Bigotry, Jury Failures, and the Supreme Court's Feeble Response

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Introduction

Early in the twentieth century, the United States Supreme Court faced five examples of fundamental failures in the criminal jury process. In one case, the Court did nothing. In four cases, the Court attempted to intervene to save defendants who were probably innocent. In three of those cases, the Court provided relief, though ultimately defendants in each case served years in prison despite the Court's intervention. In one case, a lynch mob murdered the defendant after the Court had begun its intervention and before it could hear the case.

When we examine these cases, four questions naturally arise. First, how could jurors convict on such weak evidence in capital cases? Were the jurors evil or corrupt, or was a more complex phenomenon at work? Second, why didn't the state courts provide remedies for these probably-innocent defendants? Third, why didn't the Supreme Court do more? Its intervention in one case was a weak response that did nothing to protect defendants from jury bigotry in future cases. In a second case, the intervention provided a partial remedy to the worst kind of abuses, but really only sent a message to the authorities to be more discreet when forcing black suspects to confess. The fourth question is the most important in a DNA era: Why has the Court still done

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1. Michael Klarman has written eloquently about four of these cases. Michael J. Klarman, The Racial Origins of Modern Criminal Procedure, 99 Mich. L. Rev. 48 (2000). His interest was in seeing the connections between these cases and the criminal procedure doctrine that the Court would develop. My interest is asking the difficult question of why the Court has not done more to protect against jury failures.
almost nothing to remedy failures in criminal jury decision-making? We know that hundreds—if not thousands—of failures occur each year, and still the Court sits on its hands. This Essay will conclude that the time has finally come for the Court to face the problem of jury failures. The various procedural rights, such as the right to counsel, that the Court has provided criminal defendants do little to address the fundamental problem that juries make mistakes. What is needed, and what this Essay will recommend, is a mechanism that will screen out convictions where the risk of innocence is too great to allow the conviction to stand.

I. ED JOHNSON

In 1906, Nevada Taylor was twenty-one years old, blonde, and beautiful. She lived with her father, brothers, and sister in a cottage in the Chattanooga, Tennessee Forest Hills Cemetery, where her father was the groundskeeper. Towering over the cemetery was Lookout Mountain. At 6:00 P.M. on January 23, she was on her way home from work as a bookkeeper. It was barely above freezing, and she took a shortcut to the cemetery. A man came up from behind her and “hurled her over the fence into the marble yard” of the cemetery. He put a leather strap around her neck and raped her on the cold ground. She later said that she “believed” he was black. When the newspapers reported the “brutal crime” committed by a “[n]egro fiend,” the city erupted in racist fury.

Two days later, with two black suspects under arrest, a mob of perhaps 1,500 men gathered ominously around the county jail, “[f]ierce in its determination to wreak

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3. Id. at 25.
6. Id.
7. Id.
vengeance upon some negro, and not caring to any great extent what one . . . ." The two black suspects were saved from lynching by the quick thinking of a criminal court judge who had earlier that day ordered the sheriff to take the prisoners to Nashville. Before that truth could be confirmed by a small group of the lynch mob, the county jail was badly damaged by bullets and hammers.

Lacking any concrete evidence against either suspect, the sheriff took Miss Taylor to Nashville to visit the jail where the suspects were being held. There, for about fifteen minutes, she observed the men, heard their voices, and saw them walk around the room. When the sheriff asked her if either man was the guilty party, Taylor said that Ed Johnson was like the attacker as she remembered him—that "it is [her] best knowledge and belief" that he was the man who had raped her. But, as the headline in the next day's Chattanooga Times newspaper conceded, this was not a completely positive identification. The details of the trial of Ed Johnson will appear in my forthcoming book. For my purposes here, it suffices to note that the only credible evidence against Johnson was the testimony of Nevada Taylor, and she refused to swear that he was the man who raped her. Instead, she would only say, as she had said in Nashville, that "[t]o the best of my knowledge and belief, he is the same man."

The same judge who had the suspects spirited out of


9. CURRIDEN & PHILLIPS, supra note 2, at 50-51.


11. Id.

12. Id. (utilizing, as a subheading to the article, the phrase "Almost Positive Identification").


15. Id.
town appointed three capable, white defense lawyers, who staged a vigorous defense that included seventeen witnesses. These witnesses detailed every minute of how Johnson spent the afternoon when Taylor was raped.\textsuperscript{16} If the defense witnesses were telling the truth, Johnson could not have been the rapist.

At the conclusion of the trial, one of the jurors exclaimed: "I can't stand it any longer. I can't stand it."\textsuperscript{17} After the jury was excused, the judge agreed to recall Taylor to the stand for another identification of the defendant. The same juror who had exclaimed earlier now leaned forward in the jury box "with tears streaming down his face . . . and in a voice trembling with emotion, he cried: 'In God's name, Miss Taylor, tell us positively—is that the guilty negro? Can you say it—can you swear it?'"\textsuperscript{18} She would say only, "before God, I believe this is the guilty negro."\textsuperscript{19} As she left the witness stand, "[e]vidences of weeping were heard on every side."\textsuperscript{20}

The initial jury deliberations produced a vote of 8-4 for conviction. At midnight, after four hours of deliberation, the judge permitted the jurors to go home for the evening.\textsuperscript{21} The next morning the vote was 12-0 for conviction.\textsuperscript{22} The headlines in the Chattanooga News for February 9, 1906 said all that needs to be said about the atmosphere in which Ed Johnson was tried and convicted: "The Jury Finds Ed Johnson Guilty; He Will Hang for His Fiendish Crime: Given the Full Benefit of Law, a Human Brute is Convicted. Announcement Calmly Received in Court Room."\textsuperscript{23}

Black lawyers represented Johnson vigorously on

\begin{itemize}
  \item \textsuperscript{16} See Law Taking its Course in the Case of Ed Johnson, Chattanooga Daily Times, Feb. 7, 1906, at 5.
  \item \textsuperscript{17} Ed Johnson Jury, supra note 14.
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{23} The Jury Finds Ed Johnson Guilty; He Will Hang for His Fiendish Crime, Chattanooga News, Feb. 9, 1906, at 1.
\end{itemize}
appeal. The United States Supreme Court granted a stay of execution, pending appeal to the Court. That evening the county sheriff, who was a Confederate veteran of the Civil War, stepped aside and allowed a lynch mob to break into the jail. The mob took Johnson to a bridge where he was lynched and shot fifty times. A white Baptist minister preached a moving sermon the following Sunday that examined Chattanooga's soul and found it troubled: "I maintain that that mob struck more terrible blows at the heart of our civilization than it inflicted upon Ed Johnson. The beam in our eye has prevented us from seeing this."

Four days after the sermon, the minister's house was set on fire. Despite the public spectacle that ended in Johnson's death, no arrests were made for his murder. But the Supreme Court responded to the defiance of its order by holding a criminal trial of the sheriff and twenty-five of his deputies. The sheriff told the newspapers that the lynching was the fault of the Supreme Court. He said that the people of his county were willing to let the law take its course, "until it became known that the case would not probably be disposed of for four or five years by the [S]upreme [C]ourt of the United States. The people would not submit to this and I do not wonder at it."

The Court found the sheriff and five others guilty of

24. See CURRIDEN & PHILLIPS, supra note 2, at 4-17.


26. Id.


29. CURRIDEN & PHILLIPS, supra note 2, at 233.


31. Id.
contempt of court and sentenced them to either sixty or ninety days. After he finished serving his sentence, Shipp returned home to be greeted by a crowd of about ten thousand, who cheered wildly to the tune of "Dixie." About a year after the murder, Nevada Taylor moved with her family back to her birthplace in Findlay, Ohio. She died two months later, at the age of twenty-three. News accounts attributed her death to "nervous prostration incidental to the crime committed under the very shadow of the historic Lookout Mountain."

Let us pause to examine some of the lessons of the Johnson case. First, even 100 years ago in the South, there were honorable white men who sought justice. The defense lawyers who put on a vigorous defense were honorable men. Also honorable was the judge who saved Johnson from the initial lynch mob and then appointed three able lawyers to defend him. Honorable, at least up to a point, were the jurors who begged Taylor to be more certain in her identification.

Four jurors initially voted not guilty. But after an evening at home with their families, the four hold-outs changed their votes. The plain truth is that jurors are less likely to discharge their fact-finding function accurately when they are trapped within a racist culture. At the time, blacks were portrayed as savage brutes who violated Southern womanhood, causing juries to convict innocent black men far too often. Miss Taylor believed Ed Johnson was the black man who raped her. That was enough for the jury, even for the four jurors who went home the first night with doubts of Johnson’s guilt.

II. LEO FRANK

Another case of jury failure to appear before the Court was the Leo Frank case. Frank was charged in 1913 with

34. Outrage Perpetrated on a Hancock County Girl Results in Death, Miss Nevada Taylor Dies as Result of Assault, Morning Republican, May 13, 1907, at 8.
35. Id.
36. Id.
raping and murdering an employee of his company. The Atlanta, Georgia case attracted national attention because Frank was a Jew, and anti-Semitism was on the rise in the United States. Frank "engaged two of Georgia's outstanding lawyers to defend him" in a trial that lasted four weeks.\textsuperscript{37} The defense "introduced more than two hundred witnesses, including over one hundred who testified to Frank's good character, and at least a score who insisted that they would never believe [the prosecution's chief witness] under oath or otherwise because of his notorious reputation for lying."\textsuperscript{38}

The magnificent defense came to naught. Frank was convicted and sentenced to death based wholly on circumstantial evidence offered in a trial that took place, according to Justice Oliver Wendell Holmes, "in the presence of a hostile demonstration and seemingly dangerous crowd, thought by the presiding judge to be ready for violence unless a verdict of guilty was rendered."\textsuperscript{39} The trial judge overruled the post-verdict defense motion for a new trial while incredibly stating on the record, "I am not certain of the man's guilt. With all the thought I have put on this case, I am not thoroughly convinced that Frank is guilty or innocent."\textsuperscript{40} What might explain the peculiar comment is the judge's fear that the governor "would 'not have enough troops to control the mob'" if he had ruled differently,\textsuperscript{41} but that by signaling his doubts, he would encourage the state supreme court or the governor to come to Frank's aid.

Justice Holmes undoubtedly pressed his colleagues in conference to hear the appeal from the lower court's denial of Frank's habeas petition. But the Court voted seven to two not to hear it. A petition for a pardon to Georgia's governor, John Slaton, was Frank's last hope. After a painstaking review of the evidence, Slaton concluded that Frank was innocent. He commuted Frank's sentence to life in prison, expecting, so he told friends, "that in a short while the truth

\textsuperscript{37} Leonard Dinnerstein, The Leo Frank Case 37, 52 (1968).
\textsuperscript{38} Id. at 51.
\textsuperscript{39} Id. at 109 (quoting Holmes Denies Motion to Set Aside Verdict, Atlanta Const., Nov. 27, 1914, at 5).
\textsuperscript{40} Id. at 79 (citing Plea Cites Doubts Held by Judge, Atlanta Georgian, Nov. 1, 1913, at 1).
\textsuperscript{41} Id. at 80 (purporting to quote the trial judge as he confided to a friend).
[of Frank's innocence] would come out . . . ."42

Slaton's career in politics was instantly ruined. He had to call out a battalion of state militia to keep from being lynched himself.43 Sadly, he sacrificed his career without saving Frank. A mob of twenty-five men broke into the state prison, abducted Frank, and hung him. "Hordes of people made their way" to view Frank's lifeless body and take pictures.44 The lynch mob included a "clergyman, two former Superior Court justices, and an ex-sheriff . . . ."45

Perhaps most remarkable of all, the Marietta Journal and Courier wrote in an editorial: "We regard the hanging of Leo M. Frank in Cobb [C]ounty as an act of law abiding citizens."46 It is difficult for us, today, to understand how a lynching that denies the governor his right to commute a sentence can be "an act of law abiding citizens." But, as we saw in the Johnson case, when a young Southern woman was raped and men of that era were whipped into a frenzy by anti-Semitism or racism, they would believe the worst about the Jew or the black. No rational explanation of innocence would persuade. It was as if some contour in their minds prevented them from seeing and perceiving facts as humans otherwise would.

III. JUSTICE HOLMES GETS HIS WAY: ARKANSAS RACE RIOT DEFENDANTS WIN HABEAS CLAIM

According to the Supreme Court, whites fired into a black church during a service in Arkansas on September 30, 1919, and a white man was killed "in the disturbance that followed . . . . The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes . . . ."47 One hundred and twenty-two blacks were indicted for allegedly taking part in the

42. Id. at 129.
43. See id. at 132.
44. Id. at 143.
45. Id. at 139.
46. Id. at 145 (citing Leo M. Frank Hanged Here, MARIETTA J. & COURIER, Aug. 20, 1915, at 1).
47. Moore v. Dempsey, 261 U.S. 86, 87 (1923). Historian Richard Cortner's account of the causes of the riot is far less dogmatic and does not necessarily exculpate the blacks. RICHARD C. CORTNER, A MOB INTENT ON DEATH 5-23 (1988).
riot—seventy-three for murder—while no whites were indicted.\textsuperscript{48}

The petitioners made claims that, if true, persuaded seven members of the Court that the convictions resulted from a mob-dominated atmosphere that made a fair trial impossible.\textsuperscript{49} The governor had appointed a committee to deal with what the committee called an "insurrection."\textsuperscript{50} The petitioners claimed that the committee prevented a lynching of the black prisoners in jail by promising to "execute those found guilty in the form of law."\textsuperscript{51} Petitioners also claimed that evidence of guilt was produced by whipping and torturing black witnesses until they would testify against the defendants.\textsuperscript{52}

A single lawyer represented all five defendants.\textsuperscript{53} He did not move to change venue or for separate trials.\textsuperscript{54} He "had no preliminary consultation with the accused, called no witnesses for the defence [sic] although they could have been produced, and did not put the defendants on the stand."\textsuperscript{55} The trial lasted forty-five minutes and the jury returned a verdict of guilty in "less than five minutes."\textsuperscript{56} Petitioners claimed that "no juryman could have voted for an acquittal and continued to live in Phillips County and if any prisoner by any chance had been acquitted by a jury he could not have escaped the mob."\textsuperscript{57}

Holmes had his case for granting a habeas petition. Unlike Frank's case that lasted for weeks and featured two hundred defense witnesses, the Arkansas defendants did not get even the appearance of fairness. But the victory in the Supreme Court merely opened the door for fact-finding when the case returned to the federal district court in Arkansas. Moreover, even if the federal court granted the

\textsuperscript{48} CORTNER, supra note 47, at 15.
\textsuperscript{49} See Moore, 261 U.S. at 87, 89-92.
\textsuperscript{50} Id. at 88.
\textsuperscript{51} Id. at 88-89.
\textsuperscript{52} See id. at 89.
\textsuperscript{53} See id.
\textsuperscript{54} See id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 89-90.
habeas petition, the authorities could re-try the defendants in a way that provided superficial due process without a fair determination of guilt or innocence, as in the Johnson case. But a plea deal was possible because the frenzy that led to the farcical trial had subsided. The original prosecutor in the case, now no longer the prosecutor, admitted to one of the defense lawyers that the Moore defendants were not the ring-leaders in the race riot and that he regretted very much that he could not "reach the parties who were the leaders of the trouble."58

On the advice of their black lawyer, Scipio Africanus Jones, the Moore defendants agreed to drop their habeas petition in exchange for the governor commuting their convictions to second-degree murder with a prison sentence of twelve years.59 A little more than a year later, just before leaving office, the governor granted indefinite furloughs to the Moore defendants.60 They thus served five years each61 and obviously fared better than both Johnson and Frank.

So what message does the Arkansas case send to state criminal court judges? The only clear message is that the trial must be, in form, what trials look like. That, of course, includes lawyers to represent the defendants. That message did not get through to the trial judge in the cases of the Scottsboro defendants.

IV. SCOTTSBoro DEFENDANTS

This case is better known than the first three and, at least superficially, is less of an obvious miscarriage of justice. Nine black youths were arrested for the rape of two white women on a train passing through Alabama on its way to Memphis. Some sense of the racial climate of the time in Alabama can be gained from the following excerpt from historian James Goodman's book, Stories of Scottsboro:

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58. CORTNER, supra note 47, at 179.
59. See id. at 181.
60. See id. at 182.
61. The defendants had served three years in prison before the Court granted their habeas petition. The verdicts and death sentences were handed down in 1919, id. at 17, and the Court's order reversing the convictions was in 1923.
Not until the guards took them out of their [jail] cell and lined them up against a wall and the sheriff brought two white women by and asked them to point to the boys who had "had them" did they realize that they had been accused of rape. One of the women, Victoria Price, pointed to six of them. When the other didn't say a word, a guard said that "If those six had Miss Price, it stands to reason that the others had Miss Bates." The boys protested, insisting they hadn't touched the women, hadn't even seen them before Paint Rock, when they saw them being led away from the train. Clarence Norris called the women liars. One of the guards struck him with his bayonet, cutting to the bone the hand that Norris put up to shield his face. "Nigger," the guard hollered, "you know damn well how to talk about white women."62

The women testified in great detail at the trial about the ways the young men raped them again and again. They testified that they "begged the [n]egroes to quit but the men ignored them, and even after they finished they stayed in the car with them, 'telling us they were going to take us north and make us their women or kill us.'"63 Though most of the defendants denied raping, or even touching, the women, the fact that the Alabama jury would believe the women instead of the men was unsurprising.

Nor was it surprising that the Alabama Supreme Court affirmed the convictions over a single dissent—that of Chief Justice Anderson.64 The defendants raised more than two dozen evidentiary and constitutional claims.65 But with the testimony of the women uncontradicted in the record, the Alabama Supreme Court ignored the procedural errors that moved Anderson to dissent—that the jury was "overawed or coerced by outside influence, pressure, or conduct" and that the defendants were denied effective counsel.66

What is a little surprising is the fact that the Supreme
Court granted certiorari. Unlike the Johnson, Frank, and Moore cases, there was, on the surface, no reason to doubt the accuracy of the verdict. At least part of what troubled the Court, as its opinion makes clear, was the lack of proper procedure.\(^67\) Apparently not receiving the message from Moore that the form of the trial mattered, the trial judge appointed all the members of the local bar to represent the defendants, meaning that they effectively had no counsel. The judge then rushed the case to trial before anyone had a chance to investigate defenses that might have been available. After having lost its attempt to save Ed Johnson, and after seeing the kind of justice dispensed in Moore, it is a good bet that the Court wanted a prophylaxis that would minimize the number of suspect jury verdicts from state courts. Powell v. Alabama provided a perfect vehicle.

Being lawyers themselves, the justices on the Powell Court seized on the right to counsel as the prophylactic. Stressing the failure to allow the defendants time to obtain counsel, the failure to appoint individual lawyers who would be responsible for the defense, and the lack of time provided to investigate any possible defense, the Court held that Alabama had violated the due process clause.\(^68\) As much sense as the Powell opinion makes when read by itself, when read in the context of its times, it is an enigma.

Though the Moore defendants did not have effective counsel, both Ed Johnson and Leo Frank had first-rate zealous lawyers who laid bare the weaknesses in the State’s case. The problem with “justice” in the bigoted South at that time was not procedural—it was foundational. Probably because the lawyers representing the defendants on appeal in Powell knew that the problem ran deeper than the lack of lawyers, they asked for two remedies more directly connected to the accuracy of the outcome.

The Court refused to reach the two foundational claims of the defendants: (1) an equal protection claim that the State had “systematically excluded” blacks from the jury, and (2) a due process claim that the State had denied the defendants a “fair, impartial and deliberate trial.”\(^69\) The Court would three years later reach the first claim and

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68. See id. at 71.
69. Id. at 50.
decide it in the defendants' favor in a case tried on remand from the *Powell* reversal.\(^{70}\) I will return to that issue in a moment. If the Court had been serious about correcting for jury failures, it would have decided the due process claim in the defendants' favor. That would have changed justice in the South dramatically. Federal courts would have been charged with reviewing trials for substantive fairness. The threat to innocent defendants posed by bigoted juries would have been reduced.

The Court instead put its faith in the prophylactic right to counsel. Even the prophylaxis was minimal because the Court essentially limited the right to counsel to the facts of the case, holding that,

> in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . .\(^{71}\)

Thus, when an indigent robbery defendant requested counsel a few years later, and the state court refused, the Court affirmed his conviction because he "was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow [alibi] issue."\(^{72}\)

A more fundamental question is: What good would effective counsel do for defendants like Ed Johnson, Leo Frank, the *Moore* defendants, and the Scottsboro defendants? Would another jury composed of white Southern men be more likely to believe the Scottsboro defendants because they now had a lawyer by their side? We know the answer in the Scottsboro cases. No jury ever returned a verdict other than conviction in any of the ten subsequent trials of the Scottsboro defendants. Five of the nine defendants were eventually convicted in a way that withstood appellate review.\(^{73}\) In all these cases, the defendants "enjoyed outstanding legal representation in


\(^{71}\) *Powell*, 287 U.S. at 71.


\(^{73}\) See *GOODMAN*, *supra* note 62, at 394-96.
their retrials, yet it made absolutely no difference to the outcomes.\textsuperscript{74} Even when Bates recanted and testified, in a later trial, that none of the defendants had ever touched her or Price, the jury convicted.\textsuperscript{75} With the Southern belief structure about white women and black men firmly in place, the jury chose to believe Price and not Bates.

Three years later, in \textit{Norris v. Alabama},\textsuperscript{76} the Court reached the substantive claim about the exclusion of blacks from jury pools and ruled, unanimously, in the defendant's favor.\textsuperscript{77} An intriguing speculation is that the Court began to see the futility of providing counsel to black defendants charged with raping white women in the South. But even the substantive right to include blacks in jury pools turned out, in the racist South, not to mean very much. Mississippi and South Carolina drew jurors from voting lists, and blacks were effectively disenfranchised in the Deep South.\textsuperscript{78} In other states, the law at the time permitted almost unlimited discretion to choose from the jury pool. Then there were peremptory challenges that could be used to strike blacks who made it onto the venire. In one of the Scottsboro retrials, the venire had twelve blacks out of one hundred total, but seven requested to be excused and the other five were struck by challenges.\textsuperscript{79} That Scottsboro defendant was again tried by an all-white jury.

As for why the Court in \textit{Powell} rejected the due process claim that the trial was unfair, I offer three related speculations. First, evidence to the contrary in \textit{Johnson} and \textit{Frank} notwithstanding, the Court could have believed that over the general run of cases, counsel would help avoid unjust convictions. What makes this theory weak is that the Court severely limited its prophylactic right to counsel.

A second reason the \textit{Powell} Court might have rejected the defendants' due process claim was out of fear of the consequences of insisting that Southern states provide equal justice to black defendants. After all, the Court had

\begin{footnotes}
\footnote{74. Klarman, \textit{supra} note 1, at 80.}
\footnote{75. See Goodman, \textit{supra} note 62, at 141-45.}
\footnote{76. 294 U.S. 587 (1935).}
\footnote{77. See id. at 599.}
\footnote{78. See Klarman, \textit{supra} note 1, at 80.}
\footnote{79. Id. at 81.}
\end{footnotes}
seen what happened when they ordered the Tennessee authorities to keep Ed Johnson safe while the Court reviewed his case. Michael Klarman puts it this way:

White Alabamians seemed genuinely puzzled at outside criticism of their handling of the Scottsboro cases. Avoiding a lynching was “a genuine step forward,” and thus was deserving of commendation, not condemnation. . . . A state member of the Commission on Interracial Cooperation . . . thought it odd that Alabama should be criticized for delivering exactly what the [Commission] had been fighting so hard to accomplish—replacement of lynchings with trials. Several southern newspapers warned in connection with Scottsboro that if outsiders continued to assail Alabama after juries had returned guilty verdicts, then there would be little incentive to resist a lynching on future occasions. 80

A third theory is that the Court could not yet escape the strangle-hold of state sovereignty that it had reaffirmed in the Slaughter-House Cases. 81 It thus saw its options as severely limited. Today, the power of state sovereignty in the nineteenth and early twentieth centuries is difficult to comprehend, but a small window can be opened by reviewing Plessy v. Ferguson. 82 Homer Ferguson was only one-eighth black, but under Louisiana law he was considered non-Caucasian and thus was not permitted to ride in the white-only railway cars. 83 When he ignored an order to vacate, he was ejected and arrested. Ferguson argued that the law requiring segregated train cars violated the Fourteenth Amendment. The Supreme Court conceded that the Fourteenth Amendment was designed to ensure the equality of the races under the law.

The Court then offered what is by modern standards a bizarre legal proposition about blacks and whites: “Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other . . . .” 84 The Court found:

80. Id. at 57 (quoting and citing CARTER, supra note 63, at 107, 111-13).
81. 83 U.S. 36 (1872).
82. 163 U.S. 537 (1896).
83. Id. at 540-41.
84. Id. at 544.
the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamped the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.85

Only Justice John Marshall Harlan saw the corrosive effect of segregation. Dissenting alone, he wrote:

The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?86

The majority's willingness to tolerate overt racism imposed by force of law is inexplicable to us today. I do not doubt that at least some of the justices in the majority subscribed to the nineteenth century view that blacks were inferior to whites. Still, I think it would be a mistake not to take the majority at its word. The Fourteenth Amendment issue, the Court said, was "whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature."87 As far as the 1896 Supreme Court was concerned, state legislatures were "at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."88

When facing the twin powers of racism and state sovereignty, Homer Ferguson could not prevail. Nor could the Scottsboro defendants persuade the Court to give federal courts broad review power over state criminal trials. Instead, the Scottsboro defendants received a minimalist

85. Id. at 551.
86. Id. at 560 (Harlan, J., dissenting).
87. Id. at 550.
88. Id.
procedural solution designed to reverse their convictions and do precious little to help other black defendants in the South. Indeed, the next case is a truly fundamental failure of justice that occurred two years after Powell was decided.

V. BROWN V. MISSISSIPPI

In 1934, a white man was killed by blows from an axe. Exactly one week later, three black men had been arrested, indicted, convicted of murder, and sentenced to hang.89 The defendants were represented by four court-appointed lawyers,90 and the trial transcript reveals that defense counsel represented their clients zealously and effectively.91 The defendants' confessions were the prosecution's chief evidence, and the defense established that the confessions were tortured from the defendants.92 Yet the jury convicted and sentenced the defendants to hang. So much for the Powell solution to Southern bigotry manifesting itself in criminal trials.

The Court in Brown v. Mississippi presented the facts about the torture by quoting from the dissent in the state supreme court opinion. I quote at length from these facts because no summary does justice to the depravity of the conduct sanctioned by the deputy.

Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and, having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and, still declining to accede to the demands that he confess, he was finally released, and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to

90. Id. at 10-11.
91. See generally Transcript of Record on Writ of Certiorari, Brown v. State, 173 Miss. 542 (No. 301) [hereinafter Transcript of Record].
the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the state of Alabama; and while on the way, in that state, the deputy stopped and again severely whipped the defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and, as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.93

Even for someone who grew up in the South in the 1950s and saw overt racism as often as I did, these facts are difficult to comprehend. But the truly incomprehensible fact is that twelve men convicted the defendants and sentenced them to die after deliberating for about thirty minutes.94 To attempt to be fair, most of the details of the torture were provided by the defendants' testimony and they had a clear incentive to exaggerate the brutality of their treatment. Issues of credibility are always up to the jury, and Brown would not be quite so horrific a case if that could explain the convictions. But it cannot. The State offered rebuttal witnesses after the defendants rested their case. All three rebuttal witnesses admitted to administering the whippings while testifying that they did not suggest the details of the defendants' confessions.95 The point to this, of course, was to argue that even though tortured, the defendants were nonetheless guilty.

93. Id. at 281-82 (quoting Brown v. State, 161 So. 465, 470-71 (1935) (Griffith, J., dissenting)).
94. See CORTNER, supra note 89, at 10.
Dial, the deputy who had orchestrated the whippings, was asked how severely one of the defendants had been whipped in his presence. He responded: "Not too much for a negro; not as much as I would have done if it were left to me." 96 As one of the dissenters in the state supreme court put it:

The facts are not only undisputed, they are admitted, and admitted to have been done by officers of the state, in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the state's prosecuting attorney and the trial judge presiding. 97

Faced with undisputed facts showing relentless torture to obtain confessions, the jury convicted and the judge sentenced the men to die.

I understand that the South was more racist in the 1930s than in the 1950s when I was growing up, and that Mississippi in the 1930s might have been the most racist state in the nation. Yet I cannot fathom how a juror, a white man to be sure, could hear this testimony and find, beyond a reasonable doubt, that the defendants were guilty. A technical argument can be offered in defense of the jury but it is not persuasive. Apparently because the State's witnesses testified to incriminating remarks made by the defendants, defense counsel moved to exclude the rebuttal testimony of the State's witnesses that admitted the torture. 98 The judge granted the motion. 99 But what juror in his right mind could disregard the evidence confirming the gruesome story that the defendants had told on the witness stand?

Academics have long been skeptical of the ability of a jury to disregard damning evidence. The more sensational the evidence, the more difficult it is to disregard. Indeed, the Supreme Court has deemed it unconstitutional for a state to use the trial jury to consider whether a confession is admissible. 100 The rationale is that if a jury heard the

96. *Id.* at 284.
97. *Brown,* 161 So. at 471.
98. See Transcript of Record, *supra* note 91, at 115.
99. *Id.*
confession, and decided it had been coerced, it could not cleanse its mind of the fact that the defendant confessed. How much harder would it be to cleanse one’s mind of the fact that the deputies admitted the torture that produced the confessions?

The final argument that can be offered in defense of the jury verdict was the State’s hastily presented fingerprint evidence. It seems clear from the record that the prosecutor was surprised when the defendants testified about the torture. There is no way to know whether he was surprised because he knew nothing of the torture, or because he had been assured that the defendants would not mention it (more about the prosecutor in a moment). But in rebuttal, the State offered a fingerprint expert who testified that two prints found near the victim’s body matched the prints of defendant Brown.101 Because the defense was not given a chance to have its own experts examine the fingerprints, it is unclear from the trial record how strong the fingerprint evidence was. Moreover, no fingerprint evidence connected the other two defendants to the crime, and the jury convicted them along with Brown.

Is the conclusion that these white male jurors were just evil, that they endorsed torture of black suspects? That would not be the way I read Brown. Brown, like Johnson, manifests a deep belief structure about blacks in the white South of that era. “Blacks were savages, more savage, many argued (with scientific theories to support them), than they had been as slaves. Savages with an irrepressible sex drive and an appetite for white women. They were born rapists, rapists by instinct; given the chance, they struck.”102

With that belief structure firmly in place, the jurors likely took the bait that the State had offered: the confessions were true without regard to the torture. It can be true both that you tortured a confession out of me and that I told the truth to you. Torture does not exclude truth. But torture makes truth so unlikely that a fair minded jury without a fearful, deep belief structure about blacks would have been unable to forget that the rebuttal witnesses admitted the torture and thus would have believed the defendants’ torture stories. That fair-minded jury would

101. See Transcript of Record, supra note 91, at 91-93.
102. GOODMAN, supra note 62, at 15.
have acquitted. But with the belief structure about blacks in place, juries offered no hope for Ed Johnson or the three defendants in Brown.

We might be able to understand how juries, acting on a deep belief structure that lay beneath the surface of their consciousness, could vote to convict the defendants in Brown. But what is to be said of the prosecutor? Was he captured by the same deep belief structure or was he simply ambitious? The prosecutor was John Stennis, who was elected to office in Mississippi many times over a sixty year period.103 His career culminated in his election to the United States Senate thirteen years after the Brown case, where he served for forty-one years.104

There is no evidence that John Stennis knew of the torture prior to trial. But after the rebuttal witnesses testified, the future senator from Mississippi knew for a fact that the torture took place. Perhaps he put his faith in the fingerprint evidence. Perhaps he believed the story that his witnesses offered: that they had not suggested any details of the confession to the defendants and that the confessions, while tortured from the defendants, were nonetheless true. Perhaps.

And how can we explain the failure of the Mississippi Supreme Court to order a new trial at which the confessions would be inadmissible? The majority of three judges, with little comment on the way the confessions were obtained, focused on the failure of the defense lawyers to renew their objections to the confessions after the State offered rebuttal witnesses.105 This, the court held by a 3-2 vote, constituted a waiver. The highest court in the state never even reached the merits of the claim that the confessions were coerced by torture. To be sure, at the end of its opinion, the majority wrote: “Nothing herein said is intended to even remotely sanction the method by which these confessions were obtained.”106 But rhetoric is no balm for a death sentence.

Two brave state supreme court judges dissented. Judge

104. See id.
106. Id. at 470.
Griffith rejected the waiver argument, noting that "in pertinent respects the transcript reads more like pages torn from some mediaeval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government." To Judge Griffith, in a world of torture devices, such as the rack, relying on legal niceties was not only inappropriate but also offensive.

Judge Griffith also responded eloquently to the argument that courts should let hasty, unjust trial convictions stand because, otherwise, mobs would once again resort to lynchings. If mobs were going to dominate the process, he concluded, at least courts should not aid the mobs in doing their violence and then hypocritically call it "justice":

It may be that in a rarely occasional case which arouses the flaming indignation of a whole community, as was the case here, we shall continue yet for a long time to have outbreaks of the mob or resorts to its methods. But, if mobs and mob methods must be, it would be better than their existence and their methods shall be kept wholly separate from the courts; that there shall be no blending of the devices of the mob and of the proceedings of the courts; that what the mob has so nearly completed let them finish; and that no court shall by adoption give legitimacy to any of the works of the mob, nor cover by the frills and furbelows of a pretended legal trial the body of that which in fact is the product of the mob, and then, by closing the eyes to actualities, complacently adjudicate that the law of the land has been observed and preserved.

As in Johnson, there were white heroes here. In addition to the two dissenting judges on the state supreme court, there was John Clark, who defended the men at trial and began the appeal to the Mississippi Supreme Court. It seems that he initially believed that the defendants were guilty, but the testimony about the torture and the admissions made by the rebuttal witnesses "seared" his conscience and ultimately caused him to have an emotional breakdown. At that point his wife, Matilda Floyd Tann Clark, stepped forward. The Democratic National Committee

107. Id. (Griffith, J., dissenting).
108. Id. at 472.
109. CORTNER, supra note 89, at 43, 60.
representative from Mississippi, she was “well connected in Mississippi politics.” She spoke out in defense of her husband for waging a “good fight . . . ,” noting that “[r]acial prejudice runs high here . . . .” She also said that “the justice loving, law abiding people here are in sympathy with Mr. Clark’s efforts but many of them dare not express their opinions because of inflamed public sentiment.”

More importantly, Matilda Clark persuaded former governor Earl Brewer to take over the appeal “for the purpose of helping right a grievous wrong.” A seasoned, wily defense counsel, Brewer quickly realized that Clark had made an error in his appeal to the state supreme court: he had failed to raise any federal claim. Thus, if the defendants lost in the state supreme court, no appeal would be possible to the United States Supreme Court because it can hear only federal claims. Brewer thus added the argument that the conviction of defendants using coerced evidence violated due process of law under the Fourteenth Amendment. And that, of course, was the argument that prevailed in the United States Supreme Court and saved the lives of the three defendants.

Perhaps as important to saving the lives of the defendants, if somewhat less brave, were the actions taken by the Mississippi authorities to keep the lynch mobs at bay. Presumably not wanting to see a reenactment of the Ed Johnson and Leo Frank cases, the law enforcement authorities continually provided the defendants with guards who were heavily armed with machine guns and, apparently, willing to use them. It is easy, perhaps too easy, for us to say, “Well, that was their job.”

110. Id. at 46.
111. Id. at 60 (quoting, without attribution, Matilda Clark).
112. Id. (quoting, without attribution, Matilda Clark).
113. Id. at 65 (quoting, without attribution, Matilda Clark).
114. See id. at 68-69.
115. See id. at 74.
116. See id.
117. See id. at 9.
murdering a white man were at least modestly heroic.

Perhaps it was a sign of progress in race relations in Mississippi that Brown lost by only one vote in the state supreme court and that the dissents were written in emotional tones. The United States Supreme Court unanimously reversed, with less heat and fury than the dissenting judges in the state supreme court, but nonetheless noting: "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." 118

There was no need for the Court to write an emotional opinion. All it needed was to remind the reader of the race of the tortured suspects and the race of the torturers and, beyond that, only the facts, as Morgan Cloud has described:

The methodical, understated, matter-of-fact language employed in these passages only amplifies the horror of the deputies' acts. Hyperbolic adjectives and histrionic arguments were unnecessary. Nothing was needed but the facts. These facts, presented simply and directly, were more persuasive than any legal argument ever could be. Ultimately, the truth of the facts is the source of the opinion's rhetorical impact—and its moral authority. 119

So the Brown defendants had their convictions vacated and their cases sent back to the Mississippi courts. Unlike the Scottsboro defendants, who collectively went through ten retrials, the Brown defendants worked out plea bargains and served sentences from three years to seven years in prison. 120 Historian James Goodman mentions no pleas offered to the Scottsboro defendants. This makes sense. In Brown, the strongest evidence of guilt would not be available at a retrial. But in the Scottsboro case, the State still had two victims who, in the beginning, were both effective witnesses. That the Brown defendants accepted plea deals might tell us that they were guilty. But more likely, I think, it tells us that the black defendants understood full well that a white jury would convict even on

120. See Klarman, supra note 1, at 82.
the slimmest of evidence. A retrial probably looked to the Brown defendants like a ticket to the gallows.

But the Brown defendants fared better than the Scottsboro defendants precisely because the remedy in Brown was substantive. The confessions could never be used. The Scottsboro defendants got procedural due process—the right to have a trial with competent counsel zealously representing them. That procedural due process victory gave five of them a lot of heartache and long prison sentences. The right to have counsel is not very meaningful if the jury is selected from a pool that has a deep belief in the criminality of blacks or Jews.

Juries failed Ed Johnson, Leo Frank, the Scottsboro defendants, and the Brown defendants. It is thus at least a little ironic that when another likely flawed verdict came to the Court from a Southern court, the remedy the Court provided this time was the right to trial by jury. Gary Duncan, a young black man, was charged with assault on a white youth that took place near a New Orleans public school integrated only the month before. According to Alvin Bronstein, who represented Duncan, the assault charge arose as follows:

Duncan . . . was driving home from work and passed the school and saw a bunch of kids on the sidewalk outside of the school. Two of the boys were his nephews, eleven- and twelve-year-old black kids who had been among the few to attend the previously all-white school. He saw that they were surrounded by about five or six white boys about the same age, and it looked like there was an incident or that something was going on so he pulled over, got out, and asked what was happening. There had been a little pushing and shoving between the kids, and his nephews said the other boys were taunting and teasing and threatening them. He said, "Okay, well, get in the car and I'll take you home." He then said to one of the young white boys, touching him on the elbow, "Go run along and go on home." Just like that.121

A witness to this event was a member of the school board who had opposed integration.122 He reported an assault to the police, who investigated and concluded that

122. See id.
no assault had occurred.\textsuperscript{123} Despite the police investigation, Duncan was arrested for battery, a misdemeanor under Louisiana law that carried a possible two-year penalty.\textsuperscript{124} Louisiana law did not permit jury trials in misdemeanor cases, and Duncan was thus tried before a judge known to be a crony of the racist Leander Perez, who was "really the king or the emperor of Plaquemines Parish, which was an extraordinarily mineral-wealthy piece of land."\textsuperscript{125} Perez "was one of the people who first began to distribute the phony Protocols of the Elders of Zion and a number of other racist, anti-Semitic publications."\textsuperscript{126}

Naturally, Duncan was convicted. Though it is unclear whether the Court knew anything about the questionable justice available in Plaquemines Parish, Duncan's brief set out the facts leading to the charge, including the races of the participants and the fact that the black youths had been transferred to the school under a federal court order to desegregate the New Orleans schools.\textsuperscript{127} I believe the Court granted certiorari because of the racial dimension of the case. The Court overturned Duncan's conviction on the ground that the state statute denying a jury trial to someone facing two years in prison was unconstitutional.\textsuperscript{128}

Duncan had moved for a jury trial to escape the racist justice of Leander Perez and his cronies. A jury would be better than a judge under the control of Perez. But was an all-white New Orleans jury really a solution to the substantive injustice that had been done to Duncan? Oddly enough, Duncan never got his jury trial. When the Supreme Court sent the case back to the Louisiana courts, the state legislature, attending to dicta in \textit{Duncan} about where the jury trial line would be drawn, amended the battery statute so that the maximum jail time was six months.\textsuperscript{129} Then the prosecutor charged Duncan with battery under the new

\textsuperscript{123} See id.
\textsuperscript{124} See id.
\textsuperscript{125} Id. at 5.
\textsuperscript{126} Id. at 6.
\textsuperscript{127} Brief of Appellant at 3-4, Duncan v. Louisiana, 391 U.S. 145 (1968) (No. 410), 1967 Westlaw 113845.
\textsuperscript{128} Duncan, 391 U.S. at 161-62.
\textsuperscript{129} See Bronstein, supra note 121, at 12.
This is not an ex post facto problem because battery was already against the law. Nor did it violate the due process rule that a defendant cannot be penalized for appealing his conviction, because Duncan received a two month sentence under the old statute and the most he faced under the new one was six months.

But Louisiana's challenge to federal supremacy was doomed to failure. It is difficult for those who did not live through the 1950s and 1960s to appreciate how the Southern states, in big ways and small, were challenging the premise of the Supremacy Clause that federal law prevailed over contrary state law. The federal courts were, in large part, up to the task of asserting supremacy. A federal district judge in New Orleans agreed with Bronstein that the Louisiana officials were acting in bad faith in Duncan's case and enjoined further prosecution of Gary Duncan for the battery. Thus, the man whose name is synonymous with the right to a jury trial never received his jury trial!

VI. How Are Innocent Defendants Treated by Today's Supreme Court?

Innocent defendants were ill-served by juries in most of the cases discussed in this Essay. Though it is a small data set, these cases suggest the wisdom of a meaningful review of convictions when defendants claim to have been innocent. The modern Court has not provided the doctrinal tools for a meaningful review of innocence claims. Now that we know, with DNA evidence, that innocent defendants are convicted far too often, it is time for the Court to amend its precedent on the issue of federal review of state convictions.

Almost all federal review of state convictions is by means of a habeas corpus petition after state court review is completed. Most of the time reviewing these petitions is

130. See id.
132. Duncan, 391 U.S. at 146.
134. The only other route to obtain federal review of a state conviction is for the Supreme Court to grant certiorari after the state's highest court has
spent by federal magistrates and district judges. The issue in *Jackson v. Virginia* was how much evidence was sufficient to sustain a state conviction on review in federal habeas proceedings.\textsuperscript{135} The Fourth Circuit relied on *Thompson v. Louisville*\textsuperscript{136} to reject Jackson's claim of insufficient evidence. *Thompson* held that a conviction could not be sustained if the record was completely void of evidence\textsuperscript{137} but did not address the standard for evaluating the sufficiency of the evidence when some evidence had been introduced. The lower court recognized that *Thompson* might not be the Court's final word on reviewing evidence sufficiency, but finding no Supreme Court guidance other than *Thompson*, it applied the "no evidence" rule and affirmed Jackson's conviction.\textsuperscript{138} The "no evidence" standard made the jury trial essentially the only measure of sufficiency and thus the only hope for innocent defendants. But, as we have seen, juries can make horrific errors, and innocent defendants can suffer.

The Court in *Jackson* thought the risk of erroneous convictions high enough to require a more searching inquiry than the "no evidence" rule. Appellate courts must, the Court said, decide whether "the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."\textsuperscript{139} This language portends a meaningful review, but the Court flinched in developing a metric to determine whether the evidence supported a finding of guilt beyond a reasonable doubt.

One might logically think that the review of sufficiency would entail a judgment about whether the transcript proved guilt beyond a reasonable doubt. German appellate courts undertake an independent review of the evidence in criminal cases that starts over—"hearing the witnesses, considering afresh the evidence and the law, and giving its own independent conclusions."\textsuperscript{140} American courts could at

\begin{footnotesize}
\begin{enumerate}
\item[135.] 443 U.S. 307, 313-14 (1979).
\item[136.] 362 U.S. 199 (1960).
\item[137.] Id. at 205-06.
\item[138.] *Jackson*, 443 U.S. at 312.
\item[139.] Id. at 318.
\item[140.] FLOYD FEENEY & JOACHIM HERRMANN, ONE CASE—TWO SYSTEMS: A
\end{enumerate}
\end{footnotesize}
least review the trial transcript. But *Jackson* explicitly rejected that approach, cautioning that a reviewing court need *not* ""ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt."" The Court provided no reason for refusing to require that kind of meaningful review, but the fear of a heavy burden on magistrates and federal district courts was surely on the Court's mind.

Thus, the Court sucked the life from its ""reasonable support"" standard with a test that habeas petitioners can almost never meet. ""[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."" Notice the three heavy burdens for petitioners. The test is whether *any* rational trier of fact could (not would) have found guilt beyond a reasonable doubt. And a judge applies this extremely deferential standard only after viewing the evidence in the light most favorable to the prosecution.

How many innocent defendants could meet that standard? A precious few, I believe. The Ed Johnson conviction would likely be affirmed under the *Jackson* standard. If you view the evidence in the light most favorable to the prosecution, then you reject the credibility of all the alibi witnesses, and Nevada Taylor's almost positive identification would provide a basis on which a rational trier of fact could have found guilt beyond a reasonable doubt.

The Court might be right that it would be a waste of time for federal judges to conduct a searching inquiry of the record in every case in which the habeas petitioner suggested that the evidence was insufficient. That the German courts perform an even more intensive review should give us pause, but I suspect that the rate of appeals is far lower in Germany than here. Even if the Court is right about the burden in the run-of-the-mill case, it could carve out an exception for cases where the petitioner makes

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142. *Id.* at 319.
a threshold showing of probable innocence.

What the Court did not recognize in *Jackson*, and still has not faced, is that review of state convictions should be conducted differently when a petitioner makes a plausible claim of innocence. In those cases, the review should be precisely the one the Court rejected in *Jackson*—the federal courts should review the transcript, armed with some presumption about credibility, and decide whether the State introduced sufficient evidence of guilt.

The Constitution Project recently made a similar recommendation in capital cases, calling on appellate courts to reverse convictions “if a reasonable jury could not have found guilt beyond a reasonable doubt.”143 While a standard that low might be appropriate for vacating a death penalty, I fear that it would release many guilty defendants along with innocent ones. A more appropriate standard is one that the Court requires when procedural errors might have caused a wrongful conviction—when counsel was ineffective or when the prosecutor failed to disclose exculpatory evidence. In these cases, the Court instructs lower courts to reverse the conviction if the error undermines confidence in the conviction. The failure to turn exculpatory evidence over to the defense, for example, will require reversal when there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”144

The Court’s explicit goal when structuring the right to effective counsel and the right to exculpatory evidence is to require procedures that advance the accuracy of trial outcomes. To apply the same standard for reversing convictions when a defendant makes a substantive claim of innocence simply recognizes an equivalence between procedure and substance. Lower courts are familiar with the standard. It is, to be sure, not very precise, but I trust appellate courts to apply it in a way that benefits innocent


defendants who make a substantial showing of innocence. In any event, it is far better than the vacuous *Jackson* standard.

To give just due to the jury, whose task it is to determine credibility, the reviewing court could assume that whenever there is a conflict in the testimony, that the prosecution witnesses were telling the truth. Given the notorious unreliability of eyewitness identifications, however, and what we know about how often eyewitnesses help convict innocent defendants, I would not extend the credibility rule to eyewitnesses. If the contested issue is what the victim or defendant said, I would construe that to favor the prosecution witnesses given that the jury convicted—but not eyewitness testimony.

We can test my proposal by applying it to Ed Johnson's conviction. Under my proposal, the reviewing court would assume that Nevada Taylor was telling the truth when she said she thought he was the man who raped her but the court would not assume that the alibi witnesses were not telling the truth. The court would have to ask whether Taylor's lack of certainty, combined with the many alibi witnesses, undermined confidence in Johnson's conviction. It would for me if I were on the reviewing court. Governor Slaton applied a similar standard to the evidence in Leo Frank's case and concluded that he was innocent.145

This inquiry is, I admit, a much more laborious process than the minimalist one required by *Jackson*. Thus, I do not think that due process requires a review of the evidence unless the petitioner makes a threshold showing of probable innocence. A threshold showing could be made by affidavit detailing evidence that was not presented at trial or highlighting evidence that was presented and was ignored—for example, a confession from someone else or a new witness who can identify someone else as the perpetrator.

States have their own procedures for investigating newly-discovered evidence. To some extent, my recommended change in federal habeas review would just be a backstop to apply after the state courts have finished their inquiry into newly-discovered evidence. But I would not require new evidence to make the threshold showing of innocence. In Ed

145. *See supra* note 42, and accompanying text.
Johnson's case, the fact that many witnesses testified that he was nowhere near Nevada Taylor at 6:00 P.M. on January 23, 1906 would be enough for me to find the threshold met. Then I would examine Taylor's testimony. Finding it somewhat uncertain, my confidence in Johnson's conviction would be undermined and I would enter an acquittal.

*Jackson* was decided in 1979, long before we began to be aware of how many innocent defendants are convicted. Estimates vary wildly but we know that the Cardozo Innocence Project has now proven that 208 innocent men were convicted.\(^{146}\) It is time for the Court to recognize the risk to innocence posed by our criminal process, and to amend *Jackson* to require a more searching review in federal habeas cases when the petitioner makes a threshold showing of probable innocence.

Will this cause a huge increase in the workload of appellate courts? I doubt it. In most appeals, guilt is obvious. Prosecutors tend to plea out or dismiss weak cases. It should be difficult for guilty defendants to make a threshold showing or innocence. The more sophisticated our crime investigation becomes, the more likely it is that solid physical evidence will link the defendant to the crime, thus defeating most attempts by guilty defendants to reach the innocence threshold. The United Kingdom adopted a somewhat similar system in 1995 and, as of 2001, the reversal rate was only 1.6 percent of all cases challenging the sufficiency of the evidence.\(^{147}\)

Moreover, I join Blackstone in concluding that it is better that ten guilty defendants escape justice than that one innocent person be convicted. Benjamin Franklin, by the way, upped the ante on Blackstone in a letter in 1785, stating that "it is better [that] 100 guilty Persons should escape than that one innocent Person should suffer."\(^{148}\) I doubt I would go that far, but I do not think we would even

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have to suffer the ten-to-one ratio.

My forthcoming book will argue that the right not to be deprived of life, liberty, or property without due process of law entails the right to have a federal judge review the sufficiency of evidence when a petitioner has made a threshold showing of innocence. If Congress were suddenly imbued with courage, it could of course amend the federal habeas statute to require a more in-depth review of innocence. But my money is on the Court.

In 2004, the Court tossed out a quarter century of precedents to hold that the Sixth Amendment confrontation clause actually requires the government to produce in court the witnesses against the defendant instead of relying on hearsay. While the Court’s focus in that case was on the language of the clause and the history of the right of confrontation, embedded in the notion of confrontation is the need to probe damning testimony and thus make erroneous convictions less likely. Protecting innocence by overruling bad precedents in the Confrontation Clause area leads naturally to amending Jackson for that small group of habeas petitioners who can make a threshold showing of innocence.

One of the odd phenomena about the DNA exonerations is how little attention or condemnation they have generated in this country. In 1993, a Royal Commission examined the English justice system and was “struck by evidence of a disquieting lack of professional competence . . . .” Three years later, in a book subtitled The Collapse of Criminal Justice, David Rose wrote that “English criminal justice is in a crisis without precedent, its solutions uncertain and its effects deeply damaging.” In Canada, the realization that a single defendant was wrongly convicted of murder led the Manitoba Justice Minister to commission an inquiry that made an exhaustive study of what went wrong in the case.

But unlike Britain and Canada, and unlike America


150. ROYAL COMM’N ON CRIMINAL JUSTICE, REPORT ¶ 20, at 6 (1993).


when the Scottsboro defendants were convicted, America in 2007 seems supremely unmoved by the failures we see. It is time—it is past time—that our criminal process took seriously the problem of appellate courts affirming convictions of innocent defendants.