turns out not to be enough protection for the innocent.

But there is another way, at least in theory. Two states—Ohio and Illinois—permit appellate judges to vacate a conviction and remand for a new trial if they believe the evidence, though legally sufficient, is not *strong enough* to uphold the conviction.<sup>14</sup> A third state, New York, also authorizes manifest-weight review, and reversal on that basis

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<sup>8</sup> See, e.g., Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1043–44 (2019); Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the ‘Affirmance Effect’ on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 377 (2005).

<sup>9</sup> See, e.g., Findley, *supra* note 2, at 591.

<sup>10</sup> Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Division*, 57 VAND. L. REV. 437, 482 (2004) (“[F]or all the attention given the problem of wrongful convictions, and all the remedies proposed, the discussion has included no consideration of a greater role for courts considering direct appeals from convictions.”).

<sup>11</sup> *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

<sup>12</sup> See, e.g., Findley, *supra* note 2, at 602.

<sup>13</sup> Garrett, *supra* note 5, at 126 (“Our system of criminal review certainly does not privilege factual claims.”).

<sup>14</sup> See, e.g., *State v. Thompkins*, 678 N.E.2d 541, 546 (Ohio 1994); *People v. Nicholls*, 245 N.E.2d 771, 774–75 (Ill. 1969).



leads to the defendant's discharge without a new trial.<sup>15</sup> Some federal appellate courts have also, occasionally, recognized this form of appellate review.<sup>16</sup> The appellate court in these jurisdictions can function as the "thirteenth juror" whose disagreement with the other twelve undoes the verdict.<sup>17</sup> But most federal courts and most states have little or no body of law empowering them to invoke this thirteenth-juror remedy on appeal;<sup>18</sup> instead, they typically reserve all discretion to order a new trial in the trial-court judge alone.<sup>19</sup> And that trial-court discretion has left us with wrongful convictions.

Even in the states that permit appellate courts to order a new trial based on weight of the evidence, that relief is tightly constrained by almost-insurmountable legal standards. Courts tend to defer to jurors who, by virtue of having observed the live testimony, are supposedly better at

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<sup>15</sup> See, e.g., *People v. Cahill*, 809 N.E.2d 561, 583–84 (N.Y. 2003) (citing N.Y. CRIM. PRO. LAW § 470.15(5) (McKinney 2009)); N.Y. CRIM. PRO. LAW § 470.20(5) (McKinney 2009).

<sup>16</sup> Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 TUL. L. REV. 157, 171 n.80 (2008) (collecting cases).

<sup>17</sup> See, e.g., *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). Ironically, some literature uses the "thirteenth juror" metaphor to describe prejudice in jury deliberations rather than the appellate guardrail against it. See, e.g., Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1213 (1992); see also *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 659 (2d Cir. 1946) (Frank, J., dissenting).

<sup>18</sup> "[W]eight-of-the-evidence review has continued to be treated as an afterthought in federal court and as a local quirk of procedure in state court." Cassandra Burke Robertson, *Invisible Error*, 50 CONN. L. REV. 161, 189 (2018). Texas and Florida formerly permitted reversal on the weight of the evidence but no longer do. See *Brooks v. State*, 323 S.W.3d 893 (Tex. Ct. Crim. App. 2010); *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31 (1982). Other jurisdictions have never allowed it. See Risinger, *supra* note 3, at 1315 n.168 (identifying eight jurisdictions); see also *State v. Brown*, No. A05-2418, 2007 WL 46063, at \*3 (Minn. Ct. App. Jan. 9, 2007); *State v. Bembenek*, 331 N.W.2d 616 (Wis. Ct. App. 1983).

<sup>19</sup> See Risinger, *supra* note 3, at 1315.

assessing credibility.<sup>20</sup> But research demonstrates the opposite—that jurors are actually bad at assessing credibility,<sup>21</sup> especially when race enters the equation.<sup>22</sup> By contrast, a transcript of the trial—though it may lack the dramatic spectacle of the live event—turns out to have certain advantages over live testimony for combating implicit bias and for synthesizing evidence from multiple witnesses.<sup>23</sup>

The sheer numbers cry out for a fix. They prove that appellate courts fail to serve as adequate safeguards against wrongful convictions, especially when implicit bias is in play.<sup>24</sup> As Keith Findley has argued, appellate courts should “undertake more rigorous review of facts on appeal.”<sup>25</sup> Cassandra Burke Robertson and Michael Risinger have made similar arguments.<sup>26</sup> I agree with them fully.

But universalizing manifest-weight review on appeal, as much as it may help, would not likely be enough. It is doubtful that two out of three appellate judges sitting on a panel—much less all three, as required in Ohio<sup>27</sup>—would adequately recognize and remediate convictions tainted by implicit bias. Among other things, the composition of the judiciary is not reflective of the racial makeup of the country,<sup>28</sup>

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<sup>20</sup> See, e.g., *id* at 1314; Findley, *supra* note 2, at 620.

<sup>21</sup> See, e.g., Oldfather, *supra* note 10, at 440; Findley, *supra* note 2, at 627.

<sup>22</sup> Sheri Lynn Johnson, *The Color of Truth: Race and the Assessment of Credibility*, 1 MICH. J. RACE & L. 261, 268 (1996).

<sup>23</sup> See Oldfather, *supra* note 21, at 440.

<sup>24</sup> See Thompson, *supra* note 6, at 1252 (“Because racial and ethnic stereotypes are part and parcel of American culture, our justice system must do more to ensure that jury verdicts are not influenced by stereotyped beliefs.”).

<sup>25</sup> Findley, *supra* note 2, at 609.

<sup>26</sup> See Robertson, *supra* note 16, at 170–72; Risinger, *supra* note 3, at 1313–16.

<sup>27</sup> See *infra* notes 203–204 and accompanying text.

<sup>28</sup> “Today, more than 73 percent of sitting federal judges are men and 80 percent are white.” Danielle Root, Jake Faleschini, & Grace Oyenubi, *Building a More Inclusive Federal Judiciary* 1 (Oct. 2019), <https://cf.americanprogress.org/wp-content/uploads/2019/10/JudicialDiversity-report->

much less of the criminal-justice system.<sup>29</sup> And we know that the lack of diversity among judges has real implications for the way they judge.<sup>30</sup>

So my prescriptive proposal goes further: we should boost the power not only of the appellate courts, but of *individual appellate judges*: in the face of a challenge to the weight of the evidence leading to a conviction, an appellate court should order a new trial unless *all three* judges on the panel agree with the jury's assessment of the evidence. If any one judge believes the evidence was not convincing enough for a jury to have convicted, then the defendant should get a new trial—even if the other two appellate-panel members and the presiding trial judge disagree. This proposal would give each judge the power to serve as the “thirteenth juror” and to override any perceived implicit bias that may have infected the trial result or the results of her appellate colleagues. If none of them chooses to order a new trial, we can have greater confidence in the integrity of the verdict. But if one appellate judge—even just one—sees a conviction that may have been the product of implicit bias, that judge may be an innocent defendant's last best hope to avoid an unjust loss of liberty or life. The costs are worth it.<sup>31</sup>

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3.pdf?\_ga=2.78140308.1495771030.1643469480-574958456.1643469479  
(citing Federal Judicial Center, *Biographical Directory of Article III Federal Judges, 1789-present: Advanced Search Criteria*, <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Jan. 29, 2022)).

<sup>29</sup> See generally Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 6 (Oct. 2021) (“Black people are incarcerated at a rate of 1240 per 100,000 while white people are incarcerated at a rate of 261 per 100,000”), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

<sup>30</sup> Root et al., *supra* note 28, at 2–3; see also Rachlinski & Wistrich, *supra* note 7, at 110 (“Research reveals that improving the diversity of appellate court panels can affect outcomes.”).

<sup>31</sup> Cf. Garrett, *supra* note 13, at 126 (“Further reforms aimed at providing more robust factual review would come at a cost that our system has so far not been willing to bear.”); see also Risinger, *supra* note 3,

This Article proceeds in four parts. Part I sets the stage for the problem by reviewing the insidious role implicit bias plays in convicting defendants of color. Part II then turns to extant forms of appellate review, revealing that appellate courts are generally hostile toward robust scrutiny of jurors' factual findings, often articulating flawed notions of relative institutional competency. In fact, as Part III explains, appellate judges are actually well positioned to intercede when the evidence at trial leaves room for doubt about the role bias has played in the jury's verdict. I offer my prescriptive solution in Part IV—a solution that would empower individual appellate judges—not just panels—to order new trials when bias may have invaded the fact finders' deliberations.

The scholarly literature demonstrates the foundation for my proposal.<sup>32</sup> It is replete with studies of the dangers posed by implicit bias and includes suggestions for avoiding it, usually at the trial stage.<sup>33</sup> The literature also verifies the unacceptably high rate of wrongful convictions and the appellate reluctance to order new trials on the basis of factual

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at 1282 (“Systemic complacency with the old ways of dealing with the issues is simply unacceptable, unless we are to adopt a version of the extreme position espoused by William Paley in the eighteenth century: that such convictions, however many there are, are simply the price of security, and the wrongfully convicted should be viewed as necessary, and even honorable, casualties in the war on crime.” (citing WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 553 (1785)); Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 105 (2003) (“According to this mindset, the execution of innocent people is, at worst, a cost insufficient to overrule our legislative fondness for the death penalty. At best, it is a cost outweighed by the societal benefits from retribution and deterrence that we get from capital punishment.”).

<sup>32</sup> See, e.g., Johnson, *supra* note 22, at 345 (“It must be almost self-evident that if you have a right to show that racial discrimination denied you employment, then you must also have a right to show racial discrimination denied you liberty or is about to deny you life.”).

<sup>33</sup> See, e.g., Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, 3 TEX. A&M L. REV. 189 (2015) (surveying various proposed trial reforms).

sufficiency. This Article ties all those threads together and proposes a novel solution to the problem of wrongful conviction that, if adopted, could be a meaningful path to redress some of the systemic racism that infects the criminal-justice system.

**I. IMPLICIT RACIAL BIAS, BAKED INTO OUR CRIMINAL-JUSTICE SYSTEM, IS RESPONSIBLE FOR WRONGFUL CONVICTIONS.**

When Alabama convicted Haywood Patterson of rape,<sup>34</sup> he was but one of many defendants in the century following the Civil War whose convictions followed explicit prosecutorial “reliance on race as a proxy for credibility.”<sup>35</sup> On paper, race has played no role in witness competency since Reconstruction, but “both law and lore document the persistence of race-based assessments of credibility throughout the Jim Crow era.”<sup>36</sup> Courts are now largely intolerant of explicit invocations of race as evidence of credibility or criminal conduct,<sup>37</sup> but there is every reason to

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<sup>34</sup> See *supra* note 1.

<sup>35</sup> See Johnson, *supra* note 22, at 269; see also, e.g., *Holland v. State*, 22 So. 2d 519, 520 (Ala. 1945) (upholding conviction despite prosecutor’s encouragement of jury to “consider the fact that Mary Sue Rowe is a young white woman and that this defendant is a black man for the purpose of determining his intent at the time he entered Mrs. Rowe’s home”); *Taylor v. State*, 100 S.W. 393, 393 (Tex. Ct. Crim. App. 1907) (reversing conviction where prosecutor argued: “I am well enough acquainted with this class of niggers to know that they have got it in for the [white] race in their heart, and in their hearts call them all white sons of bitches.”).

<sup>36</sup> Johnson, *supra* note 22, at 268.

<sup>37</sup> See *id.* at 321. Sadly, there remain lingering cases exhibiting explicit bias—such as a prosecutor who asked this question of a defendant on cross-examination in a 2011 trial: “You’ve got African-Americans, you’ve got Hispanics, you’ve got a bag full of money. Does that tell you—a light bulb doesn’t go off in your head and say, This is a drug deal?” See *Calhoun v. United States*, 568 U.S. 1206, 133 S. Ct. 1136, 1136 (2013) (statement of Sotomayor, J.). Justice Sotomayor excoriated the prosecutor’s “attempt to substitute racial stereotype for evidence, and

believe they remain subtext, deliberately so or not, when jurors assess the guilt or innocence of African-American defendants and the credibility of African-American witnesses. It remains the case that “black defendants fare worse in court than do their white counterparts.”<sup>38</sup> Indeed, the American justice system has a long history of rules designed explicitly to discriminate against African-Americans.<sup>39</sup> Racial bias is baked into the cake.

A. *Two Systems Govern Our Mental Processing: System 1 (Intuitive) and System 2 (Deliberative)*

Before we zero in on racism in the criminal-justice system, we need to step back and take a broader view of the cake. Researchers have thoroughly documented the influence of implicit bias over our judgments—about any number of subjects, not just those implicating race. Implicit bias involves the extent to which a decision maker regulates the interplay between her intuitive and deliberate methods of scrutiny: “Decades of psychological research has revealed that humans use two systems to make decisions: System 1,” which is “fast, automatic, and instinctive,” and “System 2,” which is slow, deliberate, and analytic.”<sup>40</sup> The degree to which decision makers allow System 1 to influence an ultimate decision, rather than overcome it with System 2 thinking, will determine whether implicit bias plays a role in the ultimate outcome.<sup>41</sup>

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racial prejudice for reason” and wrote, “I hope never to see a case like this again.” *Id.* at 1137-38.

<sup>38</sup> Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196 (2009).

<sup>39</sup> See Johnson, *supra* note 22, at 267-76 (tracing history of interplay between race and credibility determinations in U.S. courts).

<sup>40</sup> Edwards, *supra* note 8, at 1043.

<sup>41</sup> See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49, 51 (Thomas Gilovich

Researchers have developed methods of testing the effect of implicit bias. Perhaps the best recognized example is the Implicit Association Test, available on the Harvard University website for anyone to take.<sup>42</sup> Shane Frederick also developed a cognitive-reflection test<sup>43</sup> to measure how well people successfully override their System 1 intuitive thinking with deliberation.<sup>44</sup> “Most people, it turns out, are unable or unwilling to suppress that impulsive response.”<sup>45</sup> And their failure to do so, “can ‘lead to severe and systematic errors.’”<sup>46</sup>

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et al. eds., 2002) [hereinafter “HEURISTICS”] (“System 1 quickly proposes intuitive answers to judgment problems as they arise, and System 2 monitors the quality of these proposals, which it may endorse, correct, or override. The judgments that are eventually expressed are called intuitive if they retain the hypothesized initial proposal without much modification.”); see also Steven A. Sloman, *Two Systems of Reasoning*, in HEURISTICS, *supra*, at 379, 391 (“The rule-based system can suppress the response of the associative system in the sense that it can overrule it. However, the associative system always has its opinion heard and, because of its speed and efficiency, often precedes and thus neutralizes the rule-based response.”).

<sup>42</sup> The Implicit Association Test, available at <https://implicit.harvard.edu/implicit/takeatest.html>, was developed by Tony Greenwald, Mahzarin Banaji, and Brian Nosek and “is the product of decades of research on the study of bias and stereotypes.” Rachlinski et al., *supra* note 38, at 1198.

<sup>43</sup> Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP. 25, 26-28 (2006).

<sup>44</sup> Frederick’s test is comprised of three questions that strongly suggest answers that are intuitive (System 1) but incorrect; only by applying deliberative (System 2) reasoning will a subject divine the correct answer. See Guthrie et al., *supra* note 7, at 11 (quoting Frederick, *supra* note 43, at 27-28, 29 tbl. 1). The questions are “simple in that ‘their solution is easily understood when explained, yet reaching the correct answer often requires the suppression of an erroneous answer that springs ‘impulsively’ to mind.’” *Id.* (quoting Frederick, *supra* note 43, at 27).

<sup>45</sup> Guthrie et al., *supra* note 44, at 11; see also Rachlinski & Wistrich, *supra* note 7, at 91-92.

<sup>46</sup> Guthrie et al., *supra* note 44, at 31 (quoting Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974)).

*B. Intuitive Thinking Permits Implicit Bias to Infect Jury Verdicts*

That brings us to racial bias. Not surprisingly, implicit bias (System 1 decision making) is “the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system.”<sup>47</sup> And “[s]ocial science research has made clear that a majority of Americans” carry predispositions “against racial minorities, which “manifests itself in the application of racial stereotypes.”<sup>48</sup> In short, “one man’s ‘intuition’ is another man’s irrational prejudice.”<sup>49</sup> And these racial stereotypes, in turn, have four chilling manifestations in the criminal-justice system that work together against African-American defendants in insidious tandem.

First, jurors often associate blackness with certain crimes,<sup>50</sup> and that association facilitates a verdict of conviction (which conforms to, rather than challenges, jurors’ biased predispositions).<sup>51</sup>

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<sup>47</sup> *Id.*; see also Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 973 (2006) (“[I]mplicit bias—like many of the heuristics and biases emphasized elsewhere—tends to have an automatic character, in a way that bears importantly on its relationship to legal prohibitions.”).

<sup>48</sup> Thompson, *supra* note 6, at 1244; see also *id.* at 1222 (“a majority of white jurors will harbor implicit white preferences”).

<sup>49</sup> Roth, *supra* note 57, at 1696.

<sup>50</sup> See Thompson, *supra* note 6, at 1249 (“[R]esearchers have found that jurors tend to make decisions based on stereotypes where the defendant is accused of a crime that is ‘stereotypically associated’ with the defendant’s racial group and that jurors will punish these defendants more severely.” (quoting Melinda Jones, *Preventing the Application of Stereotypic Biases in the Courtroom: The Role of Detailed Testimony*, 20 J. APP. SOC. PSY. 1767, 1768 (1997))); see also *id.* at 1258 (“Just as propensity evidence might prime a jury to find that an individual acted in conformity with past behavior, race-coded language might prime a jury to find that an individual acted in conformity with widely known stereotypes about the individual’s racial or ethnic group.”).

<sup>51</sup> *Id.* at 1267 (“Legal scholars have argued that where holes exist in the prosecution’s case, jurors tend to fill in the gaps or ‘complete the story’ by turning to racial stereotypes.”).



Second, white jurors are predisposed to make negative credibility judgments against African-American witnesses.<sup>52</sup> Joseph Rand has posited that “a ‘[d]emeanor [g]ap exists when jurors of one race are called upon to assess the credibility and demeanor of a witness of a different race,” preventing even “well-intentioned and low-prejudiced jurors” from reliably assessing “the demeanor of a witness of a different race because they are unable to accurately decipher the cues that the witness uses to communicate sincerity.”<sup>53</sup> That demeanor gap hinders an African-American defendant’s ability to present exculpatory evidence (including her own testimony) that jurors would be receptive to believing.<sup>54</sup>

Third, white witnesses are more likely to provide mistaken identification testimony when the defendant is African-American<sup>55</sup> – a phenomenon that contributes to most of the wrongful convictions of defendants subsequently exonerated by DNA evidence.<sup>56</sup>

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<sup>52</sup> Johnson, *supra* note 22, at 326 (“[T]he cognitive structures of many decision makers predispose them to believe that race influences both the ability and propensity to tell the truth.”).

<sup>53</sup> Thompson, *supra* note 6, at 1264–65 (alteration in original) (footnote omitted) (quoting Joseph W. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 3 (2000)); see also Montré D. Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High-Profile Cases*, 75 U. PITT. L. REV. 679, 688 (2014).

<sup>54</sup> Thompson, *supra* note 6, at 1262 (“[J]urors who are more influenced by racial stereotypes are likely to be more suspicious of African-American witnesses.”). Professor Thompson has documented the effect of this race-based suspicion in the context of the high-profile trial of George Zimmerman for the killing of Trayvon Martin – a trial in which a pivotal prosecution witness, an African-American woman, was speaking with Martin by phone immediately before the encounter between the two men. *See id.* at 1259–60.

<sup>55</sup> Am. Bar Ass’n, *American Bar Association Policy 104D: Cross-Racial Identification*, 37 SW. U. L. REV. 917, 918 (2008) (“Persons of one racial group may have greater difficulty distinguishing among individual faces of persons in another group than among faces of persons in own group.”).

<sup>56</sup> Garrett, *supra* note 5, at 78 (“The overwhelming number of convictions of the innocent involved eyewitness identification . . . .”); see

And fourth, racial bias and different perceptions of police encounters<sup>57</sup> cause white juries “to overvalue confession evidence” from African-American defendants,<sup>58</sup> despite research demonstrating that police extract false confessions from African-American defendants more frequently than from their white counterparts.<sup>59</sup> White jurors—even those who have been questioned by police—are less likely to have experienced the degree of threatening circumstances that

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*also id.* at 70 (“Cross-racial identifications may be one explanation for the disproportionate conviction of minorities among those exonerated by postconviction DNA testing.”); Findley, *supra* note 2, at 596 (“Garrett’s analysis of the first 200 DNA exonerations shows that eyewitnesses offered mistaken identification evidence in 79% of these cases.”).

<sup>57</sup> “Today, Black Americans are more likely than whites to encounter police, to be stopped by police, and to be fatally wounded by police.” Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 73 (2021). That experience has an obvious impact on their perception of those encounters. See Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 853 (2009) (“[P]eople are likely to construe the facts . . . in a way that reinforces the beliefs that predominate among their peers.”); see also Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. REV. 1643, 1656 (2013) (“jurors engage[] in ‘motivated cognition,’” a phenomenon causing “their ideologies [to] affect[] what appear[] to them to be simply objective factfinding” (quoting Kahan et al., *supra*, at 851)).

<sup>58</sup> Roth, *supra* note 57, at 1673; see also *id.* at 1696 (“In one study, 81% of 125 cases involving false confessions ended in conviction.”).

<sup>59</sup> See generally Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, 17 PSYCHOL. PUB. POL’Y & L. 562 (2011); see also Garrett, *supra* note 5, at 88–89 (reporting that, as of 2008, sixteen percent of wrongfully convicted defendants exonerated by DNA evidence had given false confessions). White jurors may also mistakenly infer that an African-American defendant’s silence in response to questioning is an acknowledgment of criminal liability. See generally Mikah Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police*, 85 UMKC L. REV. 697 (2016).

would sway an African-American arrestee to confess falsely<sup>60</sup> and therefore less likely to understand that choice.

To make matters worse, the trial process itself can exacerbate the application of these stereotypes. Lawyers exploit these manifestations by “routinely plac[ing] covert, implicit race-based character evidence before juries. Because such evidence is subliminal, playing upon the jury’s most deep-seated prejudices, it escapes” judicial review.<sup>61</sup> Trial judges, for their part, “encourage jurors to use their life experiences and common sense to assess trial evidence . . . .”<sup>62</sup> That sort of instruction invites, rather than discourages, resort to System 1 intuition, thus making it more likely a juror’s implicit bias will play a role in her verdict. Jury service also takes people away from their other life obligations, leaving many of them “under stress and pressed for time” and thus “more likely to rely upon stereotypes” rather than take the time to overcome those stereotypes with System 2 thinking.<sup>63</sup> In short, the trial process almost invites intuitive decision making rather than providing adequate safeguards against it.

### *C. Judges Fail to Remediate the Problem.*

Nor should we allow ourselves to believe that judges will consistently save the day. Judges largely fail to curtail the

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<sup>60</sup> See generally Najdowski, *supra* note 59; see also Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 132 (2006) (describing environment that would lead an African-American detainee to confess falsely).

<sup>61</sup> Thompson, *supra* note 6, at 1254 (footnote omitted); see also *id.* at 1244 (“These stereotypes can influence many aspects of the jury’s functions.”). The racial bias manifests itself not only in trials of African-American defendants, but also of white defendants tried for crimes against African-American victims. “The traditional refusal of white juries to convict white defendants accused of crimes of violence against African American victims is notorious: credible accusations backed by powerful physical evidence, countered only by obviously false denials, routinely led to acquittals.” Johnson, *supra* note 22, at 275.

<sup>62</sup> Thompson, *supra* note 6, 1301.

<sup>63</sup> *Id.* at 1249.

effect of racial bias in jury deliberations (even if they are able to detect it). To be sure, trial judges in some jurisdictions have the power to set aside convictions and order new trials for a variety of reasons, including their own assessment of the evidence.<sup>64</sup> And, as discussed below, some appellate court also can order new trials on the weight of the evidence.<sup>65</sup> But “[s]tudies of judges indicate that they are not, by nature, System 2 thinkers . . . .”<sup>66</sup> Rather, judges—like the rest of us—“follow their intuition, even though it is wrong.”<sup>67</sup> Among other things, judges have demonstrated an inability to ignore inadmissible information in their decision making.<sup>68</sup>

More specifically, “[j]udges harbor the same measure of implicit biases concerning African-Americans as most lay adults.”<sup>69</sup> Indeed, researchers using the Implicit Association Test have detected “a strong white preference” in white judges,<sup>70</sup> stronger even than non-judges who took the same test.<sup>71</sup> So there is no reason to believe that African-American defendants can rely consistently on white judges, at the trial or appellate level, to undo wrongful convictions that were the product of implicit racial bias.<sup>72</sup>

#### *D. The Wrongful-Conviction Statistics Are Stunning*

What the theory suggests, the hard evidence confirms. The wave of DNA exonerations in the last few decades “is, or at least should be, an astonishing revelation.”<sup>73</sup> It has poured cold water over any smoldering belief that our judicial system

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<sup>64</sup> See *infra* notes 134–139 and accompanying text.

<sup>65</sup> See *infra* notes 166–206 and accompanying text.

<sup>66</sup> Rachlinski & Wistrich, *supra* note 7, at 92.

<sup>67</sup> *Id.* at 95.

<sup>68</sup> *Id.* at 92.

<sup>69</sup> *Id.* at 100.

<sup>70</sup> Rachlinski et al., *supra* note 38, at 1210.

<sup>71</sup> *Id.* at 1211.

<sup>72</sup> *But see id.* at 1195 (“[G]iven sufficient motivation, judges can compensate for the influence of these biases.”).

<sup>73</sup> Oldfather, *supra* note 10, at 442.

did an acceptable job of convicting only the guilty or of overturning wrongful convictions on appeal.<sup>74</sup> Hundreds of convicted individuals in the United States “have been exonerated by DNA testing, including 21 who served time on death row.”<sup>75</sup> Most of these exonerations occurred even after appellate courts had affirmed the convictions.<sup>76</sup> And what is perhaps most stark about the statistics is the disproportionate number of minorities: “Many more exonerees were minorities (71%) than is typical even among average populations of rape and murder convicts.”<sup>77</sup> That number is comprised primarily of “citizens wrongfully convicted by juries who credited confessions and eyewitnesses.”<sup>78</sup>

Of course, the DNA-exoneration cases are the tip of the iceberg; they occur by definition only in cases that yield DNA evidence, which tend to be those involving murder and rape.<sup>79</sup> But most wrongful convictions “remain hidden because they occur in cases where DNA analysis has no application.”<sup>80</sup> There would not necessarily be DNA evidence, for example, in robbery, assault, or drug cases. So the DNA statistics give us only a limited window into the magnitude of the problem, which may “harm tens or even hundreds of thousands of black defendants every year.”<sup>81</sup>

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<sup>74</sup> See Findley, *supra* note 2, at 593.

<sup>75</sup> Innocence Project, <https://innocenceproject.org/exonerate/> (last visited Dec. 21, 2021); see also Garrett, *supra* note 13, at 61 (“By May 2007, postconviction DNA testing had exonerated 200 persons in the United States.”); Risinger, *supra* note 3, at 1282 (“DNA analysis has resulted in a troubling number of exonerations in both capital and noncapital cases.”).

<sup>76</sup> Edwards, *supra* note 8, at 1036; see also Findley, *supra* note 2, at 594 (“only 14% of defendants” who were subsequently exonerated by biological evidence had “won reversal of their convictions on appeal (citing Garrett, *supra* note 5, at 61)).

<sup>77</sup> Garrett, *supra* note 5, at 66; see also *id.* at 129 (“These innocence cases include a disproportionate number of minorities . . .”).

<sup>78</sup> Roth, *supra* note 57, at 1656.

<sup>79</sup> See Garrett, *supra* note 13, at 73.

<sup>80</sup> Risinger, *supra* note 3, at 1282.

<sup>81</sup> Rachlinski et al., *supra* note 38, at 1202.

Indeed, we can extrapolate from the DNA numbers because we have other statistics about the rate of wrongful conviction. We know, based on “empirical studies by social scientists,”<sup>82</sup> that juries decide cases inaccurately in one out of every eight or nine cases.<sup>83</sup> That number is astounding and deserves repeating: *one out of every eight or nine*.<sup>84</sup>

None of this is new. What I have recounted in this part is based on research that scholars have been writing about for years. It is a travesty that our legal system has so far done almost nothing to intercede. In fact, as I demonstrate in the next part, we have been clinging to false maxims of institutional competency to defend this flawed system rather than institute true reform.

## II. APPELLATE COURTS, EXCESSIVELY DEFERENTIAL TO JURIES, HAVE FAILED TO INTERCEDE IN OVERTURNING WRONGFUL CONVICTIONS.

“One of the most striking features of appellate courts in the United States is that they rarely reverse lower court decisions.”<sup>85</sup> The reversal rate, in both state and federal courts, is less than ten percent.<sup>86</sup> While “our elaborate system for appeals is intended to guard against wrongful conviction of the innocent,” we know that “the appellate process in criminal cases is largely a failure on this most important

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<sup>82</sup> See Robertson, *supra* note 16, at 204.

<sup>83</sup> See Bruce D. Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 307 (2007).

<sup>84</sup> To be sure, the precise number may be unknowable, and the very process of quantifying the rate of wrongful convictions has been the subject of its own scholarship. See, e.g., Marvin Zalman & Robert J. Norris, *Measuring Innocence: How to Think About the Rate of Wrongful Conviction*, 24 NEW CRIM. L. REV. 601 (2021).

<sup>85</sup> Edwards, *supra* note 8, at 1035.

<sup>86</sup> *Id.* at 1037–38; see also Garrett, *supra* note 5, at 98 (reporting similar statistics in death-penalty cases).

score.”<sup>87</sup> Simply put, the reversal rate is lower than the wrongful-conviction rate. This part examines why that is so.

A. *The Appellate Process Emphasizes Procedure, Not Accuracy*

The primary cause of the mismatch between the conviction and reversal rates is that appellate courts do a poor job of considering “the guilt or innocence of the convicted”; instead, they focus primarily on “remedying procedural transgressions.”<sup>88</sup> While “fact-finding accuracy is the driving objective,”<sup>89</sup> the consensus of scholars is that “[a]ppellate courts generally do not directly address fact-bound questions like guilt or innocence, or truth. For the most part, innocence is not a cognizable claim on appeal.”<sup>90</sup>

To be sure, procedural rules are crucial, and appellate courts should certainly provide relief when trial courts violate them. But procedural error is an “indirect path” to reversal,<sup>91</sup> often tangential to the ultimate question of guilt or innocence. So it should not be the whole ball game. Put another way, appellate success for a wrongfully convicted person should not hinge a showing of coincidental procedural error; there must also be a meaningful mechanism to challenge the ultimate finding of guilt or innocence when that finding is mistaken.

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<sup>87</sup> Findley, *supra* note 2, at 591–92; *see also id.* at 595 (“The appellate process has “simply failed to distinguish between actually innocent appellants and the general populace of appellants . . .”).

<sup>88</sup> Stephanie Roberts Hartung, *The Confluence of Factors Doctrine: A Holistic Approach to Wrongful Convictions*, 51 SUFFOLK U. L. REV. 369, 374–75 (2018) (emphasis added). Procedural errors can include defective indictments, violations of speedy-trial rights, erroneous jury instructions, and evidentiary errors. *See generally* RICHARD H. PARSONS, POSSIBLE ISSUES FOR REVIEW IN CRIMINAL APPEALS (2d ed.), <https://www.ca7.uscourts.gov/Issues4r.pdf>.

<sup>89</sup> Findley, *supra* note 2, at 592.

<sup>90</sup> *Id.* at 601–02 (footnote omitted); *see also id.* at 602 (“[A]ppellate courts defer to trial courts almost completely on ultimate factual questions regarding guilt and innocence.”).

<sup>91</sup> *See id.* at 602.

The need for that meaningful mechanism is all the stronger in light of the role that we now appreciate implicit bias plays in the wrongful-conviction rate. Since we know that implicit bias is a source of error, reason dictates it should also be a basis for error correction on appeal. But it is not: the law does not recognize a pathway to challenge the effect of implicit bias on the conviction. Implicit bias is “not subject to [appellate] challenge through any existing legal mechanism.”<sup>92</sup>

*B. Sufficiency Review Ignores Implicit Bias*

*1. Sufficiency Review Focuses on the Existence of Evidence, Not on Its Quality*

The primary extant mechanism for challenging the substance of a guilty verdict is to challenge to the sufficiency of the evidence, usually in the form of review of the trial court’s denial of a motion for acquittal.<sup>93</sup> But “challenges to the sufficiency of the evidence almost never succeed in criminal appeals.”<sup>94</sup> It is a “very difficult standard to meet” and “is seldom productive to raise . . . on appeal.”<sup>95</sup>

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<sup>92</sup> Johnson, *supra* note 22, at 342; *see also id.* at 266 (“[T]here is no established mechanism for challenging racially biased credibility determinations.”). Even explicit bias is redressable only in the rare occasions when it comes to light through serendipitous revelations that occur despite the secrecy of jury deliberations is designed to prevent. *See* Robertson, *supra* note 18, at 165 (discussing Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017)).

<sup>93</sup> *See, e.g.,* FED. R. CRIM. P. 29; *see also* Jackson v. Virginia, 443 U.S. 307, 316 (1979) (“[N]o person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”).

<sup>94</sup> Oldfather, *supra* note 10, at 441; *see also id.* at 478 (“[T]here appears to be universal agreement that appellate courts almost never reverse convictions on sufficiency grounds.”); WILLIAM TWINING, RETHINKING EVIDENCE: EXPLORATORY ESSAYS 75 (1990); (“[A]ppellate courts almost never reverse convictions on sufficiency grounds.”).

<sup>95</sup> PARSONS, *supra* note 88, at 149.



It was not until 1970, in *In re Winship*,<sup>96</sup> that the Supreme Court “held for the first time that the Due Process Clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction ‘except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’”<sup>97</sup> Nine years later, the Court cemented the standard in *Jackson v. Virginia*, requiring federal courts to apply it when reviewing state-court convictions in habeas corpus proceedings. The Court specifically distinguished the required standard from the “‘no evidence’ rule” some courts had followed, finding the latter “‘simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt.’”<sup>98</sup> And when an appellate court reverses for evidentiary insufficiency, the case ends with no retrial; the defendant cannot be placed in jeopardy a second time.<sup>99</sup>

That higher standard under *Jackson* sounds meaningful in rooting out wrongful convictions on direct appeal. But appellate judges, like the juries who render the verdicts they review, carry their own implicit biases.<sup>100</sup> Moreover, sufficiency review involves by design a highly deferential standard. The *Jackson* Court emphasized that a court should not “‘ask itself whether *it* believes that the evidence at the trial

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<sup>96</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>97</sup> *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (quoting *Winship*, 397 U.S. at 364).

<sup>98</sup> *Id.* at 320; *see also* Findley, *supra* note 2, at 602.

<sup>99</sup> U.S. CONST. amend. V (“No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . .”); *see also* *Burks v. United States*, 437 U.S. 1, 17 (1978) (“Given the requirements for entry of a judgment of acquittal, the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial ‘second bite at the apple.’”). The protections against double jeopardy apply with equal force in state-court criminal proceedings. *See* *Benton v. Maryland*, 395 U.S. 748, 794 (1969) (“[T]he double jeopardy prohibition of the Fifth Amendment [applies] to the States through the Fourteenth Amendment,” U.S. CONST. amend. XIV).

<sup>100</sup> *See supra* notes 69-72 and accompanying text.

established guilt beyond a reasonable doubt.”<sup>101</sup> Instead, the court asks whether “*any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt.”<sup>102</sup> So a reviewing court must still defer to the factfinder’s traditional power “to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts” and must view all the evidence in “the light most favorable to the prosecution.”<sup>103</sup> And, under that persistently deferential standard, “courts are almost never willing to direct an acquittal where the state offers testimonial evidence of guilt.”<sup>104</sup> In effect, “*Jackson* ensured that so long as jurors came to personally believe a confession or eyewitness, their guilty verdict would almost surely escape review, however irrational.”<sup>105</sup> So “the *Jackson* standard has turned out to be no different [from] the ‘some evidence’ standard that preceded it.”<sup>106</sup>

## 2. *Sufficiency Review Assumes Unbiased Juries*

There is a convenience factor at work here. A highly deferential standard “allows judges—especially appellate judges—to avoid responsibility for the conviction of the factually innocent.”<sup>107</sup> And, in the process, implicit bias slips through the cracks because the sufficiency standard does not consider it. It looks only to the existence of evidence supporting the conviction, not its reliability. Some states have doctrines declaring a case legally insufficient if the state’s evidence is ‘inherently incredible,’” but “such doctrines are exceedingly narrow—often looking only to whether a

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<sup>101</sup> *Jackson*, 443 U.S. at 318–19 (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966) (emphasis added)).

<sup>102</sup> *Id.* (emphasis added).

<sup>103</sup> Findley, *supra* note 2, at 602.

<sup>104</sup> Roth, *supra* note 57, at 1673.

<sup>105</sup> *Id.* at 1653–54.

<sup>106</sup> *Id.* at 1652–53 & n.51; see also Findley, *supra* note 2, at 602.

<sup>107</sup> Risinger, *supra* note 3, at 1282.

witness's testimony is contradictory or physically impossible, without considering whether it is incredible by inference from other evidence—and rarely to overturn a verdict.”<sup>108</sup> In the end, the unspoken premise of the sufficiency standard is that our jurors (and the witnesses on whose testimony they rely) are free of bias—that almost every jury constitutes the “rational trier of fact” that the *Jackson* standard venerates.

Part of that veneration lies in other ways our court system accounts for biased jurors, lulling appellate courts into accepting the false premise that the trier of fact was rational and fair unless something overtly suggests otherwise. For example, jury selection gives lawyers the opportunity to ask jurors about their biases. But even the Supreme Court has acknowledged it can “prove insufficient,”<sup>109</sup> and Sheri Lynn Johnson calls it “largely ineffective for rooting out racial bias.”<sup>110</sup> And the remedy of a mistrial for race-based exercises of peremptory jury challenges, recognized in *Batson v. Kentucky*,<sup>111</sup> “has proved erratic in terms of effectiveness because the Court has simply failed to force rigorous enforcement of the remedy in practice.”<sup>112</sup>

Working against these protections is an almost-sacred rule of evidence that precludes jurors from testifying about improper behavior that occurs during deliberations.<sup>113</sup> In keeping with that rule, “[m]ost state and federal courts . . . will not allow evidence of racial bias to impeach a verdict.”<sup>114</sup>

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<sup>108</sup> Roth, *supra* note 57, at 1653.

<sup>109</sup> Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).

<sup>110</sup> Johnson, *supra* note 22, at 320.

<sup>111</sup> 476 U.S. 79 (1986).

<sup>112</sup> J. Thomas Sullivan, *Lethal Discrimination 2: Repairing the Remedies for Racial Discrimination in Capital Sentencing*, 26 HARV. J. RACIAL & ETHNIC JUST. 113, 123 (2010).

<sup>113</sup> E.g., FED. R. EVID. 606(b)(1) (“[A] juror may not testify about any statement made or incident that occurred during the jury's deliberations . . . or any juror's mental processes concerning the verdict. . . .”); see also Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017) (describing this “no-impeachment rule”).

<sup>114</sup> Johnson, *supra* note 22, at 322–23.

Only when “a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant” does the rule give way to the constitutional requirement of a fair trial, according to the Supreme Court’s decision in *Peña-Rodriguez v. Colorado*.<sup>115</sup> Even then, a court cannot learn about a juror’s resort to racial stereotypes or animus unless another juror comes forward to disclose it.<sup>116</sup> As Professor Robertson has argued, “invisible error arises when improper jury decision-making hides behind the shroud of rules protecting the jury’s deliberative secrecy.”<sup>117</sup>

So the *Peña-Rodriguez* standard “cannot remedy covert bias.”<sup>118</sup> The operation of implicit biases is by definition invisible; it will never involve a “clear statement” sufficient to meet the *Peña-Rodriguez* standard.<sup>119</sup> As Professor Robertson explains, bias can “fly under the radar, unapparent to the judge or to the parties, but still influenc[e] the ultimate verdict.”<sup>120</sup> Thus, nothing in an appellate court’s sufficiency review will root out implicit bias; indeed, nothing in a sufficiency review even looks for it. It assumes what we all know is *not* reliably true: that juries are rational triers of fact, barring something in the record overtly demonstrating the contrary.

### 3. *Sufficiency Review Also Falls Prey to Affirmation Bias.*

A review for evidentiary sufficiency implicates yet another implicit bias that makes the hill that much steeper for a wrongfully convicted defendant: “the tendency to affirm a

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<sup>115</sup> *Peña-Rodriguez*, 137 S. Ct. at 869.

<sup>116</sup> Robertson, *supra* note 18, at 165 (noting that the issue arose in *Peña-Rodriguez* “only because information about the jury’s deliberation was later revealed”).

<sup>117</sup> *Id.* at 163.

<sup>118</sup> Robertson, *supra* note 18, at 192.

<sup>119</sup> Johnson, *supra* note 22, at 279 (“we have very little insight into the thought processes of the jurors”).

<sup>120</sup> Robertson, *supra* note 18, at 192.

prior decision for reasons unrelated to the relative merits of the parties' arguments or the applicable standard of review."<sup>121</sup> This affirmation bias "is likely to lead reviewing courts—which begin with the knowledge that the defendant has been found guilty beyond a reasonable doubt—to interpret information about the case in a manner that is consistent with that conclusion."<sup>122</sup> The psychology underlying affirmation bias is not unique to appellate judges or even to judges generally; "[a]ll other things being equal, individuals tend to prefer an option that is consistent with the status quo rather than one that requires change from the status quo."<sup>123</sup> But it has strong resonance in the appellate-review process because appellate judges understand that if they reverse, "the trial judge may need to order a new trial or additional hearings," a consequence that may influence affirmation bias in judges who "may not necessarily want to create more work for other judges."<sup>124</sup>

Barry C. Edwards conducted a study designed to determine the extent to which affirmation bias plays out in the minds of appellate judges—giving his subjects a test case and identifying the trial-court result for some subjects but not others.<sup>125</sup> The results of his study "suggest[] that the affirmation rate in appellate courts could be as much as 8% higher than it should be due to a cognitive bias in favor of affirming prior rulings."<sup>126</sup> An earlier experiment by Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich had reached a similar conclusion.<sup>127</sup> Professor Edwards concluded that "[e]very other factor thought to explain appellate court

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<sup>121</sup> Edwards, *supra* note 8, at 1043.

<sup>122</sup> Findley, *supra* note 2, at 605-06.

<sup>123</sup> Guthrie et al., *supra* note 8, at 377.

<sup>124</sup> Edwards, *supra* note 8, at 1045.

<sup>125</sup> *Id.* at 1036.

<sup>126</sup> *Id.* at 1053.

<sup>127</sup> Guthrie et al., *supra* note 7, at 26 ("Learning an outcome clearly influenced the judges' ex post assessments of the ex ante likelihood of various possible outcomes. The intuitive notion that the past was predictable prevailed.").

decision-making pales in comparison to how the case was previously decided.”<sup>128</sup> In the end, “an appellate judge’s knowledge of the trial judge’s original decision increases the probability it is affirmed on appeal—regardless of what the original decision was.”<sup>129</sup>

It is no wonder, then, that sufficiency review has proven to be an inadequate check against wrongful convictions. Affirmation bias—layered atop implicit racial bias layered atop the already-deferential *Jackson* standard—almost ensures that sufficiency review will offer little meaningful opportunity for a defendant to overturn a wrongful conviction, even when that conviction was the product of implicit bias.

*C. Courts Have Failed to Exercise Adequately Their Power to Reweigh Evidence*

Because sufficiency review is by design the wrong vehicle for addressing implicit bias in wrongful convictions, one logically turns to a remedy in which the appellate court *can* reweigh the evidence—that is, can assess not simply the *existence* of evidence on which a reasonable jury could convict, but instead its *weight*. Reviewing the weight of the evidence “may suggest that the evidence, though legally sufficient, was not enough to create confidence in the verdict.”<sup>130</sup>

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<sup>128</sup> Edwards, *supra* note 8, at 1035.

<sup>129</sup> *Id.* at 1036.

<sup>130</sup> Robertson, *supra* note 18, at 198; *see also* Robertson, *supra* note 16, at 180 (“[T]he district court is permitted to make its own credibility determinations; to view the evidence neutrally, instead of in the light most favorable to the prevailing party; and to order a new trial if the jury’s verdict is against the great weight of the evidence, even if a reasonable jury could have returned the verdict.”). The difference between sufficiency and weight of the evidence is an example of the difference between what Luke Meier characterizes as the “probability” analysis and the “confidence” analysis. Robertson, *supra* note 18, at 195 (citing Luke Meier, *Probability, Confidence, and the “Reasonable Jury” Standard*, 84 Miss. L.J. 747, 749–50 (2015)).

When a court reviews the weight of the evidence, it sits “as a ‘thirteenth juror’” that potentially “disagrees with the jury verdict, thus creating a ‘hung’ jury and a need for retrial.”<sup>131</sup> The standard presumes evidentiary sufficiency; “[a] reversal based on the weight of the evidence . . . can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict.”<sup>132</sup> So a weight-of-the-evidence review by definition owes less (if any) deference to the jury’s assessment of key aspects of the evidence (such as credibility and cross-racial identification) and, theoretically at least, could consider whether implicit racial bias has played an improper role in the decision. The remedy in these circumstances is not outright reversal, but rather remand to the trial court for a new trial. That new trial, in turn, poses no double-jeopardy problem, unlike a reversal premised on evidentiary insufficiency.<sup>133</sup>

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<sup>131</sup> Thomas S. Ginter, *Weight Versus Sufficiency of Evidence: Tibbs v. Florida*, 32 BUFF. L. REV. 759, 773 (1983); see also *Tibbs v. Florida*, 457 U.S. 31, 43 (1982) (“The reversal simply affords the defendant a second opportunity to seek a favorable judgment.”); Michael Seward, Case Comment, *The Sufficiency-Weight Distinction – A Matter of Life or Death*, 38 U. MIAMI L. REV. 147, 154 (1983) (“In reversing a conviction upon a verdict contrary to the weight of the evidence, a court acts as a member of the jury, casting its own vote.”). Pennsylvania has rejected the “thirteenth juror” terminology, explaining that the judge evaluating evidentiary weight has powers more limited than the jury’s. See *Commonwealth v. Widmer*, 744 A.2d 745, 752 (Pa. 2000) (“Trial judges, in reviewing a claim that the verdict is against the weight of the evidence do not sit as the thirteenth juror. Rather, the role of the trial judge is to determine that ‘notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.’” (quoting *Thompson v. City of Philadelphia*, 493 A.2d 669, 674 (1985))).

<sup>132</sup> *Tibbs*, 457 U.S. at 42–43.

<sup>133</sup> *Id.* at 42 (analogizing manifest-weight reversal to “[a] deadlocked jury,” which “we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause.”). *But see* *People v. Romero*, 859 N.E.2d 902, 909 n.2 (N.Y. 2006) (explaining that, under New York statutory law, a defendant cannot be retried following a

With that backdrop, I turn now to the reception that manifest-weight review has received in both trial and appellate courts following criminal convictions. That reception has been limited, if not downright hostile.

1. *Trial Courts Rarely Grant New Trials Based on Evidentiary Weight*

a. *Trial Courts Have the Power*

In the federal system, trial courts have always enjoyed the power to review a jury's verdict and to order a new trial if the verdict runs against the weight of the evidence. From the founding, trial courts could grant new-trial motions "whenever it appears with a reasonable certainty, that . . . the jury have proceeded . . . contrary to strong evidence."<sup>134</sup> The current authority for doing so resides in the Federal Rules of Criminal Procedure, which "authorize a district judge to grant a new trial when 'the interest of justice so requires.'"<sup>135</sup> The availability of a new trial in state court based on weight of the evidence is, of course, a function of state law as to which the rules vary from state to state.<sup>136</sup>

In jurisdictions that permit trial courts to order a new trial based on evidentiary weight, the court need not defer to the jury's credibility determinations, even when they can be inferred from the verdict. "The vast majority of courts that have considered the issue agree that the trial judge should be permitted to make an independent assessment of witness credibility in determining whether the jury's verdict is against

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reversal on weight of the evidence (citing N.Y. CRIM. PRO. LAW § 470.20(5) (McKinney 2009)).

<sup>134</sup> *Cowperthwaite v. Jones*, 2 U.S. (2 Dall.) 55, 56 (1790); *see also* *Capital Traction Co. v. Hof*, 174 U.S. 1, 14 (1899) (trial judge empowered "to set aside [jury] verdict, if, in his opinion, it is against . . . the evidence").

<sup>135</sup> Robertson, *supra* note 18, at 173 (quoting FED. R. CIV. P. 33).

<sup>136</sup> *See, e.g., In re* Petition for Writ of Prohibition, 539 A.2d 664, 684-86 (Md. 1988) (surveying various state jurisdictions).



the great weight of the evidence.”<sup>137</sup> Professor Robertson points out that credibility assessment is critical to a trial court’s weight-of-the-evidence review; “[i]f the trial court were not allowed to consider credibility, then direct evidence would always pass the weight-of-the-evidence test, just as it always passes the sufficiency test . . . .”<sup>138</sup>

At first blush, a trial court’s weight-of-the-evidence review can appear to usurp the jury’s role in settling disputes.<sup>139</sup> But Professors Robertson and Findley have supplied the answers to that concern. The first is that “the judge is actually playing a very different role” from the jury:

[T]he 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. The judge, on the other hand, has greater experience with a range of cases and an

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<sup>137</sup> *Id.* at 180–81; *see also* *United States v. Crittenden*, 971 F.3d 499, 506 (5th Cir. 2020) (“[A] district court may grant a new trial even where ‘the evidence is sufficient to support a conviction,’ if, upon ‘cautiously reweigh[ing] it,’ the district court concludes that the evidence ‘preponderate[s] heavily against the guilty verdict.’” (quoting *United States v. Herrera*, 559 F.3d 296, 302 (5th Cir. 2009) (emphasis added by *Crittenden* court)), *vacated on other grounds*, 971 F.3d 499 (5th Cir. 2020).

<sup>138</sup> Robertson, *supra* note 16, at 211.

<sup>139</sup> The Sixth Circuit explained this concern in *Holmes v. City of Massillon*, 78 F.3d 1041 (6th Cir. 1996):

“Where no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury’s verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts.”

*Id.* at 1047 (quoting *Duncan v. Duncan*, 377 F.2d 49, 54 (6th Cir. 1967)).

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.<sup>140</sup>

The judge's power is thus "a 'safety valve' for the jury, rather than a usurpation of its essential function."<sup>141</sup> This view of the judge-jury power allocation suggests correctly (and in keeping with the jury's historical role<sup>142</sup>) that jury verdicts are not so immune from scrutiny as conventional wisdom often supposes. The second answer to the usurpation concern is that rejecting a jury's verdict does not result in an acquittal; it merely requires the case to proceed to a second trial, where a jury will still render the ultimate verdict.<sup>143</sup>

Moreover, unlike civil cases, which are subject to a constitutional bar against judicial reexamination of jury verdicts under the Seventh Amendment,<sup>144</sup> the "Sixth Amendment poses no barrier to review of guilty verdicts because the right to a jury trial is a criminal defendant's alone."<sup>145</sup> Our cultural fixation on jury-trial rights is based on the notion that "juries provide 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the

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<sup>140</sup> Robertson, *supra* note 16, at 200 (footnotes omitted).

<sup>141</sup> Andrew S. Pollis, *The Death of Inference*, 55 B.C. L. REV. 435, 488 (2013) (quoting Robertson, *supra* note 18, at 177); *see also* Findley, *supra* note 2, at 619 ("For centuries, eminent authorities have argued that the judicial authority to overturn verdicts and grant a new trial before a new jury is an important safeguard that protects the jury trial right."); James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOK. L. REV. 459, 475 (1975) ("[T]he power to reverse in the interest of justice is more in the nature of a safety valve, seldom used when the system is working satisfactorily, rather than a short circuit [that] disrupts the system.").

<sup>142</sup> *See id.* at 489 & n.371.

<sup>143</sup> *Id.* at 488 & n.367 (citing Robertson, *supra* note 16, at 205).

<sup>144</sup> U.S. CONST. amend. VII; *see generally* Robertson, *supra* note 16, at 189-93.

<sup>145</sup> Findley, *supra* note 2, at 619.

complaint, biased, or eccentric judge.”<sup>146</sup> A judge’s rejection of a guilty verdict is in perfect harmony with that underlying purpose.

For the same reason, the subsequent retrial poses no double-jeopardy concerns. “[A] new trial is beneficial to the defendant—despite evidence sufficient to support a conviction, the defendant is given another opportunity to win acquittal.”<sup>147</sup> Retrial after reversal in a manifest-weight challenge is “not so much a second jeopardy, but rather a second opportunity for a jury to find the defendant innocent,”<sup>148</sup> akin to a deadlocked jury (with the judge serving as the holdout).<sup>149</sup>

*b. Trial Courts Are Reluctant to Invoke the Power in Criminal Cases*

Despite the established procedure for reweighing evidence, trial courts have not “commonly invoked” that power in criminal cases—where it the need is greatest—“and in many states it was either never recognized or was abolished altogether.”<sup>150</sup> Even where the power exists, “judges hardly ever revisit jurors’ credibility findings or decisions about what weight to give testimonial evidence in relation to other evidence of guilt or innocence, even when a defendant’s liberty is at stake.”<sup>151</sup> Professor Robertson argues that “the trial judge’s power to review evidentiary weight remains significantly undervalued in the contemporary era of the vanishing trial.”<sup>152</sup>

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<sup>146</sup> George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1, 1 (1992) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

<sup>147</sup> Seward, *supra* note 131, at 156.

<sup>148</sup> Ginter, *supra* note 131, at 776.

<sup>149</sup> See *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

<sup>150</sup> Risinger, *supra* note 3, at 1315.

<sup>151</sup> Roth, *supra* note 57, at 1653 (footnotes omitted).

<sup>152</sup> Robertson, *supra* note 18, at 168.

Doctrinally, “the standards by which judges weigh the evidence and determine when to grant a new trial are chaotic and inconsistent.”<sup>153</sup> That “doctrinal confusion . . . hinders the administration of justice and gives rise to systemic procedural inequalities.”<sup>154</sup> Even when established doctrine provides guidance, it urges “caution when reweighing evidence.”<sup>155</sup> So trial courts “couch their decisions in terms of ‘exceptional cases,’ ‘preventing injustice,’ or the ‘evidence preponderating heavily against the verdict.’”<sup>156</sup> Those standards are too high to satisfy meaningfully the main purpose of a weight-of-the-evidence review: to order a new trial when a jury reaches an erroneous verdict.<sup>157</sup>

## 2. *Appellate Courts Have Limited Power*

If trial courts fail to offer wrongfully convicted defendants meaningful weight-of-evidence review, the next logical question is whether appellate courts step in to fill the void. They don’t. Instead, appellate courts are confused about their standard of review but in general are overly deferential to trial-court decisions that deny new-trial motions. More broadly, appellate courts have no power of direct review over jury verdicts, except in a handful of jurisdictions where the power is not robust enough to solve the problem.

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<sup>153</sup> *Id.* at 171; *see also id.* Robertson, *supra* note 16, at 201 (“[T]his is an area of law that is rarely discussed and often confused.”).

<sup>154</sup> Robertson, *supra* note 18, at 179.

<sup>155</sup> Seward, *supra* note 131, at 154.

<sup>156</sup> *Id.* at 155 (footnotes omitted) (first quoting *United States v. Pepe*, 209 F. Supp. 592, 595 (D. Del. 1962), *aff’d*, 339 F.2d 264 (3d Cir. 1964); then quoting *United States v. Parelus*, 83 F. Supp. 617, 618 (D. Haw. 1949); and then quoting *United States v. Robinson*, 71 F. Supp. 9, 10-11 (D.D.C. 1947))).

<sup>157</sup> Robertson, *supra* note 16, at 188 (“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.”).

a. *Appellate Courts Apply a Deferential, Abuse-of-Discretion Standard of Review to Trial-Court Orders Denying New Trials.*

Appellate courts reviewing trial-court rulings on weight of the evidence have further confused and eroded the remedy.<sup>158</sup> Professor Robertson notes that “[t]he doctrinal confusion . . . hinders the administration of justice and gives rise to systemic procedural inequalities.”<sup>159</sup> The Supreme Court was skeptical of the appellate court’s power to do anything more than evaluate the trial judge’s exercise of discretion, at least in civil cases.<sup>160</sup> Commentators and courts have also expressed institutional concerns with permitting the appellate court to substitute its judgment not only for the jury, but also for the trial-court judge.<sup>161</sup>

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<sup>158</sup> Robertson, *supra* note 16, at 201 (“[T]his is an area of law that is rarely discussed and often confused.”); Albert Tate, Jr., “Manifest Error” – Further Observations on Appellate Review of Facts in Louisiana Civil Cases, 22 LA. L. REV. 605, 606 (1962) (“[A]ppellate judges do have differing views among themselves as to the proper weight to attach to trial court determinations of the facts . . .”).

<sup>159</sup> Robertson, *supra* note 18, at 179.

<sup>160</sup> See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (“[T]he Seventh Amendment restricted the court of appeals to ruling only on whether the trial court abused its discretion in denying a new trial.”); see also Robertson, *supra* note 16, at 191. But the Seventh Amendment concerns that animate the reluctance in civil cases do not have sway in criminal cases. See *supra* notes 144–146 and accompanying text.

<sup>161</sup> See, e.g., 11 CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2819, at 261 (3d ed. 2012) (“To allow appellate review of the denial of the new-trial motion would mean that the verdict could be set aside solely by judges who were not present at the trial even though the trial judge has found that the verdict is not against the clear weight of the evidence.”); see also Robertson, *supra* note 16, at 193–94 (*Gasperini* requires “the trial court [to] take primary responsibility for reviewing the weight of the evidence.”); *People v. Lemmon*, 576 N.W.2d 129, 135 (Mich. 1998) (“Appellate reluctance to interfere with the grant of a new trial is soundly rooted in the proposition that “[t]he judge was “there.” We were not.” (quoting *Alder v. Flint City Coach Lines, Inc.*, 110 N.W.2d 606, 610 (Mich. 1961) (Black, J., concurring))).

So when a trial court denies a defendant's request to order a new trial on weight-of-the-evidence grounds, the opportunity for justice on appeal is "even more diluted because the court is called upon to defer to the trial court's decision and reverse only for abuse of discretion. By this time, the soup is too thin to contain much nourishment at all."<sup>162</sup> And most appellate courts have "adopted the view that they must scrutinize decisions granting new trials more closely" than decisions denying them; the Second Circuit, for example, "will not review the denial of a new trial on weight of the evidence grounds at all."<sup>163</sup> The Eighth and Ninth Circuits call a district court's denial of a motion for new trial "'virtually unassailable.'"<sup>164</sup> Appellate courts are thus "willing to accept a greater degree of error in denying a new trial than in granting one"<sup>165</sup> – precisely the opposite of the approach that would help remediate the wrongful-conviction rate.

*b. Appellate Courts, with Rare Exceptions, Undertake No Independent Review of the Weight of the Evidence.*

Not only do appellate courts apply minimal scrutiny to *trial-court orders* denying new trials, they also almost

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<sup>162</sup> Risinger, *supra* note 3, at 1315 (footnote omitted); *see also* Tate, *supra* note 158, at 605 ("[A] trial court's factual determinations should not be disturbed upon review in the absence of 'manifest error.'" (quoting David W. Robertson, Comment, *Appellate Review of Facts in Louisiana Civil Cases*, 21 LOUISIANA L. REV. 402, 402 (1961))).

<sup>163</sup> Robertson, *supra* note 16, at 194; *see also* State v. Carter, 896 S.W.2d 119, 123 (Tenn. 1995) ("An appellate court may presume that the trial court has acted as the thirteenth juror and approved the jury's verdict where the trial court simply overrules a motion for new trial without any explicit statement that it has independently weighed the evidence and agrees with the jury's verdict.").

<sup>164</sup> Franks v. Kirk, 804 Fed. App'x 610, 611 (9th Cir. 2020) (quoting Kode v. Carlson, 596 F.3d 608, (9th Cir. 2010)); White Commc'ns, LLC v. Synergies3 Tec Servs., LLC, 4 F.4th 606, 613 (8th Cir. 2021) (quoting Batiste-Davis v. Lincare, Inc., 526 F.3d 377, 381 (8th Cir. 2008)).

<sup>165</sup> Robertson, *supra* note 16, at 203.

universally lack any power to review the weight of the evidence independently.<sup>166</sup> A student commentator argued in 1983 that appellate courts should have and should exercise the power to reverse judgments, including convictions, when they disagree with the jury's resolution of the evidence but concede that the evidence was legally sufficient.<sup>167</sup> But forty years later, even after others scholars have joined the cry,<sup>168</sup> most states have no law on the subject, and a few specify that appellate review of evidentiary weight is not available at all.<sup>169</sup> Appellate relief on evidentiary weight was once available in Mississippi, Texas, and Florida, but all three states have now eliminated it—Mississippi with essentially no analysis and Texas and Florida with tortured history.<sup>170</sup>

New York, Ohio and Illinois stand out as the only three states that permit appellate review of the weight of the evidence (and not simply review of a trial-court order on the question),<sup>171</sup> but only Ohio has a robust body of law on the

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<sup>166</sup> The appellate court, like the trial court, sits as the “thirteenth juror” when reversing a judgment on the weight of the evidence. *See Ginter, supra* note 131, at 760 (“[A] reversal based on the weight of the evidence means only that the appellate court, sitting as the ‘thirteenth juror,’ disagrees with the jury’s evaluation of the conflicting testimony.”).

<sup>167</sup> Seward, *supra* note 131, at 163 (“To prevent . . . injustice, it is suggested that all states should allow their appellate courts to reweigh evidence.”).

<sup>168</sup> *See supra* notes 25-26 and accompanying text.

<sup>169</sup> *See, e.g., State v. Brown*, No. A05-2418, 2007 WL 46063, at \*3 (Minn. Ct. App. Jan. 9, 2007); *State v. Bembenek*, 331 N.W.2d 616 (Wis. Ct. App. 1983); *see also Robertson, supra* note 18, at 184 (“[W]ith regard to new trials on the weight of the evidence, there has been no push for convergence among the states.”).

<sup>170</sup> *See Little v. State*, 233 So. 3d 288, ¶ 20 (Miss. 2017); *Brooks v. State*, 323 S.W.3d 893 (Tex. Ct. Crim. App. 2010); *Tibbs v. State*, 397 So. 2d 1120 (Fla. 1981), *aff’d*, 457 U.S. 31 (1982).

<sup>171</sup> *See, e.g., State v. Thompkins*, 678 N.E.2d 541, 546 (Ohio 1994); *People v. Nicholls*, 245 N.E.2d 771, 774–75 (Ill. 1969). The right to weight-of-the-evidence appellate review in New York is statutory and has received only scant discussion in the case law. *See People v. Cahill*, 809 N.E.2d 561, 583–84 (N.Y. 2003) (citing N.Y. CRIM. PRO. LAW § 470.15(5) (McKinney 2009)).

subject. Even in Ohio, manifest-weight relief is constrained by both the language courts use in describing their charge and in a unique requirement of panel unanimity.

*i. The Tortured History in Texas and Florida*

*(a) Texas Says Yes, Then Says No*

The Texas experience is illustrative of both the hostility appellate courts have expressed toward reviewing evidentiary weight and the confusion and disagreement among appellate judges on the question. Until 2010, appellate courts in Texas had the power to reverse a case under a “factual-sufficiency standard,” as distinguished from the “legal-sufficiency standard” mandated by the Supreme Court’s decision in *Jackson v. Virginia*.<sup>172</sup> The difference between the two was that “the reviewing court [was] required to defer to the jury’s credibility and weight determinations . . . under a legal-sufficiency standard while it [was] not required to defer to a jury’s credibility and weight determinations . . . under a factual-sufficiency standard.”<sup>173</sup>

Despite that difference, Texas courts had continued to adhere to a contrary maxim, even in the factual-sufficiency context, that an appellate judge should not reverse “simply because, on the quantum of evidence admitted, he would have voted to acquit had he been on the jury.”<sup>174</sup> The Texas Court of Criminal Appeals, in a sharply divided five-to-four decision, acknowledged in 2010 that these two principles were “inconsistent.”<sup>175</sup> But, rather than clarifying the appellate court’s power to order a new trial if the appellate judges disagreed with the jury’s verdict, a plurality of the

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<sup>172</sup> See *Brooks*, 323 S.W.3d at 894–95 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)), *overruling* *Clewis v. State*, 922 S.W.2d 126 (Tex. Ct. Crim. App. 1996); see also *supra* notes 97–106 and accompanying text.

<sup>173</sup> *Brooks*, 323 S.W.3d at 899–900.

<sup>174</sup> *Id.* at 901 (quoting *Watson v. State*, 204 S.W.3d 404, 414 (Tex. Ct. Crim. App. 2006)).

<sup>175</sup> *Id.*



court elected instead to resolve the inconsistency by eliminating factual-sufficiency (that is, weight-of-the-evidence) review altogether.<sup>176</sup>

In reaching that decision, the plurality dismissively rejected the notion that a factual-sufficiency review was necessary to respond to “[s]ome [w]idespread [c]riminal [j]ustice [p]roblem.”<sup>177</sup> The court insisted that review under the legal-sufficiency standard was adequate. It offered a single example to prove the point:

The store clerk at trial identifies A as the robber. A properly authenticated surveillance videotape of the event clearly shows that B committed the robbery. But, the jury convicts A. It was within the jury's prerogative to believe the convenience store clerk and disregard the video. But based on all the evidence the jury's finding of guilt is not a rational finding.<sup>178</sup>

This example is shockingly simplistic. It does no more than establish that a legal-sufficiency review can reject a jury's finding when irrefutable evidence demonstrates the finding was wrong. But it does nothing to address conflicts in *witness testimony*, where the dangers of implicit bias are most prevalent.<sup>179</sup>

Four judges on the Texas Court of Criminal Appeals dissented and would have retained factual-sufficiency review.<sup>180</sup> They pointed to the factual-sufficiency standard, which requires the appellate court, before ordering a new

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<sup>176</sup> *Id.* at 905 (“[T]he only way to retain a factual-sufficiency standard, which would be meaningfully distinct from a *Jackson v. Virginia* legal-sufficiency standard, would be to allow reviewing courts to sit as ‘thirteenth jurors.’ However, our factual-sufficiency decisions have consistently declined to do this.”); *see also id.* at 926 (Cochran, J., concurring) (“Appellate courts must defer to [the jury’s] credibility assessments . . .”).

<sup>177</sup> *Id.* at 906.

<sup>178</sup> *Id.* at 907.

<sup>179</sup> *See supra* notes 50–63 and accompanying text.

<sup>180</sup> *Brooks*, 323 S.W.3d at 926–32 (Price, J., dissenting).

trial, to “say, with some objective basis in the record, that the jury’s verdict, while legally sufficient, is nevertheless against the great weight and preponderance of the evidence, and therefore ‘manifestly unjust.’”<sup>181</sup> They argued that the “manifestly unjust” standard does not permit the appellate court to order a new trial merely because it disagrees with the jury’s verdict, as the plurality held. Instead, the factual-sufficiency standard permitted reversal only in rare cases, when “the State’s evidence is intolerably tenuous or [when] the verdict is against the *great weight* of the evidence.”<sup>182</sup>

But the dissenters did not prevail, and the Texas courts no longer permit weight-of-the-evidence reviews in criminal appeals. One student commentator, demonstrating rhetorical restraint, observed that “eliminating the standard does not further the goals of Texas criminal courts to exonerate the innocent.”<sup>183</sup> Despite the court’s dismissive language, there is a widespread criminal-justice problem, and Texas has turned a blind eye to it, at least in the context of weight-of-the-evidence review.

*(b) Florida Says No and Prompts the U.S.  
Supreme Court’s Seminal Decision on the  
Subject*

Unlike Texas, Florida law was never clear on the availability of weight-of-the-evidence review on appeal. But in 1981, the Supreme Court of Florida shut the door definitively in *Tibbs v. State*: weight-of-the-evidence review, “if ever valid in Florida, should now be eliminated from Florida law. Henceforth, no appellate court should reverse a conviction or judgment on the ground that the weight of the

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<sup>181</sup> *Id.* at 928 (quoting *Watson v. State*, 204 S.W.3d 404, 417 (Tex. Ct. Crim. App. 2006)).

<sup>182</sup> *Id.* at 929 (emphasis added).

<sup>183</sup> Jason Hanna, Comment, *Brooks v. State, the Standard Was Raised, but the Bar Was Lowered: If Texas Appellate Courts Cannot Protect the Accused, Who Will?*, 55 S. TEX. L. REV. 373, 407 (2013).

evidence is tenuous or insubstantial.”<sup>184</sup> Ironically, despite rejecting weight-of-the-evidence review, the Supreme Court of Florida’s decision in *Tibbs* led to the United States Supreme Court’s only decision on the subject, giving life to the “thirteenth juror” nomenclature and clarifying that double-jeopardy concerns to not bar retrial after a manifest-weight reversal.<sup>185</sup> But the Supreme Court took no position on whether the remedy should or should not be available, in either state or federal court.

In doing away with manifest-weight review, the Florida *Tibbs* court articulated four policy justifications, but none is compelling. First, the court saw value in “leaving questions of weight for resolution only before the trier of fact”;<sup>186</sup> I address this institutional-competency concern below.<sup>187</sup> Second, the court sought to “avoid disparate appellate results” that it feared would be the product of endorsing weight-of-the-evidence review.<sup>188</sup> But disparate results are an acceptable product of different evidentiary records in trial proceedings, just as different juries reach different conclusions in different cases. Third, the court did not want to perpetuate two levels of evidentiary review (sufficiency and weight) that appellate courts conflate<sup>189</sup>—a concern more properly directed to the

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<sup>184</sup> *Tibbs v. State*, 397 So. 2d 1120, 1125 (Fla. 1981), *aff’d*, 457 U.S. 31 (1982).

<sup>185</sup> *See Tibbs*, 457 U.S. 31, 42 (1982); *see also supra* note 17 and accompanying text. The double-jeopardy question reached the United States Supreme Court, despite the Supreme Court of Florida’s rejection of weight-of-the-evidence review on appeal, because the latter court had reversed the defendant’s convictions on weight-of-the-evidence grounds in an earlier decision. *See Tibbs*, 397 So. 2d at 1126.

<sup>186</sup> *Tibbs*, 397 So. 2d at 1125.

<sup>187</sup> *See infra* notes 220–236 and accompanying text.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* (expressing concern about having to review appellate reversals to determine if they “were based on sufficiency or on weight.”). Ironically, it was the Supreme Court of Florida itself—and not the lower courts—that created confusion in *Tibbs* about whether the earlier reversal of his conviction was on sufficiency or weight grounds. *See id.* at 1122 (“We are

quality of judging and opinion writing than to the law itself. The fourth concern was designed to protect defendants: the *Tibbs* court wanted to ensure that appellate courts would reverse on sufficiency grounds when warranted, rather than give in to the “temptation” invoke manifest-weight reversal as a pretext for ordering a retrial (a retrial that reversal on sufficiency grounds would not permit).<sup>190</sup> But the court ignored the corollary effect on wrongfully convicted defendants against whom the evidence passes a sufficiency test; its holding strips them of the only other nonprocedural recourse on appeal.

The *Tibbs* court, unlike the Texas court three decades later, was unanimous in its rejection of manifest-weight review. One concurring justice went further than the majority, finding “no legal justification for such a procedure.”<sup>191</sup>

*ii. The Robust Law Governing Manifest-Weight Review on Appeal in Ohio.*

Ohio is the state with the largest volume of decisional law addressing manifest-weight review on appeal.<sup>192</sup> That volume comes as no surprise; the Supreme Court of Ohio has repeatedly affirmed that the right to a manifest-weight review on appeal is available on appeal in Ohio<sup>193</sup> and is distinct from

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asked by *Tibbs* to rule that our reversal of his original convictions was based on evidentiary insufficiency, not evidentiary weight.”).

<sup>190</sup> *Id.* at 1125–26; *see also* *Tibbs v. Florida*, 457 U.S. 31, 50–51 (1982) (White, J., dissenting) (expressing same concern).

<sup>191</sup> *Id.* at 1127 (Sundberg, J., concurring in part and dissenting in part).

<sup>192</sup> A search for “manifest weight” on Westlaw confined to Ohio courts yields 10,000 results, which appears to be Westlaw’s upper limit. *See* AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES* 233 (8th ed. 2021).

<sup>193</sup> *See* *Eastley v. Volkman*, 972 N.E.2d 517, ¶ 7 (Ohio 2012) (“There should be no question that a court of appeals has the authority to reverse a judgment as being against the weight of the evidence.”); *see also* *State v. Thompkins*, 678 N.E.2d 541, 548 (Ohio 1994). The right in Ohio emanates in part from a unique constitutional provision: “No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except

a sufficiency review.<sup>194</sup> The review is available in appeals from both jury trials and bench trials.<sup>195</sup>

Ohio has clarified both the nature of a manifest-weight review and an important procedural distinction that applies to it. As to nature, the appellate court “weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.”<sup>196</sup> As to the procedural distinction, there is no predicate requirement that the appellant first move for a new trial in the trial court; the appellate court can address the evidentiary-weight question whether or not the trial court has done so, even after a jury trial.<sup>197</sup> So appellate courts in Ohio are empowered to play a *primary* role in the process of reweighing

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by the concurrence of all three judges hearing the cause.” OHIO CONST. art. iv, § 3(B)(3). While that provision imposes “a limitation on the power of a court of appeals” rather than confer the underlying right, *see Thompkins*, 683 N.E.2d at 548, there is no doubt that the underlying right—whether its source is textual or inferential—is entrenched in Ohio appellate law.

<sup>194</sup> *See Thompkins*, 678 N.E.2d at 386 (“The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.”); *Eastley*, 972 N.E.2d 517, at ¶ 9 (same).

<sup>195</sup> *See* OHIO R. APP. P. 12(C). In civil cases tried to a judge, an appellate court reversing on manifest-weight grounds has the option of ordering a new trial or weighing the evidence itself. OHIO R. APP. P. 12(C)(1). In a civil case tried to a jury, the only relief the appellate court may order following a manifest-weight reversal is a new trial. OHIO R. APP. P. 12(C)(2). Interestingly, Ohio’s appellate rules do not mention manifest-weight reversal in criminal cases.

<sup>196</sup> *Eastley*, 972 N.E.2d 517, at ¶ 20 (quoting *Tewarson v. Simon*, 750 N.E.2d 176, 185 (Ohio Ct. App. 2001) (quoting *Thompkins*, 678 N.E.2d at 547 (quoting *State v. Martin*, 485 N.E.2d 717, 720–21 (Ohio Ct. App. 1983)))) (alterations added by *Tewarson* court).

<sup>197</sup> *Id.* at ¶ 29 (“Nothing in the rules or statutes requires a party to have made a particular motion before seeking appellate review of a jury verdict on the weight of the evidence.”).

evidence, not simply the role of reviewing a trial court's grant or denial of a motion for a new trial.<sup>198</sup>

Still, that power is more limited than the jury's power to decide the case in the first instance. The review occurs "not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury[,] but in the more restricted sense of whether it appears to the trial court that manifest injustice has been done and that the verdict is against the manifest weight of the evidence."<sup>199</sup> So there remains a "presumption in favor of the finder of fact."<sup>200</sup> Indeed, "every reasonable intendment and every reasonable presumption must be made in favor of the judgment," and "[i]f the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment . . . ."<sup>201</sup> There is even a strand of case law in Ohio that suggests deference to the jury's credibility determinations.<sup>202</sup>

It bears emphasis, too, that a manifest-weight reversal in Ohio requires *all three appellate judges* to concur in overturning

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<sup>198</sup> Cf. *supra* notes 160–165 and accompanying text.

<sup>199</sup> *Eastley*, 972 N.E.2d 517, at ¶ 27 (quoting *Rohde v. Farmer*, 262 N.E.2d 685, 686 (Ohio 1970)).

<sup>200</sup> *Id.* at ¶ 21.

<sup>201</sup> *Id.* (quoting *Seasons Coal Co. v. City of Cleveland*, 461 N.E.2d 1273, 1276 n.3 (Ohio 1984) (quoting 5 OHIO JURISPRUDENCE 3d § 603, at 191–92 (1978))).

<sup>202</sup> See MARK P. PAINTER & ANDREW S. POLLIS, OHIO APPELLATE PRACTICE § 7:22, at 374 (2021–22 ed.) ("The law is currently muddled on the extent to which the appellate court independently evaluates witness credibility when performing a manifest-weight challenge."). The explanation for this anomalous strand of law is "the misplaced reliance" on an Ohio Supreme Court decision that discusses credibility in the context sufficiency review, not manifest-weight review. *Id.* (citing *State v. DeHass*, 227 N.E.2d 212 (Ohio 1967)). A recent example is in *State v. Pittman*, 2022-Ohio-300, ¶ 45 (Ohio Ct. App. 2022) (citing *DeHass* for the proposition that "in a manifest-weight review, the weight to be given the evidence and the credibility of the witnesses are primarily for the finder of fact.").

a jury verdict.<sup>203</sup> By contrast, in reviewing any other claim of error, only two out of three panelists must concur.<sup>204</sup> So Ohio, unlike almost every other state, offers an appellate remedy that has the theoretical capacity to address implicit bias, even where the evidence was sufficient to support a conviction. But the unanimity requirement imposes a higher hurdle for reversal than would apply to any other type of error. A central rationale for the higher barrier “is to preserve the jury’s role with respect to issues surrounding the credibility of witnesses,”<sup>205</sup> a concern also reflected in the substantive standard.<sup>206</sup>

### III. COMPARATIVE INSTITUTIONAL COMPETENCIES: MANIFEST-WEIGHT REVIEW ON APPEAL DOES NOT UNDERMINE THE JURY SYSTEM.

The scholarly and judicial literature is replete with statements elevating the jury’s competency to evaluate factual issues, including witness credibility, and privileging jury fact finding over fact finding by appellate courts. “Notions of relative institutional competence form the grounds on which justifications of appellate deference to trial-level fact finding are almost universally formulated.”<sup>207</sup> Perhaps the strongest argument against manifest-weight review on appeal is the concern that it degrades the jury system and the historical deference our legal system has always conferred on juries to resolve factual disputes. Indeed, the very notion that an appellate court can root out implicit bias in jury verdicts

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<sup>203</sup> OHIO CONST. art. iv, § 3(B)(3); *see also* State v. Thompkins, 678 N.E.2d 541, 548 (Ohio 1994).

<sup>204</sup> OHIO CONST. art. iv, § 3(B)(3) (“A majority of the judges hearing the cause shall be necessary to render a judgment.”).

<sup>205</sup> *Thompkins*, 678 N.E.2d at 548.

<sup>206</sup> *See supra* notes 199–202 and accompanying text.

<sup>207</sup> Oldfather, *supra* note 10, at 444–45.

strikes at the heart of that deference<sup>208</sup> and suggests a step away from an adjudicative system that places so much trust and power in the hands of “ordinary citizens.”<sup>209</sup>

But on closer examination, these concerns dissolve. Instead, manifest-weight review can work in perfect harmony with the jury system while maximizing the appellate court’s ability to review the record of a trial with a degree of greater acuity that is inherently lacking in the trial process. There are several interrelated considerations that prove this point.

A. *There Is No Value in Deferring to a Guilty Verdict Tainted by Implicit Bias*

As a threshold matter, we start with a self-evident maxim: a jury verdict infected by implicit racial bias—especially in a criminal case—should enjoy no reverence. But that self-evident maxim is actually a departure from longstanding principles of appellate review. “[T]he standards governing challenges to general verdicts are exceedingly deferential, focusing only on what a hypothetical jury could have found, rather than on what the actual jury did find.”<sup>210</sup> So instead of

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<sup>208</sup> Tate, *supra* note 158, at 607 (arguing that appellate courts engage in “primarily the *review*” of trial-court determinations, “not an independent redetermination in which the trial court finding is assigned no weight.”).

<sup>209</sup> See Powers v. Ohio, 499 U.S. 400, 406 (1991) (“The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.”).

<sup>210</sup> Charles Eric Hintz, *Fair Questions: A Call and Proposal for Using General Verdicts with Special Interrogatories to Prevent Biased and Unjust Convictions*, 54 U.C. DAVIS L. REV. ONLINE 43, 53 (2021). Appellate judges have historically expressed the same deference when describing the process of reviewing a trial judge’s factual findings. See generally Tate, *supra* note 158, at 608-09 (“[T]he appellate judge should . . . rule out every reasonable construction of the evidence [that] supports the trial determination; reversal should not be recommended simply because the appellate judge might have himself decided the case differently by construing the evidence differently than did the trial court.”); *id.* at 614 (deference is warranted “not only because as a practical matter the trial judge is in a better position than [are] his appellate brethren to evaluate



ensuring a review process that lends itself to rooting out convictions influenced by implicit bias, appellate courts afford “rather extreme deference” to jury verdicts.<sup>211</sup> The “usual surface justification” for doing so “vests the jury with plenary authority on the judgment of witness veracity because of the jurors’ opportunity to observe demeanor during testimony.”<sup>212</sup>

That surface justification has its appeal; “[w]ithout epistemic access to truth, or any readily apparent way to apply standards and principles to the case-specific determinations about truth and veracity, appellate courts naturally prefer to defer to those deemed better positioned to make such judgments.”<sup>213</sup> But deeming the jury better positioned to make those judgments may be more about “creat[ing] confidence that the system is accurately determining guilt and innocence” than about “whether it really is.”<sup>214</sup> And the intolerably high wrongful-conviction rate<sup>215</sup> exposes that the confidence is unwarranted. So the argument that the jury is better positioned to decide the facts “is becoming increasingly less tenable as a justification.”<sup>216</sup>

It is fair to ask how we can know when bias has played a role in a conviction, thus justifying a departure from the tradition of jury deference. As Professor Robertson acknowledges, “in many cases there may be no ‘extrinsic indication of bias’ but only a verdict that appears not to comport with the great weight of the evidence.”<sup>217</sup> Given the

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the credibility of witnesses,” but “also because the proper and efficient operation of our judicial system allots factual determinations primarily to the trial judge and only secondarily to the appellate court, and because the public interest in the swift and authoritative settlement of disputes at law requires it”).

<sup>211</sup> Risinger, *supra* note 3, at 1314; *see also* Findley, *supra* note 2, at 607.

<sup>212</sup> Risinger, *supra* note 3, at 1314.

<sup>213</sup> Findley, *supra* note 2, at 607.

<sup>214</sup> *See id.*

<sup>215</sup> *See supra* notes 74–84 and accompanying text.

<sup>216</sup> Findley, *supra* note 2, at 608.

<sup>217</sup> Robertson, *supra* note 16, at 205.

consequences of a wrongful conviction, that assessment should be enough to warrant a new trial.<sup>218</sup> If the record permits a reasonable debate about whether bias played a role, we should assume it did.<sup>219</sup>

*B. Research Refutes the Underlying Premise that Juries Are Better Positioned to Judge Witness Credibility*

The deference to juror factfinding has its roots in the premise that “the face and talk and appearance of many persons, and probably of most people, is a fairly accurate approximate guide to their personality and character”<sup>220</sup> and that “[t]he fact finder . . . enjoys an advantage over appellate courts in that it experiences the introduction of evidence and testimony as it happens.”<sup>221</sup> So the law has long assumed that jurors, watching witnesses testify live in the courtroom, are more competent at assessing credibility than appellate judges whose access to the testimony consists only of a “cold” paper record<sup>222</sup> that “inevitably must give an incomplete and sometimes distorted picture of the case.”<sup>223</sup>

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<sup>218</sup> *Id.* (“Allowing the court to order a new trial on the weight of the evidence may therefore correct biased or otherwise improper jury verdicts even when it is not clear why the jury entered the verdict that it did.”) (footnote omitted).

<sup>219</sup> See *infra* notes 299–311 and accompanying text.

<sup>220</sup> Tate, *supra* note 158, at 613.

<sup>221</sup> Oldfather, *supra* note 10, at 440.

<sup>222</sup> *Id.* at 446; see also *id.* at 439 (describing conventional view that “appellate courts are not very good at fact finding” because “appellate judges are not present in the courtroom to witness testimony and evidence firsthand.”).

<sup>223</sup> LESTER BERNHARDT ORFIELD, *CRIMINAL APPEALS IN AMERICA* 85 (1939); see also Adam N. Steinman, *Rethinking Standard of Appellate Review*, 96 *IND. L.J.* 1, 16 (2020) (“[T]he Supreme Court has emphasized that trial courts have an advantage when evaluating the credibility of live witness testimony because ‘the various cues that “bear so heavily on the listener’s understanding of and belief in what is said” are lost on an appellate court later sifting through a paper record.’” (quoting *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985))).

But “the conventional wisdom” about jurors’ institutional competency “is misguided.”<sup>224</sup> Research has more recently shown that “people consistently perform poorly at using demeanor evidence to assess credibility and veracity, such that much of the information traditionally thought to provide the jury with a fact-finding advantage may actually operate to mislead.”<sup>225</sup> In short, “social science has debunked the theory that humans accurately judge credibility based on demeanor.”<sup>226</sup> Worse yet, “[w]hen the speaker and observer are of different races or cultures, even more opportunities for mistranslation may exist, since behavioral cues thought to signal sincerity in one culture may be taken as signs of deception by members of another culture.”<sup>227</sup>

So it turns out that “there are fundamental respects in which appellate courts can function as superior fact finders.”<sup>228</sup> Indeed, the appellate court’s “recourse only to a transcript provides . . . certain advantages.”<sup>229</sup> It is a “less ephemeral mode of communication” that can be “reread and reconsidered,”<sup>230</sup> permitting “a cohesive narrative, organized chronologically or along some other logical organizing scheme.”<sup>231</sup> And, where implicit bias is at work, “[t]hought

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<sup>224</sup> Oldfather, *supra* note 10, at 445.

<sup>225</sup> *Id.* at 440; *see also* Findley, *supra* note 2, at 627 (“Demeanor evidence, to the extent it is useful for assessing credibility, is useless, or worse, when it comes to assessing eyewitness testimony.”); Roth, *supra* note 57, at 1647 (“[J]urors are not particularly good at determining credibility or weighing evidence . . .”).

<sup>226</sup> Roth, *supra* note 57, at 1656; *see also* Thompson, *supra* note 6, at 1258 (“Although jurors serve as the chief lie detectors during trial, studies demonstrate that jurors, like other people, are not very good at lie detection.”); Findley, *supra* note 2, at 621 (“Empirical research shows that people—including professional fact finders like police officers and judges—are simply not good at using demeanor to assess veracity.”).

<sup>227</sup> Oldfather, *supra* note 10, at 458.

<sup>228</sup> *Id.* at 440; *see also* Findley, *supra* note 2, at 623 (“[A]ppellate courts have one other advantage over juries: experience and perspective.”).

<sup>229</sup> Oldfather, *supra* note 10, at 440.

<sup>230</sup> *Id.* at 455; *see also* Findley, *supra* note 2, at 622 (same).

<sup>231</sup> Findley, *supra* note 2, at 620.

processes based on information from a textual source are more compatible with systematic, rational (and therefore 'legal') thought than are those based on information received orally."<sup>232</sup> In other words, adjudicating facts based on a transcript actually facilitates the exercise of deliberative (System 2) thinking.<sup>233</sup>

But the law has not caught up with the science; "the system's promotion of the idea that 'lie detecting is what our juries do best' has largely worked "<sup>234</sup> and remains intact even though "the cover has been blown on the jury."<sup>235</sup> The judicial system continues its entrenched practice of "inappropriately insulating jury verdicts of guilt from review because of excessive deference to the jury's evaluation of live testimony."<sup>236</sup> And when implicit bias has exacted its influence on that evaluation, that deference is antithetical to meaningful appellate review.

*C. Appellate Review of Jury Verdicts Need Not Supplant the Jury's Traditional Fact-Finding Role*

Traditional notions of power delegation may at first blush suggest a conflict when courts step beyond notions of sufficiency and entertain questions of evidentiary weight that juries normally answer.<sup>237</sup> But Professor Robertson argues that manifest-weight review can co-exist with the jury's traditional fact-finding role and that there is no conflict;

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<sup>232</sup> Oldfather, *supra* note 10, at 440; *see also* Robertson, *supra* note 16, at 215 ("The appellate court may also have more time for 'research and deliberation' and need not make quick rulings during the heat of trial." (quoting Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 757 (1982))).

<sup>233</sup> *See supra* notes 40–46 and accompanying text.

<sup>234</sup> Roth, *supra* note 57, at 1654 (footnotes omitted).

<sup>235</sup> *Id.* at 1656.

<sup>236</sup> Risinger, *supra* note 3, at 1282.

<sup>237</sup> *See* Ginter, *supra* note 131, at 761 ("Consideration of the weight of the evidence allows an appellate court to possess some dominion over the jury . . .").

“[g]iven the reciprocal influence between judge and jury, the judge’s ability to grant a new trial on the weight of the evidence may function more as a safety valve than as a ‘denigration of the jury system.’”<sup>238</sup> She explains that “[t]he fact-finding competencies of judges and jurors are . . . mixed; each has strengths the other lacks.”<sup>239</sup> And because the law supplies no clear remedy for a biased conviction, “[t]he trial judge’s power to evaluate the weight of the evidence and to order a retrial helps to fill the gap,” particularly “when deliberative secrecy and post-verdict anti-impeachment rules conceal the presence of what would otherwise be reversible error.”<sup>240</sup>

The same, of course, is true of an appellate court’s power. In essence, the jury’s province is to find the facts based on proper considerations, not improper ones. So “when the court evaluates the weight of the evidence, it is not asking what evidence the jury reasonably could have believed. Instead, it is trying to determine whether the jury reached its verdict based on bias or some factor other than the evidence before it.”<sup>241</sup> And, “[r]ather than confining each decisionmaker in the system to one narrowly defined role,” having both the jury and the appellate court “perform the same functions (or at least to have some overlapping jurisdiction)” may “increase the chance that more interests can have a role in any particular decision,”<sup>242</sup> thus leading to a more accurate result.

In the end, even if there is a conflict, that conflict is worth the value that comes from reducing the frequency of wrongful

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<sup>238</sup> Robertson, *supra* note 16, at 177 (quoting *Lind v. Schenley Indus., Inc.*, 278 F.2d 79, 90 (3d Cir. 1960)); *see also* Seward, *supra* note 131, at 161 (the jury right “is strengthened, not weakened, when the court exercises its discretionary power to grant a new trial. . . [T]he 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.”).

<sup>239</sup> Robertson, *supra* note 16, at 205.

<sup>240</sup> Robertson, *supra* note 18, at 167.

<sup>241</sup> *Id.* at 187–88.

<sup>242</sup> Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VAND. L. REV. 1, 70 (2021).

convictions. Professor Findley, in reflecting on Professor Oldfather's contributions, explains that "analysis of the comparative institutional advantages of trial and appellate courts means not that one court should always have primacy over the other on factual questions, but that primacy ought to depend on the type of facts at issue, and an assessment of which court truly has the advantage with respect to that kind of fact finding."<sup>243</sup> Distilling institutional competency at so granular a level may be challenging in general, but it presents no problem in the criminal-justice context, particularly for those who prioritize fairness to the defendant over imposition of criminal liability. After all, we revere the jury's power primarily as a means of *protecting* criminal defendants from overzealous prosecution,<sup>244</sup> so the rationale for deferring to the jury is substantially lower when a criminal defendant seeks to reverse a conviction.

*D. Appellate Courts Already Play a Role in Weighing Evidence—When Considering Whether Trial Error Was Harmless*

Our institutional-competency analysis would not be complete without recognizing that appellate courts already play a role in weighing evidence. When confronted with trial-court error, the appellate court determines whether "it was harmless beyond a reasonable doubt."<sup>245</sup> Doing so requires the appellate judges to weigh the totality of the record (minus any erroneous evidence or argument) to determine whether it is "so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of" the error.<sup>246</sup> For example, "appellate

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<sup>243</sup> Findley, *supra* note 2, at 622.

<sup>244</sup> See *supra* note 146 and accompanying text.

<sup>245</sup> *Chapman v. California*, 368 U.S. 18, 24 (1967).

<sup>246</sup> *Yates v. Evatt*, 500 U.S. 391, 405 (1991); see also *Carella v. California*, 491 U.S. 263, 267 (1989) (Scalia, J., concurring) ("In the usual case the harmless determination requires consideration of 'the trial record as a whole,' in order to decide whether the fact supported by improperly

courts generally find [race-based] prosecutorial conduct to be improper, [but] they rarely overturn the defendant's conviction, often finding no prejudicial impact when the statement is balanced against the weight of the other evidence offered against the defendant."<sup>247</sup>

As a justice on the Supreme Court of Pennsylvania has recently explained, "it would be an overstatement . . . to suggest that appellate courts are wholly incapable of rendering judgments about the potential impact of certain evidence upon the fact-finder, or the ultimate likelihood that a different result would have obtained."<sup>248</sup> In these scenarios—in which no jury has had an opportunity to consider the record without the offending error—substituting their assessment for a jury's is a "familiar exercise" for appellate judges.<sup>249</sup> When appellate judges can make such a determination adverse to a criminal defendant, there is no legitimate place for slavish deference to the jury when it returns a guilty verdict that the appellate judges themselves would not have reached.

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admitted evidence was in any event overwhelmingly established by other evidence." (quoting *United States v. Hasting*, 461 U.S. 499, 509 (1983)).

<sup>247</sup> Thompson, *supra* note 6, at 1255 (citing Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J. RACIAL & ETHNIC JUST. 1, 25 (2016)). Other examples: when a trial court admits evidence improperly, the appellate court will weigh the trial record (minus the offending evidence) to determine whether the jury would have reached the same result. *See, e.g.*, *People v. Schultz*, 475 P.3d 1073, 1101 (Cal. 2020). And when the State improperly withholds exculpatory material from the defendant (and thus the jury), in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), the appellate court considers whether the "result of the proceeding would have been different" with the withheld evidence *See, e.g.*, *United States v. Bagley*, 473 U.S. 677, 682 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

<sup>248</sup> *Commonwealth v. Hamlett*, 234 A.3d 486, 508 n.9 (Pa. 2020) (Donohue, J., dissenting).

<sup>249</sup> *See id.*

The only remaining question, then, is how many judges it should take to reject the verdict. The next Part explains that the answer to that question is “one.”

#### IV. PRESCRIPTIVE PROPOSAL: EACH APPELLATE JUDGE SHOULD HAVE THE POWER TO ORDER A NEW TRIAL ON MANIFEST-WEIGHT GROUNDS.

If we are to take meaningful steps to combat wrongful convictions, we must invoke every reasonably available tool for doing so. It is time that we recognize the power of individual appellate judges to order new trials in criminal cases, even without the concurrence of the other two judges on the panel. This proposal would require statutory change at the federal level<sup>250</sup> and constitutional amendments in most state jurisdictions.<sup>251</sup>

The effect of implicit bias in jury verdicts is the animating concern. With that in mind, perhaps single-judge reversal would be most appropriate “when a conviction was undergirded primarily with evidence known to be of questionable reliability, such as a stranger-on-stranger

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<sup>250</sup> See, e.g., 28 U.S.C. § 46(b) (2018) (“In each circuit the court may authorize . . . separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court . . .”).

<sup>251</sup> See, e.g., CAL. CONST. art. 6, § 3 (appellate court “shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment”); N.Y. CONST. art. 6, § 8(c) (“In each appellate term no more than three justices assigned thereto shall sit in any action or proceeding. Two of such justices shall constitute a quorum and the concurrence of two shall be necessary to a decision.”); OHIO CONST. art. iv, § 3(A) (“[T]hree judges shall participate in the hearing and disposition of each case.”); *id.*, § 3(B)(3) (“A majority of the judges hearing the cause shall be necessary to render a judgment.”); ILL. S. CT. R. 22(c) (“Three judges must participate in the decision of every case, and the concurrence of two shall be necessary to a decision.”); see also Thomas B. Marvell and Carlisle E. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REFORM 415, 439 (1988) (“With few exceptions, [appellate courts] either have only three judges or they decide cases in panels of three judges.”).



eyewitness identification or ‘jailhouse snitch’ testimony.”<sup>252</sup> I would add coerced confessions to the list. But my proposal would not impose any particular conditions; whenever a single judge on an appellate panel is convinced that the jury reached the wrong result—or that bias played a role in the result—that judge should have the power to require a new trial. The rationales for my proposal are the focus of this Part.

*A. The Wrongful-Conviction Problem Requires a Stronger Institutional Fix Than Scholars Have So Far Proposed*

In past decades, the literature often highlighted the problems of implicit bias and wrongful convictions without specifying “precisely the procedural vehicle that should be created or adapted” to solve it.<sup>253</sup> The historical focus on identifying the problems is understandable given that the problems are intractable. And no suggested solutions will enjoy empirical support until after we implement and assess them (and even then, the efficacy may be difficult or impossible to measure). The focus on the problems is also understandable because we need policymakers to appreciate the need for systemic fixes before we can expect them to allocate resources toward identifying and implementing solutions. But I believe the time has arrived. “Until courts and legislatures are willing to craft safeguards that will address the impact of bias head-on, the jury system will continue to be infiltrated with bias.”<sup>254</sup> And we can no longer tolerate that bias.

If, as the research shows, the underlying problem is a product of jurors’ reliance on System 1 (intuitive) processing, two logical interventions suggest themselves: (1) training the jury to invoke System 2 (deliberative) processing; and

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<sup>252</sup> Risinger, *supra* note 3, at 1332; *see also* Oldfather, *supra* note 10, at 461 (“[M]isidentifications represent one of the most frequent causes of wrongful convictions.”).

<sup>253</sup> *See, e.g.*, Johnson, *supra* note 22, at 344.

<sup>254</sup> Thompson, *supra* note 6, at 1244–45.

(2) erecting an appellate safeguard to intercede when that jury training either does not occur or does not suffice. With respect to the former, Mikah Thompson advocates an open discussion of racial stereotypes with the jury, in both jury selection and jury instructions, to draw jurors' attention to the issue and thus temper the risk of intuitive decision making.<sup>255</sup>

With respect to the latter, several scholars have advocated greater judicial intervention, at both the trial and appellate levels, to root out the work of implicit bias.<sup>256</sup> Much of that discussion has involved manifest-weight review.<sup>257</sup> Professor Rachlinski has also suggested increasing "the depth of appellate scrutiny, such as by employing *de novo* review rather than clear error review, in cases in which particular trial court findings of fact might be tainted by implicit bias."<sup>258</sup> These scholars' ideas are sound, but we need something more concrete at the appellate level.

Even if we authorize manifest-weight review more broadly in appellate courts, that step alone would be unlikely to reach the full extent of the problem. Appellate courts require two of the three judges on the panel to concur in a judgment,<sup>259</sup> so manifest-weight review would provide relief only in those cases in which two judges detected or suspected that implicit bias played a role in the conviction.<sup>260</sup> Given the composition of the judiciary<sup>261</sup> and appellate courts' institutional reluctance to reweigh evidence,<sup>262</sup> it seems highly unlikely that we can solve the real-world problem with only a theoretical remedy.

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<sup>255</sup> *Id.* at 1294–306.

<sup>256</sup> *See supra* notes 25–26, & 167 and accompanying text.

<sup>257</sup> *See id.*

<sup>258</sup> Rachlinski et al., *supra* note 38, at 1231.

<sup>259</sup> *See supra* notes 250–251.

<sup>260</sup> Ohio, as noted above, *see supra* note 203 and accompanying text, requires all three judges on a panel to reverse on manifest-weight grounds following a jury trial. *See* OHIO CONST. art. iv, § 3(B)(3).

<sup>261</sup> *See supra* notes 28–30 and accompanying text.

<sup>262</sup> *See supra* notes 199–202, 221–223, & 236 and accompanying text.

The judicial reluctance to reweigh the evidence in favor of a wrongfully convicted defendant of color has explanations that extend beyond the oft-articulated deference to the jury's province. Among them: judges, like juries, are susceptible to relying on System 1 processing, and research demonstrates they invoke it in their judging. "[E]ven while pursuing rational decisions in earnest, judges are like other decision makers who may unknowingly take mental shortcuts, such as the subconscious reliance on heuristics, to make complicated decisions."<sup>263</sup> That means race makes a difference, even with judges; "[r]acial influences . . . operate much like the influence of emotion and other intuitive processes in judges."<sup>264</sup> And even racially diverse panels are not enough to overcome the work of implicit bias; "[e]xposure to a group of esteemed Black colleagues apparently [is] not enough to counteract the social influences that produce implicit negative associations regarding African-Americans."<sup>265</sup> In short, "judges harbor the same kinds of implicit biases as others."<sup>266</sup> So requiring a panel majority to detect and remediate implicit bias in a jury verdict is too tall an ask.

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<sup>263</sup> Edwards, *supra* note 8, at 1043; *see also id.* at 1044. ("[P]rior research has examined how race, gender, and other characteristics of a defendant can affect judges' sentencing decisions"); Johnson, *supra* note 22, at 265 ("[R]ace may inappropriately skew the credibility determinations of perfectly respectable judges who do not seem to manifest any animosity, racial or otherwise, toward African American litigants.").

<sup>264</sup> Rachlinski & Wistrich, *supra* note 7, at 103.

<sup>265</sup> *Id.* at 105–06.

<sup>266</sup> Rachlinski et al., *supra* note 38, at 1195. To be sure, Professor Rachlinski and his collaborators also concluded that, "given sufficient motivation, judges can compensate for the influence of these biases." *Id.* So they implore the bench to "adopt[] a deliberative approach" to avoid "intuitive, heuristic-based decision making" that leads them "to make erroneous decisions." Guthrie et al., *supra* note 7, at 31. But it is "unclear" whether judges with the motivation to avoid bias actually do so "on a continual basis in their own courtrooms." Rachlinski et al., *supra* note 38 at 1225. It is questionable whether enough judges have those motivations in the first place.

Even when judges are receptive to the argument in the abstract, they may not be receptive to applying it in a particular setting when the features of a tainted jury verdict are so difficult to detect. Professor Robertson argues that the uncertainty should pose no barrier to a retrial if the evidence was not enough to “create confidence” in the verdict.<sup>267</sup> In that circumstance, even if the judge “cannot know” how the jury reached its verdict “given the needs of deliberative privacy,” the judge should still order a new trial.<sup>268</sup> Professor Johnson takes a similar view: “[i]f we wait for proof of racial animosity, we may be sidetracked.”<sup>269</sup> But these admonitions, when coupled with System 1 processing at the judicial level, will not likely persuade enough judges to make a meaningful difference in appellate outcomes.<sup>270</sup>

*B. Single-Judge Manifest-Weight Reversal Would Not Undermine the Tradition of Three-Judge Appellate Panels*

There is nothing magical in the requirement that appellate panels sit in panels of three – and, therefore, nothing magical in requiring two judges on a panel to concur in the disposition.

It is true that three-judge panels have been entrenched in our judicial system “since the circuit courts were created in 1789.”<sup>271</sup> But “there is little, if any, legislative history to explain with any certainty the reasons behind selecting three

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<sup>267</sup> See Robertson, *supra* note 18, at 198.

<sup>268</sup> See *id.* Professor Robertson’s argument focuses primarily on trial-court judges, but the concept applies with equal force on appeal, assuming the law permits the remedy.

<sup>269</sup> See Johnson, *supra* note 22, at 265.

<sup>270</sup> See *id.* at 324 (“I am unaware of any case in which the need to reweigh evidence was attributed to biased credibility determinations by the jury.”).

<sup>271</sup> A. Lamar Alexander Jr., *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part 1)*, 40 N.Y.U. L. REV. 563, 571 (1965); see also Mitchell W. Bild, Note, *Rethinking the Federal Courts: Why Now is Time for Congress to Revisit the Number of Judges That Sit on Federal Appellate Panels*, 95 CHI.-KENT L. REV. 335, 338 (2020).

judges—as opposed to any other number—to hear appeals.”<sup>272</sup> That choice (as opposed to a higher number) seems to be a function primarily of the desire to foster judicial economy<sup>273</sup> and a product of the “three-judge tradition.”<sup>274</sup> And arguments in favor of even larger panels focus on the twin goals of “more ideologically balanced decisions” and “improv[ing] institutional legitimacy.”<sup>275</sup>

Diluting the power of individual judges in the context of important *legal rulings* perhaps makes sense, particularly in politically charged times, given that appellate courts “were intended to harmonize and unify the national law.”<sup>276</sup> But the same concerns evaporate when appellate judges assess *facts* at an individual trial, as they do when assessing evidentiary weight. In the evidentiary-weight context, the precedential value of a particular disposition is minimal. Its salience lies not in the advancement or clarification of the law, but rather in the potential vindication of an individual, wrongfully convicted defendant.

*C. Single-Judge Reversal Enhances the Unanimous-Verdict Requirement*

Because manifest-weight review addresses questions of fact, rather than law, the justification for requiring two appellate judges to concur (much less all three, as Ohio requires<sup>277</sup>) loses much of its resonance. Instead, investing the power to order a new trial in each individual appellate judge is a natural extension of the constitutional requirement of unanimity in jury verdicts for criminal convictions.

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<sup>272</sup> Bild, *supra* note 271, at 340–41.

<sup>273</sup> See *id.* (citing H.R. REP. NO. 80–308, at A7 (1947)).

<sup>274</sup> See *id.* at 338 (quoting Alexander, *supra* note 271, at 573) (emphasis removed).

<sup>275</sup> *Id.* at 358–59.

<sup>276</sup> Cf. Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969).

<sup>277</sup> See *supra* notes 203–204 and accompanying text.

The Supreme Court’s 2020 decision in *Ramos v. Louisiana*<sup>278</sup> illustrates that requiring unanimous juries is a tool to limit racially biased verdicts. There, the Court struck down Louisiana’s allowance of nonunanimous verdicts, explaining that the origins of that law were to “establish the supremacy of the white race.”<sup>279</sup> The Court explained that Louisiana, “[w]ith a careful eye on racial demographics, . . . sculpted a ‘facially race-neutral’ rule permitting 10-to-2 verdicts in order ‘to ensure that African-American juror service would be meaningless.’”<sup>280</sup> So we already recognize the important role that unanimity plays in protecting against results tainted by racial bias.

Why, then, should the rule be any different on appeal? After all, if the appellate court in a manifest-weight review sits as the thirteenth juror with the power to defeat unanimity and require a new trial,<sup>281</sup> it seems arbitrary that we dilute each judge’s participation in that thirteenth-juror role, particularly given our knowledge that detecting bias in the jury’s verdict requires a perspective or a willingness to overcome System 1 processing that many appellate judges lack.<sup>282</sup> That perspective is key to evaluating someone else’s

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<sup>278</sup> 140 S. Ct. 1390 (2020).

<sup>279</sup> *Id.* at 1394 (quoting OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA 374 (H. Hearsey ed. 1898)).

<sup>280</sup> *Id.* at 1394 (quoting *State v. Maxie*, No. 13–CR–72522 (La. 11th Jud. Dist., Oct. 11, 2018)).

<sup>281</sup> See *supra* notes 17 & 131 and accompanying text.

<sup>282</sup> See *supra* notes 28–30, and 66–72 and accompanying text; Oldfather, *supra* note 10, at 444 (suggesting that appellate courts, when determining the level of deference to accord to trial-court fact finding, should first undertake an “express consideration of institutional competence as applied to the specific matters before the court in a given case.”); Thompson, *supra* note 6, at 1255–56 n.82 (explaining, in the context of evidentiary rulings, that “[a]ppellate judges “are unlikely” to find that a ruling was “arbitrary and irrational” – and thus erroneous – “if they do not fully grasp that a prosecutor’s improper reference to race can trigger juror bias” (quoting Demetria D. Frank, *The Proof Is in the Prejudice: Implicit Racial Bias, Uncharged Act Evidence & the Colorblind Courtroom*, 32 HARV. J.

conduct, as criminal trials inevitably require factfinders to do; it informs our “empathetic projection: ‘If I did that under those circumstances, what might I be thinking or feeling?’”<sup>283</sup> In this sense, context matters: “a contextually rich environment” – which “anthropologists (and legal theorists influenced by them) call ‘thick description’ – situates behavior in ways that allow the observer to render more accurate determinations of what occurred.”<sup>284</sup>

So instead of viewing the three-judge panel as a collective, we should recognize it for what it is: three individuals with different competencies to review the trial-court record, just as each individual trial juror does, and with equal power to defeat unanimity.

*D. Solvency: Single-Judge Reversal Is Likely to Make a Difference*

There are also compelling reasons to believe that empowering individual appellate judges to reverse convictions and order new trials would have a salient effect on the wrongful-conviction rate.

In the DNA context – which is only a small slice of the pie<sup>285</sup> – Brandon L. Garrett found that a substantial number (nineteen) out of 200 appellate decisions affirming the convictions of defendants later exonerated by DNA evidence were not unanimous – they were marked by dissenting opinions that “commented on the weakness of the

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RACIAL & ETHNIC JUST. 1, 25 (2016)); Tate, *supra* note 158, at 609 (“[T]here is a substantial minor percentage of cases in which different judges may reasonably reach different conclusions based upon the same appellate record.”).

<sup>283</sup> Risinger, *supra* note 3, at 1294.

<sup>284</sup> See *id.* at 1295 (quoting Gilbert Ryle, *Thinking and Reflecting*, in 2 GILBERT RYLE, COLLECTED PAPERS 465, 474–79 (1971), and Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 3 (1973)).

<sup>285</sup> See *supra* notes 80–81 and accompanying text.

prosecution's case."<sup>286</sup> And in cases of reversal, Garrett found that "judges made statements in eight cases (6% of the cases with a written decision) suggesting that the defendant might be innocent."<sup>287</sup> If empowered to reverse on manifest-weight grounds, there is reason to believe that the individual judges who expressed these concerns might have exercised the power to order new trials if they had the authority to do so and even if their fellow panelists disagreed. Professor Robertson has also documented the unsurprising statistic that appellate courts invoke manifest weight as the basis for reversal far more frequently when the right is robust, as it once was in Texas, than when its availability is doubtful (as in the federal system).<sup>288</sup>

Given how few jurisdictions already offer manifest-weight review on appeal, there is necessarily a fair amount of speculation that accompanies my proposal. Even for Ohio, where manifest-weight review is already available on appeal, I have not undertaken to determine how often the court rejects manifest-weight review by less-than-unanimous panels. Anecdotally, we know it happens often enough to matter.<sup>289</sup> And it well may happen more often than we know;

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<sup>286</sup> Garrett, *supra* note 5, at 106.

<sup>287</sup> Findley, *supra* note 2, at 595 (citing Garrett, *supra* note 5, at 105).

<sup>288</sup> Robertson, *supra* note 16, at 182 ("The federal circuit courts of appeals typically reverse just over 2,000 judgments each year, but only a handful of those reversals – less than 0.5 percent – are based on the weight of the evidence. In Texas, by contrast, where the right to review is much more systematized, 4 percent of reversals are based on the weight of the evidence (footnote omitted)). Texas has since abolished manifest-weight review on appeal. *See supra* notes 172–183 and accompanying text.

<sup>289</sup> *See, e.g.*, State v. Metz, 146 N.E.3d 1190, ¶ 119 (Ohio Ct. App. 2019) (Gallagher, S., J., concurring in part and dissenting in part), *appeal allowed*, 152 N.E.3d 319 (Ohio 2020); State v. Patel, 147 N.E.3d 97, ¶ 37 (Ohio Ct. App. 2019) (Delaney, J., dissenting); State v. Bennett, 140 N.E.3d 1145, ¶ 45 (Ohio Ct. App. 2019) (Froelich, J., dissenting); State v. Burns, 2019-Ohio-2663, ¶ 78 (Ohio Ct. App. 2019) (Lynch, J., concurring in part and dissenting in part); State v. Salazar, 2019-Ohio-2585, ¶ 81 (Ohio Ct. App. 2019) (Brunner, J., dissenting); State v. Ford, 2019-Ohio-2570, ¶ 96 (Ohio Ct. App. 2019) (Gallagher, E.A., J., dissenting); *In re A.S.*, 2019-Ohio-2359,



there is reason to believe that Ohio's unanimous-panel requirement<sup>290</sup> discourages judges from taking the time to write dissenting opinions addressing manifest weight. Doing so requires time-consuming (sometimes painstaking) sifting through the record and writing up an explanation, but that dissenting opinion would neither alter the result for the defendant nor advance an understanding of the law for the public at large. But if that same effort would actually afford the defendant a new trial, it would serve more than a symbolic purpose. In short, conferring the power on a single judge would likely inspire that judge to express her views in a way that the opportunity to write a mere dissenting opinion does not.

*E. A Second Trial After a Manifest-Weight Reversal Would Instill Greater Confidence in the Criminal-Justice System*

It bears emphasis that a manifest-weight reversal does not end the case; the defendant must still stand trial again.<sup>291</sup> Courts have “uniformly rejected” the argument that a divided jury “establishes reasonable doubt [that] requires acquittal.”<sup>292</sup> So the thirteenth juror, embodied in our single appellate judge, may do no more than order a retrial.

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¶ 34 (Ohio Ct. App. 2019) (Bergeron, J., dissenting); *see also In re S.M.B.*, 2019-Ohio-3579, ¶ 123 (Nelson, J., concurring in part and dissenting in part) (characterizing manifest-weight determination as “a close one”). These examples do not include cases in which divided panels affirmed on sufficiency grounds, where the dissenting judge would presumably have exercised the power to reverse on manifest-weight grounds if given the power to do so.

<sup>290</sup> *See supra* notes 203–204 and accompanying text.

<sup>291</sup> *See supra* note 133 and accompanying text.

<sup>292</sup> *Arizona v. Washington*, 434 U.S. 497, 509 (1978). Professor Risinger takes a different view. He suggests that after a reversal on manifest-weight grounds—for which he uses the British nomenclature “unsafe verdict”—“a retrial on the same record should . . . be prohibited—not on double jeopardy grounds at all, but on the grounds that a second or third conviction on the same record would a fortiori be subject to reasonable

That retrial, in turn, offers the defendant an opportunity to place her fate in the hands of a second jury. Of course, there is no way to ensure that implicit bias will not infect that second jury's deliberation process; the evidence the parties will present at the second trial is likely to be substantially the same as the evidence at the first. But studious defense counsel will consider adjusting the defense tactics to account for whatever went amiss at the first trial. Perhaps it will mean greater, or different, focus in jury selection. Perhaps it will mean refraining from calling a particular witness who did not play well with the first jury. Perhaps it will mean adjusting language and imagery in questions and arguments designed to exploit jurors' System 1 processing to the defendant's advantage. Or perhaps counsel—now wiser about how implicit bias may have operated the first time—will address it with the jury directly, calling it out in jury selection and advocating jury instructions, as Professor Thompson advocates.<sup>293</sup> I can envision opportunities to call it out in questioning and jury argument as well. With any combination of these mitigating steps, a second trial presents a defendant a greater chance of a result in which implicit bias may play a lesser role, perhaps converging on the ideal of a fair trial in which it plays no role at all.<sup>294</sup>

In addition to the immediate benefit to the defendant, retrials in these circumstances instill greater confidence in the criminal-justice system overall. Some defendants will win acquittals the second time; others may not. For that latter, “[t]here is a general presumption that if a second jury agrees with the first, it was the . . . judge and not the jury who was

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doubt, and therefore fundamentally in violation of due process and our duty to protect the innocent.” Risinger, *supra* note 3, at 1333.

<sup>293</sup> See Thompson, *supra* note 6, at 1297–1306.

<sup>294</sup> See also Robertson, *supra* note 18, at 199 (“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.”).

mistaken about the weight of the evidence.”<sup>295</sup> Under *Tibbs*, “even if a single jury verdict might appear against the weight of the evidence and hence be unjustified, the same verdict from a subsequent jury based upon the same evidence might not look so aberrant to the court the second time around.”<sup>296</sup>

Of course, with a second conviction would come a second right to appeal. It is reasonable to ask whether the defendant should have the right to a manifest-weight review on second appeal. The answer to that question has to be “yes.” If the right to a trial free of bias is to have meaning, the remedy for an improper trial cannot be a second improper one.<sup>297</sup> Public confidence in the trial system demands that we do it as many times as necessary to get it right.<sup>298</sup>

#### F. *The Costs Are Worth Paying*

Finally, the costs of single-judge manifest-weight reversal are inarguably worth it to society.

The “increase the cost of adjudication”<sup>299</sup> is the only significant cost.<sup>300</sup> At the appellate level, the recognition of the

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<sup>295</sup> Robertson, *supra* note 16, at 208–09.

<sup>296</sup> Findley, *supra* note 2, at 635 (citing *Tibbs v. Florida*, 457 U.S. 42, 43 n.18 (1982)).

<sup>297</sup> *But see* Robertson, *supra* note 16, at 208 (noting “rules limiting the number of times that the trial judge may order a new trial.”).

<sup>298</sup> *See id.* at 206 (“[T]he public’s faith in the jury system would likely increase if the courts had a consistent mechanism by which those seemingly unfair verdicts could be set aside.”).

<sup>299</sup> *See id.* at 207.

<sup>300</sup> There is theoretically another cost; appellate judges willing to reverse on manifest-weight grounds may suffer political consequences for doing so, especially in jurisdictions that elect judges. *See* Findley, *supra* note 2, at 606–07 (“No court wants to be responsible for releasing a defendant convicted of a serious crime and risk the fallout should the defendant commit another crime. The empirical evidence indicates that pressures to be ‘tough on crime’ do have a significant impact on judges, especially in jurisdictions, like most, where judges are elected.” (footnotes omitted)). But “[t]he *Tibbs* rule that a weight-of-the-evidence reversal does not implicate double jeopardy concerns to bar retrial, whatever its doctrinal or analytical merit, at least has the advantage of permitting

right to manifest-weight review, currently unavailable in most jurisdictions,<sup>301</sup> would certainly add to the workload.<sup>302</sup> But, as Chad Oldfather has explained, “there is no reason to believe that the absolute number of appeals would increase dramatically. Those criminal defendants who are inclined to appeal their convictions will probably do so anyway.”<sup>303</sup> Indeed, the defendants who would challenge manifest weight probably would challenge sufficiency in any event, given the close connection between the two arguments,<sup>304</sup> so the job of reviewing the record would be no more burdensome. And once a court permits manifest-weight review on appeal, that court incurs no marginal cost to extend the new-trial power to each of the panelists.

For those cases remanded for new trials, the new trials would of course would entail additional costs. Professor Robertson notes that a second trial in the civil context “would appear unaffordably decadent.”<sup>305</sup> In any event, “the increased adjudication cost may reasonably be the price of justice.”<sup>306</sup> And that cost concern is less resonant in the criminal context, where “any gains in factual accuracy should be highly valued.”<sup>307</sup>

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appellate courts to engage in aggressive fact review without having to shoulder full responsibility for acquitting an accused person.” *Id.* at 634.

<sup>301</sup> See *supra* notes 169–170 and accompanying text.

<sup>302</sup> Oldfather, *supra* note 10, at 482 (“Empowering appellate courts to review the factual underpinnings of criminal convictions, critics argue, would open the proverbial floodgates, resulting in even more work for already overburdened appellate courts.”).

<sup>303</sup> *Id.* at 512; see also *id.* at 485 (“If . . . one recognizes that appellate courts are in some respects better positioned to evaluate facts than trial-level fact finders, the judicial economy justification loses much of its force.”).

<sup>304</sup> See *supra* note 132 and accompanying text.

<sup>305</sup> Robertson, *supra* note 18, at 168; see also *id.* at 189 (“Given the modern rarity of jury trials, it may seem superfluous and inefficient to allow not just one trial, but two.”).

<sup>306</sup> *Id.* at 209.

<sup>307</sup> Oldfather, *supra* note 10, at 485.

The Supreme Court highlighted this conclusion in *Ramos*,<sup>308</sup> where it held that nonunanimous juries in criminal cases are unconstitutional. The *Ramos* Court rejected a four-justice plurality's 1972 opinion in *Apodaca v. Oregon*,<sup>309</sup> which had argued that "[s]tates have good and important reasons for dispensing with unanimity, such as seeking to reduce the rate of hung juries."<sup>310</sup> But the *Ramos* Court assailed that "breezy cost-benefit analysis" and rejected the *Apodaca* premise that "reducing the rate of hung juries . . . always scores as a credit, not a cost."<sup>311</sup>

If we value fair adjudication, there should be no serious debate over whether the costs of single-judge evidentiary reversal are worth it. We do, and they are.

### CONCLUSION

We have come a long way since Haywood Patterson was sentenced to death for a rape that the physical evidence establishes he did not commit. But it remains beyond serious dispute that implicit bias plays a role in the systemically disproportionate convictions of people of color. And if we mean to do something about that problem, we have to construct systemic protections. They may have to look different from the familiar to be effective.

Admittedly, reversal on the vote of one out of three appellate judges is intuitively troubling. But that intuitive reaction yet another demonstration of System 1 processing. Deliberative thinking, by contrast, welcomes the opportunity for unorthodox solutions to entrenched problems. Single-judge reversal on evidentiary weight could have a real impact in reducing wrongful convictions while preserving the juror's

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<sup>308</sup> 140 S. Ct. 1390 (2020).

<sup>309</sup> 406 U.S. 404 (1972).

<sup>310</sup> *Id.* at 1401 (citing *Apodaca*, 406 U.S. at 411).

<sup>311</sup> *Id.* The Court also questioned "whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions[.]" *Id.*

ultimate authority to decide guilt or innocence. As Professor Oldfather observed, what remains “is to put these ideas into practice.”<sup>312</sup>

It’s time for a change as radical as the problem is severe.

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<sup>312</sup> Oldfather, *supra* note 10, at 485.