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NOTE

Credibility Interrogatories in Criminal Trials

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Abstract. Our criminal appeals system struggles to detect wrongful convictions, and its treatment of unreliable testimony deserves a share of the blame. An interconnected web of judicial dispositions makes convictions backed by testimony—no matter how marginal—largely impervious to review. When challenged, this imperviousness is explained away as deference to the jury's role as lie detector. But this explanation doesn't persuade. Given the volume of testimonial evidence mounted in modern trials, the mere fact of conviction provides little insight into the jury's underlying credibility judgments.

Reformers overlook this. Instead, they blame the jury for mishandling bad testimony—and they call for expanding the scope of appellate review over questions of evidentiary quality. But this is a poor fix. By the time a defendant's case arrives on appeal, critical information has already been lost. Reviewing courts lack the institutional capacity to recover it. And requiring judges to render credibility judgments diminishes the jury's position as the finder of fact.

This Note proposes an alternative solution: Defendants facing unreliable testimony could request "credibility interrogatories." Should the jury convict, the trial judge would administer a set of special questions asking the jurors to flag testimony they unanimously deemed too suspect to credit. This prophylactic would cabin the paralytic effects of bad testimony on sufficiency review, enable appellate courts to more accurately assess the prejudicial impact of error, and smoke out meritorious claims of innocence.

Best of all, credibility interrogatories achieve these benefits in a manner consistent with current law. While special interrogatories are sometimes said to be disfavored in criminal trials, previous commentators have overlooked the saving power of key procedural modifications. This Note draws on federal and state case law to sketch out an approach that is simple, effective, and protective of the rights of defendants and the function of the appellate system. By shining new light on an understudied instrument of judicial discretion, this Note is of likely interest to scholars and practitioners alike.

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Introduction

Our criminal justice system is plagued by unreliable testimony. Some witnesses "misperceive, misremember, [or] misdescribe."[1] Some lie—for money, for status, for lenity, or for no reason at all.[2] False and perjured statements are among the foremost causes of wrongful convictions in the United States.[3] In recognition of the danger that unreliable testimony poses, criminal law has erected a net of procedural safeguards to prevent the jury from falling under its influence.[4] But no similar caution is shown on appellate review.

Consider the following scenario. You are wrongfully charged with a serious offense. During trial, the prosecution calls a witness to the stand. The witness lies. He testifies that he saw you fleeing the scene of the crime. To any

1. *See* Jonathan J. Koehler, *Proficiency Tests to Estimate Error Rates in the Forensic Sciences*, 12 LAW, PROBABILITY & RISK 89, 89 (2013); *see also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 345 (2009) (Kennedy, J., dissenting) ("A typical witness must recall a previous event that he or she perceived just once, and thus may have misperceived or misremembered.").

2. *See, e.g.*, Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331, 333 (2011) ("The corrupting impact of false testimony on the justice system is profound and corrosive."); Anthony Salzman, *Recantation of Perjured Testimony*, 67 J. CRIM. L. & CRIMINOLOGY 273, 273 (1976) ("Witnesses have violated their judicially administered oaths to tell the whole truth since the beginning of American jurisprudence, and courts and legislatures have engaged in continual efforts to cure the problem."); *see also* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 652, 663-64 (2004) (noting that testimony is often exchanged for leniency or financial reward).

3. One recent review of DNA exonerations revealed that over half of the underlying convictions were secured on the basis of perjury or false accusations. *See* SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989-2012, at 40 tbl.13 (2012), https://perma.cc/SC82-B4HP. Similarly, bad testimony was a "contributing cause[]" in 76.5% of wrongful death row convictions resulting in exoneration between 2007 and April 2017. *See DPIC Analysis: Causes of Wrongful Convictions*, DEATH PENALTY INFO. CTR., https://perma.cc/X79W-2TWK (archived Nov. 16, 2018). Multiple illustrations underscore this point. *See, e.g.*, Rob Warden, Ctr. on Wrongful Convictions, Nw. Univ. Sch. of Law, How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row: An Analysis of Wrongful Convictions Since Restoration of the Death Penalty Following *Furman v. Georgia* attachment A (2001), https://perma.cc/Y7UX-EK8D (summarizing the facts of forty-six cases in which bad testimonial evidence led to false capital convictions).

4. Some of these protections are codified in procedural rules. *See, e.g.*, FED. R. EVID. 403 (permitting the trial judge to exclude evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice"); *id.* 702 (tasking judges with gatekeeping the reliability of expert and scientific evidence). Others have been created by judicial pronouncement. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593-95 (1993) (listing factors a judge is to consider prior to admitting expert testimony); Manson v. Brathwaite, 432 U.S. 98, 114-16 (1977) (providing indicia of reliability for eyewitness testimony).

cautious observer, his testimony would set off alarm bells: He is a jailhouse informant, he has pecuniary motives, and his story melts under cross-examination. For these reasons, the jury declines to credit his testimony during its deliberations. Nevertheless, the jury convicts you on the force of the state's remaining case. You challenge the conviction. What result on appeal?

Your outlook is grim. Under current law, the reviewing court is required to treat the fact of conviction as nearly insurmountable evidence that the jury found the witness's testimony credible.[5] Indeed, it must presume the jury found the testimony so credible as to outweigh any evidence you may have put forward.[6] If the prosecution committed error—even grave error—in bringing its case, this error may be found "harmless" on the theory that the witness's testimony constituted "likely" or "overwhelming" evidence of guilt.[7] The court may decline to order forensic evidence retested, reasoning that the witness's statements defeat your claim of actual innocence.[8] And should new DNA evidence preclude you from having been the perpetrator, a judge may nevertheless cite the witness's testimony as sufficiently probative to obviate the need for a new trial.[9]

The manner in which judicial presumptions surrounding bad testimony inhibit appellate review is a problem this Note calls "testimonial ossification."[10] Recent scholarship has begun to examine its causes, but no work has treated the phenomenon comprehensively.[11] Thus, few commentators have questioned that the jury's general verdict can be read to imply credibility judgments about specific witnesses.[12] Instead, they blame the jury for

5. *See infra* Part I.A.

6. *See infra* Part I.A.

7. *See infra* Part I.B.

8. *See infra* Part I.C.

9. *See infra* Part I.C.

10. The label "ossification" is appropriate in two respects. First, it speaks to the special strength that testimonial evidence gains on review. Second, it describes the process by which appellate innocence-protection instruments are immobilized as a result of this durability.

11. The most comprehensive effort to date studied the ossification of testimonial evidence on sufficiency review. *See* Andrea Roth, *Defying DNA*: *Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. REV. 1643, 1648-54 (2013). Other works have provided excellent top-down analyses of the adversity that criminal defendants face on appeal. *See, e.g.*, Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 348-54; Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 94-116 (2008). This Note's contribution is comparatively circumscribed. It examines only a single cause of adversity: bad testimony. And it hopes to prove only a single—and somewhat distinct—point: Valuable credibility judgments are being squandered, but can be reclaimed.

12. *See infra* Part II.A.

mishandling unreliable testimony.[13] And their reform proposals primarily center on changing the standard of appellate review so as to give judges greater freedom to act as independent "lie detectors."[14] These proposals miss the mark. For all their faults, jurors have important things to say about witness reliability. Our criminal justice system is made worse—not better—when it declines to listen to them. And requiring appellate courts to come to their own credibility judgments is inefficient, inaccurate, and contrary to the jury's proper democratic function.

This Note proposes an alternative solution: a trial-level prophylactic in the form of carefully drafted special interrogatories.[15] Commentators have largely brushed over this possibility, reasoning that findings beyond the general verdict are disfavored in criminal trials.[16] But are they really? Special interrogatories have a long—if misunderstood—history in American criminal law.[17] And recent years have seen a pronounced resurgence in their use.[18] To date, only a handful of works have provided commentary on this resurgence.[19]

13. *See infra* Part II.B.1.

14. *See infra* text accompanying notes 140-44.

15. This Note uses the term "special interrogatories" to refer to additional questions asked of the jury which are *independent* of the verdict. These are distinct from "special verdicts," which ask questions *constitutive* of the verdict (whether or not the jury also synthesizes these components into a general verdict). For a treatment of the significance of this distinction, see Part III.C.1 below. Where it is necessary to refer to both instruments simultaneously, this Note uses the term "special questions."

16. *See, e.g.*, Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 136 n.260 (1996) ("[I]t would be radical if juries were required to reply to special interrogatories on discrete factual questions in criminal cases . . . ."); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 139 n.226 (1988) (noting incorrectly that criminal courts are not allowed to "propound special interrogatories"); Gregory Mitchell, Comment, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CALIF. L. REV. 1335, 1355 (1994) (implying that special interrogatories are disfavored in criminal cases). This aversion is justified on a number of grounds, but the most common rationale is that judges could use special interrogatories to push the jury toward a finding of guilt. *See infra* Part III.C.1. The proposal advanced in this Note uses several procedural modifications to mitigate this risk. *See infra* Part III.A.1.

17. *See infra* Part II.C.

18. *See* United States v. Gonzales, 841 F.3d 339, 347 (5th Cir. 2016) ("This historic aversion to special questions has lessened in recent years, at least for interrogatories that are not accompanied by an instruction directing a finding of guilt based on the answer . . . ."); United States v. Reed, 147 F.3d 1178, 1180 (9th Cir. 1998) ("Exceptions to the general rule disfavoring special verdicts in criminal cases have been expanded and approved in an increasing number of circumstances."). For a discussion of the contexts in which courts currently use special interrogatories, see Part II.C below.

19. *See, e.g.*, Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 90-105 (1990) (arguing for a broad shift toward the fact verdict, a kind of special verdict, in civil jury trials); Meghan A. Ferguson, Note, *Balancing Lenity, Rationality, and Finality: A Case for Special Verdict*
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Those handful have had an outsize influence on state and federal law.[20] But little ink has been spilled on the potential of special interrogatories to combat wrongful convictions—and still less on how such a move might be made palatable to courts.[21]

This Note attempts to fill that void. It argues that defendants facing suspect testimony could protect themselves by requesting judicially administered "credibility interrogatories." Should the jury vote to convict, the judge would present the jurors with a set of special interrogatories asking them to indicate if they unanimously found certain witnesses' testimony too unreliable to credit. This simple intervention solves a range of issues currently hindering criminal appeals. And it does so in a manner consistent with current law.[22] There is no need for statutory amendment, no departure from precedent. By repurposing a tool already used by trial courts, this proposal empowers judges and defense counsel to head testimonial ossification off at the pass.

Forms in Cases Involving Overlapping Federal Criminal Offenses, 59 DUKE L.J. 1195, 1215-20 (2010) (arguing for special verdicts to combat problems of collateral estoppel); Robert M. Grass, Note, *Bifurcated Jury Deliberations in Criminal RICO Trials*, 57 FORDHAM L. REV. 745, 751-56 (1989) (describing the benefits of increased use of special verdicts in complex RICO cases); Kate H. Nepveu, Note, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 YALE L. & POL'Y REV. 263 (2003) (cataloguing the then-current incidence of special verdicts in criminal trials, and providing a framework for assessing their utility); Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283, 317-25 (1992) (calling for the availability of postacquittal special interrogatories).

20. *See, e.g.*, *Gonzales*, 841 F.3d at 348 (citing Nepveu, *supra* note 19); United States v. Applins, 637 F.3d 59, 82-83 (2d Cir. 2011) (citing Grass, *supra* note 19); United States v. Hedgepeth, 434 F.3d 609, 613 n.2 (3d Cir. 2006) (citing Nepveu, *supra* note 19); Rossetti v. Curran, 891 F. Supp. 36, 42 n.15 (D. Mass. 1995) (citing Randall, *supra* note 19), *modified and remanded*, 80 F.3d 1 (1st Cir. 1996); Commonwealth v. Jacobs, 39 A.3d 977, 988 (Pa. 2012) (Saylor, J., concurring) (citing Ferguson, *supra* note 19).

21. To my knowledge, only two works have made a pragmatic argument that special interrogatories could be applied to this end. First, a short passage in an essay by then-Chief Justice Roger J. Traynor imagines that "skillful" lawyers and judges might be able to design special questions facilitating harmless error review. *See* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 23 (1970). But—citing to a single case—he observes that special questions are "seldom used" in criminal trials. *See id.* at 23-24, 91 n.56 (citing United States v. Spock, 416 F.2d 165 (1st Cir. 1969)). Second, a few paragraphs in a more contemporary article postulate that defense counsel might request special questions to detect prejudice in coerced confession claims. *See* Dennis J. Braithwaite, *Coerced Confessions, Harmless Error: The "Guilty as Hell" Rule in State Courts*, 36 AM. J. TRIAL ADVOC. 233, 258-61 (2012). Both works treat the issue of special interrogatories only peripherally. Thus, they leave substantial normative and descriptive work to be done. They also address only a sliver of the problem—error-based review. And they do not address interrogatories on evidentiary reliability, on which this Note will focus. *See infra* Part III.A.

22. *See infra* Part III.B.2.

This Note proceeds in three Parts. Part I illustrates how the legal fiction of deference to juries' credibility judgments allows bad testimony to derail sufficiency, error-based, and innocence-based review. Each Subpart begins with an exposition of current doctrine and closes with an illustration underscoring the danger it poses. Part II calls into question the presumptions which give rise to testimonial ossification. It highlights the costs of ignoring jury judgments, the danger of turning reviewing courts into lie detectors, and the potential utility of targeted jury factfinding. Part III shows how courts could combat testimonial ossification through the use of credibility interrogatories. It explains the instrument's optimal form and function, argues for its potential to facilitate criminal appeals, and responds to some of the practical and doctrinal objections that might be raised.

I. Understanding the Problem of Testimonial Ossification

Bad testimonial evidence creates a number of difficulties for postconviction review, a phenomenon which this Note labels "testimonial ossification." This Part explores how testimonial ossification impedes three important avenues for challenging wrongful convictions: sufficiency review, error-based review, and innocence-based protections.

A. Sufficiency Review

In any criminal case, the state must prove guilt beyond a reasonable doubt.[23] This protection extends to appellate review: When a judge finds the evidence presented at trial insufficient to sustain a conviction, that conviction cannot stand.[24] However, in a federal sufficiency-of-the-evidence challenge, the reviewing court is not to assess the defendant's probable guilt de novo.[25] Instead, the proper inquiry, specified by the U.S. Supreme Court in *Jackson v. Virginia*, is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[26] This means considering "all of the evidence . . . in the light most favorable to the prosecution."[27] State courts have largely settled on the same standard.[28]

23. *See In re* Winship, 397 U.S. 358, 364 (1970).

24. *See* Jackson v. Virginia, 443 U.S. 307, 318-19 (1979), *superseded in other part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (codified as amended at 28 U.S.C. § 2254 (2017)).

25. *See id.*

26. *See id.* at 319 (citing Johnson v. Louisiana, 406 U.S. 356, 362 (1972)).

27. *Id.* (emphasis omitted).

28. Many states expressly follow *Jackson*. *See* Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 435, 478 n.188 (2004) (citing

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Despite the Supreme Court's exhortation that this approach is friendlier to defendants than the "no evidence" rule previously employed,[29] sufficiency review is still a largely impotent tool of innocence protection. Sufficiency challenges are common,[30] but they almost never prevail.[31] The reason for their inefficacy has much to do with how the aforementioned standards interact with bad testimonial evidence. Under *Jackson*, a reviewing court must presume that the jury believed the testimony of all of the prosecution's witnesses.[32] This presumption is functionally indestructible.[33] That is, even a conviction resting "solely upon the uncorroborated testimony of an [alleged] accomplice" must be upheld on sufficiency grounds unless it is either "physically impossible" that the witness could have seen the event or "impossible under the laws of nature"

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cases from seven such states). Those that do not often use functionally identical language. *See id.*

29. *See Jackson*, 443 U.S. at 319-20. The earlier "no evidence" standard would uphold a conviction if there was a "mere modicum" of evidence—a standard the *Jackson* Court reasoned was too low a bar to adequately protect the due process rights of defendants. *See id.* at 320 (quoting Jacobellis v. Ohio, 378 U.S. 184, 202 (1964) (Warren, C.J., dissenting)).

30. One study of first-level criminal appeals from five state appellate courts found that sufficiency challenges were raised in between 19.1% and 49.7% of cases. *See* JOY A. CHAPPER & ROGER A. HANSON, NAT'L CTR. FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS 32 tbl.2 (1989), https://perma.cc/Z7A6-XUNH. One study of defendants exonerated by DNA evidence showed that 45% had filed *Jackson*-type sufficiency appeals. *See* Garrett, *supra* note 11, at 112.

31. Indeed, of the sixty factually innocent defendants who raised *Jackson*-style sufficiency challenges in a study of DNA exonerees, only one such claim prevailed. *See* Garrett, *supra* note 11, at 112; *see also* Oldfather, *supra* note 28, at 478 ("[A]ppellate courts almost never reverse convictions on sufficiency grounds . . . ."). This problem is especially acute on federal habeas review, due to the extra deference afforded. *See* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 726 (1990) ("[S]imple insufficiency-of-the-evidence relief on federal habeas is almost unheard of.").

32. *See Jackson*, 443 U.S. at 319 (noting that on review judges are to consider all evidence "in the light most favorable to the prosecution"); *see also* Musacchio v. United States, 136 S. Ct. 709, 715 (2016) (quoting *Jackson*, 443 U.S. at 319) (reiterating this standard); Schlup v. Delo, 513 U.S. 298, 330 (1995) (noting that when examining sufficiency of the evidence, "the assessment of the credibility of witnesses is generally beyond the scope of review"), *superseded in other part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (codified as amended at 28 U.S.C. § 2255 (2017)); Burks v. United States, 437 U.S. 1, 16-17 (1978) (holding that even trial courts are to place credibility disputes in the hands of the jury, and that appellate courts owe the same deference).

33. *See, e.g.*, Foxworth v. St. Amand, 570 F.3d 414, 426-27 (1st Cir. 2009) (noting that a conviction can be upheld on sufficiency review even if its sole support came from the uncorroborated testimony of an eyewitness exposed to "withering cross-examination" that revealed "a number of weaknesses" in his story); *see also* United States v. Lipscomb, 539 F.3d 32, 40 (1st Cir. 2008); Ramonez v. Berghuis, 490 F.3d 482, 490 (6th Cir. 2007).

that the event could have occurred at all.[34] Many states similarly require that the testimony be "inherently incredible" to be excluded from consideration on sufficiency review.[35]

In applying *Jackson*, judges almost always presume that the jury's belief in witness testimony outweighed all competing evidence.[36] They do this not only in the face of compelling defense testimony,[37] but also in the face of objective scientific evidence such as DNA testing.[38] Thus, the only real hope of winning on a sufficiency challenge is if a vital component of the prosecution's case goes unsupported.[39] This reduces to a single question: Was there any testimony—no matter how implausible—which supports the necessary inferences?

To understand the special power these presumptions give to bad testimony, consider the facts of two sufficiency review cases related to the same criminal act. This story is set at a paper mill in Green Bay, Wisconsin, where Thomas Monfils called the police on his coworker Keith Kutska for stealing a piece of electrical cord.[40] Kutska refused to have his bag searched, and he was suspended for five days.[41] Monfils was later found dead in of one of the mill's pulp vats.[42] Charges were filed, and convictions secured, against Kutska and five other coworkers.[43] The defendants sought habeas relief on sufficiency grounds. It is instructive to examine how two of these cases played out.

The first is the case of Michael Piaskowski, who was convicted of first-degree murder.[44] The government's case against Piaskowski relied almost entirely on two witnesses, Brian Kellner and James Gilliam, who repeated stories they allegedly heard from third parties about the murder.[45] These

34. United States v. Van Wyhe, 965 F.2d 528, 531 (7th Cir. 1992) (quoting United States v. Dunigan, 884 F.2d 1010, 1013 (7th Cir. 1989)).

35. *See* Roth, *supra* note 11, at 1653 & n.54 (listing cases).

36. *See id.* at 1653.

37. *See Musacchio*, 136 S. Ct. at 715 (withholding from reviewing courts the power to resolve testimonial disputes).

38. *See* Roth, *supra* note 11, at 1645-54.

39. *See* Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 602 (2009) (noting that in practice, courts "uphold convictions unless there is essentially no evidence supporting an element of the crime"); Oldfather, *supra* note 28, at 478 (arguing that pragmatically, there may be little to no difference between the *Jackson* standard and a "no evidence" standard).

40. *See* Piaskowski v. Bett, 256 F.3d 687, 689 (7th Cir. 2001).

41. *See id.*

42. *See id.* at 690.

43. *See id.*

44. *See id.*

45. *See id.* at 691 ("The State's case against Piaskowski relies almost exclusively on the intersection of the accounts of Kutska and [another coworker] as related by Kellner and Gilliam.").

accounts placed Piaskowski at the scene of a confrontation between Monfils and a group of workers.[46] The court presumed—as *Jackson* requires—that this testimony was believed by the jury.[47] But the state presented no evidence that permitted the further inference that the defendant was actually involved in the murder.[48] On these grounds, his conviction was overturned.[49]

Contrast this with the case of Michael Johnson, who was also convicted of Monfils's murder.[50] Like Piaskowski, Johnson was put at the scene of the altercation by Kellner and Gilliam's testimony.[51] But his case differed in one material respect: An additional witness, David Wiener, testified that he saw Johnson carrying a large object to the location where the victim's body was found.[52] The court held that this testimony—in conjunction with that of Kellner and Gilliam—could be read to tell a complete story of guilt.[53] His claim for relief was accordingly denied.[54]

Read in tandem, these cases underscore the sway one witness's testimony can have. The reviewing court in Johnson's case was required, under *Jackson*, to assume that the jury credited Wiener's testimony. But what if the jury had not? Wiener's credibility was far from obvious: When questioned by the police after the murder, he twice denied seeing any suspicious conduct.[55] He first came forward only six months later.[56] Even then, he claimed that an object obstructed his view of the defendants—such that he could not see what they were carrying.[57] It probably did not help that he had been convicted of murdering his brother.[58] Nor could it have helped that while in prison he intimated to fellow inmates that he may himself have been Monfils's killer.[59] Perhaps the jury improperly convicted Johnson only on the basis of Kellner

46. *See id.*

47. *See id.* at 692. However, the court did so only begrudgingly. *See id.* (stating that despite external indicia of unreliability, the court was "willing to accept . . . that Kellner's account places Piaskowski near the [scene] at the time the confrontation began").

48. *See id.* at 692-93.

49. *See id.* at 695.

50. *See* Johnson v. Bett, 349 F.3d 1030, 1033 (7th Cir. 2003).

51. *See id.*

52. *See id.* at 1033-35.

53. *See id.* at 1035.

54. *See id.* at 1039.

55. *See* State v. Basten, Nos. 97-0918-CR, 97-0919-CR & 97-1193-CR, 1998 WL 61129, at *17 (Wis. Ct. App. Feb. 17, 1998).

56. *See id.*

57. *See id.*

58. *See id.* at *19.

59. *See id.* at *7.

and Gilliam's testimony, but not Wiener's. Clearly this was possible; Piaskowski's jury did precisely this. If so, the judicial presumption of Wiener's credibility denied Johnson sufficiency relief in a case otherwise largely identical to one in which relief was granted. But current doctrine does not provide defendants any means of rebutting this presumption.

B. Error-Based Review

When a defendant's trial rights are violated, she can seek to have her conviction vacated. But not every procedural misstep calls for such a dramatic remedy.[60] Indeed, given the complexity of the modern criminal trial, one would be hard-pressed to find a case in which there was not at least some errant conduct. To prevent rampant reversals, courts apply various formulations of what has become known as the "harmless error rule."[61] This rule provides that relief will not be available for errors which were "harmless" to the ultimate outcome of the trial.[62] A similar "harmlessness" analysis is applied to other sorts of postconviction challenges, including ineffective assistance of counsel claims.[63]

60. *See, e.g.*, Bruno v. United States, 308 U.S. 287, 293 (1939). This was not always so—"[t]hroughout most of the history of the United States, appellate courts reversed convictions for most any error committed at trial." Charles S. Chapel, *The Irony of Harmless Error*, 51 OKLA. L. REV. 501, 502 (1998).

61. These formulations vary based on the nature of the error and the procedural posture. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 765 (1946) (requiring that a court reverse unless the state provides "fair assurance" that the decision "was not substantially swayed by the error"); *see also* United States v. Olano, 507 U.S. 725, 734 (1993) (repeating the *Kotteakos* standard, but placing the burden of proof on the defendant). State courts are free to adopt their own standards but, much like the federal approach, they tend to "focus exclusively on whether the procedural error affected the result of the proceeding under review." *See* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1794 (2017). For a general treatment of the standards of review used, see *id.* at 1799-800.

62. There is a narrow exception for "structural errors"—those that are deemed so intolerable as to command automatic reversal. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 339, 344-45 (1963) (deprivation of a defendant's right to counsel); Tumey v. Ohio, 273 U.S. 510, 532, 535 (1927) (denial of the right to trial by an unbiased adjudicator); *see also* Washington v. Recuenco, 548 U.S. 212, 218-19 (2006) (noting that structural errors "requir[e] automatic reversal"). But this exception is narrow. *See* Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991). It continues to shrink. *See* Chapel, *supra* note 60, at 504 n.26. And when determining whether structural error has actually occurred, appellate courts give deference to trial-level factfinding, especially when it involves credibility judgments. *Cf.* Bennett v. Stirling, 170 F. Supp. 3d 851, 871 (D.S.C.) (rejecting the trial court's finding that a juror—who used a racial epithet to refer to the defendant—did not have racial animus, but nevertheless noting a general deference to the trial court on questions of credibility), *aff'd*, 842 F.3d 319 (4th Cir. 2016).

63. A defendant who claims ineffective assistance of counsel is entitled to reversal if his lawyer failed to meet a minimum standard of competency and he can show that his

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The challenge comes in identifying when error qualifies as "harmless." Doctrinally, the Supreme Court has remained clear: Reviewing courts are to look to whether the error likely impacted the decision of the *specific* jury *actually* empaneled at trial.[64] Under this approach, judges are not to indulge hypotheticals about what a "rational jury" might have found.[65] They certainly are not to decide based on their own personal opinions of the evidence.[66] This concrete inquiry is sometimes labeled the "effect on the judgment" approach.[67]

Despite this approach's formulaic clarity, courts have struggled to apply it consistently. After all, general verdicts leave them with "only probabilities to go on" as to which evidence the jury credited.[68] And sometimes, the record permits only "unguided speculation."[69] These challenges have induced many judges to employ the easier-to-apply "likely guilt" or "overwhelming evidence" tests.[70] These shortcuts reduce the traditional "effect on the judgment" inquiry into an evidentiary one: How strong was the prosecution's case?[71] If the evidence was exceptionally strong, courts may reason that virtually no error could have changed the jury's verdict.[72]

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lawyer's errors were "so serious as to deprive the defendant of a fair trial." *See* Strickland v. Washington, 466 U.S. 668, 687 (1984). In effect, this is simply a more demanding formulation of harmless error review. The presence of testimonial evidence weighs heavily in determining the outcome of *Strickland* challenges. *See, e.g.*, Ramonez v. Berghuis, 490 F.3d 482, 490 (6th Cir. 2007). Thus, *Strickland* violations are more likely to be found when defense counsel's misconduct deprives the jury of the ability to decide witnesses' credibility for itself. *See, e.g.*, McGahee v. United States, 570 F. Supp. 2d 723, 736-37 (E.D. Pa. 2008), *aff'd*, 370 F. App'x 274 (3d Cir. 2010).

64. *See* Murray, *supra* note 61, at 1794 ("Nearly all harmless error rules used by courts today focus exclusively on whether the procedural error affected the *result* of the proceeding under review . . . ." (emphasis added)).

65. *See* Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) (asserting that the relevant inquiry is "not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand").

66. *See Kotteakos*, 328 U.S. at 763 ("[I]t is not the appellate court's function to determine guilt or innocence.").

67. *See, e.g.*, TRAYNOR, *supra* note 21, at 22.

68. *See id.*; *see also Sullivan*, 508 U.S. at 284 (Rehnquist, C.J., concurring) ("[T]he reviewing court is usually left only with the record developed at trial to determine whether it is possible to say beyond a reasonable doubt that the error did not contribute to the jury's verdict.").

69. *See* Holloway v. Arkansas, 435 U.S. 475, 491 (1978).

70. *See* Chapel, *supra* note 60, at 503-05; Garrett, *supra* note 11, at 108-09.

71. *See* Garrett, *supra* note 11, at 107-08 ("[W]hen the State's case is strong, an error may be less likely to contribute to the outcome . . . .").

72. *See* Murray, *supra* note 61, at 1795-96 (observing that error, "no matter how egregious," is often overlooked where there is "overwhelming evidence" of the defendant's guilt).

In *Neder v. United States*, the Supreme Court countenanced the use of this heuristic, but it nevertheless stressed that an inquiry based in history must be conducted.[73] Unfortunately, courts have not heeded this instruction. Instead, the language of "likely guilt" and "overwhelming evidence" is often invoked reflexively.[74] And factual innocence affords little protection. A study by Brandon Garrett found that of exonerated defendants who filed error-based appeals, courts referred to defendants' guilt in half of cases, and cited "overwhelming" evidence of guilt in one in ten cases.[75]

Testimonial ossification offers an important explanation for why many factually innocent defendants fare poorly on error-based review. Courts usually hold error harmless summarily when a conviction was supported by untainted testimony.[76] On the rare occasions when they enter into a more detailed analysis, both federal and state courts generally defer to the prosecution's testimonial evidence unless it is deeply suspect or facially compromised.[77] To be sure, some judges engage in a relatively independent

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73. *See* 527 U.S. 1, 17 (1999) (holding that where an erroneous instruction impacted an element which was supported by uncontested evidence, the error could reasonably be assumed harmless). *But see id.* at 19 ("[S]afeguarding the jury guarantee will often require that a reviewing court conduct a *thorough examination* of the record." (emphasis added)); *see also id.* ("A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, 'become in effect a second jury to determine whether the defendant is guilty.'" (quoting TRAYNOR, *supra* note 21, at 21)).

74. Judges concede as much. *See* Harry T. Edwards, Madison Lecture, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1170 (1995) ("[W]e have applied the harmless-error rule to such an extent that it is my impression that my colleagues and I are inclined to invoke it almost automatically where the proof of a defendant's guilt seems strong.").

75. *See* Garrett, *supra* note 11, at 108 tbl.8.

76. Often, a court's analysis begins and ends with this finding. *See, e.g.*, United States v. Schmidgall, 25 F.3d 1533, 1538-39 (11th Cir. 1994) (holding error "harmless beyond a reasonable doubt" due to the presence of untainted corroborating testimony); Jenkins v. Hartman, 314 F. Supp. 303, 309-10 (E.D. Tenn. 1970) ("[T]he direct testimony of these credible eye-witnesses to the incident would have provided positive and sufficient untainted evidence for the jury to have found the petitioner guilty beyond a reasonable doubt . . . ."); *see also* Braswell v. Dretke, No. 3:02-CV-0342-M, 2004 WL 2583605, at *37 (N.D. Tex. Nov. 12, 2004) ("Based on the jury's credibility findings, there is no reasonable probability that the outcome of petitioner's trial would have differed . . . .").

    In one such case, the court found that any error in the jury instructions was not prejudicial because the defendant was convicted on "positive identification testimony." *See* State v. Tillman, 600 A.2d 738, 744-45 (Conn. 1991). The defendant was later exonerated by DNA evidence. *See* Giovanna Shay, *What We Can Learn About Appeals from Mr. Tillman's Case: More Lessons from Another DNA Exoneration*, 77 U. CIN. L. REV. 1499, 1503 (2009).

77. For an example from the federal system, compare Coppola v. Powell, 878 F.2d 1562, 1571 (1st Cir. 1989) (declining to find overwhelming evidence where there were "serious questions of credibility" coupled with "gaps in the identification evidence,"

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review of the testimonial record.[78] But to the extent this analysis does not look to the likely impact of error on the specific jury empaneled, it is wrong as a matter of law.[79] And such an independent review seldom works in the favor of wrongfully convicted defendants.[80]

Take the case of Danny Brown, who was sentenced to life in prison for aggravated murder.[81] His trial featured testimonial evidence of mixed reliability. Center stage was the prosecution's "prime" eyewitness, a six-year-old boy.[82] The trial was laden with errors, including improper admission of hearsay evidence.[83] No matter: Because "[e]yewitness testimony [of the six-year-old] indicated that [Brown] was the murderer," there was "overwhelming evidence" of guilt.[84] Nineteen years and one dispositive DNA test later, Brown walked free.[85] Perhaps the errors in Brown's case were slight enough to make

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while recognizing the case presented a "close" question), with Clark v. Moran, 942 F.2d 24, 32-33 (1st Cir. 1991) (finding overwhelming evidence of guilt where the prosecution presented nonconflicting testimony, even though it may have been "inherently suspect"). These cases were decided under the relatively exacting *Chapman* standard. *See* Chapman v. California, 386 U.S. 18, 24 (1967). Of course, under *Kotteakos* and *Olano* the deference to the state's testimonial evidence will be still greater. *See supra* note 61 and accompanying text.

For examples from state courts, see State v. Kendrick, 100 A.3d 821, 830 (Conn. 2014) (noting that Connecticut courts apply rigorous scrutiny to legal questions of constitutional dimension but *not* to credibility judgments); State v. Smith, 600 So. 2d 1319, 1326 (La. 1992) (stating that when conducting harmless error review, the court would "not make credibility determinations . . . or usurp the jury's customary function in our legal system"); and State v. Brown, 552 S.E.2d 390, 403 (W. Va. 2001) ("It was the role of the jury to weigh the evidence and make credibility assessments . . . . [T]his Court will not second guess it simply because we may have assessed the credibility of the witnesses differently.").

78. *See, e.g.*, United States v. Hands, 184 F.3d 1322, 1330-31, 1330 n.23 (11th Cir. 1999).

79. *See* Milton v. Wainwright, 407 U.S. 371, 377-78 (1972) ("[W]e do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court 14 years ago by use of evidence not challenged here . . . ."); Weiler v. United States, 323 U.S. 606, 611 (1945) (noting that reviewing courts are not permitted to "look at the printed record [and] resolve conflicting evidence," as "under our system of justice, juries alone have been entrusted with that responsibility").

80. Judge Harry Edwards has argued that this approach has become a crutch used by courts to avoid discerning the likely effect of error on the final verdict. *See* Edwards, *supra* note 74, at 1170-71 ("[D]efendants asserting violations of individual rights and liberties on appeal frequently receive a standard response: the errors to which they objected at trial were harmless . . . .").

81. *See* State v. Brown, No. L-82-297, 1983 WL 6945, at *1 (Ohio Ct. App. Sept. 16, 1983) (per curiam), *aff'd mem.*, 660 N.E.2d 1173 (Ohio 1996).

82. *See id.*

83. *See id.* at *2, *4-5, *8-13.

84. *Id.* at *14.

85. *See Danny Brown*, NAT'L REGISTRY EXONERATIONS, https://perma.cc/4RGV-6EDX (last updated July 21, 2018).

the court's holding appear permissible. But under an overwhelming evidence test, it is unclear why this would matter, provided the eyewitness testimony itself remained untainted.

Must the jury have credited the six-year-old's testimony? If it did not, what at first seemed "harmless" error may have been outcome determinative. Only the jury knows for sure. But in the absence of extraordinary circumstances, reviewing courts lack a basis on which to draw an informed conclusion.[86] Some have taken cases like Brown's as cause to reject the "effect on the outcome" approach altogether in favor of approaches that assess the extent of rights degradation caused by the underlying error.[87] This Note advances a more modest argument: If the sanctity of our procedural rights is to turn on a historical inquiry, it is incumbent on reviewing courts to get that inquiry right.

C. Innocence-Based Protections

Testimonial ossification even works to divest defendants of protections related to their factual innocence. Factual innocence claims are broadly unavailable on federal habeas review, though they continue to be raised.[88] Still, federal courts have the prerogative to grant new trials where the interests of justice so require.[89] And states have created—by statute or judicial invention—freestanding systems of postconviction review. These permit defendants to seek new evidence, have evidence retested, or move for new trials in light of newly uncovered information.[90] A thorough treatment of these claims is beyond the scope of this Note. All that must be observed is a central commonality: Nearly all require a "preliminary showing of innocence."[91]

Nominally, judges are free to assess the strength of the evidence.[92] But old habits die hard. Even without the law's prodding, a range of cognitive biases

86. For a discussion of that exception and its significance, see Part III.B.2 below.

87. *See, e.g.*, Murray, *supra* note 61, at 1795-96.

88. *See* Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of* Herrera v. Collins*: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 139-40 (1996) (discussing the range of responses to the Court's cryptic holding in *Herrera v. Collins*); *see also* Herrera v. Collins, 506 U.S. 390 (1993).

89. *See* FED. R. CRIM. P. 33.

90. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1635, 1674 (2008).

91. *See id.* at 1635.

92. *See* Schlup v. Delo, 513 U.S. 298, 330 (1995) ("[U]nder the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments."), *superseded in other part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (codified as amended at 28 U.S.C. § 2255 (2017)).

induce judges to treat prosecution testimony as highly probative of guilt.[93] For one, hindsight and outcome biases tend to limit judges' ability to imagine that events could have unfolded any other way.[94] Given that defendants have already been convicted, judges are inclined to see conviction as the only reasonable outcome.[95] Moreover, confirmation bias can lead judges to overvalue evidence that conforms to their original beliefs about a defendant's guilt.[96] Due to the stigma of conviction, that original belief tends to be one of guilt.[97] Education of judges can lessen these effects, but it cannot eliminate them altogether.[98] These biases have led Stephanos Bibas to question whether "the very enterprise of after-the fact-review is doomed to failure."[99] His suggestion is instead to focus reform efforts on trial-level interventions.[100]

One poignant illustration of the adversity defendants face on factual innocence review is the case of Leonard McSherry, who was convicted of multiple violent felonies against a young child.[101] After his trial, he was notified that a new type of DNA testing excluded him from having been the perpetrator.[102] Nevertheless, his state habeas appeal was denied.[103] The reviewing court noted that "[t]estimony and other evidence at trial

93. *See, e.g.*, Findley & Scott, *supra* note 11, at 307-22 (describing several cognitive biases that lead judges to overestimate the strength of the prosecution's case); D. Brian Wallace & Saul M. Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors?*, 36 LAW & HUM. BEHAV. 151, 156 (2012) (finding that judges continue to lean on coerced testimony even after they have identified it as such). Of course, these same sorts of issues further impede harmless error and sufficiency review as well. *See* Findley & Scott, *supra* note 11, at 320-21, 367-68.

94. For a thorough treatment of what these biases are and what forms they take, see Findley & Scott, *supra* note 11, at 307-22.

95. *See id.* at 320 ("Hindsight bias and outcome bias, together, should be expected to have an affirmance-biasing effect in postconviction and appellate review because the outcome of the case—conviction—tends to appear, in hindsight, to have been both inevitable and a 'good' decision." (footnote omitted)); *see also* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 3-4 (discussing the problem of hindsight bias in judicial review).

96. For an overview of the confirmation bias phenomenon and its effect on criminal prosecutions, see Findley & Scott, *supra* note 11, at 309-16.

97. *See id.* at 314 (noting that confirmation bias is "particularly significant in criminal cases, where an individual is being judged—by police, prosecutors, defense lawyers, judges, and jurors—and where the initial working hypothesis presented to each actor in the system is that the defendant is guilty").

98. *See* Bibas, *supra* note 95, at 5 ("Studies find that experience and expertise may moderate, but do not eliminate, cognitive biases.").

99. *See id.* at 2.

100. *See id.* at 6-11.

101. People v. McSherry (*In re* McSherry), 14 Cal. Rptr. 2d 630, 632 (Ct. App. 1992).

102. *See id.* at 633-34.

103. *See id.* at 640.

overwhelmingly identified [him] as the perpetrator."[104] It made much of the fact that "the prosecution case was not based merely upon an identification of [McSherry] by the victim, but upon multiple identifications by eyewitnesses."[105] It was not until the DNA sample was affirmatively matched to another incarcerated person that McSherry was set free.[106] Of course, we may question whether all of these identifications were believed, or even believable. What if the jury credited only one? The value of this information is apparent. Unfortunately, it is at present wholly unavailable.

II. Resituating the Jury as Factfinder

The judicial dispositions that cause testimonial ossification are often justified as "deference" to the jury's status as lie detector. This Part challenges that characterization by showing how valuable credibility judgments are currently being misplaced, how their loss inhibits appellate review, and how they might be preserved through the use of an underutilized instrument of criminal procedure: special interrogatories.

A. The Jury as Lie Detector

The jury—we are told—is a lie detector. This was not always the prevailing view.[107] Nevertheless, that credibility judgments are the province of the jury has become a "fundamental premise of our criminal trial system."[108] For exactly the same reason, judges are to refrain from passing judgments on witnesses' credibility.[109] This disposition leads to the phenomenon of testimonial ossification discussed in Part I above.

104. *Id.* at 632.

105. *See id.* at 636.

106. *See* Brief of the Innocence Network as Amicus Curiae in Support of Petitioner at 15, Fry v. Pliler, 551 U.S. 112 (2007) (No. 06-5247), 2007 WL 173682.

107. *See* George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 579-80 (1997).

108. *See* United States v. Scheffer, 523 U.S. 303, 312-13 (1998) (plurality opinion). This idea seems to have caught on with the public as well. *See, e.g.*, Charles Nesson, *The Evidence or the Event?: On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1370 (1985) (observing that the public is more trusting of jury determinations involving testimonial evidence than circumstantial evidence).

109. *See, e.g.*, Goldman v. United States, 245 U.S. 474, 477 (1918) (rejecting the idea that "the power to review embraces the right to invade the province of the jury by determining questions of credibility").

On the traditional telling, the jury's dominion over testimonial evidence owes to its special skill at assessing credibility.[110] Members of the general public are said to be competent judges of character, especially when equipped with three instruments of lie detection present at trial: the oath, cross-examination, and demeanor evidence.[111] A somewhat distinct argument is that the jury's status as factfinder owes to its function as a check by the laity against the power of the state.[112] Scholars have suggested that other considerations may be at play as well: fear of "trial by machine" whereby DNA evidence alone would determine guilt or innocence,[113] an interest in the legitimacy of decisions,[114] and a desire to scapegoat the jury for system-level errors.[115]

Whatever the explanation, the rhetoric surrounding criminal appeals remains constant: The reluctance of reviewing courts to pass credibility judgments is almost always framed in terms of deference to the jury. Courts routinely invoke this language.[116] So do modern scholars.[117] The problem is that juries do not—in any real sense—issue credibility findings.[118] There is little reason to think that jurors' personal beliefs about a specific witness are necessarily revealed by the general verdict. There is even less reason to think that those beliefs are accurately relied upon by reviewing courts.[119] To be sure,

110. *See* Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891) ("[T]he jury . . . are presumed to be fitted for [credibility determinations] by their natural intelligence and their practical knowledge of men and the ways of men . . . .").

111. *See, e.g.*, California v. Green, 399 U.S. 149, 192-93 (1970) (Brennan, J., dissenting).

112. Arguments of this sort come primarily from the school of democratic criminal justice. *See generally, e.g.*, Laura I Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413 (2017).

113. *See* Roth, *supra* note 11, at 1656-59.

114. *See* Fisher, *supra* note 107, at 579-81; *see also infra* Part III.C.2.

115. *See* Fisher, *supra* note 107, at 706-07.

116. *See, e.g.*, United States v. Triumph Capital Grp., Inc., 544 F.3d 149, 158-59 (2d Cir. 2008) (noting that courts must "defer to the jury's assessment of witness credibility" (quoting United States v. Glenn, 312 F.3d 58, 64 (2d Cir. 2002))); Bruce v. Terhune, 376 F.3d 950, 957 (9th Cir. 2004) (per curiam) (instructing courts engaged in sufficiency review to show "near-total deference" to "[a] jury's credibility determinations").

117. *See, e.g.*, Findley, *supra* note 39, at 602 ("Appellate courts pay extreme deference to trial-level fact finders on factual determinations and related questions like credibility."); Fisher, *supra* note 107, at 579 ("Appellate courts refuse to revisit the jury's judgments of credibility."); Roth, *supra* note 11, at 1653-54 ("[S]o long as jurors [come] to personally believe a confession or eyewitness, their guilty verdict would almost surely escape review, however irrational.").

118. *See* Sullivan v. Louisiana, 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring) ("In the typical case, of course, a jury *does not make explicit factual findings*; rather, it simply renders a general verdict on the question of guilt or innocence." (emphasis added)).

119. *See id.* ("[A]lthough it may be possible to conclude from the jury's verdict that it has found a predicate fact (or facts), the reviewing court . . . necessarily engages in some speculation as to the jury's decisionmaking process; for in the end no judge can know

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if the jury votes to convict, something in the prosecution's case must have been persuasive. But what? The modern criminal trial often takes the form of two competing parades of testimonial evidence.[120] If a prosecutor calls twenty witnesses to the stand, it is not necessarily safe to presume the jury found all twenty credible. And if we do so presume, we certainly can't claim to be speaking on the jury's behalf.

As Part I above illustrates, a jury need not credit the full range of the prosecution's evidence in order to convict. But current doctrine makes little allowance for this possibility.[121] Instead, the jury is made on appeal into a sort of sock puppet. It is said to have rendered "findings" on various sorts of evidence. These "findings" are then used to support the range of presumptions and dispositions discussed in Part I above. Never mind what the jury actually found. And all this out of respect for the jury's special acuity at lie detecting. This fiction might be countenanced if it were useful, or at least innocuous. As the next Subpart shows, it is neither.

B. Two Normative Upshots

The sock puppet phenomenon described in the previous Subpart suggests two important insights. First, at least some of the blame juries receive for inaccurate lie detection is misplaced. Juries may well have important things to say about witness credibility. Our system loses—in accuracy, efficiency, and legitimacy—when it declines to listen to them. Second, given the limited information available to reviewing courts, testimonial ossification does not lend itself well to appellate resolution. This Subpart will take up each insight in turn.

1. Informational loss

In recent years, a vibrant community of commentators has called into question the jury's aptitude at lie detecting. Skepticism is now the consensus view among academics.[122] Indeed, this skepticism has become so ingrained that

for certain what factors led to the jury's verdict."); *see also* TRAYNOR, *supra* note 21, at 23 ("How can anyone determine what went on in the mind of another or of twelve others who served as triers of fact? The only source of direct evidence would be their own testimony.").

120. *See, e.g.*, Lapointe v. Comm'r of Corr., 112 A.3d 1, 112 (Conn. 2015) (Zarella, J., dissenting) (observing that a single murder case involved "more than eighty volumes of transcripts" and "thousands of pages of testimony"); *see also* ROBERT P. BURNS, A THEORY OF THE TRIAL 107 (1999) ("[A] jury will hear over days, weeks, or months an enormous range of testimony from a large number of perspectives.").

121. A narrow exception to this general tendency is taken up in Part III.B.2 below.

122. *See* Max Minzner, *Detecting Lies Using Demeanor, Bias, and Context*, 29 CARDOZO L. REV. 2557, 2563 (2008) ("Legal commentators have generally accepted the view that

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the alternative view is often dismissed in a conclusory aside.[123] This skepticism can be largely attributed to a loss of trust in the jury's three instruments of truth finding.[124] The oath doesn't require live spectating. Accurate trial transcripts have supplanted the need to spectate cross-examinations in person.[125] Demeanor evidence has come under assault as unreliable[126] and prone to bias.[127] And, at any rate, Court TV could suffice.[128]

There is force to these charges—but they go only so far. Recent scholarship has painted a more complex portrait of the jury's factfinding abilities.[129] Sure enough, demeanor evidence is an imperfect means of smoking out deception. But that is not to say it is altogether useless. Some demeanor clues—such as sarcasm—are of clear relevance when assessing whether statements should be taken seriously.[130] Similarly, "emotion and intensity . . . may be crucial to [the] understanding and weighing of testimony,"[131] especially during intense cross-examinations when temperaments can run hot. And there is some reason to believe that in group deliberations, substantive and contextual considerations yield more accurate results than when the same information is considered by individuals.[132]

Beyond this, assessing demeanor is hardly the jury's only (or most powerful) tool of lie detection. Recent research suggests that jurors closely

'psychological studies strongly indicate that observers do no better than pure chance in evaluating live witnesses.'" (quoting David Crump, *The Case for Selective Abolition of the Rules of Evidence*, 35 HOFSTRA L. REV. 585, 610 (2006))).

123. *See, e.g.*, Roth, *supra* note 11, at 1656 (noting in passing that "social science has debunked the theory that humans accurately judge credibility based on demeanor").

124. *See supra* text accompanying note 111.

125. Indeed, some evidence suggests that lie detecting is *more* accurate when based on a transcript, as compared to in-person assessment. *See* Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 934 (1971).

126. *See, e.g.*, Maria Hartwig et al., *Strategic Use of Evidence During Police Interviews: When Training to Detect Deception Works*, 30 LAW & HUM. BEHAV. 603, 604 (2006).

127. *See* H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 439-43 (2001) (listing several factors likely to bear on juror credibility assessments).

128. *See* Roth, *supra* note 11, at 1655-56. Indeed, with the ability to pause, rewind, and replay, it might be argued that a reviewing court is in a *better* position to capitalize on demeanor clues.

129. *See* Minzner, *supra* note 122, at 2568 (surveying the modern empirical literature on lay lie detection and concluding that structural features of the trial likely aid jurors in assessing credibility).

130. *See* Mitchell, *supra* note 16, at 1353.

131. *Id.*

132. *See* Jessica M. Salerno et al., *Individual Versus Group Decision Making: Jurors' Reliance on Central and Peripheral Information to Evaluate Expert Testimony*, PLOS ONE 2-3, 23-24 (Sept. 20, 2017), https://perma.cc/FQ4E-LC7H.

scrutinize witnesses' factual claims against the web of background information available to them. They are adept at using contextual clues to sniff out tensions, inconsistencies, and signs of subterfuge.[133] They are well situated to make use of these contextual clues, given their access to folk wisdom.[134] And since they are drawn from the community in which the crime occurred, they know the sorts of information often critical to spotting dishonesty. Is loitering in a park a sensible alibi? Perhaps; perhaps not. Which park? And at what time?

Further, juries enjoy important structural advantages over other factfinders. They deliberate for long periods of time—usually hours, if not days.[135] They immerse themselves in the facts of the case for an extended length of time—often days, if not weeks.[136] And they have the benefit of multiple minds converging on the same set of underlying questions. These factors are significant, because lie detection is a prolonged process that benefits greatly from cognitive exertion over sustained periods of time.[137]

It is unclear—and may never be fully clear—just how far these considerations carry us.[138] To be sure, juries' credibility judgments are not infallible. But nor are they statistical noise. Given the right circumstances, juries can spot unreliable testimony. And they can do so even where other actors might fail. The upshot is that there is a real informational cost to the sock puppet phenomenon described in Part II.A above. This problem is especially acute when viewed in light of the alternative: appellate fact review, taken up next.

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133. *See* Minzner, *supra* note 122, at 2567-68. The term "context clues" refers to the various factual details that give insight into a particular claim or set of claims. *See id.* at 2569.

134. *See* Samuel Krislov & Paul Kramer, *20/20 Vision: The Future of the California Civil Courts*, 66 S. CAL. L. REV. 1915, 1949 (1993).

135. Indeed, judges are not shy about requiring the jury to keep deliberating until it has reached a verdict. *See, e.g.*, People v. Anderson, 671 N.Y.S.2d 149, 150 (App. Div. 1998) (holding that a trial court did not abuse its discretion by requiring a jury to deliberate for three days). And judges sometimes *require* further deliberation when they suspect that the verdict was too rushed to reflect fair consideration. *See, e.g.*, United States v. Alper, 449 F.2d 1223, 1233 (3d Cir. 1971) (countenancing a trial court's decision to send a jury back for further deliberation when it spent only seven and a half hours for a trial that lasted nine weeks).

136. *See* David L. Cook et al., *Criminal Caseload in U.S. District Courts: More than Meets the Eye*, 44 AM. U. L. REV. 1579, 1593-94 (1995).

137. *See* Hee Sun Park et al., *How People Really Detect Lies*, 69 COMM. MONOGRAPHS 144, 152 (2002) (finding in an experimental study of lie detection that in 60% of cases, deception was not detected until at least a day after the lie was communicated).

138. *See* John B. Meixner, Comment, *Liar, Liar, Jury's the Trier?: The Future of Neuroscience-Based Credibility Assessment in the Court*, 106 NW. U. L. REV. 1451, 1473 (2012) ("[T]here is a gap in the literature with regard to the jury's ability to assess credibility.").

2. Limits to appellate recovery

Calls for appellate courts to more actively review factual findings were once described as a move from "the provocative to the heretical."[139] If so, heretics abound. Reforming the standards of review used by appellate courts has become a crux of modern innocence scholarship. Recent years have given rise to a wealth of reform proposals. To name just a small sampling: adopting a "contextual" approach to harmless error review,[140] augmenting federal habeas "innocence" review,[141] reformulating "plain error" review,[142] reviewing innocence claims solely on the probative power of the new evidence,[143] and increasing scrutiny related to "unsafe" convictions.[144] Despite their differences, these approaches share a common feature: They rely on appellate courts changing the manner in which they treat the prosecution's evidence. There is sense to this approach. Appellate courts are, after all, an important bulwark against wrongful convictions. Nevertheless, they should be our system's last line of defense—not its first. Three difficulties attend to any solution reliant on appellate oversight.

The first difficulty is a pragmatic one. Appellate courts are limited in resources, especially time. Appellate courts at both the federal and state levels already suffer from substantial backlogs.[145] Increasing their responsibilities is not much of a solution.[146] Appellate courts are also epistemically limited. Whereas juries become—by necessity—intimately familiar with the facts of the case before them, appellate courts do not.[147] The jury lives and experiences the record firsthand; there is no guarantee that reviewing judges examine the

139. *See* Jon O. Newman, Madison Lecture, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 997 (1993).

140. *See* Murray, *supra* note 61, at 1795.

141. *See* Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1, 35 (2016).

142. *See* Dustin D. Berger, *Moving Toward Law: Refocusing the Federal Courts' Plain Error Doctrine in Criminal Cases*, 67 U. MIAMI L. REV. 521, 527 (2013).

143. *See* Garrett, *supra* note 90, at 1632.

144. *See* D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281, 1331-32 (2004) (explaining that a less deferential review could be given to verdicts deemed "against the weight of the evidence").

145. *See* Johnson v. Williams, 568 U.S. 289, 300 (2013); Patricia M. Wald, Comment, *Bureaucracy and the Courts*, 92 YALE L.J. 1478, 1479 (1983).

146. *See* Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 429 (1980) ("Appellate review of an entire trial transcript is an incredibly inefficient use of appellate court time.").

147. *See* Oldfather, *supra* note 28, at 449 (noting that whatever the jury's faults at assessing credibility, it "will often be in a better position to do so than a group of judges removed in time and space from the evidence").

record at all.[148] Indeed, "[g]iven the volume in most appellate courts, it stretches the imagination to believe that even one of the [reviewing] judges would read the entire record."[149] At best, judges may review an annotated version assembled by the parties—who may or may not have properly spotted the issues that matter most.[150] And even where judges do attempt an earnest review, it may be incomplete[151] or otherwise lacking in important context clues.[152] Put simply, granting reviewing courts greater power to exercise discretion does not, by itself, give them insight into when exercising that discretion is proper.

The second difficulty is a principled one. The Sixth Amendment guarantees the right to a trial by jury,[153] and the Supreme Court has held that usurping the jury's factfinding power is contrary to the spirit of this mandate.[154] Similarly, the Fifth Amendment constitutionalizes the jury's place in criminal law[155] and placing too much power in the hands of appellate judges is corrosive to this end.[156] While judges remain free to resolve questions of law, findings of fact and credibility fall within the jury's province.[157] The jury is an important organ of democracy.[158] Efforts to diminish its status in our criminal justice system should be approached with skepticism.

148. *See* Goldberg, *supra* note 146, at 430 n.92.

149. *Id.*

150. *See id.*

151. *See* Findley, *supra* note 39, at 603 ("Appellate courts routinely avoid substantive review of potentially meritorious claims based on the defendant's failure to . . . make an adequate record.").

152. *See* Goldberg, *supra* note 146, at 430 ("An appellate court reading a record in its entirety knows nothing of the unreasonable pause, the inappropriate smile, the sarcasm that changes a 'sure' which means 'yes' to a 'sure' which means 'I don't believe that' or 'I don't agree.'" (footnote omitted)); *see also* Mitchell, *supra* note 16, at 1353 (arguing that a cold record gives reviewing judges insufficient information to assess credibility).

153. *See* U.S. CONST. amend. VI.

154. *See* Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (observing that the right to trial by jury is "fundamental to the American scheme of justice," and that central to this right is the ability to have the jury, not the judge, decide the facts of the case (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968))).

155. *See* U.S. CONST. amend. V; *cf., e.g.*, Patterson v. New York, 432 U.S. 197, 202-05 (1977) (reviewing cases that connect the Due Process Clause to the jury's responsibility to find facts).

156. *See* Goldberg, *supra* note 146, at 430 ("[A]n appellate court is far removed from being a jury, and jury trials comprise the heart of our criminal justice system.").

157. *See* Sparf v. United States, 156 U.S. 51, 65 (1895) ("[A]s, on the one hand, it is presumed that juries are best judges of facts, it is, on the other hand, presumable that the courts are the best judges of the law." (quoting Georgia v. Brailsford, 3 U.S. (3. Dall.) 1, 4 (1794))).

158. *See* Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1401-02 (2017).

Further, even a good-faith effort to inquire into what the empaneled jury found is epistemically fraught. Rather than assessing the defendant's guilt, judges are left to speculate about the jury's speculation. This compounds second-order uncertainty on top of the first. And there is good reason to fear for inconsistency. An experimental study by Lee E. Teitelbaum and colleagues flagged several worrisome dimensions of unreliability.[159] Initially, prospective jurors diverge greatly as to how they view evidence.[160] Thus, appellate judges—without knowledge of the specific jury empaneled—would struggle to reproduce juror deliberations.[161] Moreover, judges are inconsistent with regard to how they understand juror deliberations—some credit the capabilities of jurors more than others.[162] And judges as a group have difficulty divorcing themselves from their years of legal training. This leads them to systematically misunderstand how juries approach questions of fact.[163] One additional problem is that the record reviewed by the appellate court contains material that the trial judge kept from the jury. While we might hope that our judges can sequester this information, in practice this sort of mental compartmentalization poses real challenges.[164]

The third difficulty is a political one. A powerful inertia surrounds the standards of appellate review. The U.S. Supreme Court has been the primary moving force behind developments in this space.[165] Thus, absent word from on high, lower courts are unlikely to effect change on their own.[166] And even if they did, it is not clear that courts would be able to apply a new rule with any greater consistency than they have existing ones.[167] Given the impracticability, infeasibility, and undesirability of combating testimonial ossification by way of

159. Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147.

160. *See id.* at 1176.

161. *See id.* at 1183-84.

162. *See id.* at 1172-73.

163. *See id.* at 1184; *see also* United States v. Cerro, 775 F.2d 908, 916 (7th Cir. 1985) ("The lay mind evaluates evidence differently from the legal mind, and while many appellate judges have substantial experience with juries and perhaps great insight into the thinking process of juries, others do not.").

164. *See* Mitchell, *supra* note 16, at 1354 ("Because the record preserves both tainted and untainted evidence, and because this tainted evidence may be very probative of guilt, a judge trying to examine only the untainted evidence may face a very difficult task.").

165. *See* Chapel, *supra* note 60, at 502.

166. *See id.* (observing that where changes have been made to the harmless error standard, the Court has been the "moving force").

167. *See* Garrett, *supra* note 90, at 1637.

appellate intervention, reformers might look to greener pastures. This Note will explore one potential alternative: empowering the jury to speak for itself.[168]

C. The Promise of Special Factfinding

In the typical criminal case, the jury returns a general verdict, containing only a finding of guilt or innocence.[169] It is often said that requesting information beyond the general verdict is disfavored.[170] Courts have expressed concern that special interrogatories might "infringe on [the jury's] power to deliberate free from legal fetters; on its power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations; and on its power to follow or not to follow the instructions of the court."[171] But despite these concerns, special interrogatories have had a long history in U.S. criminal law. Indeed, they are "as old a feature of the jury system as are general verdicts."[172] And recent years have seen a decided shift in favor of their use, owing in large part to a growing awareness that they can be administered without prejudicing the defendant.[173]

As a matter of black-letter law, the Federal Rules of Criminal Procedure lack a precise corollary to Rule 49(b) of the Federal Rules of Civil Procedure, which expressly permits special interrogatories.[174] However, Rule 57(b) of the Federal Rules of Criminal Procedure allows courts to act "in any manner consistent with federal law, [the Federal Rules of Criminal Procedure], and the local rules of the district."[175] This gives federal courts broad freedom to apply

168. Some scholars have suggested the promise of this move in passing, but have stopped short of showing how it might be made possible. *See* TRAYNOR, *supra* note 21, at 23; Teitelbaum et al., *supra* note 159, at 1152 & n.16 (noting that appeals are hobbled by the opacity of general verdicts).

169. *See* Sullivan v. Louisiana, 508 U.S. 275, 284 (1993) (Rehnquist, C.J., concurring).

170. *See, e.g.*, United States v. Jackson, 542 F.2d 403, 412-13 (7th Cir. 1976). This refrain is old—similar language can be found at least as far back as the nineteenth century. *See, e.g.*, Hamilton v. People, 29 Mich. 173, 190 (1874). Several scholarly works have noted that the opposition to special interrogatories is often rooted in habit. *See, e.g.*, Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1355 n.192 (2000) (observing that the claimed judicial disfavor of special verdicts in criminal cases is "often recited reflexively . . . rather than as a conclusion following sustained analysis").

171. United States v. Ogull, 149 F. Supp. 272, 276 (S.D.N.Y. 1957). A more thorough treatment of why courts are averse to special questions is taken up in Part III.C below.

172. *Ogull*, 149 F. Supp. at 277; *see also* Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 592 (1923) (tracing the use of special interrogatories to early U.S. history).

173. *See supra* note 18 and accompanying text.

174. *See* FED. R. CIV. P. 49(b).

175. FED. R. CRIM. P. 57(b).

special interrogatories, which are now used in various contexts.[176] To name just a few: identifying the basis of guilt in alternative-theory convictions,[177] establishing the predicate elements of offenses,[178] clarifying important facts,[179] and flagging which affirmative defenses the jury found persuasive.[180] A driving motivation behind the deployment of special interrogatories is "allow[ing] an assessment of whether the jury's determination of guilt rested on permissible bases."[181] State approaches vary: While a small handful constrain their use,[182] most take a broadly permissive approach.[183]

In what cases might new sorts of interrogatories be permitted? The most recent hint from the Supreme Court came in 2010, in *Black v. United States*.[184] *Black* held that a defendant's refusal to acquiesce to the use of special interrogatories did not constitute a waiver of the defendant's objections to the jury instructions.[185] The opinion of the Court—on behalf of six Justices—reiterated that "the absence of a Criminal Rule authorizing special verdicts counsels caution."[186] But it noted that this caution should not be read to "suggest that special verdicts in criminal cases are never appropriate."[187] To the contrary, it quoted favorably to language in Judge Newman's opinion in *United States v. Ruggiero*: "[A] District Court should have the discretion to use a jury interrogatory in cases where risk of prejudice to the defendant is slight and the

176. For a more expansive list of examples, see Nepveu, *supra* note 19, at 269-80.

177. *See, e.g.*, United States v. Pungitore, 910 F.2d 1084, 1136 (3d Cir. 1990) (using special interrogatories in a murder case to determine on which theory the jury convicted).

178. *See, e.g.*, United States v. Coonan, 839 F.2d 886, 888 (2d Cir. 1988) (using special interrogatories in a RICO case to establish the predicate facts).

179. *See, e.g.*, United States v. Pforzheimer, 826 F.2d 200, 206 (2d Cir. 1987) (using special interrogatories to identify the quantity of drugs the jury believed the defendant had possessed).

180. *See, e.g.*, United States v. Wattleton, 296 F.3d 1184, 1196 (11th Cir. 2002) (using a special verdict form to determine whether the jury credited an insanity defense).

181. United States v. Roman, 870 F.2d 65, 73 (2d Cir. 1989).

182. *See, e.g.*, People v. Jackson, 874 N.E.2d 123, 128 (Ill. App. Ct. 2007) (noting that under Illinois law, special interrogatories are limited to "ultimate issue[s] of fact on which the parties' rights depend"); State v. Osburn, 505 P.2d 742, 749 (Kan. 1973) (prohibiting the use of special questions in Kansas criminal trials).

183. *See* Nepveu, *supra* note 19, at 280 ("[S]pecial verdict forms and special interrogatories have been used in all these varied circumstances, by all of the Circuits, and by forty-six of the states.").

184. 561 U.S. 465 (2010).

185. *See id.* at 474.

186. *Id.* at 472.

187. *Id.* at 472 n.11.

advantage of securing particularized fact-finding is substantial."[188] The remainder of this Note will frame its analysis around this two-part framework.

III. Introducing Credibility Interrogatories

To combat testimonial ossification, this Note proposes the use of credibility interrogatories. Simply stated, a judge would—on the defendant's request—provide the jury with a set of postverdict special interrogatories asking them to flag testimony they unanimously deemed too unreliable to consider. This Part argues that it is in the interest of all parties to put these interrogatories to use.

A. The Proposal

As with any instrument of criminal procedure, details matter. This Subpart explores how credibility interrogatories should be administered, what form they should take, when they should be used, and how judges should handle any inconsistency that arises. Along the way, this Subpart shows that careful design can keep these interrogatories within the safe outer bounds of judicial discretion.

1. Procedural contours and safeguards

The process for administering credibility interrogatories would work as follows. First, the defense would submit a timely filing to the court, listing the witnesses about whom it wished to see interrogatories. This could occur at the same time as the defense submits its requested jury instructions. The prosecution would then be given time to appropriately respond.[189] Any debate over the propriety of the requests would take place without the jury present.[190] After reviewing the arguments for and against the interrogatories, the judge would be tasked with determining which—if any—to grant. Finally, the judge would issue a final decision on the record.

To avoid accidentally introducing reversible error, credibility interrogatories would make use of two procedural safeguards. The first safeguard is requiring the defendant to request the interrogatories. Courts have

188. *Id.* at 473 n.11 (alteration in original) (quoting United States v. Ruggiero, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part), *abrogated in part by* Salinas v. United States, 522 U.S. 52 (1997)).

189. *See, e.g.*, United States v. Aiello, 864 F.2d 257, 265 (2d Cir. 1988) (holding that a defendant's request for special interrogatories, made four hours into the jury's deliberation, "came 'too late'").

190. This is to eliminate the risk that the debate might color the jury's views of the credibility of the witnesses on the stand.

repeatedly held that soliciting the defendant's express consent reduces the danger of reversible error.[191] Credibility interrogatories would go one step further: They would require that the defendant *initiate* the request. Even vociferous critics of special interrogatories in criminal trials have permitted their use where "specifically requested by the defendant for cause shown."[192]

The second safeguard is administering credibility interrogatories only after the general verdict has been returned. For several reasons, judges might be tempted to provide the interrogatories contemporaneously. Doing so might prompt the jury to examine the specified testimony with a more discerning eye.[193] It could check against cognitive bias.[194] And—if nothing else—jurors in civil cases tend to like special interrogatories of this sort.[195] Nevertheless, it would be risky. The fear of influencing the jury's internal deliberations has long relegated criminal special interrogatories to the shadows.[196] This danger can be eliminated completely, however, by requiring that special interrogatories be made available only after the general verdict has been decided.[197]

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191. *See* United States v. O'Looney, 544 F.2d 385, 392 (9th Cir. 1976) (holding that the traditional dangers of special interrogatories were not present where the interrogatories were not imposed "over the defendants' objections"); State v. Simon, 398 A.2d 861, 868 (N.J. 1979) (reasoning that "trial errors 'induced, encouraged, or acquiesced in . . . ordinarily are not a basis for reversal on appeal'" unless they are of "such magnitude that they trench directly upon the proper discharge of the judicial function" (quoting State v. Harper, 319 A.2d 771, 774-75 (N.J. Super. Ct. App. Div. 1974))); *cf.* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 251 (2003) ("Federal and state courts usually do not allow special verdicts or special interrogatories if the criminal defendant objects to their use.").

192. *See, e.g.*, United States v. Desmond, 670 F.2d 414, 420 & n.2 (3d Cir. 1982) (Aldisert, J., dissenting) (seeking to limit criminal special interrogatories to cases "when requested by the defendant[] under certain circumstances" or else made mandatory by statute or U.S. Supreme Court precedent).

193. *See Ruggiero*, 726 F.2d at 927 n.3 (Newman, J., concurring in part and dissenting in part).

194. *See* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 585 n.283 (2004) ("[W]here the evidence is overwhelming with respect to some elements of the crime, but there is only scant evidence to establish a specific element, there is a danger that, due to coherence effects, the fact-finder will find the defendant guilty despite the absence of evidence on the particular element."). Here, "correctly administered special verdicts could serve to expose that evidentiary deficiency." *See id.*

195. *See* Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 174-75 (1996) (finding that juries returning special verdicts tended to feel "more informed, better satisfied, and more confident that their verdict reflected a proper understanding of the judge's instructions" (citing Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of Its Meaning and Its Effects*, 18 LAW & HUM. BEHAV. 29, 50 (1994))).

196. *See infra* Part III.C.1.

197. Many courts have expressly countenanced this approach. *See, e.g.*, United States v. Ramirez-Castillo, 748 F.3d 205, 214 n.6 (4th Cir. 2014) (stating that impermissible

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2. Form and content

Next, courts must consider how to phrase the interrogatories. There is great flexibility in the language they could use. To avoid confusion, this Note counsels a straightforward approach, as illustrated by the sample credibility interrogatory shown in Figure 1 below.

Figure 1
Sample Credibility Interrogatory Form

Credibility Interrogatory Form

We, the Jury, present our Answers to Interrogatories submitted by the Court, to which we have unanimously agreed:

Interrogatory No. 1: Did the Jury unanimously consider the testimony of Witness _____ too unreliable to consider? Answer "yes" only if no juror found the testimony reliable.

Yes _____ No _____

Interrogatory No. 2: Did the Jury unanimously consider the testimony of Witness _____ too unreliable to consider? Answer "yes" only if no juror found the testimony reliable.

Yes _____ No _____

special questions substituting for a general verdict may have been permissible if administered after guilt had been decided); *Desmond*, 670 F.2d at 418 (approving of special interrogatories submitted after a guilty verdict); *see also* United States v. Spock, 416 F.2d 165, 183 n.42 (1st Cir. 1969) (suggesting that this procedure could be sufficient to cure prejudice).

Some courts have similarly held that verdict slips containing special interrogatories, but which instruct the jury to first reach a general verdict, are harmless. *See* United States v. Alfonzo-Reyes, 592 F.3d 280, 293 (1st Cir. 2010) (countenancing a procedure of this sort); United States v. Udeozor, 515 F.3d 260, 271 (4th Cir. 2008) (upholding instructions taking this form); United States v. Hedgepeth, 434 F.3d 609, 613 (3d Cir. 2006) ("[T]he verdict slip was structured so that the jury was first instructed to determine whether [the defendant] was guilty . . . and only then move to consideration of the special findings. The danger of prejudice to [the defendant] was thus alleviated, as we cannot say that the jury was led step-by-step to a guilty verdict when the special findings followed the guilt determination." (footnote omitted)).

But requiring that the general verdict be returned first eliminates any risk that the jury could be biased by "look[ing] down the page." *See Hedgepeth*, 434 F.3d at 613 n.4; *see also* Randall, *supra* note 19, at 322 ("[S]pecial interrogatories could become more palatable in general by isolating the jury's deliberation process from its consideration of the special interrogatories.").

This structure reflects two important decisions—for reasons that may not be immediately obvious. Both merit a brief discussion.

First, it favors a binary approach. In theory, an interrogatory could take a more detailed form. For instance, it could ask the jury to write a short paragraph about each witness, to rank-order testimony based on credibility, or to rate the quality of each piece of testimonial evidence on a numerical scale (say, one to ten). It could also include questions about specific claims made by witnesses. Analogous "reasoned verdicts" are common in some civil law nations.[198] A few scholars have explored the potential benefits of their adoption.[199]

But all is not well with this approach. For one, courts are unlikely to countenance any inquiry that so thoroughly pierces the veil of jury deliberation. It is the job of juries to render judgments, not explanations.[200] Credibility interrogatories, like other commonly used special interrogatories, therefore take the form of a finding in response to a narrow inquiry.[201] Reasoned verdicts do not. It is also unclear whether a reasoned verdict would be useful on appeal. Ironically, the glut of information could leave reviewing courts without sufficient guidance.[202] Suppose the jury assigns a witness a

198. *See* Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in* Taxquet v. Belgium, 86 CHI.-KENT L. REV. 613, 615-16, 620 (2011) (explaining that juries in Europe are sometimes asked to "articulate the reasons why they determined certain facts to have been proved").

199. *See, e.g.*, John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 487 (2002).

200. *See* United States v. Ogull, 149 F. Supp. 272, 276 (S.D.N.Y. 1957) (noting that asking the jury special questions risks infringing on its power to submit a verdict without a "report of its deliberations"); *cf.* United States v. Reed, 147 F.3d 1178, 1181-82 (9th Cir. 1998) (stating that where a special question is "no more coercive" on the jury's deliberative process than asking it to identify the object of a conspiracy, the "traditional concerns regarding special verdicts are not implicated").

The form specified above does not run afoul of this objection. It asks only for a narrow finding, much like the predicate fact interrogatories routinely administered. *See supra* Part II.C. It is notable that determining which witnesses the jury found credible was among the early uses of special interrogatories when the instrument first developed in thirteenth-century England. *See* GEORGE B. CLEMENTSON, A MANUAL RELATING TO SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 1-5 (1905).

201. *See* United States v. Barrett, 870 F.2d 953, 956 (3d Cir. 1989) (Stapleton, J., concurring) (noting that where only specific fact answers were requested, there was no issue with "the intrusive nature of special interrogatories"). Credibility interrogatories may be likened to a secondary reliability "screening," analogous to the one judges use in deciding admissibility. For a more thorough analysis as to the importance of limited review, see Part III.C.2 below.

202. *See* JONAKAIT, *supra* note 191, at 251 (noting in the civil context that "for special verdicts to work well, judges must give the 'jury a small number of simply worded, unambiguous questions, each limited to one issue'" (quoting JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 12.1, at 553 (3d ed. 1999))).

"seven out of ten" credibility rating. There is no way to divine from this information the one thing that matters most: whether the testimony can be said with certainty to have been a factor in the trial. In this way, reasoned verdicts invite capricious review—one of the ills this Note's proposal seeks to combat.

Second, the proposed approach requires unanimity with regard to the jury's answers. Strictly speaking, this is not necessary for all special interrogatories.[203] But it is the preferable tack. Without unanimity, the reviewing judge may be led to infer that the voices of a majority who declined to credit testimony would—in the course of jury deliberations—prevail over the voices of the few. But as Sidney Lumet's *12 Angry Men* reminds us, this assumption is not safe.[204] Absent unanimity, there is no way to tell whose reasoning and willpower triumphed.

Further, a unanimity requirement protects defendants from being accidentally injured by their own interrogatories. The recommended formulation only gives reviewing courts enough information to exclude evidence. It does not allow courts to conclude which evidence the jury must have relied upon. Imagine a detailed interrogatory revealed that one juror disbelieved a piece of eyewitness testimony, while the other eleven credited it. This might tempt a reviewing court to conclude—incorrectly—that an error was harmless due to the overwhelming evidence of guilt provided by that witness's testimony.[205] Of course, this need not be true.

3. Framework for judicial discretion

The decision to administer credibility interrogatories must be one of practical prudence.[206] This Note therefore declines to advance a mechanical

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203. This is true at least where, as here, the interrogatory does not request a finding as to an element of the offense. *See* Nepveu, *supra* note 19, at 283-87 (summarizing case law holding that juries need not be unanimous on all issues, but that unanimity is required where the interrogatory speaks to an element of the offense).

204. *See* 12 ANGRY MEN (Orion-Nova Productions 1957).

205. This is because judges are not above the influence of "coherence effects." *See* Simon, *supra* note 194, at 549-50, 549 n.117 (noting generally that factfinders' cognitive processes are biased in favor of inflated support for an initial decision).

206. *See* Black v. United States, 561 U.S. 465, 472 & n.11 (2010) (citing United States v. Ruggiero, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part)) (leaving the question of whether to administer special interrogatories to a judicial balancing of interests), *abrogated in part by* Salinas v. United States, 522 U.S. 52 (1997); Dreiling v. Gen. Elec. Co., 511 F.2d 768, 774 (5th Cir. 1975) ("[B]oth the initial question of whether to employ special interrogatories and the secondary question of how those interrogatories are to be framed are matters within the sound judicial discretion of the trial judge.").

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formula. Instead, it suggests three lodestars that a court might look to when making its decision. The first lodestar is the magnitude of the defendant's liberty interest. This is relevant in two respects. First, it speaks to the likely utility of the added information. Whereas small misdemeanors are unlikely to be reviewed by a court of last resort, judicial review in capital cases is a near certainty.[207] Thus, interrogatories will more probably be of use in subsequent proceedings. Second, defendants in these cases stand to lose everything. Simultaneously, the public has a significant interest in making sure the guilty party has been put away. These are the cases in which the most turns on our system getting the outcome right. Reasonable undertakings to safeguard that outcome are especially desirable.

The second lodestar is the nature of the testimony. The greater the court's reason to suspect that jurors might disregard a witness's statements, the greater the value in allowing the reviewing courts to learn of that fact. To be sure, this analysis must be contextual. Nevertheless, the literature has identified a number of characteristics that should be treated as red flags. These include coerced testimony;[208] suspicious expert testimony;[209] subsequent recall of

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The exception would be where credibility interrogatories were required by law. *See* United States v. Desmond, 670 F.2d 414, 420 n.2 (3d Cir. 1982) (Aldisert, J., dissenting). Under current law, this may arise in cases of treason. The U.S. Constitution states that without a "Confession in open Court," a treason conviction requires "the Testimony of two Witnesses to the same overt Act." *See* U.S. CONST. art. III, § 3, cl. 1. The "overt Act" requirement has been read to require special findings. *See* Haupt v. United States, 330 U.S. 631, 641 n.1 (1947) (reasoning that special verdicts are required for distinct "overt acts" of treason not pleaded as separate counts); Kawakita v. United States, 190 F.2d 506, 511 (9th Cir. 1951) (applying special verdicts in a treason trial), *aff'd*, 343 U.S. 717 (1952). Credibility interrogatories may be a necessary means of preserving the "two Witnesses" requirement.

207. *See* BARRY LATZER & JAMES N.G. CAUTHEN, JOHN JAY COLL. OF CRIMINAL JUSTICE, THE CITY UNIV. OF N.Y., JUSTICE DELAYED?: TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 47 (2007), https://perma.cc/VE4H-PPS9 (noting that some states make death penalty appeals mandatory where certain conditions are met); NICOLE L. WATERS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248874, CRIMINAL APPEALS IN STATE COURTS 5 & tbl.2 (2015), https://perma.cc/JS3U-PJL7.

208. The introduction of coerced testimony is not necessarily unconstitutional, even though it "may contribute to wrongful convictions." *See* Petty v. City of Chicago, 754 F.3d 416, 422 (7th Cir. 2014) (quoting Whitlock v. Brueggemann, 682 F.3d 567, 584 (7th Cir. 2012)).

209. The Supreme Court has repeatedly noted the role that false expert testimony plays in wrongful convictions. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009); *see also, e.g.*, Williams v. Illinois, 567 U.S. 50, 96 (2012) (Breyer, J., concurring).

past events;[210] hypnotically refreshed testimony;[211] eyewitness testimony made under unreliable circumstances;[212] and statements made by parties with ulterior motives, such as codefendants[213] and jailhouse informants.[214] A cautious judge might require the defendant to make a threshold showing of unreliability prior to employing credibility interrogatories.[215]

A final lodestar is whether special circumstances would make credibility interrogatories especially onerous. For example, a judge could consider the vulnerability of the witnesses about whom interrogatories would be administered.[216] A judge might also inquire into whether the timing of the

210. *See generally* Mark L. Howe & Lauren M. Knott, Review, *The Fallibility of Memory in Judicial Processes: Lessons from the Past and Their Modern Consequences*, 23 MEMORY 633 (2015) (highlighting various problems that arise due to the fallibility of witness recollection).

211. Though the Court has acknowledged the danger posed by the use of this instrument, it has declined to categorically exclude its use from trial. *See* Rock v. Arkansas, 483 U.S. 44, 61 (1987).

212. Erroneous eyewitness identifications played a role in over 70% of wrongful convictions overturned through DNA testing. *See Eyewitness Misidentification*, INNOCENCE PROJECT, https://perma.cc/YJ7H-GVT5 (archived Nov. 21, 2018). A number of factors may signal potentially troublesome testimony. For example, courts should be cognizant of factors that may have impaired the witnesses' sensory perception. *See* Thomas D. Albright, Perspective, *Why Eyewitnesses Fail*, 114 PROC. NAT'L ACAD. SCI. 7758, 7760-61 (2017). They should also be sensitive to emotional and cognitive factors that may produce false recollection. *See id.*

213. *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542-43 (2005) (noting that codefendants have strong ulterior motives).

214. *See* Russell D. Covey, *Abolishing Jailhouse Snitch Testimony*, 49 WAKE FOREST L. REV. 1375, 1375 (2014) ("Jailhouse snitch testimony is arguably the single most unreliable type of evidence currently used in criminal trials.").

215. Some may question whether it would better for judges to simply *exclude* potentially unreliable evidence at this stage. I disapprove of this view for several reasons. First, special interrogatories present an appealing middle path for testimony that is sufficiently probative to be admissible under *Manson v. Brathwaite*'s totality-of-the-circumstances test, *see* 432 U.S. 98, 114 (1977), but that is nevertheless marginal enough to raise concern. Second, certain indicia of unreliability will only be revealed on the witness stand, making it difficult for judges to police testimony proactively. This is especially true given that many of the same epistemic difficulties outlined in Part II.B.2 above also apply to evidentiary screening—the judge has only a single perspective, and will have little time and little information to go on. Third, if it is—as this Note argues—the *jury's* job to resolve credibility disputes, it is preferable that the jury be allowed to hear as full a range of evidence as possible.

216. Evidence law makes certain allowances for witnesses who are more likely to be harmed by intense or hostile inquisitions. *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 853 (1990) (concluding that there is no absolute right to confront child witnesses in abuse cases). However, a similar allowance is likely unnecessary in all but the most extreme cases of witness vulnerability. The risk of being found incredible pales in comparison to the trauma of being cross-examined. This is especially so since the public may take

footnote continued on next page

request or the volume of interrogatories requested would unduly impede judicial economy.[217] Where concerns such as these arise, courts would do well to limit the number of interrogatories, rather than decline to use them altogether.

4. Handling inconsistency

Finally, judges must be prepared to handle inconsistency, which could take one of two forms. The first form occurs when the jury returns a verdict of not guilty, alongside a set of interrogatories militating in favor of guilt. This issue could arise only if credibility interrogatories were administered after an acquittal—which they would not be under the current proposal.[218] This is in part because they would have little value, since a not guilty verdict is normally where the government's journey ends. Jeopardy attaches, and the defendant cannot be tried again for the same offense.[219] The judge is not within her liberty to command guilt notwithstanding a finding of acquittal. Moreover, collateral estoppel affords additional protection to offenses predicated on the same underlying facts.[220]

The only nettlesome question is whether answers to special interrogatories could render factual determinations uncontestable in a subsequent criminal prosecution—for instance, one brought by the federal

little stock in the jury's findings, *see* Roth, *supra* note 11, at 1647, if it becomes aware of them at all. Moreover, interrogatories prevent long and unpleasant appellate inquisitions into a witness's credibility, possibly immortalized in published opinions.

217. For an explanation of why this danger is de minimis, see Part III.C.3 below.

218. Defendants have no incentive to indict the credibility of their own witnesses. For similar reasons, courts have sometimes opposed interrogatories administered upon a finding of acquittal, unless it could be shown that their administration would be of real benefit to the defendant. *Compare* United States v. Ruggiero, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part) ("Also of obvious danger, though not considered prejudicial in the circumstances presented, is an interrogatory to be answered only in the event of an acquittal."), *abrogated in part by* Salinas v. United States, 522 U.S. 52 (1997), *with* Heald v. Mullaney, 505 F.2d 1241, 1246 (1st Cir. 1974) (holding that interrogatories *favoring* the defendant that are administered before the verdict but direct the jury to answer only in the event of an acquittal were at worst a permissible windfall).

219. *See* U.S. CONST. amend. V; *see also* Smith v. Massachusetts, 543 U.S. 462, 466-67 (2005) (explaining that unless a jury has already come to a guilty verdict that the trial judge sets aside, postacquittal prosecution violates double jeopardy).

220. *See* Ashe v. Swenson, 397 U.S. 436, 446-47 (1970). Note, however, that this requires determining which predicate facts a jury considered, which is not always easy. For this reason, some have suggested making use of special questions in this context. *See, e.g.*, Randall, *supra* note 19, at 322-23. *See generally* Joseph J. DeMott, Note, *Rethinking* Ashe v. Swenson *from an Originalist Perspective*, 71 STAN. L. REV. 411 (2019).

government after a state-level trial[221]—under the doctrine of offensive collateral estoppel.[222] Authorities are divided.[223] Some courts have held that offensive collateral estoppel based on special questions is permissible.[224] However, the Supreme Court intimated in *United States v. Dixon* that this approach may be improper, writing that "an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one—though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time."[225] And the prevailing view among other courts—state and federal—is that offensive collateral estoppel is inconsistent with the trial rights of defendants.[226] Given these concerns, as well as the general uncertainty surrounding this doctrine, it is best not to administer interrogatories at all after an acquittal.[227]

Thus, the more pertinent issue is the second form of inconsistency. This occurs when the jury returns a verdict of guilty, alongside a set of interrogatories that undercut that decision. Of course, the potential to catch inconsistency is a feature of the proposal. Nevertheless, it is useful to consider how the trial court might respond. A review of neighboring case law suggests a simple analytic framework.

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221. Such a prosecution can be brought under the separate sovereigns doctrine. *See, e.g.*, Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1867 (2016).

222. *See generally* Richard B. Kennelly, Jr., Note, *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379 (1994).

223. *See* Cornelius v. Smith, No. 1:13CV1010, 2014 WL 4851890, at *3-10 (M.D.N.C. Sept. 29, 2014) (analyzing courts' disagreement over this issue), *appeal dismissed per curiam*, 597 F. App'x 162 (4th Cir. 2015).

224. *See id.* at *10 (holding that where a prior jury found, using a special verdict form, that the defendant had committed burglary, it was not improper for the judge to instruct the jury during a retrial on a related felony murder charge that it could assume beyond a reasonable doubt that the defendant had committed burglary); State v. Dial, 470 S.E.2d 84, 89 (N.C. Ct. App. 1996) (holding that under the doctrine of collateral estoppel, a jury's answer to a special verdict form—which established that North Carolina's jurisdiction over the proceeding was proper—barred the defendant from relitigating the issue in the subsequent retrying of the case).

225. 509 U.S. 688, 710 n.15 (1993).

226. *See Cornelius*, 2014 WL 4851890, at *8 (noting a trend among courts against recognizing offensive collateral estoppel in criminal proceedings); *see also* United States v. Smith-Baltiher, 424 F.3d 913, 920 (9th Cir. 2005); United States v. Gallardo-Mendez, 150 F.3d 1240, 1244 (10th Cir. 1998); United States v. Pelullo, 14 F.3d 881, 896 (3d Cir. 1994); United States v. Harnage, 976 F.2d 633, 636 n.2 (11th Cir. 1992); People v. Goss, 521 N.W.2d 312, 316 (Mich. 1994).

227. *See* United States v. Ruggiero, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part), *abrogated in part by* Salinas v. United States, 522 U.S. 52 (1997).

In some extraordinary cases, answers to special interrogatories will so vitiate the government's case as to warrant vacating the conviction.[228] This would occur where the interrogatories negate a crucial element of the prosecution's case—in effect demonstrating the evidence insufficient to support a conviction. Incidents like this arise on occasion. For instance, a jury may find a defendant guilty of drug possession, only to answer "none" when asked about the quantity of drugs it believed the defendant possessed.[229] In the context of credibility interrogatories, this could arise when a jury flags as unreliable the only testimony supporting a crucial rung of the prosecution's case.[230] Here, the interrogatory serves a valuable purpose: exposing convictions that are based on patently insufficient evidence. Some case law suggests that the judge might be free to send the jury back to clarify its answers.[231] Here, there is no danger of injuring the defendant: Without the interrogatories, she would have been convicted anyway. Alternatively, a judge could direct a verdict for the defendant. Should she do so, the state would be free to appeal this decision.

Far more frequently, interrogatories will merely weaken the government's case. In such cases, the judge would enter the guilty verdict. Unlike a drugless drug possession conviction, finding a prosecution witness's testimony incredible need not be fatal to the conviction. After all, as the Supreme Court made clear in *United States v. Powell*, even seemingly inconsistent verdicts do not require reversal.[232] Still, defendants are left no worse off than they otherwise would have been. There is no danger that the interrogatories induced the jury to convict. And the defendant will have this information preserved should a later court find cause to review the decision.

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228. *See* United States v. Gonzales, 841 F.3d 339, 348 (5th Cir. 2016) ("Courts consistently vacate convictions when the answers to special interrogatories undermine a finding of guilt the jury made on the general question."). This is not conceptually distinct from a judge directing a judgment for the defendant notwithstanding the verdict. *See* Fong Foo v. United States, 369 U.S. 141, 142 (1962) (per curiam).

229. Strange, but true. *See, e.g.*, United States v. Randolph, 794 F.3d 602, 607 (6th Cir. 2015); United States v. Shippley, 690 F.3d 1192, 1193 (10th Cir. 2012).

230. Consider, for example, what might have occurred in the Monfils murder cases—discussed in Part I.A above—if the jury had rejected Wiener's testimony. *See supra* notes 40-54 and accompanying text.

231. *See, e.g.*, *Shippley*, 690 F.3d at 1193.

232. *See* 469 U.S. 57, 65 (1984). The theory runs that such inconsistency may be an outlet for discretionary lenity. *See* Dunn v. United States, 284 U.S. 390, 393 (1932) (quoting Steckler v. United States, 7 F.2d 59, 60 (2d Cir. 1925) (Hand, J.)). *See generally* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 211-13 (1989) (reviewing the Supreme Court's canon on verdict inconsistency).

B. The Functional Case for Expanded Credibility Factfinding

Having clarified how credibility interrogatories would work, this Subpart builds the case for putting them to use in criminal trials. Specifically, this Subpart shows how this simple intervention enables defendants and judges to combat testimonial ossification at the trial level.

1. Circumscribing sufficiency

Credibility interrogatories could breathe new life into sufficiency review of convictions backed by testimony. When appellate courts know with certainty that the jury rejected a specific piece of evidence, they need not treat that evidence as dispositive. This is because the jury's actual findings of fact are controlling on sufficiency review.[233] Thus, credibility interrogatories could replace the near-indestructible presumption of reliability with a properly circumscribed one. The propriety—and power—of this intervention is demonstrated by the judicial treatment of special interrogatories in analogous contexts.

Consider *United States v. Frampton*.[234] There, the defendant was accused of murder on two alternative theories: as a principal, or as an aider and abettor.[235] Alongside a general verdict, the trial judge instructed the jury to note—should

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233. A wealth of authority supports this proposition. *See, e.g.*, United States v. Gonzales, 841 F.3d 339, 350 (5th Cir. 2016) (rejecting the idea that the "jury's actual findings can be ignored" in a defendant's sufficiency challenge); United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000) ("We may not substitute our own determinations of credibility . . . for that of the jury."); United States v. Lucarelli, 476 F. Supp. 2d 163, 169 (D. Conn.) ("[T]he parties' original intent in positing the special interrogatory to the jury . . . ended up having a life beyond this purpose inasmuch as it became the vehicle to reflect the jury's finding that the Government's proof on the element of intent fell short."), *adhered to on reconsideration*, 490 F. Supp. 2d 295 (D. Conn. 2007); United States v. Werme, No. 89-132, 1990 WL 74267, at *3 (E.D. Pa. May 31, 1990) ("[T]he submission of the jury interrogatories was not error; indeed, the interrogatories reveal that [the defendant] must be acquitted. Had a general verdict been given, this Court would not know on which theory of liability the jury had convicted [the defendant]."); *see also* Griffin v. United States, 502 U.S. 46, 61 (1991) (Blackmun, J., concurring in the judgment) ("commend[ing]" the use of special interrogatories to prevent a defendant from being convicted on the basis of insufficient evidence).

Indeed, some courts have bemoaned the *lack* of special interrogatories when conducting sufficiency review. *See, e.g.*, State v. Ellis, No. 09-1210, 2011 WL 944428, at *6, *9 (Iowa Ct. App. Mar. 21, 2011) (lamenting the verdict's lack of special interrogatories, as it forced the court to wade into the witnesses' testimony on sufficiency review). Only one federal court has come out the other way. *See* United States v. Bran, 776 F.3d 276, 280 (4th Cir. 2015). *But see Gonzales*, 841 F.3d at 349-50 (explaining that this portion of *Bran* is dicta).

234. 382 F.3d 213 (2d Cir. 2004).

235. *Id.* at 224.

it convict—which theory it found persuasive.[236] And convict it did—for acting as a principal.[237] In setting aside the conviction on sufficiency grounds, the Second Circuit flagged the influence of the interrogatories on its final holding.[238] Ordinarily, the court noted, it would have to affirm if the evidence supported either of the government's theories.[239] But because of the jury's clarification, it only needed to consider whether the evidence supported the theory that the defendant acted as a principal.[240]

Credibility interrogatories work in just the same manner. As the *Johnson* case (discussed in Part I.A above)[241] demonstrates, whether a conviction was errant may rely just as much on the testimony a jury credits as it does on the prosecutorial theories it credits. The proposed instrument is more intuitive and less intrusive than alternative-theory questions: It does not require the jury to reach unanimity on the special question prior to the verdict. And it lets juries do what they do best—reach findings.

Applying interrogatories to the credibility context is no stretch. In perjury cases, juries are already given special questions asking them to identify testimony they found false.[242] And these special questions have had a pronounced effect on appellate review. Despite the high evidentiary requirements in perjury cases,[243] testimonial ossification would seem to

236. *See id.*

237. *Id.*

238. *See id.*

239. *See id.* (citing United States v. Masotto, 73 F.3d 1233, 1241 (2d Cir. 1996)).

240. *See id.*

241. *See supra* text accompanying notes 50-59.

242. Courts have taken this approach at both the state and federal levels. *See, e.g.*, United States v. Reed, 147 F.3d 1178, 1181-82 (9th Cir. 1998) (upholding the use of special questions in a perjury case); State v. Dial, 720 P.2d 461, 463-64 (Wash. Ct. App. 1986) (permitting their use under state law). Note that these are not credibility interrogatories, but are instead interrogatories relating to a predicate fact of conviction.

243. Generally speaking, defendants cannot be convicted on federal perjury charges unless the government can "establish the falsity of the statement alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances." Weiler v. United States, 323 U.S. 606, 607-09 (1945).

obligate courts to presume—on sufficiency review—that the jury identified lies in the defendant's testimony.[244] But where special interrogatories are deployed, courts cabin sufficiency review accordingly.[245]

2. Assessing prejudicial error

Credibility interrogatories also facilitate error-based review. They do this by revealing areas in which the jury found the prosecution's case to be dangerously thin. As Part I.B above demonstrates, informational constraints lead courts to treat the prosecution's evidence as a single conglomerate. Under a "likely guilt" or "overwhelming evidence" approach, courts tend to weigh the prejudicial effect of error against the overall support for conviction. But this conglomeration gets the analysis wrong—a specific "conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."[246] The relevant question is not the strength of the conglomerated evidence, but rather the strength of the necessary syllogism.

Consider the following hypothetical. A crucial rung of the prosecution's case against Defendant *D* is supported by the identical testimony of two witnesses—Witness *A* and Witness *B*. The jury votes to convict *D*. The testimony of Witness *A* is subsequently held to have been inadmissible. Was this error harmless? A court would probably answer yes—Witness *A*'s testimony was merely duplicative of Witness *B*'s.[247] But what if the jury—in response to a credibility interrogatory—reported that it excluded Witness *B*'s testimony? The answer would change from a qualified yes to an easy no. Of course, not all cases will be so black and white. But some will be. Either way, all parties stand to benefit from this information.[248]

244. Reviewing courts have noted that without special questions, it becomes almost impossible know on what count of perjury the jury convicted. *See, e.g.*, United States v. Richardson, 421 F.3d 17, 31 (1st Cir. 2005) (maligning the decision not to use a special verdict form for a perjury conviction, and upholding the jury's conviction despite the fact that the defendant did not know which of nineteen separate statements the jury found false).

245. *See, e.g.*, *Dial*, 720 P.2d at 463 (using interrogatories in this manner).

246. Strickland v. Washington, 466 U.S. 668, 696 (1984).

247. *See* Rodriguez-Mancilla v. Holder, 367 F. App'x 839, 840 (9th Cir. 2010) (per curiam) (holding that an error was rendered harmless because the tainted evidence was not relied upon).

248. To be sure, prosecutors may also stand to gain from the use of credibility interrogatories. For instance, knowing that the jury flatly rejected the testimony of one of the prosecution's witnesses may be useful to a reviewing court when assessing whether a *Brady* violation was material. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the prosecution violates due process when it suppresses evidence that is helpful to the defense and "material either to guilt or to punishment"). But this should

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A good argument can be made that a trial-level intervention is a natural outgrowth of the Supreme Court's harmless error canon. Take, for instance, the case of *Bollenbach v. United States*.[249] There, a jury voted to convict the defendant—but only after receiving improper instructions from the judge.[250] Prior to the instruction, the jury had deliberated for seven hours. After it, the jury reached a decision in five minutes.[251] In reviewing the conviction, the Court held that the erroneous instruction could not be considered harmless, as the sudden change in the jury's course demonstrated that the error had, in fact, materially affected deliberations.[252]

Stripped of its facts, *Bollenbach* stands for an important proposition: Harmless error review is intended to treat circumstantial evidence as probative of what factors influenced the jury's decisionmaking.[253] Thus, courts have followed the rationale in *Bollenbach* where "the record indicates that the factfinder did not find the evidence to be overwhelming," with relevant signals including the jury "sending notes during deliberations, delivering a split verdict that convicts the defendant on some counts while acquitting or failing to achieve unanimity on others, or . . . deliberating for a period long enough to suggest that the jury did not view the case as a slam dunk for the prosecution."[254] This approach makes sense. A proper analysis should consider all available clues. But the aforementioned factors are underinclusive. Sending notes of consternation to the judge may be good evidence of a divided jury, but the converse does not hold true. The same goes for short deliberations and split verdicts. Accordingly, few cases since *Bollenbach* have presented a clear enough nexus between an error and external indicia of its impact on the empaneled jury to make use of this intuition.

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not discourage defendants from seeking their use. Given the frequency with which guilt is found to be "likely" or "overwhelming," *see supra* notes 68-75 and accompanying text, the benefits of offsetting testimonial ossification should exceed the danger of foreclosing potential arguments down the road. It should be noted that the benefits to error-based review (unlike those affecting sufficiency review) do not turn solely on the accuracy of the jury's factfinding. Even if juries systematically get credibility judgments wrong, harmless error review nevertheless requires knowing *how* they get them wrong.

249. 326 U.S. 607 (1946).

250. *See id.* at 609-10.

251. *See id.*

252. *See id.* at 614-15.

253. *See id.*; *see also* Murray, *supra* note 61, at 1804 n.69.

254. Murray, *supra* note 61, at 1796 n.23; *see also id.* at 1804 n.69. For an example, see State v. Baby, 946 A.2d 463, 487-89 (Md. 2008) (looking to the jury's notes to the judge in determining whether error was prejudicial). *See also* Kyles v. Whitley, 514 U.S. 419, 443 n.14 (1995) (treating evidence of a hung jury as probative in the context of a *Brady* claim).

Credibility interrogatories provide a clarity that other indicia of uncertainty, such as time spent deliberating, do not. Nothing is lost from equipping judges with more reliable informational instruments. And indeed, special interrogatories have—in other contexts—already proven able aids in assisting harmless error review.[255]

3. Identifying meritorious claims

Finally, credibility interrogatories could prove valuable complements to appellate discretion. In case selection for discretionary appeals, judges are on the lookout for errant decisions or, at a minimum, cases that present a close question. Determining whether a case fits this mold is difficult work. And it requires what is essentially a preliminary assessment on the merits. In this context, credibility interrogatories are invaluable. Where the evidence of multiple witnesses—or of key witnesses—is flagged as suspect, a court knows to read the appurtenant materials with special care. Where there is smoke, there may be fire. Courts are likely to be receptive to interrogatories serving this role.[256] Indeed, one survey of the California judiciary revealed that nearly two-thirds of respondents viewed the instrument as underutilized.[257]

A similar logic applies to the gamut of state-level postconviction proceedings discussed in Part I.C above. Voluminous quantities of evidence are generated in criminal proceedings.[258] Accordingly, there is a great deal of evidence to be retested. And new evidence of potential value periodically emerges. Defendants understandably want to run through every available door. Thus, state postconviction proceedings are deluged with appeals—a problem only worsened by the exhaustion requirement established by the

255. *See* Roger J. Traynor, La Rude Vita, La Dolce Giustizia*; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 228 (1962) ("[A] jury's answer to a special interrogatory may reveal that an error was harmless."). Perhaps most tellingly, courts have *imputed* credibility judgments from wholly unrelated special questions. *See, e.g.*, Thomas v. Kelly, 903 F. Supp. 2d 237, 248 (S.D.N.Y. 2012) ("Through special interrogatories, it was clear that the jury did not find the defendant officers' testimony credible."), *appeal dismissed and case remanded per curiam sub nom.* Thomas v. City of New York, No. 12-4712 (2d Cir. Apr. 30, 2013). Credibility interrogatories are a more direct path to the same end.

256. In other contexts, courts have acknowledged that special interrogatories can be helpful tools. *See, e.g.*, Commonwealth v. Golston, 366 N.E.2d 744, 752 (Mass. 1977) (permitting special interrogatories that act as an "aid" to the court, unless they prejudice the defendant).

257. *See* Strier, *supra* note 195, at 174-75.

258. *See* sources cited *supra* note 120.

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[259] Meritorious claims are lost in the flood. External indicia signaling a need for closer review would be of value.

One auxiliary benefit of administering credibility interrogatories is smoking out systemic malfunction. It is not uncommon for jailhouse informants to become intimately familiar with the trial system and to establish themselves within it as semiprofessional perjurers.[260] Some "expert" witnesses have carved out similar nooks.[261] Credibility interrogatories are a valuable first signal to the prosecution and reviewing judge that there is a problem with a witness's testimony. The effect is likely to be a slight but valuable nudge toward accountability. And increased knowledge of how our criminal justice system is—and is not—working is of use to practitioners and reformers alike.

C. Responding to Three Principal Objections

The previous Subpart highlighted the benefits of credibility interrogatories. In light of these arguments, a good case can be made that the value of particularized credibility factfinding will—at least for the most unsafe testimony—be "substantial."[262] This Subpart takes up the question of "prejudice" and engages with some of the objections that might be raised.

259. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(1), 110 Stat. 1214, 1218-19 (codified as amended at 28 U.S.C. § 2254(b) (2017)); Samuel R. Wiseman, *Habeas After* Pinholster, 53 B.C. L. REV. 953, 972-77 (2012) (explaining how AEDPA and the Court's holding in *Cullen v. Pinholster* place pressure on state-level postconviction systems to produce factual records, even where those systems are unable to provide a sufficiently thorough review); *see also* Cullen v. Pinholster, 563 U.S. 170 (2011).

260. *See* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 15-16 (2009).

261. For a notable case of an expert witness being repeatedly hired to perjure himself in support of the prosecution, see *In re* Investigation of the W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 502-04 (W. Va. 1993).

262. *See* Black v. United States, 561 U.S. 465, 473 n.11 (2010) ("[A] District Court should have the discretion to use a jury interrogatory in cases where risk of prejudice to the defendant is slight and the advantage of securing particularized fact-finding is substantial." (alteration in original) (quoting United States v. Ruggiero, 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part), *abrogated in part by* Salinas v. United States, 522 U.S. 52 (1997))); *see also supra* text accompanying notes 184-88.

1. Nullification and lenity

Opposition to special interrogatories in criminal trials is often couched in the language of jury nullification.[263] In inducing the jury to pass certain waypoints in reaching its verdict—the argument runs—we hobble its ability to dispense lenity.[264] Consequently, special interrogatories are usually justified on the theory that their benefits outweigh the countervailing costs of reduced nullification.[265]

At least as it pertains to the present proposal, this concern misses the mark. The bar on double jeopardy ensures credibility interrogatories function as a one-way ratchet against the state.[266] This makes all the difference.[267] As the discussion above highlights, inconsistency would not inhibit the jury's power

263. *See, e.g.*, United States v. Gonzales, 841 F.3d 339, 346-47 (5th Cir. 2016) (noting that much of the hostility to special questions in criminal trials "stems from a desire not to undermine jury nullification"); United States v. Desmond, 670 F.2d 414, 416 (3d Cir. 1982) ("Some of the antipathy toward special verdicts in criminal trials has its roots in the doctrine of 'jury nullification' . . . ."); *cf.* United States v. Barrett, 870 F.2d 953, 956 (3d Cir. 1989) (Stapleton, J., concurring) (stating that special interrogatories should be permitted because the "constraining influence on jury nullification seems . . . nill or at least de minimus").

264. *See Desmond*, 670 F.2d at 417-18.

265. *See, e.g.*, Leipold, *supra* note 170, at 1355 (conceding the harm to nullification but arguing that "it is not obvious that preserving the right to nullify is worth the cost to innocent defendants"); Ferguson, *supra* note 19, at 1227 (justifying the use of special interrogatories on the theory that "the average defendant's interest in improving accuracy outweighs a defendant's interest in preserving the possibility of nullification").

266. There is nothing improper about such an arrangement. *See* United States v. Coonan (*In re* United States), 839 F.2d 886, 891 (2d Cir. 1988) ("[T]he government, unlike a defendant, may not rightfully seek the benefit of an irrational verdict; although juries may freely temper the rigor of the law, they surely may not enhance it."); *see also* Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 378-79 (1913) (noting that it is "unquestioned" that a court may grant a new trial if the jury misapplied the law, as this "obtained at the common law" and "do[es] not trespass upon the prerogative of the jury to determine all questions of fact" (quoting Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 596 (1897))).

267. *See* United States v. Spock, 416 F.2d 165, 182-83 (1st Cir. 1969) (distinguishing as a permissible case where interrogatories had the "purpose of benefiting the defendant"). In a subsequent edit, *Spock* qualified this rationale, *see id.* at 183 n.41½, but more recent case law—including First Circuit precedent—has upheld special interrogatories that do not risk prejudicing the defendant, *see, e.g.*, Heald v. Mullaney, 505 F.2d 1241, 1246 (1st Cir. 1974); *see also* United States v. O'Looney, 544 F.2d 385, 392 (9th Cir. 1976) (finding no error where there was "no suggestion" that a different verdict form would have made a jury more likely to acquit).

to acquit.[268] What is imperiled is more nearly nullification's inverse: the liberty of jurors to convict in a manner contrary to common logic. No such liberty is needed to combat an abuse of sovereign power.

Some of this caution stems from a taxonomical mistake: Courts have broadly failed to distinguish between "special verdicts" and "special interrogatories."[269] It is unclear precisely when this confusion began.[270] But the stakes are not merely linguistic—there are real differences between the instruments.[271] Special verdicts allow judges to break the general verdict into several bite-sized pieces, making it easier for the jury to convict.[272] Some courts have suggested that special interrogatories are similarly an "invitation" to make the general verdict beholden to the subsidiary issues.[273] But this is in tension with the general presumption that jurors are competent to follow instructions.[274] And it is clearly inapposite where interrogatories are administered after the verdict.[275]

2. Sanctity of the jury verdict

A more compelling family of objections relates to the sanctity of the jury verdict. On this view, even special interrogatories that favor the defendant may tread on the jury's independence, freedom to deliberate, and democratic function. The U.S. Supreme Court has extensively treated arguments of this

268. *See supra* Part III.A.1; *cf.* United States v. Shippley, 690 F.3d 1192, 1196 (10th Cir. 2012) ("[I]t's difficult to see how a jury might have been lenient to the defendant by finding [him] guilty despite its conclusion that the government had failed to prove the facts necessary to support such a verdict.").

269. *See* 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.10(a), at 710 n.1 (4th ed. 2015); GORDON MEHLER ET AL., FEDERAL CRIMINAL PRACTICE: A SECOND CIRCUIT HANDBOOK § 49-3, at 1187 (18th ed. 2018) ("[I]n criminal cases the terms special verdicts, special interrogatories and jury interrogatories are used interchangeably." (citation omitted)).

270. *See* Collett v. Frederiksen (*In re* George's Estate), 18 N.W.2d 68, 70 (Neb. 1945) (Messmore, J., dissenting) (claiming that special verdicts and special interrogatories blur together in "a fog, built over not years but centuries, and through which it is difficult to see the light").

271. *See* United States v. Gonzales, 841 F.3d 339, 346 (5th Cir. 2016) (discussing the differences). The Supreme Court has also taken care to flag this divergence. *See* Black v. United States, 561 U.S. 465, 472 n.9 (2010) (noting that while both parties referred to the interrogatories at issue as "special verdicts," this label is inappropriate).

272. *See Spock*, 416 F.2d at 182 ("There is no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step."); *see also* United States v. Palmeri, 630 F.2d 192, 202 (3d Cir. 1980) (finding that courts object to special interrogatories primarily where they implicate a linear progression toward guilt).

273. *See, e.g.*, *Spock*, 416 F.2d at 183.

274. *See* CSX Transp., Inc. v. Hensley, 556 U.S. 838, 841 (2009) (per curiam) ("[I]n all cases, juries are presumed to follow the court's instructions.").

275. *See supra* note 197 and accompanying text.

sort in the context of the "no-impeachment rule," which restricts defendants' use of the testimony of jurors to challenge their convictions.[276] Recently, the Court's decision in *Peña-Rodriguez v. Colorado* carved out a bold exception to this rule, holding that it is constitutionally impermissible to prohibit a juror from testifying about racial bias in the jury room.[277] This decision drew two strong dissents.[278] It is easy to see why. Necessary or otherwise, calling jurors to the witness stand is ugly business. But the concerns raised in the *Peña-Rodriguez* dissents are not arguments against the use of credibility interrogatories. To the contrary, they lend support to the proposal's propriety.

First, credibility interrogatories do not harm the finality of verdicts.[279] To be sure, the possibility of accusations "raised for the first time days, weeks, or months after the verdict" could pose serious problems for the criminal justice system.[280] But here, the relevant information would be available immediately following conviction. If anything, credibility interrogatories improve finality by centering jurors' initial—and not judges' subsequent—findings of fact.[281] This gives both sides clarity as to how an appeal might unfold. And whereas subsequent impeachment may be hindered by jurors' faded or altered memories, the timely administration of interrogatories allays any such concern.

Indeed, *Peña-Rodriguez* demonstrates what can happen when insufficient information comes to light at trial. Had a juror notified the trial judge of the presence of racial animus in a timely manner, the parade of horribles that comes with juror impeachment might well have been avoided.[282] The Court's

276. *See, e.g.*, FED. R. EVID. 606(b). For a general synopsis of the no-impeachment rule, see Fraser Holmes, Note, *Becoming Penelopes: Rethinking the Federal No-Impeachment Rule After* Peña-Rodriguez, 96 TEX. L. REV. 1053 (2018).

277. *See* 137 S. Ct. 855, 869 (2017).

278. *See id.* at 871-74 (Thomas, J., dissenting); *id.* at 874-85 (Alito, J., dissenting).

279. Preserving the finality of verdicts was a core concern for Justice Alito in dissent. *See id.* at 885 (Alito, J., dissenting). A desire to safeguard the legitimacy of verdicts is separately described by George Fisher as among the primary features driving our justice system's reliance on the general verdict. *See* Fisher, *supra* note 107, at 577-85.

280. *See Peña-Rodriguez*, 137 S. Ct. at 885 (Alito, J., dissenting) (quoting Tanner v. United States, 483 U.S. 107, 120 (1987)).

281. *See* United States v. Gonzales, 841 F.3d 339, 351 (5th Cir. 2016) ("The Sixth Amendment concern with courts' invading the jury's purview . . . would face an even greater affront if a court were to replace a jury's answer to special interrogatories with its view of how the case should have been decided.").

282. The potential of postverdict special interrogatories to reduce the need for the *Peña-Rodriguez* exception in the context of racial bias is beyond the scope of this Note. However, the same procedural innovations discussed in Part III.A above can inform how such a trial-level intervention might be designed. One scholarly work examining harmless error review of *Batson* errors quickly dismisses the possibility of using special interrogatories. *See* Muller, *supra* note 16, at 136 n.260; *see also* Batson v. Kentucky, 476

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reasoning reflects this intuition. For instance, the refusal in *Tanner v. United States* to depart from the no-impeachment rule was justified by the availability of alternatives to juror impeachment: (1) voir dire; (2) direct observation of the jury "by the court, by counsel, and by court personnel"; (3) jurors "report[ing] inappropriate juror behavior to the court"; and (4) the introduction of nonjuror evidence.[283] The promise of these alternatives was again raised in *Warger v. Shauers*.[284] And the *Tanner* alternatives were cited in both the majority opinion and in Justice Alito's dissent in *Peña-Rodriguez*.[285]

Whether or not these alternatives are sufficient to combat improper verdicts, all agree that they are appropriate.[286] And special interrogatories might be properly conceptualized as an alternative to witness impeachment. To be sure, the alternative of juror reporting outlined in *Tanner* only expressly countenances preverdict communications.[287] But the proposed interrogatories are administered in a contemporaneous fashion and serve precisely the same purpose—putting the judge on notice of certain problems as soon as they become apparent. In this way, they do not differ from a judge asking jurors whether they've been drinking or abusing drugs if she suspects misconduct. Such an inquiry is clearly within the judge's prerogative.

Second, credibility interrogatories do not undermine the decisions juries reach. Unlike subsequent impeachment, they do not incentivize the "harassment of former jurors" or "the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors."[288] To the contrary, they ensure that once the jurors leave the courtroom, they have said all they will ever need to say. Nor do they risk making private deliberations public, imperiling "frankness and freedom of discussion and conference."[289] The proposed interrogatories present simple "yes or no" questions.[290] No explanation is given, and there is no possibility of jurors being asked to disclose why the jury reached its findings. The jury answers as a collective, and whatever conclusion it reaches will be its last word on the matter.

U.S. 79 (1986). But as compared to calling jurors to the stand, it is hard to say this approach is not the preferable one.

283. *See Tanner*, 483 U.S. at 127.

284. *See* 135 S. Ct. 521, 530 (2014) (extending *Tanner*'s reasoning and referencing expressly its "extraneous information" exception).

285. *See Peña-Rodriguez*, 137 S. Ct. at 866; *id.* at 878-83 (Alito, J., dissenting).

286. *See id.* at 866 (majority opinion); *id.* at 878-83 (Alito, J., dissenting).

287. *See Tanner*, 483 U.S. at 127.

288. *See Peña-Rodriguez*, 137 S. Ct. at 877 (Alito, J., dissenting) (quoting S. REP. NO. 93-1277, at 14 (1974)).

289. *See id.* at 884 (quoting *Tanner*, 483 U.S. at 120).

290. This objection underscores the importance of the binary approach suggested in Part III.A.2 above.

Third, there is no reason to fear for negative public perception of the criminal justice system. To be sure, the system loses some of its ethos of infallibility each time a conviction is overturned.[291] But all the same, we permit appellate review of criminal convictions. So long as there is appellate review, it is imperative that courts are able to conduct that review properly. Credibility interrogatories do no more than this. Moreover, the public's reverence for the jury has already begun to falter.[292] The national prominence of the innocence movement has sounded a note of concern into the tenor of public discourse.[293] Support for criminal justice reform is widespread and bipartisan.[294] Our system is better served by steps to improve its accuracy than it is by undertaking to keep its shortcomings hidden from view.

Finally, as Justice Thomas noted in his *Peña-Rodriguez* dissent, history matters. The no-impeachment rule has its roots in English common law, and was a background principle by the time the Fourteenth Amendment was ratified.[295] Formulations of it were adhered to under federal law and the law of all fifty states.[296] And the Court has traditionally declined to break from this

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291. *Cf. Tanner*, 483 U.S. at 120 ("[P]ostverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts . . . . It is not at all clear, however, that the jury system could survive such efforts to perfect it.").

292. *See* Roth, *supra* note 11, at 1647 ("There is little evidence to suggest the public still views the jury as a particularly reliable lie detector . . . .").

293. *See, e.g.*, Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 369 (2017) ("[F]requent and well-publicized exonerations have been etched into the public consciousness over the last several years . . . .").

294. One recent illustration of the bipartisan interest in criminal justice reform is the passage of the First Step Act, which has been described as bringing the "most substantial changes in a generation" to certain elements of the postconviction criminal justice system. *See* Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), https://perma.cc/36A9-MNDR; *see also* First Step Act of 2018, S. 756, 115th Cong. (enacted). The bill was passed in the Senate by a vote of 87-12, and in the House by a vote of 358-36. *See* Erin McCarthy Holliday, *President Trump Signs Criminal Justice Reform First Step Act into Law*, JURIST (Dec. 21, 2018, 3:30 PM), https://perma.cc/CBS4-9NAL.

295. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 873 (2017) (Thomas, J., dissenting) ("By the time the Fourteenth Amendment was ratified, Lord Mansfield's no-impeachment rule had become firmly entrenched in American law."); *see also* Vaise v. Delaval (1785) 99 Eng. Rep. 944, 944; 1 T.R. 11, 11 (first articulating this principle).

For Justice Thomas in *Peña-Rodriguez*, this factor was "dispositive." *See Peña-Rodriguez*, 137 S. Ct. at 874 (Thomas, J., dissenting). Justice Alito also offered up a thorough treatment of the rule's evolution in the United States. *See id.* at 875-77 (Alito, J., dissenting).

296. *See* Jarod S. Gonzalez, *The New* Batson*: Opening the Door of the Jury Deliberation Room After* Peña-Rodriguez v. Colorado, 62 ST. LOUIS U. L.J. 397, 399-401 (2018) ("Every state and federal jurisdiction follows to a substantial degree the concept that jury verdicts cannot be impeached based on what occurs during formal jury deliberations."). Note,

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tradition.[297] By contrast, English common law made extensive use of special interrogatories in criminal cases.[298] And criminal special interrogatories were—for much of American history—considered altogether proper.[299] In this sense, the proposal is in keeping with the original understanding of the jury's proper function.[300] Indeed, it is a return to its roots.

3. Judicial economy

A final concern is of judicial economy. This could take one of two forms. First, some judges might fear for delays during jury deliberations.[301] They need not. Even in the civil context—where interrogatories are more prevalent[302]—delay is a problem only in fringe cases.[303] Credibility interrogatories are comparatively innocuous. The question they ask is a historical one: what the jurors found. This leaves little room for debate—they either all agreed, or they did not. Even if they never discussed a particular witness's credibility, each

however, that jurisdictions have taken divergent approaches in their applications of this principle. *See id.* at 399. Some, following the lead of Iowa, only prohibit jurors from testifying about their own subjective mental states, but allow indictment with clearly established facts. *See id.* at 400; *see also* Wright v. Ill. & Miss. Tel. Co., 20 Iowa 195 (1866), *overruled in part by Peña-Rodriguez*, 137 S. Ct. 855.

297. *See, e.g.*, Warger v. Shauers, 135 S. Ct. 521, 525 (2014) (holding that juror testimony could not be introduced to prove that another juror had lied during voir dire); Tanner v. United States, 483 U.S. 107, 113-16, 127 (1987) (holding that juror testimony could not be introduced to prove that the jurors had used alcohol and drugs during the trial).

298. *See* CLEMENTSON, *supra* note 200, at 2-4.

299. *See* Morgan, *supra* note 172, at 592 ("In the United States the submission of special interrogatories, answers to which are to accompany the general verdict, is generally recognized as proper at common law.").

300. It bears mention, however, that this Note's proposal constitutionalizes nothing. Instead, it capitalizes upon the play in the joints that the dissenters in *Peña-Rodriguez* sought to preserve. *See* 137 S. Ct. at 874 (Thomas, J., dissenting) ("Perhaps good reasons exist to curtail or abandon the no-impeachment rule. . . . Ultimately, that question is not for us to decide. It should be left to the political process . . . ." (citing *id.* at 876-78 (Alito, J., dissenting))).

301. *See* United States v. Escobar-Garcia, 893 F.2d 124, 126 (6th Cir. 1990) (declining, "in the interest of judicial economy," to fully endorse criminal special interrogatories).

302. *See* United States v. Palmeri, 630 F.2d 192, 202 n.8 (3d Cir. 1980) ("Because special interrogatories are rarely used in criminal trials, we must draw on our experience with them in civil trials.").

303. *Compare* Phillips v. Irvin, No. 05-0131-WS-M, 2007 WL 2570756, at *14 (S.D. Ala. Aug. 30, 2007) (holding that the court was justified in declining to consider plaintiff's proposal for twenty-five special interrogatories of dubious relevance—presented for the first time after the close of evidence—out of concern for delays), *with* High Plains Coop. Ass'n v. Mel Jarvis Constr. Co., 137 F.R.D. 285, 287, 289 (D. Neb. 1991) (describing special interrogatories as "seemingly innocuous" and noting a trial court's determination in another case that they did not cause unreasonable delays).

juror should still be master of her own personal perception. Any resultant delay could be resolved through judicial prodding.[304] And in the truly extraordinary event that the jury reaches an impasse, the judge remains free to dismiss the interrogatories altogether. Here, the defendant is left no worse than she otherwise would have been.

Second, judges might cite downstream administrative costs. After all, if the instrument is doing its job, defendants' appeals may—at least in some instances—be more likely to prevail. But an overall increase in cost is hardly a given. Appellate courts retain their prerogative to deny relief. Add to that the ways in which credibility interrogatories could reduce appellate workload and hasten screening.[305] And their use would be both diffuse and staggered. Courts therefore have little to lose by exploring the use of this instrument.

A final point calls for soul-searching: If costs do result, are they improper?[306] Judges would reverse only where defendants were erroneously prejudiced in fact, where the defendant was convicted on the basis of insufficient evidence, or where the defendant was innocent in fact. Though the Supreme Court has adopted a high bar for claims of pure innocence, its reasoning has owed in part to floodgates concerns not here implicated.[307]

304. When juries claim they are unable to reach a final verdict, federal judges may sometimes use "*Allen* charges" to admonish them to keep deliberating. *See* Allen v. United States, 164 U.S. 492, 501 (1896). *Allen* charges have been used effectively in cases involving special interrogatories. *See, e.g.*, Kawakita v. United States, 190 F.2d 506, 522 (9th Cir. 1951) (upholding the use of *Allen* charges to induce the jury to answer 104 discrete special interrogatories), *aff'd*, 343 U.S. 717 (1952); *see also* United States v. Washington, 447 F.2d 308, 310 n.6 (D.C. Cir. 1970) (overviewing the use of *Allen* charges for special interrogatories). To be sure, some circuits disallow *Allen* charges or permit them only in modified form. *See* David M. Fragale, *Influences on the Jury*, 88 GEO. L.J. 1367, 1380-83 (2000). But the postverdict administration of special interrogatories allays any danger that the jury will feel coerced to convict. *Cf.* Jenkins v. United States, 380 U.S. 445, 446 (1965) (per curiam) (holding that an *Allen* charge was impermissible where it had a "coercive effect" on the jury's verdict).

305. *See* Goldberg, *supra* note 146, at 429 (noting that appellate courts waste an enormous amount of time reviewing trial transcripts). This Note's proposal would limit such wasted time.

306. *See* Scott v. Illinois, 440 U.S. 367, 384 (1979) (Brennan, J., dissenting) ("[C]onstitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments."); Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971) (holding that when the integrity of the criminal justice system is threatened, a state's fiscal interests are "irrelevant").

307. *See* Herrera v. Collins, 506 U.S. 390, 426 (1993) (O'Connor, J., concurring) (demanding a "truly persuasive" showing of actual innocence out of concern that courts will be "deluged with frivolous claims of actual innocence" (quoting *id.* at 417 (majority opinion))).

Stripped of this danger, one would be hard-pressed to justify the imprisonment of the wrongfully convicted where it could be properly avoided. After all, the costs of mistakes—in both human and economic terms—are substantial.[308]

Conclusion

Credibility interrogatories are no panacea. Testimonial ossification is just one reason meritorious criminal appeals fail. For the proposed intervention to be of use, a defendant must first vindicate the right to go to trial. Most do not.[309] The jury must then flag testimony as suspect. Not all will. The defendant may have to appeal.[310] Many defendants decline to do so.[311] And even within these constraints, credibility interrogatories cannot always be counted upon to change the final outcome.

Still, given the volume of criminal appeals, even small fixes can right substantial wrongs. Each year, state appellate courts alone hear roughly 70,000 challenges to conviction.[312] Even a one-in-one-thousand solution could reveal seventy overlooked errors, sufficiency issues, or cases deserving additional review. Estimates of wrongful convictions imagine the problem to be much more severe.[313]

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308. In addition to the impact on the wrongfully convicted defendant, there are also social costs to the offender remaining at large. *See generally* James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629 (2012-2013).

309. Though exact statistics are unavailable, studies suggest that 90% to 95% of cases are resolved by plea bargaining. *See* LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), https://perma.cc/JJS5-RYLH; *see also* Lafler v. Cooper, 566 U.S. 156, 169-70 (2012) (describing the status quo as "a system of pleas, not a system of trials"). But note that of the first 358 defendants exonerated by DNA exonerations, only 40 had pled guilty. *See DNA Exonerations in the United States*, INNOCENCE PROJECT, https://perma.cc/NF3A-XNLV (archived Nov. 24, 2018).

310. To be sure, some judges would be able to use credibility interrogatories to spot sufficiency issues sua sponte. *See supra* Part III.B.2. However, judges cannot always be expected to reach this conclusion. And the benefits to error-based and innocence-based review would generally require defendants to raise a challenge on their own.

311. Even among innocent defendants, appeal is not ubiquitous. Moreover, many wrongfully convicted defendants stop fighting after their first appeal. *See* Garrett, *supra* note 11, at 94-95. However, defendants who receive favorable responses to credibility interrogatories may have greater confidence in their ability to prevail—potentially leading them to appeal with higher frequency.

312. *See* WATERS ET AL., *supra* note 207, at 1.

313. The underlying incidence of wrongful conviction is difficult to accurately measure. *See generally* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008) (overviewing the challenges associated with precise empirical assessments). One study of capital cases has suggested that over 4% of those sentenced to death between

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Ultimately, this Note's ambition is a practical one. Credibility interrogatories provide one ready-made tool to combat testimonial ossification. But it is up to defendants to request them, and to judges to permit their use. While inertia is powerful, experimentation in trial courts has already effected a shift in how special questions are used in criminal trials.[314] The arguments advanced above suggest that credibility interrogatories have real potential to facilitate appeals. And, properly administered, they carry minimal risk. Will these arguments be vindicated? In time, and with experience, we might just find out.

1973 and 2004 may have been innocent. *See* Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230, 7234 (2014).

314. *See supra* Part II.C. Of course, it matters that the experimentation is within the scope of judicial prerogative and does not derogate the rights of defendants. *Cf.* Gray v. United States, 174 F.2d 919, 923-24 (8th Cir. 1949) (noting that "[i]t is not the function of the courts subordinate to the Supreme Court to introduce innovations of criminal procedure" where the experimentation comes at the expense of a defendant's rights).