

THE BETRAYAL OF *JACKSON V. VIRGINIA* AND THE WAY TO RESTORE ITS PURPOSE

JOSEPH P. ATNIP***

ABSTRACT

Perhaps the most often-cited case in criminal appellate decisions is *Jackson v. Virginia*,¹ a 1979 Supreme Court case that intended to set a more rigorous standard of appellate review when a defendant claimed that the state failed to prove its case beyond a reasonable doubt. *Jackson* required that appellate courts review the record to determine whether there was *sufficient* evidence, not just *some* evidence, to convict. The appellate courts' exaltation of cautionary instructions found within the text of *Jackson* has rendered the holding meaningless. That overemphasis upon the cautionary instructions has resulted in a cavalier attitude toward the truth that has trickled down from the appellate courts to the trial courts, too often resulting in the failure of our criminal justice actors to acknowledge overwhelming evidence of innocence.

Most appellate courts have interpreted *Jackson* to mean that they should avoid even questioning the credibility of prosecution witnesses. But *Jackson* requires that appellate courts determine the quantum (the "sufficiency") of evidence necessary to justify a verdict of guilty, so failing to judge the veracity of witnesses usually means failing to measure the quantum of evidence. In this Article, I propose a way to measure the amount of evidence needed to qualify as "sufficient." I propose that the appellate courts employ a standard of review that is used throughout our judicial system in other contexts. This Article argues that appellate courts should overturn a verdict of guilty **if the record shows by clear and convincing evidence that the state did not prove its case beyond a reasonable doubt**. This standard of review is relatively straightforward. This way to measure sufficiency will return the appellate courts to the thesis of *Jackson*. It will provide courts with a methodology that will make *Jackson* easier to follow, ensure fairness to both the state and the defense, and make the sufficiency of the evidence analysis more structured and less

*** Joe Atnip was the first elected District Public Defender in his two-county rural district in Tennessee. He held the job for 32 years and retired two years ago. He is a 1982 graduate of Vanderbilt University School of Law. He is a past president of the Tennessee Public Defenders Conference. He is a former member of the Board of the Tennessee Bar Association and a former member of the Board of the Tennessee Association of Criminal Defense Lawyers. He wishes to thank the Hon. David Raybin and Judge Mark Ward for reviewing drafts of the article and for their encouraging comments. The author is also grateful for the assistance and encouragement of George C. Thomas, Board of Governors Professor of Law and Judge Waugh Distinguished Scholar at Rutgers University School of Law, and co-author of CRIMINAL PROCEDURE: CASES, PRINCIPLES, AND POLICIES, a widely used casebook. Of this article, Professor Thomas has written, "This is an important article. Joe Atnip demonstrates that courts do not fairly evaluate criminal defendants' claims of innocence. He allows the reader to experience these injustices by discussing actual cases in which he represented defendants. Perhaps most importantly, Mr. Atnip proposes a way to read the seminal Supreme Court case that would give innocent defendants a better chance to establish their innocence."

1. 443 U.S. 307, 316 (1979).

subject to accusations of arbitrariness.

I. A POORER AND SCARIER PLACE TO LIVE: THE HIGH COST OF IGNORING INNOCENCE

Since 1989, there have been more than 3,630 people found to have been completely innocent of any crime, who, nevertheless, spent a total of 32,750 years in prison.² Many of these wrongly convicted people were freed because of DNA evidence.³ But these people were lucky. They were freed because of the immense effort of lawyers who tackled their cases, even though their clients had already been found guilty and had already been told by the appeals courts that everything was done correctly and that their plea of innocence had no merit.⁴

Moreover, that 3,630 figure does not account for the unknown—and perhaps unknowable—number of men and women who were not totally innocent but were innocent of what the prosecutor said they did and were nevertheless convicted of the higher charge. The National Registry of Exonerations clearly says, “We focus on exonerations because the only false convictions that we know about are those that end in exonerations.”⁵ In other words, they count only those who were completely innocent of any wrongdoing.⁶

That 3,630 number also does not account for those cases that I call “The Scary Ones.” They are the men and women who were charged and convicted upon flimsy or, in some cases, false evidence, and they had no way of proving their innocence beyond any doubt, so they languished, or continue to languish, in a concrete cage. I know about The Scary Ones because I have represented some of them. They haunt me still today.⁷

2. NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Dec. 18, 2024).

3. *DNA Exonerations in the United States (1989–2020)*, INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Dec. 18, 2024). The Innocence Project stopped maintaining a list of all DNA exonerations where “post-conviction DNA testing was central to exoneration” in 2020. Their current tracking includes all “‘IP successes’ (meaning DNA exonerations, exonerations based on other evidence, and other victories such as post-conviction Alford pleas).” The Innocence Project still provides “Fast facts” for the first 375 DNA exonerations nationwide. *Id.*; Samuel Gross, *Changes in Exonerations Over Time*, NAT’L REGISTRY OF EXONERATIONS (2020), www.law.umich.edu/special/exoneration/Documents/NRE.Changes%20in%20DNA%20Exonerations.FINAL.11.7.22.SRG.pdf.

4. See, e.g., *Chronicling a Powerful Legacy of Justice Work*, INNOCENCE PROJECT: HISTORY OF IMPACT, <https://history.innocenceproject.org/> (last visited Dec. 18, 2024) (explaining that Barry Scheck and Peter Neufeld started the Innocence Project as a law clinic at the Benjamin N. Cardozo School of Law after working on the Marion Coakley case).

5. *Our Mission*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/mission.aspx> (last visited Dec. 18, 2024).

6. The National Registry of Exonerations defines an “exoneree” in a way that excludes those who are innocent of the crime charged but guilty of a lesser crime. “A person who was convicted of a crime and later officially declared innocent of that crime, or relieved of all legal consequences of the conviction because evidence of innocence that was not presented at trial required reconsideration of the case.” *Glossary*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Dec. 18, 2024).

7. It has been estimated that one out of every eight or nine jury verdicts is inaccurate. See Bruce Spencer, *Estimating the Accuracy of Jury Verdicts*, 4 J. EMPIRICAL LEGAL STUD. 305, 307 (2007).

Wayne Simpson,⁸ for example, was sentenced to three years in prison because he defended himself, his girlfriend, and his property from an intruder. Wayne had moved in with his girlfriend, Linda. A few days later, Linda's ex-boyfriend (and high school sweetheart) found out that Linda had a new boyfriend. The ex-boyfriend decided he would try to get Linda to take him back. He went to Linda's house and pounded on the door. Linda was inside but refused to come out. When the ex-boyfriend went around to the back porch, he saw Wayne's possessions lying there and threw Wayne's stuff out into the yard. (Wayne was at work at the time.) The ex-boyfriend admitted at trial that he also phoned Linda repeatedly and went over to her house again, after dark, after drinking at a beer joint.

Later that week, the ex-boyfriend cruised their neighborhood. Upon seeing Wayne and Linda come out of the house and get into Wayne's truck, the ex-boyfriend pulled into the driveway and blocked them from leaving. The old boyfriend then got out of his truck, spoiling for a fight. Wayne got out, grabbed a baseball bat from the bed of his truck, and told the old boyfriend to "Get back." The ex-boyfriend growled that he was going to "whoop" Wayne and kept coming. He outweighed Wayne by 25 pounds, was two and a half inches taller, and 7 years younger. (Both men were in their 40s.) When the ex-boyfriend got within a couple of feet of Wayne, Wayne hit him with the bat, striking him on the arm. According to the ex-boyfriend, the bat didn't even slow him down. Instead, he stated that he then chased Wayne into the neighbor's yard, returned to Wayne's truck (where his former girlfriend sat), and talked with her. Only then did he finally leave because, he said, "She asked me to." It took the ex-boyfriend two days to bother to report the incident. By that time, he had a cast on his arm, claiming the bone was cracked.

What happened next is what happens way too often. Since the intruder got to the police first, the intruder became the good guy. No matter that he probably could have been charged with criminal trespass and assault against Wayne, and perhaps telephone harassment against Linda, the intruder told his story first, so he became "the victim." The police charged Wayne with aggravated assault and threw him in jail.

I did not represent Wayne at the trial level. A private attorney took it to the jury and lost. I received the transcript of the trial and took the case up to the court of criminal appeals. And I lost. I write about this case, not because it is particularly exciting or particularly intriguing in any respect. I write about it because it is so typical and yet so scary that a citizen can be prosecuted on facts as petty and paltry as these. The state, for example, knew how weak their case was because they were reduced to arguing, believe it or not, that their "victim" had no romantic interest whatsoever in his old girlfriend.

After I read what happened at trial, I was astounded that a Weakley

8. I have changed names of clients and other witnesses unless noted otherwise.

County jury⁹ would have convicted Wayne on such absurd facts. The jury should have laughed the D.A. out of court. It was also clear to me that the defense attorney was not at the top of his game that day, but that should not have made a difference. A jury should be able to recognize prosecutorial overreach when they see it.

What is worse, though, is that I knew when I first read the transcript that the jury verdict would be upheld by the Tennessee Court of Criminal Appeals. Yes, what the jury did was unusual and unfortunate. But what is *frightening* is that our appeals courts will not push back against nonsense like this. Our appeals courts have, in large measure, denied any responsibility for recognizing weak cases, much less recognizing innocence. As I will explain in this Article, appeals courts have taken a perfectly reasonable Supreme Court case and used it to justify their reluctance to do the difficult and perhaps politically perilous job of correcting injustice.

My brief to the appellate court on behalf of Wayne was twenty-nine pages long. The state's brief was nine pages, mostly cut and paste. The state knows they don't have to try very hard. In the appeals court's decision, the judge wrote, "Defendant's brief is replete with complaints and criticisms about the various witnesses at trial. These complaints, while colorful and interesting to read, are nothing more than attacks upon the credibility of the witnesses. *Assessing the quality of witness testimony is not within our purview.*"¹⁰ In other words, what the witnesses say is *no concern of ours*. The judge is simply wrong. Yet, he relies upon several prior cases that say the same thing.¹¹ Like most appellate judges, he misread the case upon which he based his reluctance to acknowledge innocence.

That statement by the appellate judge also betrays a tenuous grasp of courtroom reality. It has been my experience that virtually all evidence in a criminal trial is witness testimony. Even physical evidence like DNA must be collected, transported, and analyzed by human beings who speak before the jury and are cross-examined. If appellate courts are not going to assess the quality of witness testimony, at least in most of the criminal trials I have litigated, they are not going to do anything as far as

9. Weakley County is in northwest Tennessee. The county boasts its manufacturing, agriculture, business, and education. *Discover Weakley County*, #WEAKLEYCOUNTYTN, <https://www.weakleycountyttn.gov/about.html> (last visited Dec. 18, 2024). Thus, in this rural county, juries often include farmers, teachers, plumbers, and businesspeople.

10. The author wishes to preserve the anonymity of his clients to spare them from reliving their stories. As a result, several citations, including this one, have been reserved and are on file with the author.

11. See, e.g., *State v. Thomas*, 687 S.W.3d 223, 249 (Tenn. 2024) (stating that to determine the sufficiency of the evidence, "the prosecution is afforded 'the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.'" (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010))). The Court elaborated further that "[q]uestions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *Id.* at 249 (quoting *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). "Typically, we cannot and will not attempt to re-weigh or re-evaluate the evidence. *Id.* (citing *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002))."

ascertaining the truth is concerned. As in most cases, in Wayne's case, witness testimony was all there was. When the appeals judge said, "Assessing the quality of witness testimony is not within our purview," he was saying, "Assessing the truth of a case is not our job." As we will see, assessing the truth of what the witnesses have said is the most important job these jurists can perform, and our Constitution requires them to do it.¹²

Next was the much scarier case of James Arnold. James was a Marine veteran who married a woman who already had several young children. One of those children was an eight-year-old boy, and one was a nine-year-old girl. They lived in a small house. The eight-year-old boy claimed that one day, when his mother was still sleeping in the bedroom, his stepfather, James, in broad daylight, forced him down onto the living room sofa, turned him over onto his stomach, and climbed up on top of him. Then, the boy said, James pulled the boy's pants down, pulled his own pants down, and brutally raped him from behind. There were several problems with the boy's story. One was that the pediatrician who examined the boy could find absolutely no physical evidence that it had happened. Another problem was this undisputed testimony: The nine-year-old sister, who, like the boy, despised the stepfather, was sitting on the same couch, wide awake, inches away, when this supposedly occurred, and she neither saw nor heard anything.

Again, I did not try the case, but James was found guilty and sentenced to serve 100% of thirty years for rape of a child. I was handed the case to appeal. And again, the appeals court refused to overturn the trial court. Is it possible that James was guilty? Of course, anything is possible. However, because the chance was so remote, the appellate court's failure to act in this case became a horrific illustration of the moral emptiness of the appellate courts' guiding standards. Notice I did not say that the judges themselves were morally culpable. I said the *standards* by which they review the facts of a case are deeply flawed, and those rules result in innocent people being locked in cages for the best years of their lives.

Years ago, I also represented a young mother who was charged with using a lit cigarette to burn her baby's body. The local papers had a field day, and so did the several agencies devoted to catching child abusers. My client, Jill Moore, was arrested, of course, and her child was handed over to foster care. "I didn't burn my baby!" was all Jill could say through the tears. "I have no idea how those burns got on her skin!"

I was able to obtain color pictures of the infant. They did indeed look bad. I called the local family doctor and set up an appointment with him.

12. The Constitution guarantees "sufficient proof." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979) ("In short, *Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no 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.").

He took one look at the pictures. “Those are not burns at all,” he said. “That’s impetigo.” I don’t remember if any state agency had bothered to take the child to a doctor before unleashing the awesome power of government upon that young lady. It is hard to overstate the trauma that was inflicted. If I recall correctly, they eventually admitted that the baby did not have cigarette burns, and they dismissed the charges. However, they took their time. The prosecutor exacted a pound of flesh, or, more accurately, tribute, by dragging the case out much longer than it should have been.

I mention this young girl’s case because it is typical of many that I have had during 40 years of representing the men and women of my district.¹³ Instead of a rush to judgment, there should have been a race to uncover the truth. The unhappy fact is that there is not enough incentive to search for innocence. One of the best ways to encourage more thorough investigations at the trial level is to require the appeals courts to effectively review the prosecutions of those who have been convicted. Because if we had gone to trial in Jill’s case and, somehow, lost, there would have been little if any recourse in our court of appeals. The appeals court would have taken the testimony of any of the prosecution’s witnesses who said that the child had been burned with a cigarette and ignored the doctor, because remember, “Assessing the quality of witness testimony is not within [their] purview.”¹⁴

Unfortunately, it often seems that the further the judge sits from a defendant, the less the judge cares about justice for that defendant. Too often, the only goal of the higher court is analysis of the *process* of the trial, not of the justice of the trial.¹⁵ In other words, usually, the only relevant question for the appeals court is, “Did everybody follow the rules?” Particularly when it comes to whether a defendant is guilty or not, the higher courts have found a way to wash their hands of the whole ugly business of determining truth.

A portion of the decision of the appeals court in *State v. Larry Miller*¹⁶ demonstrates again that even if an appellate judge is making a sincere effort to do the right thing, the case law is so stacked against a meaningful review that it’s hard to tell whether the judge is intentionally ignoring the evidence or is simply following that language from Wayne’s case that I

13. This fact is a result of our adversarial system of justice. A trial is a contest. The judges look upon themselves as referees. But even a prosecutor must seek justice, MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); however, this admonition is honored more in the breach than in the observance. I do not place all the blame on the prosecutors for wanting to win at all costs. Telling a prosecutor before a trial that his primary goal is not to win is like telling a prizefighter his object is not to win but to get in there and duke it out anyway.

14. *Id.*

15. *Id.*

16. As mentioned above, the author wishes to preserve the anonymity of his clients to spare them from reliving their stories. As a result, several citations, including this one, have been reserved and are on file with the author.

just quoted.

Larry Miller was an off-duty sheriff's deputy who found his wife in bed with another man and shot and killed the other man. He was certainly guilty of manslaughter, but I argued, only partially successfully, that he was not guilty of the charged offense—first-degree murder. The state's last witness was a young woman who claimed that my client had told her that if he caught his wife in bed with another man, my client would kill him. This woman claimed that my client was pursuing her and that she went out of her way to avoid any contact with him. But on cross, I had her read several love letters that she had sent to my client while he was in jail. In the letters, she discussed intimate fantasies and even said that it was all her fault that he had gotten into trouble in the first place. However, after her testimony, the trial judge said, "The testimony of the last witness was totally impeached, and I don't know that her testimony is subject to belief by anyone."

Sure enough, the appeals judge wrote an entire paragraph summarizing that woman's direct examination and said not one word about the cross-examination. If you were to read the decision by the appeals court only, you would never know that she had wanted Larry to hold her in his arms and kiss her all over, and that, after my cross-examination, the District Attorney himself basically told her to shut up. After all, if you must "accredit the state's witnesses,"¹⁷ then there is no need to mention that the state's witnesses are unbelievable. I cannot blame the judge who wrote the opinion in Larry's case for ignoring the cross-examination. If he must accredit the state's witnesses and resolve conflicts in favor of the state, and if it does not matter whether the jury was rational in its decision-making, it is unnecessary to read the cross-examination part of a witness's testimony. The appellate judge in Larry's case was simply obeying the precedent that soon followed in the wake of the decision in *Jackson v. Virginia*. Those cases that claimed they were following *Jackson* did indeed cite passages from its text. In other words, the precedent in most jurisdictions does reflect the truth of *Jackson*, just not the whole truth.

II. THE HISTORY OF *JACKSON*

Before *Jackson* was decided by the U.S. Supreme Court in 1979, appellate courts did not even have to pretend they had read the transcript of the whole trial.¹⁸ All they were required to do was to start to read the beginning of the state's case. When they read *any* of the state's evidence that indicated the defendant might have committed the crime, they could quit

17. *State v. Ware*, No. W2010-01992-CCA-R3-CD, 2011 WL 4716238, at *5 (Tenn. Ct. App. Oct. 7, 2011).

18. *Jackson*, 443 U.S. at 320 (stating that the "no evidence" rule from *Thompson v. Louisville*, 362 U.S. 199 (1960), only required a "mere modicum of evidence," which is simply any evidence that "has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence"). *Jackson* was an appeal on a habeas corpus proceeding in Federal Court, but its holding applies to all criminal appeals in state or federal courts because the decision was based on due process, 14th Amendment grounds.

that case and go on to the next one. All the state had to show was “any evidence,” and that was it.¹⁹ In other words, the appellate courts were required to play virtually no role at all in the pursuit of truth.

In the *Jackson* case, the defendant admitted to shooting and killing his girlfriend, but claimed that she was the aggressor, that she came at him with a knife, and that he had defended himself by pulling a gun on her.²⁰ In the ensuing struggle over the gun, he said it accidentally went off (twice). He said he fled the scene and failed to seek help for her because he was afraid. He also claimed he was high, and therefore unable to form the requisite *mens rea* of malice aforethought.²¹ The defendant was found guilty of first-degree premeditated murder at trial.²² He appealed in state court, claiming that the state had failed to prove that he had premeditated the killing.²³ The appeals courts said there was “some” evidence of premeditation, and, since any evidence at all was enough, the conviction was upheld in the Virginia state courts.²⁴ Mr. Jackson then filed a *habeas corpus* petition in federal district court. The district court, applying the same standard of review employed by the state court, found that there was no evidence whatsoever to support the element of premeditation and granted the writ. The state appealed to the Federal Court of Appeals, and that court, in turn, reversed the district court’s decision. Remarkably, all this back-and-forth decision-making was based upon the same standard of review which had been articulated in the controlling precedent, *Thompson v. Louisville*,²⁵ which said that if there is any evidence at all to support the verdict, then the appellate court need not intervene.²⁶

But then, the U.S. Supreme Court stepped in and said, “Hold on, our whole judicial system is based on the idea that an American cannot be imprisoned unless the government has proven beyond a reasonable doubt that he did it. If we compromise the integrity of the ‘proof beyond a reasonable doubt’ standard, then America will be a much poorer, much scarier place to live.” (The author’s words.) *Jackson* said that proof beyond a reasonable doubt plays a vital role in the American scheme of justice because it “operates to give ‘concrete substance’ to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding.”²⁷ Moreover, that standard “impress[es] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused,” and “the standard symbolizes the significance that our society attaches to the criminal sanction, and thus to liberty itself.”²⁸

19. *Id.*

20. *Id.* at 310–11.

21. *Id.* at 311.

22. *Id.*

23. *Id.* at 311–12.

24. *Jackson v. Virginia*, 443 U.S. 307, 312 (1979).

25. 362 U.S. 199 (1960).

26. *Id.* at 199.

27. *Jackson*, 443 U.S. at 315.

28. *Id.* (citing *In re Winship*, 397 U.S. 358 (1970) (Harlan, J., concurring)).

The courts of criminal appeals say that the jury is the only fact-finder.²⁹ They say that an appeals court's only role is to decide whether the law was followed. In other words, they are concerned only with issues of law, and not with whether witnesses tell the truth. They do err, not knowing *Jackson*.³⁰

Jackson says that whether there was enough evidence to convict is not just a question of fact; it is a question of law.³¹ When it comes to sufficiency of the evidence, *Jackson* doesn't just blur the distinction between fact and law; *Jackson* erases that distinction. If the jury says that the defendant did it, but there is not enough evidence to prove beyond a reasonable doubt that the defendant did it, that's a violation of the law. That's a violation of the 14th Amendment Due Process Clause, *Jackson* says.³² The 14th Amendment is the law.³³

Jackson requires the appeals courts to surrender the fact/law fiction. *Jackson* demands that the appeals courts determine facts. Nonetheless, the government in the *Jackson* case argued strenuously that if the jury is merely instructed to find that the state has proven everything beyond a reasonable doubt, that's enough.³⁴ In other words, the jury was told what to do, and we must assume that they did it.³⁵ However, in response, the Supreme Court said that was not enough. It is not enough, Justice Stewart wrote, to simply instruct the jury that the state had to prove everything beyond a reasonable doubt. In reality, telling the jury about proof beyond a reasonable doubt can be meaningless; a mere "trial ritual," as the Court put it.³⁶

29. See, e.g., *State v. Ware*, No. W2010-01992-CCA-R3-CD, 2011 WL 4716238, at *6 (Tenn. Ct. App. Oct. 7, 2011) (differentiating between appellate courts and factfinders).

30. While I argue that the text of *Jackson* provides the necessary tools for appellate courts to apply the appropriate standard, some authors assert, with cogent scholarship, that *Jackson* does not go far enough on behalf of innocent defendants. See, e.g., GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 113 (2008). Professor Thomas is probably correct, but I argue that our justice system will nevertheless be improved significantly if we are true to the *Jackson* doctrine.

31. *Jackson*, 443 U.S. at 320 & n.14 ("Application of the *Thompson* standard to assess the validity of a criminal conviction after *Winship* could lead to absurdly unjust results. Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error. Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence. Yet a defendant against whom there was but one slender bit of evidence would not be denied due process so long as the jury has been properly instructed on the prosecution's burden of proof beyond a reasonable doubt. Such results would be wholly faithless to the constitutional rationale of *Winship*." (citations omitted)).

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

33. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

34. See, e.g., *Jackson*, 443 U.S. at 316 (stating that "the Federal Courts of Appeals have generally assumed that so long as the reasonable doubt instruction has been given at trial, the no-evidence doctrine of *Thompson v. Louisville* remains the appropriate guide for a federal habeas corpus court to apply").

35. The government argued that its position promoted several values, including "(i) the most effective use of limited judicial resources, (ii) the finality in criminal trials, (iii) minimizing friction between federal and state judicial systems, and (iv) the doctrine of federalism." Brief for Respondents at 7, *Jackson*, 443 U.S. 307 (1979) (No. 78-5283). The Court in *Jackson* disagreed that the *Thompson* test should apply to federal habeas corpus proceedings. *Jackson*, 443 U.S. at 321.

36. *Jackson*, 443 U.S. at 333 n.7 (Stevens, J., concurring).

“[A] properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury.”³⁷ Proof beyond a reasonable doubt is just too important a bulwark against government overreach to leave everything in the hands of the jury and go home.

The *Jackson* Court went on to say that a “modicum” of evidence (a small amount, in other words) by itself, “[cannot] support a conviction beyond a reasonable doubt.”³⁸ (They said there was more than a small amount of evidence against Mr. Jackson, by the way, and upheld his premeditated first-degree murder conviction.)³⁹

This would have been a revolutionary decision, had it been followed as the Supreme Court obviously wished it to be. But the government lawyers were aghast, and they warned that this ruling would mean that appeals judges would have to read the whole trial transcript. What a waste of time, they said.⁴⁰ Indeed, the Supreme Court Justice who disagreed with the principle behind *Jackson* admitted this was one of the main reasons for his opposition: “Because the ‘rational trier of fact’ must certainly base its decisions on *all* of the evidence, the Court’s broader standard may well require that the entire transcript of the state trial be read whenever the factfinders’ rationality is challenged under the court’s rule.”⁴¹ How thoughtless. How cruel. Forcing the judge’s clerk to actually read the cross-examination of a witness in addition to reading the prosecutor’s direct examination. And then asking the poor clerk to read what the defense witnesses said? What a waste of time. So what if there is ample evidence of innocence contained within the cross-examinations by the defense counsel? So what if a young woman sits confined within a gray concrete cave for 25 of the best years of her life? Our time is too precious to spend reading an entire transcript.⁴²

The Supreme Court realized when it decided *Jackson* that the ruling would increase the workload of the appeals judges, and it was aware of how virulent the opposition from the prosecutors would be.⁴³ Plus, the Court wanted to caution everyone that their decision did not mean that

37. *Id.* at 317 (majority opinion).

38. *Id.* at 320.

39. *Id.* at 324.

40. The justices who concurred in judgment described the labor that would result “unproductive” and “pointless.” *Id.* at 337–39 (Stevens, J., concurring). “[A] re-trial-by-transcript would be wasteful exercise . . .” Brief of Amicus Curiae in Support of Respondent at 20, *Jackson*, 443 U.S. 307 (1979) (No. 78-5283).

41. *Id.* at 337 (Stevens, J., concurring).

42. Proponents of the status quo may argue that some states, including Tennessee, have a “13th Juror” rule that gives a trial judge the power to give a defendant a new trial if the judge disagrees with the jury verdict. In effect, the judge can weigh the evidence, and if the judge disagrees with the jury’s decision, the judge can “hang” the jury and require a retrial. In forty years of practicing in criminal courts, the author has seen the 13th Juror rule applied only once, probably because, unlike the 12 jurors, the “13th juror” must stand for re-election.

43. Amicus Curiae in support of the government claimed that even if eliminating the *Thompson* test did not double the federal habeas workload, it would certainly double the man hours. Brief of Amicus Curiae in Support of Respondent at 40, *Jackson*, 443 U.S. 307 (1979) (No. 78-5283).

appeals courts would have to retry the case.⁴⁴ After all, the jury had seen the witnesses up close. The jury was in a much better position to decide who was telling the truth and who was not.⁴⁵ The Supreme Court wanted to emphasize that the jury's decision must be given great respect and must not be overturned just because an appeals judge thinks he would have ruled differently.⁴⁶

So, the Supreme Court took language from pre-*Jackson* cases and gave appeals courts some caveats to go along with the new rule. Adding these caveats, or, as I call them, cautionary instructions, was probably a mistake. These cautionary instructions supplied the prosecutors and an obedient appellate judiciary with the tools they needed to twist *Jackson* all the way back to the way it was before *Jackson*. The *Jackson* Court, for example, gave this cautionary instruction: The appeals courts must "view[] the evidence in the light most favorable to the prosecution," and decide if any "rational trier of fact" could have found beyond a reasonable doubt that the defendant committed the crime.⁴⁷ The appeals courts have taken these words and run with them, but they have divorced these words from the purpose—that is, the holding—of the *Jackson* case, and, in so doing, have made the principal command of *Jackson* of practically no effect.

The appellate courts have trumpeted the instruction to view the evidence in the light most favorable to the prosecution, but have neglected to emphasize that *Jackson* ordered them to view *all* of the evidence, not just the evidence that helps the state.⁴⁸ And they parrot the state's attorney in every single case that it is not the appeals judges' viewpoint that matters, it is the "rational trier of fact[s]" decision that must be obeyed.⁴⁹

Just who is this "rational trier of fact" that the *Jackson* Court said is the model against which all jurors must be compared? Going on a quest for the mind of this "rational juror" is a fool's errand. Common sense will tell you that the judge must use his own sense of right and wrong, truth and untruth, when he tries to divine the "rationality" of the jury's decision. The *Jackson* Court's call to look to the "rational juror" rather than relying on the judge's own opinion is nothing more than a call for judicial restraint. The

44. "[T]his inquiry does not require a court to 'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.'" *Jackson*, 443 U.S. at 318–19 (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966)).

45. But even the belief that the best judge of facts is found at the trial level is subject to debate by scholars. Professor Pollis, for example, points out the studies that have shown that humans are simply not good at judging the credibility of others by appearance or demeanor. Moreover, he argues that a dispassionate written record can be more conducive to determining the truth of a witness's testimony than a fleeting oral presentation that cannot be reviewed. Andrew S. Pollis, *The Appellate Judge as the Thirteenth Juror: Combatting Implicit Bias in Criminal Convictions* 46–47 (Case W. Rsr. Univ. Sch. of L., Working Paper No.2202-2, 2022).

46. "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* at 319.

47. *Id.*

48. *Id.*

49. *Id.*

reliance upon the rational juror's decision is meant to humble the courts, not neuter them. Nor does it absolve them of responsibility when they see strong evidence of innocence and ignore it because "[I]t's not in [their] purview."⁵⁰ "Purview," of course, just means the realm of responsibility.⁵¹ Witnesses can lie all they want to. Cross-examination can show they are liars. The appellate judges say it's not their job to care about what a witness says. Whose job is it, then, if not the judge's? Why, the "rational juror's," of course.

How do we know what a rational juror will decide? Do we have a description of this rational juror somewhere? Has there been an archetypal rational juror whose opinions and attitudes and morals have been studied and catalogued, perhaps? Christians, after all, have the archetype of the "perfect person."⁵² Christians will use this model of the perfect person (Jesus Christ) to help guide their decisions. But, alas, unfortunately for the appellate courts, the "rational juror" failed to preach a single sermon, much less a sermon on a mount.⁵³ Nor did the rational juror speak a single parable. In short, Christians have something to go by when determining what the perfect person would do. Judges have no such guidance when divining the mind of the rational juror.

Appellate judges, of course, have no idea of whether a jury is rational or not until they read the evidence presented at trial and judge whether the jury's decision was "rational." What the appellate judges do have, of course, is their own opinion of who is telling the truth and who is not telling the truth. They have their sense of right and wrong, fair and unfair. Yes, they can and should try to separate their prejudices from their decisions, and they can try to approach their reading of a case more objectively, which is all the *Jackson* Court wanted them to do. However, they should not use the "rational jury" as an excuse to avoid a comprehensive search in the transcript for obvious signs of innocence. (I believe the search should be facilitated, by the way, by a requirement that the defense point to the pages in the record that indicate innocence.)

The rational juror standard is a cautionary tool meant only to keep judges from overturning jury decisions with which the judge may disagree, but decisions that are nevertheless supported by ample proof, even considering the defendant's evidence. But the *Jackson* court uttered a few more words of caution, and, sure enough, the government's legion of prosecutors set about to exalt these additional cautionary instructions at the expense of the actual holding of *Jackson*. The Court said:

50. As mentioned above, the author wishes to preserve the anonymity of his clients to spare them from reliving their stories. As a result, several citations, including this one, have been reserved and are on file with the author.

51. *Purview*, DICTIONARY.COM, <https://www.dictionary.com/browse/purview> (last visited Dec. 27, 2024) (explaining that "purview" means "the range of operation, authority, control, concern, etc.).

52. The perfect person references Jesus who "was in all points tempted like as we are, yet without sin." *Hebrews* 4:15 (King James).

53. *Matthew* 5–7.

[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that, upon judicial review, *all of the evidence* is to be considered in the light most favorable to the prosecution.⁵⁴

Translated into English, what the Court said is that it is the jury's job to make decisions about how truthful the prosecutor's witnesses are and how truthful the defendant's witnesses are. Then, if the defendant is found guilty, an appeals court looks at *all* the evidence in the light most favorable to the prosecutor. In other words, the *Jackson* Court says that appeals judges must give the prosecutor the benefit of the doubt now that the guy has been convicted.⁵⁵ What *Jackson* does not say is that appeals courts are rubber stamps, as the prosecutors have argued ever since *Jackson* was decided.⁵⁶ What *Jackson* does not say is that the appeals courts must not judge whether the witnesses have been truthful. Common sense tells us that the only way to know whether the jury was rational is to judge whether they properly assessed whether the witnesses were telling the truth. As I mentioned, what the witnesses say is usually the entire case. If the appeals court does not judge the accuracy and credibility of the witnesses, it can have no idea whether the jury was rational.⁵⁷

54. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citations omitted).

55. *Id.*

56. The Honorable Jon O. Newman, a Senior U.S. Circuit Judge of the U.S. Court of Appeals for the Second Circuit wrote:

My concern is that federal appellate courts, including my own, examine a record to satisfy themselves only that there is some evidence of guilt and do not conscientiously assess whether the evidence suffices to permit a finding by the high degree of persuasion required by the "reasonable doubt" standard. The irony is that ever since winning the battle to discard Learned Hand's "civil sufficiency" approach, we have been losing the war to achieve meaningful appellate review of insufficiency claims in criminal cases.

Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979, 993 (1993). He continues, writing that it is regrettable that most appellate opinions after *Jackson* only quote the "any rational trier of fact" language without acknowledging that the Court used a more traditional and more rigorous standard ("whether the law's ubiquitous reasonable . . . jury could find the matter proven . . . beyond a reasonable doubt") in an earlier sentence:

I think the two sentences convey quite different thoughts. The first sentence, correctly in my view, applies the traditional test for determining sufficiency of evidence—namely, whether the law's ubiquitous reasonable person, in this case a reasonable jury, could find the matter proven by the requisite degree of persuasion, in this case beyond a reasonable doubt. The second sentence, however, shifts the emphasis away from the law's construct of the reasonable jury and conjures up the image of a vast random distribution of reasonable juries, with the risk of creating the misleading impression that just one of them need be persuaded beyond a reasonable doubt. [T]he Court gave no indication that it even realized it was setting out two different standards. Thus, I cannot be certain that the 'any rational trier' standard was intended to authorize a less demanding form of review than the 'reasonable jury' standard.

Id. at 987–88.

57. Demanding that the decision be reasonable was the reason the dissent (actually, I am calling the

The first sentence of that paragraph I quoted from *Jackson* does not remove the appeals court judge from the decision-making process *because it says they must view the evidence*.⁵⁸ Why view the evidence? Does that mean they just have to look at the pages of the transcript without reading the words? No, of course they must read the words. But why read the words? If they are not going to evaluate what they are reading, then why read it? Is it even possible to read something without thinking about it, that is, without evaluating it?⁵⁹ Tennessee appeals courts repeatedly say that their job is not to weigh or evaluate the evidence (by “evidence,” as I said, they mean the transcript). However, *Jackson* tells them to read the evidence,⁶⁰ and there is no way to read the evidence without evaluating it. That’s the way humans are. When we read something, we think about what we are reading. We are not automatons.

But that sentence goes further and tells the appeals judges in every state in the Union that they must study that transcript very carefully. They must do much more than read it. They must weigh and evaluate all the evidence with extreme care because those judges themselves must decide whether the jury has been “rational.”⁶¹ It is time for the courts of appeal to face reality. They are the decision-makers when it comes time to decide whether the jury has been “rational.” They cannot hide behind the fig leaf of the fictional “objective” standard of the “rational juror.” For too long, appeals courts have been allowed to consider the search for innocence as the least important of their duties, if, indeed, it is a duty at all. The Supreme Court in *Jackson* instructed them differently.

There are two problems with our courts’ obeisance to the prosecutors regarding the mishandling of the cautionary instructions in the paragraph above from *Jackson*.

1. The cautionary instructions cannot stand on their own. They must be read in the context of the holding of the case. If lifted from the text of *Jackson* and recited as holy scripture, those instructions will make the holding of no effect. Of course, that’s what the prosecutors

concurring opinion the dissent because the “dissent” agreed with the majority that the defendant was properly convicted) in *Jackson* was so exercised. The “dissent” knew that *Jackson* was revolutionary and that the cautionary instructions were merely a lubricant to make the holding go down easier. *Jackson*, 443 U.S. at 443 (Stephens, J., concurring).

58. “[C]ourts do not take seriously their obligation to assess sufficiency of evidence in light of the “reasonable doubt” standard. They end their inquiry upon noticing the existence of “some” evidence of guilt. But the Supreme Court warned in *Jackson* against sustaining convictions supported by only a “modicum” of evidence.” Newman, *supra* note 56, at 996.

59. The Honorable Richard Posner, retired U.S. Court of Appeals judge for the Seventh Circuit, wrote: “If the *complete record*, testimonial and physical, leaves a strong doubt as to the defendant’s guilt, even though not so strong a doubt as to require a judgment of acquittal, the district judge may be obliged to grant a new trial.” *United States v. Morales*, 910 F.2d 467, 468 (7th Cir. 1990) (emphasis added).

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

61. In addition to *Jackson*’s command, the Supreme Court has recognized that state appellate courts have the authority to reweigh evidence. “[T]he appellate court sits as a ‘thirteenth juror’ and disagrees with the jury’s resolution of the conflicting testimony.” *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). See *infra* note 68 for a further discussion of *Tibbs*.

wanted. Unfortunately, the courts have gone along with them to such an extent that we are back to the pre-*Jackson* days where even a modicum of proof will be enough to allow the appeals court to ignore the defendant's proof entirely, as I noted earlier in the case of the forcible sodomy that supposedly occurred in broad daylight on the same couch occupied by a witness who neither saw nor heard anything.

2. Not only do the cautionary instructions, if taken too far, negate the holding of the case, but those instructions, if divorced from the holding, are incoherent and unworkable. Yes, Jesus said not to worry about tomorrow,⁶² but that passage must be read in light of the higher goal, which is to prepare today for eternity. *Jackson* says every conflict in the evidence must be seen in the light most favorable to the government, but this passage, too, must be read in the context of the goal of *Jackson*, which is to force the appeals courts to make sure the jury's decision was rational.

Government prosecutors will say, and the appeals courts will echo like a mantra, that *Jackson* says it is the responsibility of the jury, not the appeals court, to weigh the evidence.⁶³ Yes, it is the responsibility of the jury to weigh the evidence, but the holding of *Jackson* says it is the responsibility of the appeals court to decide whether the jury's weighing was rational.⁶⁴ When you decide whether something is "rational," you must exercise your own judgment, your own sense of what is credible and what is incredible. You must draw upon your own experiences in life. In other words, it is the judge's job to decide whether the state's proof is good enough. When an appeals court says that it is not its job to weigh or evaluate the evidence, the court is shirking its responsibility.

Prosecutors saw that language in *Jackson* that said all conflicts in the testimony must be resolved in favor of the state, and they twisted it to mean the appeals courts can't second-guess the decisions of the jury. If you are prohibited from second-guessing the decisions of the jury, then, of course, you can't say the jury is ever wrong. The state will quote the part of *Jackson* in the last paragraph of the opinion that says that the courts of appeal must defer to the jury when there are conflicting parts of the testimony, but that statement cannot stand alone. It must be read together with the overarching command of *Jackson* that the jury's decisions must be rational. The highest criminal court in Texas figured this out and explained the *Jackson* standard as follows:

A hypothetical that illustrates a proper application of the *Jackson v. Virginia* legal-sufficiency standard is a robbery-at-a-convenience-store case: The store clerk at trial identifies A as the robber. The properly

62. *Matthew* 6:34.

63. For example, courts will say it is none of their business to weigh the credibility of witnesses. "This is a matter inherently within the province of the jury, and 'absent extraordinary circumstances,' this court will not reevaluate the testimony of a witness to determine his or her motives or other possible measures of reliability." *United States v. Dunigan*, 884 F.2d 1010, 1013 (7th Cir. 1989) (citations omitted).

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

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.⁶⁵

Scholars may question my quoting with approval anything from the above case, *Brooks v. State*,⁶⁶ a decision by Texas's highest criminal appellate court.⁶⁷ That case overturned, according to its critics, over 100 years of precedent which gave appellate courts in Texas the authority to review the evidence, and if they decided that the weight of the evidence was against the verdict, remand the case for a new trial.

The Texas experience with *Jackson* is instructive because their highest criminal appellate court has essentially interpreted *Jackson* as Justice Stewart meant for it to be interpreted. For many years, Texas had allowed appellate courts to remand cases for a new trial if the appellate courts found the "manifest weight" of the evidence favored a not guilty verdict. The majority opinion in *Brooks* said that Texas would no longer allow its appellate courts to use any standard of review of evidence other than the standard set by *Jackson*. The primary reason given was that *the "weight of the evidence" review that they were abandoning was essentially the same as the "sufficiency of the evidence" review that is defined by Jackson*.⁶⁸

Remarkably, the *Brooks* court said that a *Jackson* review, if "properly applied," was just as careful and comprehensive as a sufficiency weight of the evidence review.⁶⁹ Indeed, that is the thesis of this Article. The *Brooks*

65. *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010).

66. *Id.*

67. In recent years a number of scholars have called for a change in the way appellate courts approach their review of a criminal conviction. Andrew Pollis of Case Western University School of Law has argued that appellate judges should make an independent review of the weight of the evidence and should order a new trial if the "manifest weight" of the evidence indicates that the jury erred. Mr. Pollis argues further that even if only one judge on an appellate panel agrees that the defendant deserves a new trial, that should be sufficient to send the case back to the trial court. Pollis, *supra* note 45.

68. *Brooks*, 323 S.W.3d at 910. A little history is in order here. Texas was concerned about a case originating in Florida. Prior to 1981, the state of Florida, like Texas, allowed their appellate courts to remand cases for a new trial if the court decided that the weight of the evidence was against the verdict. See *Tibbs v. State*, 397 So. 2d 1120 (1981). The Florida Supreme Court did so in Mr. Tibbs' case, but the U.S. Supreme Court reviewed the Tibbs decision and said that it appeared that, although couched in "weight of the evidence" terms, the Florida courts had actually decided the case on a "sufficiency of the evidence" basis. The U.S. Supreme Court said that when an appellate court merely disagrees with the verdict because the weight of the evidence indicates the defendant is not guilty, then the appellate court is essentially acting as a thirteenth juror, and the appellate courts' decision has the same effect as a hung jury, and the case can be retried before another set of twelve jurors. But when an appellate court says there was not sufficient evidence, what they are saying is that there is not enough evidence to convict beyond a reasonable doubt and the defendant should not have been tried in the first place. Therefore, when a case is reversed because of insufficient evidence, the defendant is acquitted and cannot be retried. The Tibbs decision caused Texas to be concerned about several decisions in their state that had been remanded for new trials because the appellate courts had deemed the weight of the evidence against the verdict. Were these decisions already decided in the Texas courts actually based on sufficiency rather than weight? The *Brooks* Court aimed to straighten out this issue for Mr. Brooks and for all future appellate reviews of evidence.

69. *Brooks*, 323 S.W. 3d at 906 n.26.

court noted that even with a weight of the evidence review, it has always been required that the appellate court give “proper deference” to the jury decision and that the reviewing court should never simply substitute its judgment for the jury’s.⁷⁰ Yes, *Jackson* does say that the evidence must be viewed in a light that is favorable to the verdict, but that is just the beginning of the analysis, according to *Brooks*:

Viewing the evidence in the light most favorable to the verdict, however, begins the *Jackson v. Virginia* legal-sufficiency analysis. The *Jackson v. Virginia* standard still requires the reviewing court to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” This is the portion of the *Jackson v. Virginia* standard that essentially incorporates a factual-sufficiency review.⁷¹

That is the problem courts have been having since *Jackson* was decided. How to properly apply the standard of review. More specifically, how to properly measure the quantum of deference to give the jury decision. *Brooks* said *Jackson* is indistinguishable from a weight-of-the-evidence review. In other words, to be properly applied, *Jackson* requires a weight-of-evidence review. Yes, a court must defer to the jury decision, but only if that decision is rational, and the only way to determine the rationality of any decision is to study it, think about it, and measure it in the jurist’s mind against what that jurist deems to be irrational. The only way you can judge whether a jury was rational is to decide whether its decisions were rational.

Not only are appellate courts shirking their duty under *Jackson*, but they are also disobeying their own rules—at least in Tennessee. There is a rule in Tennessee that tries to bring the appeals court judges back to earth—a rule that tries to remind them that they are not legal automata and that their decisions affect real people. A rule that says appeals judges should care whether someone is innocent or not. That rule is Rule 13(e) of the Tennessee Rules of Appellate Procedure.⁷² “Findings of Guilt in Criminal Actions. Findings of guilt in criminal actions, whether by the trial court or jury, shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.”⁷³ This rule is largely ignored by appeals courts because the rule has been interpreted out of existence. In their decisions, the appeals courts often quote Rule 13(e), but seldom follow it.⁷⁴ Instead, this is the boilerplate language, taken

70. *Id.* at 901.

71. *Id.* at 902 n.19.

72. Other states have similar rules; *see, e.g.*, IND. R. TRIAL P. 50(a)(5), WIS. STAT. § 974.02(2), OHIO REV. CODE ANN. § 2945.831.

73. TENN. R. APP. P. 13(e).

74. Attorneys General will protest that there is a small percentage of cases in which the proof was found insufficient. Here are a few examples in the state of Tennessee. *See, e.g.*, *State v. Roberts*, 106 S.W.3d 658, 662 (Tenn. Ct. App. 2002) (citing *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990) (“In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence.”); *In re Juanita W.*, No. E2013–02861–COA–R3–JV, 2015 WL 388721 (Tenn. Ct. App. 2015) (same). It is indeed true that occasionally an appeals court will reverse on the basis of

from a decision in another case I appealed, *State v. Ware*:⁷⁵

It is well-established that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. Therefore, on appeal, the convicted defendant has the burden of demonstrating to this Court why the evidence will not support the jury's verdict. To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. The jury's verdict of guilt, approved by the trial judge, accredits the State's witnesses and resolves all conflicts in favor of the State. The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value to be given to the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this Court. *We do not attempt to re-weigh or re-evaluate the evidence.* Likewise, we do not replace the jury's inferences drawn from the circumstantial evidence with our own inferences.⁷⁶

It was *Jackson* that the Tennessee courts interpreted to permit state appeals courts to stay as far away from the actual trial and the person being tried as possible. But that interpretation is *wrong*. The court in *Walter Ware's case*⁷⁷ says that it is not the appeals court's job to weigh or evaluate the evidence. However, the failure of the appellate courts to weigh or evaluate evidence is an unconstitutional violation of due process⁷⁸ and has severely compromised the integrity of our justice system and has wrongly imprisoned scores, if not hundreds, of innocent people.⁷⁹ And such failure contradicts both *Jackson* and Rule 13(e).

The court of criminal appeals may respond by saying that Rule 13(e) is working as intended and that our case law does not hamstring their search for cases where the evidence is insufficient to support the verdict. They may say that whenever the defendant claims there was insufficient evidence the judges on the court will read every word of the transcript of the trial to make sure that there was sufficient evidence. But if that is so, then why does the appeals court admit in practically every case that they do not even attempt to weigh or evaluate the evidence?

insufficient evidence. An examination of those relatively few cases, though, will seldom give any guidance as to the analytical yardstick used to distinguish sufficient from insufficient. Currently, the means of measuring sufficient evidence is so amorphous that it appears to me that the decisions are completely ad hoc. My hope is that this article's proposed standard of appellate review will help to structure the appellate courts' analytical framework and will give both the state and the defense better guidance as to what constitutes "sufficient evidence."

75. *State v. Ware*, No. W2010-01992-CCA-R3-CD, 2011 WL 4716238, (Tenn. Ct. App. Oct. 7, 2011).

76. *Id.* at *5 (citations omitted) (emphasis added); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); TENN. R. APP. P. 13(e).

77. *Ware*, 2011 WL 4716238.

78. *See supra* note 12 and accompanying text.

79. GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* 227 (2008).

Weighing and evaluating evidence is exactly what 13(e) requires them to do. “Evidence” is every word that was spoken from the witness stand. The transcript of the trial, in other words, is the evidence. The only way to determine whether something is “sufficient” is to measure it. Another word for “measure” is “weigh.”⁸⁰ To determine whether the evidence is sufficient, courts must weigh it. Once the appeals court gets the case, the jury has already weighed the evidence; now the appeals court must reweigh that same evidence after carefully reading and studying it. And yet in Walter’s case, and in every similar case, the appeals courts proudly proclaim that they don’t even attempt to evaluate evidence. Rule 13(e) tells them they *must* evaluate the evidence.⁸¹ Their cases tell them they *must not*.

Here is the irony: I have been told by a former judge of the court of criminal appeals that Rule 13(e) was written specifically to *comply* with *Jackson*.⁸² Indeed, Rule (13)(e) does obey that U.S. Supreme Court case. Why then do the cases that followed *Jackson* say it is *not* the job of the Tennessee appellate court to weigh or evaluate evidence? Because the cases that followed *Jackson* gleaned a few choice sentences from *Jackson* and ignored the language that calls our courts to a higher standard.

“[The state] simply fails to recognize that courts can and regularly do gauge the sufficiency of the evidence without intruding into any legitimate domain of the trier of fact.”⁸³ “A challenge to a state conviction brought on the ground that the evidence cannot fairly be deemed sufficient to have established guilt beyond a reasonable doubt states a federal constitutional claim.”⁸⁴ “The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence.”⁸⁵ Those sentences are from *Jackson*. Indeed, the requirement set by that case is that the appeals courts must evaluate all the evidence to determine if that evidence can “reasonably support a finding of guilt beyond a reasonable doubt.”⁸⁶ How a judge can determine if something can be reasonably supported without evaluating it is a question criminal appeals court judges need to ask themselves. Nowhere does *Jackson* give courts permission to avoid weighing the evidence. *Jackson* simply states that the appellate court’s job is to weigh the evidence and to resolve conflicts in the evidence in favor of the state.⁸⁷ *Jackson* never says that appellate judges cannot

80. *Weigh*, THESARAUS.COM, <https://www.thesaurus.com/browse/weigh> (last visited Dec. 23, 2024).

81. “Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if *the evidence* is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.” TENN. R. APP. P. 13(e).

82. See also *State v. Remus*, No. W1999-01448-CCA-R3-CD, 2000 WL 279911, at *1 (Tenn. Ct. App. 2000) (“Rule 13(e) of the Tenn. R. App. P. is consistent with and compelled by the holding in *Jackson v. Virginia*.”).

83. *Jackson v. Virginia*, 443 U.S. 307, 321 (1979).

84. *Id.* at 322.

85. *Id.* at 323.

86. *Id.* at 318.

87. *Id.* at 318–19.

88. TENN. R. APP. P. 13(e).

weigh and evaluate evidence. Weighing and evaluating evidence is required by Rule 13(e) and by *Jackson*.

If Rule 13(e) were allowed to breathe, the appeals court could actually be a filter to catch those cases where the proof of guilt was truly weak. If 13(e) had not been emasculated by the appellate cases that cherry-picked words out of *Jackson*, then the appeals courts could play a role in the pursuit of truth. Because of the cases that played out post-*Jackson*, the courts of criminal appeal in most states now play almost no role in reviewing evidence and finding innocence.

Moreover, Rule 13(e) does not mention the “rational juror” at all, so the Rule gives no excuse for a failure to do the work of searching for evidence of innocence. (Frankly, though, obeying *Jackson* and Rule 13(e) will not entail a whole lot of “searching.” As mentioned above, the defense attorney should be required to point to the pages in the record where that evidence of innocence lies.)

It is time to restore the meaning of *Jackson*. *Jackson* stands for the proposition that juries can make mistakes. Just because a judge told the jury that there must be proof beyond a reasonable doubt does not mean that the jury actually required the D.A. to prove everything beyond a reasonable doubt.⁸⁸ Yes, we are to give the jury the benefit of the doubt because they are in a better position than an appeals court to ascertain the truth of what the witnesses have said, but that does not mean the appeals courts can ignore ample proof that the state failed to prove guilt beyond a reasonable doubt.

III. A PROPOSAL TO RESTORE THE PURPOSE OF *JACKSON*

Defense attorneys and appellate judges can restore *Jackson*.⁸⁹ Defense attorneys, by arguing the truth of *Jackson*, and appellate judges, by reassessing any precedent that twists the cautionary instructions of *Jackson* by ignoring the holding of the case.

But appellate courts need to take a further step. They must make *Jackson* easier to follow and thus more difficult to disobey. Appellate courts can take this step, or the legislature can enact a law forcing this simplification. Indeed, the following proposal not only simplifies *Jackson* but summarizes it, as well. It combines the holding of the case with all the

88. In fact, the Supreme Court has held that the Constitution does not require that courts define the reasonable doubt standard for juries. *United States v. Ashrafkhan*, 964 F.3d 574, 578 (6th Cir. 2020) (citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1994)).

89. Scholars' calls for reform of our appellate courts' review of guilty verdicts have largely fallen on deaf ears, perhaps because the changes advocated appear to courts and legislatures to be stronger medicine than the patient needs. Scholars point out that the *Jackson* doctrine is only a floor beneath which due process will not allow courts to descend, but that states are certainly free to enact more stringent standards. As noted above, Professor Pollis recommends that whenever an appellate court finds that the manifest weight of the evidence is against the verdict, the case should be remanded to the trial court for a new trial, even if only one of the three judges on the appellate panel so finds. Pollis, *supra* note 45, at 51. Significantly, Professor Pollis notes that his proposal would require statutory change at the federal level and constitutional amendments in most state jurisdictions.

cautionary instructions. Plus, it has the benefit of exorcising the misty, supernatural spirit of the rational juror. This way forward is inspired by these words in the *Jackson* decision: “The *Thompson* doctrine [that any evidence of guilt at all is enough to let the appellate courts wash their hands of the case] simply fails to supply a workable or even a predictable standard for determining whether the due process command of [proof beyond a reasonable doubt] has been honored.”⁹⁰

The *Jackson* doctrine has now become unworkable, and it fails to give us a predictable standard or test for determining whether the state has proven their case beyond a reasonable doubt. We can make it more workable and more predictable by recognizing the command that a modicum (a small amount) of proof is not enough.⁹¹ It is not enough for the appeals courts to peruse the record and find that the state did have a small amount of proof. A small amount of proof, *Jackson* says, is not sufficient for a rational jury to find proof beyond a reasonable doubt.

The *Jackson* doctrine does not mean the appeals judge can overturn a decision just because he feels the state probably did not prove its case beyond a reasonable doubt. As so many cases have said post-*Jackson*, the verdict of guilty shifts the burden of proof.⁹² Before the trial, it was the state that had to prove its case.⁹³ After a verdict of guilty, it is the defense that must prove its case.⁹⁴

Either way, the fact remains that the appeals judges need a “standard of proof,” or a test, in other words, by which to judge the evidence. *Jackson* says, and I agree, that the amount of proof needed before overturning a jury decision must cause the judge to be convinced to a greater degree than simply deciding that the state “more likely than not” did not prove its case beyond a reasonable doubt.⁹⁵ And yet to say that the judge cannot overturn a verdict unless he is convinced beyond a doubt that the jury was irrational is going too far as well. That, it appears, is the test appeals courts apply today. Only if they are convinced beyond any doubt that the government railroaded the defendant do they overturn the jury.

So, yes, I admit that we need a test, a standard of proof, that is stricter than “the defendant probably is innocent” to overturn a jury decision. If the judges look at both sides of the evidence and they feel that probably the defendant is innocent, and probably the jury got it wrong, that should

90. *Jackson*, 443 U.S. at 320.

91. *Id.*

92. *See, e.g., State v. Carruthers*, 35 S.W.3d 516, 557–558 (Tenn. 2000).

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

94. *Id.* But, actually, it’s not the defendant who proves his case in the courts of appeal, because the record is already there in the transcript. It is the appellate judges themselves who must read and study and acknowledge the truths revealed in that record, whether those truths favor the state or the defendant. As mentioned, however, the defense should be required to show the court the pages that indicate innocence.

95. *Id.* at 314–16.

not be enough to reverse the jury decision. But if there is only a little proof that the defendant is guilty, in other words, if there is only a small amount of proof that he did it, *Jackson* says the verdict must be overturned. A modicum of evidence of guilt is not enough.⁹⁶

What is needed is a standard of proof that the judges can sink their teeth into. A standard that they can be comfortable with. A standard that gives them real guidance. A standard that is more like working with Legos than working with clay. A standard that is a compromise between “more likely than not” the defendant was railroaded and “virtually certain” he was. A standard that combines the *Jackson* doctrine with the cautionary instructions of *Jackson*.

That standard is “clear and convincing evidence.” It is a standard used in many other areas of the law.⁹⁷ Judges are very familiar with that test. If employed by the courts of appeal, it would make the defense carry a heavy burden of proof.⁹⁸ It would not allow a judge to overturn a verdict just because he thought the proof was “against the weight of the evidence.”

This is the language that will resurrect *Jackson* and, hopefully, protect the case from a future betrayal:

If the record shows by clear and convincing evidence that the state did not prove its case beyond a reasonable doubt, then the verdict must be set aside.

This standard of review is fair to all parties. This language will provide both lawyers and judges with a test by which to measure whether the evidence was sufficient or not. This test responds to all the fears voiced by the opposition to *Jackson*. (Except for the fear that the judges will have to read stuff that doesn’t agree with the prosecution. Sorry, they will have to read both sides of an issue. And, as mentioned, the defense should be required to point to the pages in the record that support innocence.) This workable standard does away with the awkwardness of trying to reconcile the holding of *Jackson* with the exaggerated emphasis upon the cautionary instructions. It should be clear that those twisted translations of the instructions are logically incoherent and, under analysis, fall under their own weight. This standard removes the amorphous shield of the “rational jury,” and forces the appeals court judges to do the hard work of evaluating evidence of innocence. This standard is the *Jackson* doctrine put into effect.

This standard will also give lawyers some guidance in structuring their arguments. Now, there is virtually no way to measure how much evidence is “insufficient” under Tennessee Rule 13(e) or other states’ similar

96. *Id.*

97. 32A KRISTINA E. MUSIC BIRO, ET AL., C.J.S. EVIDENCE § 1553 (2024) (explaining that clear and convincing proof is the standard used in most civil cases).

98. “The preponderance of the evidence standard requires that the truth of the facts asserted be more probable than not, whereas the clear and convincing evidence standard requires that the truth be highly probable.” *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005).

rules.⁹⁹ Lawyers and judges need more of a measuring rod than, for example, Justice Stewart gave when he said he could not articulate exactly the test for obscenity, but “I know it when I see it.”¹⁰⁰

Those few decisions that have actually found the evidence to be insufficient did not describe their thought process. They just made a conclusion without an objective analysis of the legal meaning of “insufficient.”¹⁰¹ Since lawyers and judges alike have so little to go by, deciding whether the evidence is sufficient is either an opaque exercise or a formless one. I believe it is formless, and, therefore, burdened with the baggage of arbitrariness.

A clear and convincing standard of review does not require a modification of *Jackson*, because *Jackson* articulates the minimum requirements of any review of evidence, and “clear and convincing” merely fits those requirements. This “clear and convincing” standard of review will affect not only the appeals process, but it should also affect the process at the trial level. It should affect the decisions that the prosecutors and the judges make. Prosecutors and judges do not like being overturned by the appeals courts. Trial judges fear the appellate courts. A reversal or a remand will describe in detail where the trial judge was wrong. Prosecutors hate being scolded by the appeals courts, as well. A reversal will usually make headlines in the local press, and prosecutors are, after all, answerable to some extent to the voting public. I believe that many, if not most, of the cases that I have described in this article would have been affected had the appeals judges been following *Jackson* all these years. I believe the prosecutors, knowing their cases would be examined by the appeals courts for evidence of innocence, would have pressured law enforcement to more carefully investigate leads, and to ask the questions of their witnesses that I ended up asking on cross-examination in front of twelve people.

In the long and honored history of agenda-driven interpretations and muddled thought, seldom has a Supreme Court case been so tortured beyond recognition as has *Jackson*, and with such significant consequences. It is time to recognize our mistake.

99. See, e.g., Michael S. Pardo, *What Makes Evidence Sufficient?*, 65 ARIZ. L. REV. 431, 438 (2023) (“The central problem is that, as a matter of both formal doctrine and legal practice, the line between sufficient and insufficient evidence is obscure and individual decisions are frustratingly opaque.”).

100. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

101. See Pardo, *supra* note 99, at 440 (“Because of the underlying uncertainty, the line between reasonable (rational) and unreasonable (irrational) jury findings is not clear. Nor are judicial opinions particularly helpful in articulating the reasoning that separates the two categories. This uncertainty regarding sufficiency doctrine potentially leaves applications to the arbitrary, inconsistent, unprincipled, or biased whims of individual judges. And indeed, scholars have forcefully leveled this charge.”).