Maine Law Review

Volume 64
Number 2 *Symposium: Balancing Fairness With Finality: An Examination of Post-Conviction Review*

Article 5

June 2012

Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland

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Christopher M. Johnson, *Post-Trial Judicial Review of Criminal Convictions: A Comparative Study of the United States and Finland*, 64 Me. L. Rev. 425 (2012).
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POST-TRIAL JUDICIAL REVIEW OF CRIMINAL CONVICTIONS: A COMPARATIVE STUDY OF THE UNITED STATES AND FINLAND

Christopher M. Johnson

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POST-TRIAL JUDICIAL REVIEW OF CRIMINAL CONVICTIONS: A COMPARATIVE STUDY OF THE UNITED STATES AND FINLAND

Christopher M. Johnson[*]

In 2011, two murder cases involving defendants who professed their innocence came to dramatic conclusions in appellate courts.[1] In Finland in August 2011, the murder prosecution of Anneli Auer ended[2] with her acquittal by an appellate court.[3] In the United States in September 2011, the murder prosecution of Troy Davis ended with his execution in Georgia's death chamber, despite exculpatory information developed after his trial about the reliability of some eyewitness identification evidence.[4]

The Finnish case arose out of the December 2006 death of Jukka Lahti in Ulvila.[5] His wife, Auer, called the police and claimed that an intruder entered their house and attacked her husband.[6] After an investigation, the police charged Auer, accusing her of having staged the break-in.[7] The Georgia case arose out of the shooting death of Savannah police officer Mark MacPhail on August 19, 1989.[8] The shooting happened shortly after midnight, near a bus station and Burger King at which MacPhail worked as a security guard.[9] A disturbance had begun outside a

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1. Actually, of course, more than two murder cases came to dramatic conclusions in appellate courts in 2011. Perhaps the best-known case involved Amanda Knox, an American convicted of murder in Italy, and acquitted in an appellate court in 2011. *See* NINA BURLEIGH, THE FATAL GIFT OF BEAUTY: THE TRIALS OF AMANDA KNOX (2011).

2. Subject, however, to a prosecution appeal to a higher appellate court.

3. *Prosecutors Still Investigating Anneli Auer Despite Initial Murder Acquittal*, HELSINGIN SANOMAT, Aug. 26, 2011, http://www.hs.fi/english/article/Prosecutors+still+investigating+Anneli+Auer+despite+initial+murder+acquittal/1135268863652.

4. Colleen Curry & Michael S. James, *Troy Davis Executed After Stay Denied by Supreme Court*, ABC NEWS, Sept. 21, 2011, http://abcnews.go.com/US/troy-davis-executed-stay-denied-supreme-court/story?id=14571862. *See also* In re Davis, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010) (describing facts of case), *appeal dismissed* 625 F.3d 716 (11th Cir. 2010), *cert. denied* 131 S. Ct. 1787 (2011).

5. *Wife Found Guilty of Killing Her Husband in Long-Running Ulvila Homicide Case*, HELSINGIN SANomat, June 23, 2010, http://www.hs.fi/english/article/Wife+found+guilty+of+killing+her+husband+in+long-running+Ulvila+homicide+case/1135258088101. A Finnish language story about the case appears at http://www.iltalehti.fi/uutiset/2011062613861464_uu.shtml.

6. *Id.*

7. *Id.*

8. Davis v. State, 660 S.E.2d 354, 357 (Ga. 2008).

9. *Id.*

pool hall, during which a man was beaten.[10] MacPhail went to the scene in response to a call for help, and there encountered several people, one of whom shot him three times.[11] The prosecution contended that Davis shot MacPhail. Davis maintained his innocence, arguing that another person committed the crime.[12]

This article does not examine the facts of either case, and thus ventures no opinion on Auer's or Davis's guilt. Depending on the evidence, one could conclude that justice was served in both Finland and the United States, or in one country but not the other, or in neither. Rather, this article compares the different conceptions of post-trial judicial review of criminal convictions illustrated by the two cases.

In Finland, the appellate process afforded Auer a *de novo* reconsideration of the question of her guilt, without requiring a prior showing of procedural error in the trial. In the United States, a federal district court did receive new evidence on the issue of Davis's guilt, acting under an extraordinary ruling from the United States Supreme Court,[13] but in doing so held Davis to a high burden of proof with respect to his innocence.[14] In the United States, a principle of deference to the trial jury's judgment as to the facts operates to prevent any subsequent reviewing court from undertaking a *de novo* re-examination of the case against Davis. In the United States, a truly *de novo* inquiry into his guilt would occur only at a second trial, and an American appellate court would order such a trial only upon finding some defect in the first trial.

Observers have noted the "relative lack of scholarly attention paid to the institutional role of appellate courts in the criminal context."[15] Comparative studies of criminal appellate procedure are "virtually non-existent."[16] In an effort to contribute to closing that gap in the scholarship, this article undertakes a comparative investigation of the Finnish and American systems of post-trial judicial review of criminal convictions. By means of that comparison, the article seeks to understand the underlying assumptions and practical implications of two differing conceptions of the role of the post-trial juridical review of criminal convictions. The task of comparative description is facilitated by the fact that, to a significant extent, information about the Finnish legal system is available in the English language.[17]

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10. *Id.*

11. *Id.*

12. Curry & James, *supra* note 4.

13. *In re* Davis, 130 S. Ct. 1 (2009).

14. *In re* Davis, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010) (describing facts of case), *appeal dismissed* 625 F.3d 716 (11th Cir. 2010), *cert. denied* 131 S. Ct. 1787 (2011).

15. Chad M. Oldfather & Michael M. O'Hear, *Criminal Appeals: Past, Present, and Future*, 93 MARQ. L. REV. 339, 339 (2009).

16. Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMP. & INT'L L. 1, 2 (2011).

17. An excellent database for Finnish statutory and case law is Finlex, available at http://www.finlex.fi/en/. English (and other foreign language) translations of many important statutes are available, and the site links to Finnish case law, although decisions are reported only in Finnish and Swedish on that site. A collection of English-language abstracts of selected Finnish appellate opinions is available in the Dombase database administered by the Institute for Human Rights: http://trip.abo.fi/aadb/dombase/dombaseen.htm. Citations to Finnish judicial opinion abbreviate the name of the court and give numbers indicating the year and docket number of the case. The

Before turning to that task, it is necessary to define some terms and note some limitations of the argument. The article focuses on post-trial judicial review of criminal convictions. Except to the extent necessary to the description and comparison of the two systems of post-trial judicial review, the article thus does not examine other important aspects of Finland's and America's criminal adjudication systems. It does not examine the trial processes that produce a criminal conviction in the first instance. Important differences distinguish trial procedures in the two countries, but a detailed analysis of those difference falls outside the scope of the present article.

Also, the article does not examine post-trial, *non-judicial* forms of review of a criminal conviction. In the United States, an officer or agency typically housed in the executive branch of government has authority to pardon or grant clemency to convicted persons.[18] In Finland, the President holds the pardon power.[19] Such extra-judicial forms of review of criminal convictions warrant comparative attention, but this article leaves that task for another day.

The phrase, "post-trial judicial review," also requires some explanation, as it is not in common use in either country to denote any phase of the review of a criminal conviction. American law divides what this article refers to collectively as "post-trial judicial review" into three phases for state prisoners (direct appeal, state post-conviction review or collateral attack, and federal habeas corpus), and two phases for federal prisoners (direct appeal and habeas corpus). One cannot, with complete fidelity to the American distinction between trial and appellate courts, call the collective "appellate review," because aspects of the review involve hearings in trial-level courts. Also, the latter two phases often take the form of a new lawsuit challenging the prisoner's continued confinement, rather than an appeal of the prior conviction. Finnish law also has three phases of judicial review: an initial appeal through the hierarchy of courts; an "extraordinary review" that begins either in the intermediate court of appeals or the Supreme Court; and under some circumstances, review in an international court.

Part I examines that architecture of the appellate process—the sequence and hierarchy of the courts engaged in the post-trial judicial review of a conviction. In that regard, Finland and the United States share some notable similarities. In one significant respect, though, the architecture of judicial review differs in the two countries. Because of the country's federal structure, American post-trial judicial review of state prisoner convictions can involve the presentation of the same claim

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abbreviations are as follows: "KKO" refers to the Finnish Supreme Court, the korkein oikeus; "I-SHO" refers to the Itä-Suomen Hovioikeus, or Eastern Finland Court of Appeals; "HelHO" refers to the Helsinki Court of Appeals; "RHO" refers to the Rovaniemi Court of Appeals; "KouHO" refers to the Kouvola Court of Appeals; "VaaHO" refers to the Vaasa Court of Appeals.

18. A number of articles discuss aspects of an executive pardon power. *See, e.g.,* Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651 (2008); Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665 (2001); Lauren Schorr, *Breaking into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L. REV. 1535 (2009);; Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020 (1996).

19. The pardon power has recently come under review in Finland. *Niinistö willing to abolish presidential pardon for criminals*, HELSINGIN SANOMAT, Feb. 20, 2011, http://www.hs.fi/english/article/Niinist%C3%B6+willing+to+abolish+presidential+pardon+for+criminals/1135270069867.

in both state and federal courts. Lacking a federal structure of government, Finland does not make available two different sets of courts for the review of criminal convictions. However, because of its status as a signatory to the European Convention on Human Rights, prisoners challenging their Finnish criminal convictions on the grounds of a violation of the Convention can take the case to a separate judicial authority, the European Court of Human Rights. Also, because of Finland's membership in the European Union, a Finnish prisoner can, under some circumstances as described below, challenge a conviction in the European Court of Justice.

Part II examines the history of post-trial judicial review of criminal convictions in each country. Finland's criminal justice system has been much influenced by the continental civil law tradition. America's, of course, developed in the common law tradition. The right to appeal a criminal conviction arose at different times in each tradition, in response to different impulses.[20] The origin and timing of the development of the right to appeal in the United States led to a conception of appeal as limited by the prerogatives of the jury. No such parallel development occurred in Finland. That fact marks a second significant distinction between the conceptions of appeal in the two countries.

Part III explores the nature of the inquiry undertaken in post-trial judicial review of criminal convictions in the two countries. The article divides that Part into sub-parts by reference to two broad decisional strategies available to reviewing courts: assessing or avoiding the merits of the prisoner's claim.

In Finland, a principal ground for appeal is that the conviction is substantively unjust, in that the prosecution failed to demonstrate the defendant's guilt. In the United States, defects in trial structure or procedure commonly form the basis for post-trial judicial review, with challenges to the substantive justice of the conviction figuring less prominently. In both countries, exceptions exist; certain procedural issues can form the basis for a Finnish challenge to a conviction, and American prisoners can seek relief on substantive grounds. However, in Finland, the scope for procedurally-based appeals is relatively narrow, and in the United States, claims focusing directly on the adequacy of the proof of guilt are subject to conditions that prevent post-trial judicial review from undertaking a *de novo* reconsideration of guilt. That difference in the focus of post-trial judicial review constitutes a significant distinction between the conceptions of appeal in the two countries.

The second section of Part III examines non-merits-based grounds for resolving criminal appeals. In the United States, waiver doctrines proliferate and, when applicable, have the effect of allowing a conviction to be affirmed without regard either to the substantive justice of the conviction or the procedural regularity of the trial. In Finland, some waiver doctrines exist, but they are considerably less prevalent than in the United States. That difference constitutes another significant distinction between the conceptions of appeal in the two countries.

Part IV concludes the article by examining the collective significance of such distinctions. What does the comparison reveal about American priorities and goals

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20. *See* Marshall, *supra* note 16, at 4-14 (describing the history).

vis-à-vis criminal adjudication? What does the comparison reveal about Finnish goals and priorities? In 1939, Roscoe Pound wrote that:

> It would seem that where life or liberty is at stake, as in a criminal prosecution, a rational re-examination of the whole case after trial, at least at the instance of a convicted accused, to be made by a tribunal insuring the best judicial power in the jurisdiction, in order to insure that justice has been done, would be a matter of course. . . . In the English-speaking world we have been slow in coming to the conception of review of a conviction suggested above, and in the United States we have still much of the way to go. In our traditional legal system we have hardly become aware of the end, although the public often assumes that review and affirmance by an appellate tribunal is an assurance that the merits of a conviction have been passed upon and that guilt of the accused has been established by the judgment of the highest court.[21]

By means of comparative analysis, this article seeks to discern how much farther we have come in the seven decades since Pound wrote those words.

Ultimately, the article proposes that the Finnish system manifests a relatively greater trust than the American system in the decisional expertise of the judges entrusted with the power of appellate review of criminal convictions. The American system, by contrast, seeks to preserve the privileged position of the jury. It embodies a relatively greater trust in the decisional expertise of that trial court fact-finder and a correlatively greater suspicion about the appellate courts. Second, the Finnish system of post-trial judicial review of criminal convictions manifests a more single-minded pursuit of the goal of achieving an accurate verdict, as measured by its reflection of the truth of the facts underlying the accusation. While the American system unquestionably values accurate verdicts, it also pursues other goals to the extent of compromising the pursuit of factual truth. These include, to a greater extent that the Finnish system, the goals of preserving public confidence in the criminal adjudication system and controlling that system's costs.

I. The Architecture of Post-Trial Judicial Review

When completely invoked by a defendant convicted, like Davis, in a state court, the American system of post-trial judicial review involves at least two trips through the hierarchy of state trial and appellate-level courts with the opportunity, at the end of each trip, to seek review by the United States Supreme Court.[22] The first trip, the "direct appeal," involves the presentation of issues raised before or during trial, or in some instances, at a post-trial but pre-direct appeal motion for a new trial. The second trip, "state post-conviction review," typically involves the presentation of claims not already litigated in the direct appeal process. Finally, and usually after both direct appeal and state post-conviction review, the state prisoner may, by filing a petition for a writ of habeas corpus, pursue an appeal through the hierarchy of federal courts. For defendants convicted in federal court,

21. Roscoe Pound, *Introduction* to LESTER B. ORFIELD, CRIMINAL APPEALS IN AMERICA 3 (1939).

22. The qualification "at least" reflects the fact that some convicted defendants file more than one state post-conviction petition and/or more than one federal habeas petition. Such repeat petitions are referred to as "successive" petitions.

the opportunities for post-trial judicial review include two trips through the federal courts, the first on direct appeal, and the second in habeas corpus.

If, in any phase of post-trial judicial review, the prisoner prevails, the conviction is vacated. In some relatively rare instances, the nature of the prisoner's successful claim bars the prosecution from bringing the charge again in a second trial.[23] On other occasions, the prosecutor could retry the case, but chooses not to. Probably most often, successful appeals are followed by reprosecution on the same charge. In the event of conviction after a second trial, the reconvicted prisoner may pursue a second appeal through all the same channels.

In its basic structure, the Finnish system of post-trial judicial review will not strike an American lawyer as markedly unfamiliar. Criminal prosecutions begin in a trial court.[24] Both the State and the defendant have the right to appeal the trial court judgment to an intermediate court of appeal.[25] The Finnish Supreme Court has discretion to determine which cases it hears on appeal.[26] Because of its structural similarity to American direct appeal, this article will refer to that first phase of Finnish post-trial judicial review as the Finnish direct appeal.

Also, like the United States, Finland provides for judicial review of criminal convictions after the end of that direct appeal.[27] Under that provision, a convicted person, who has become aware of perjury affecting the case or of new evidence tending to show the person's innocence, may file a petition in the intermediate court of appeal or Supreme Court seeking the reversal of the conviction.[28] At the hearing on such a petition, the petitioner may seek to present new information.[29] If the court finds the petitioner's claim to have merit, the court may either order a retrial or enter judgment for the prisoner without a retrial.[30] Using the English label assigned by the translators of the relevant Finnish statute, this article refers to that phase of Finnish post-trial judicial review as "extraordinary review."

While Finland does not operate separate state and federal criminal courts, Finnish convictions can, under some circumstances, be reviewed in an international court, either the European Court of Human Rights or the European Court of Justice.[31] Although from time to time American convictions come before

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23. A finding that the prosecution introduced insufficient evidence of guilt or violated the guarantee of a speedy trial, for example, would preclude re-trial.

24. 7/1734 Oikeudenkäymiskaari, ch. 1, § 1 (2011) [hereinafter Code of Judicial Procedure]. The English translation is available at http://www.finlex.fi/en/laki/kaannokset/1734/en17340004.pdf and the Finnish at: http://www.finlex.fi/fi/laki/ajantasa/1734/17340004000. In the English translation, the trial court is referred to as the district court; in Finnish, the trial court is the käräjäoikeus.

25. Code of Judicial Procedure, *supra* note 24, ch. 25, § 1. In Finnish, the intermediate court of appeal is called hovioikeus.

26. *Id.* ch. 30, §§ 1, 2(1). In Finnish, the Supreme Court is called korkein oikeus.

27. *Id.* ch. 31.

28. *Id.* ch. 31, §§ 2(1), 5, 8. For cases invoking this procedure, see, for example, KKO 2009:84 and KKO 2008:24.

29. Code of Judicial Procedure, *supra* note 24, ch. 31, § 5.

30. *Id.* ch. 31, §§ 6, 14. *See also, e.g.*, KKO 2009:84 (noting that the court of appeal held oral hearing, reassessed the evidence, and entered conviction, thereby altering the trial court's judgment of acquittal).

31. *See* discussion *infra* Part I.B.2.

international courts,[32] such appeals do not now form a regular part of American post-conviction review, and the decisions of international courts are not generally regarded as enforceable by American courts.[33]

In Finland and in the United States, choices about the architecture of post-trial judicial review reflect two principal concerns: the first relating to the fundamental purpose of post-trial judicial review, and the second relating to functional and structural constraints on the courts responsible for conducting post-trial judicial review. First, in both countries, post-trial judicial review aims to ensure that lower courts reliably find facts and faithfully and consistently apply the governing law. The architecture of post-trial judicial review serves that goal by providing the oversight sufficient to hold trial courts accountable for their decisions. Second, both countries have specific understandings about the functions properly performed by the various courts engaged in post-trial judicial review. Those understandings bear on the architecture of post-trial judicial review. In the United States, for example, the capacity to receive evidence is allocated exclusively to trial-level courts, while in Finland, appellate courts also have that capacity. Also, concepts of the proper jurisdiction of courts can influence the architecture, as manifested for example in the decisional specialization associated with federalism. This article thus organizes its comparison of the architecture by reference to those two features.

A. The Goal of Review: Accountability Through Judicial Hierarchy

Within the Finnish direct appeal, the trial court—appeals court—Supreme Court sequence of review reflects a simple hierarchy of authority. Review in the intermediate court of appeal affords a forum in which the judgment of the trial court can be reviewed. Discretionary review in the Supreme Court affords the legal system an option for correction of error in the appeals court. In granting the power of discretionary review to the highest court, Finnish law allows that highest court of appeal to concentrate on cases of great or general importance. The American system features the same hierarchy of authority, responsive to the same concern to enable multiple opportunities for review, without requiring the judicial system to accept for full review every case at every level of court.

Two justifications could be advanced for the multiple opportunities for review implicit in the creation of an appellate court hierarchy. First, one could argue that the cumulative process enriches the analysis such that, by the time the case reaches the higher courts, the prior work of lower courts improves the quality of the later courts' decisions. At times, the United States Supreme Court has vouched for that benefit of repetitive review.[34]

Second, one might argue that higher courts make better decisions than lower courts, for reasons relating to their staffing or workload. For example, the process

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32. *See, e.g.*, Avena and other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31); LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27).

33. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 516 (2008) ("[N]either Medellin nor his *amici* have identified a single nation that treats ICJ judgments as binding in domestic courts.").

34. *See, e.g.*, California v. Carney, 471 U.S. 386, 399 (1985) (Stevens, J., dissenting) ("Premature resolution of the novel question presented has stunted the natural growth and refinement of alternative principles.").

of collective decision-making characteristic of appellate courts may produce better decisions than can be made by a single trial judge.[35] Also, insofar as higher courts decide fewer cases than lower courts, higher court judges may have more time to spend per case. Associated with that greater capacity for focus is the fact that higher courts also tend to have to decide a smaller number of disputed issues per case than do lower courts, insofar as not every decision made by a trial judge is appealed, and not every ruling of an intermediate court of appeal is accepted for review by the highest, discretionary review courts.

Some of these latter considerations seem less applicable to Finland than to the United States. The process of collective decision-making takes place in Finnish trial courts on questions of law, insofar as lay and professional judges deliberate together on all issues, including legal issues.[36] Moreover, in some cases, multiple professional judges preside together at a trial.[37] American trial courts, via juries, engage in collective decision-making on issues of fact, but juries do not decide issues of law and the concept of having multiple judges preside together on a trial is foreign to modern American practice.[38]

In both countries, one also finds evidence of the belief that higher courts make better decisions even when not preceded and informed by a lower court examination of the case. In the United States, for example, some states provide that certain cases will proceed directly from a trial court to the state Supreme Court, thereby bypassing the intermediate court of appeals.[39] In Finland, a prisoner who petitions for extraordinary review after direct appeal files that petition not in the trial court, but in the appeals court or Supreme Court.[40]

In one respect, the Finnish system of hierarchical review constrains trial courts in their fact-finding capacity more than does the American system. At the conclusion of a Finnish criminal trial, the fact-finder must explain in writing the reasoning supporting the verdict.[41] An American jury has no such obligation, but rather merely announces the verdict. Indeed, by various devices American law seeks to protect jury verdicts from challenges on the grounds of incoherence.[42] The

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35. *See, e.g.*, Marshall, *supra* note 16, at 29, 31 (citing references from South Africa and New Zealand attesting to the value of collective decision-making processes).

36. 689/1997 Laki oikeudenkäynnistä rikosasioissa, ch. 10, § 4 (2002) [hereinafter Criminal Procedure Act], *available at* http://www.finlex.fi/en/laki/kaannokset/1997/en19970689.pdf (English translation).

37. Code of Judicial Procedure, *supra* note 24, ch. 2, § 1.

38. It has not always been this way. In some early trials, more than one professional judge presided. *See, e.g.,* Stephen B. Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U. L. REV. 26, 83-88 (1978) (discussing trial brought on charges arising from the "Fries Rebellion" in Eastern Pennsylvania, over which presided two judges). The practice of using multiple judges at certain American trials survived in places into the twentieth century. *See, e.g.*, IRVING MORRIS, THE RAPE CASE: A YOUNG LAWYER'S STRUGGLE FOR JUSTICE IN THE 1950'S, at 35 (2011) (noting that three judges presided on capital trials in Delaware as late as the 1940's).

39. *See, e.g.*, Cecilia Rasmussen, Oversight Led to Automatic Appeals in Death Row Cases, L.A. TIMES (June 17, 2007), http://articles.latimes.com/2007/jun/17/local/me-then17.

40. Code of Judicial Procedure, *supra* note 24, ch. 31, §§ 2, 12, 14a.

41. *Id.* ch. 21, § 3(1); Criminal Procedure Act, *supra* note 36, ch. 11, § 4(1).

42. One such rule obliges appellate courts to affirm inconsistent verdicts. *See generally* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV.

absence of an explanation for the verdict leaves post-trial reviewing courts in the position of deferring to a verdict if any rational jury could have reached it.[43] It matters not whether the actual jury, in reaching the verdict, followed a logical line of reasoning.

B. Functional Specialization: Evidence and Federalism

The architecture of post-trial judicial review can also reflect concepts of courts' functional specialization. This article notes two kinds of functional specialization. The first involves the competence to take evidence, and the second involves federalism and its implications for courts' competence to decide different kinds of legal issues. In respect both to evidence and federalism, one finds in Finland less functional specialization within post-trial judicial review than one finds in the United States.

1. Evidence

In Finland, the trial court does not have a monopoly on the authority to receive evidence. Rather, litigants can present evidence, at least in the discretion of the court, in both the intermediate court of appeals and in the Supreme Court.[44] Moreover, in criminal cases, unlike in civil cases, the parties are not limited to re-presenting on appeal the same evidence presented in the trial court; rather, new evidence may also be presented on appeal.[45]

In 2010, evidently in an effort to conserve the resources of the court of appeals, the Finnish parliament passed a statute empowering the court of appeals more often to forego the oral evidentiary hearing.[46] For example, as of January 1, 2011, a person sentenced to four months or less of imprisonment must apply to the court of appeals for permission to appeal.[47] The new law does not, however, change the fact that, when it hears evidence on appeal, the court of appeals decides the case *de novo*.

By contrast, the American system differentiates by function among the courts engaged in post-trial judicial review of criminal convictions. Perhaps the most notable instance involves the rule restricting the presentation of evidence to trial-

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771 (1998). Another bars post-trial reviewing courts from admitting juror testimony for the purpose of impeaching a verdict. *See generally* Benjamin T. Huebner, *Beyond Tanner: An Alternative Framework for Postverdict Juror Testimony*, 81 N.Y.U. L. REV. 1469 (2006).

43. *See* discussion *infra* Part III.A.2.

44. Code of Judicial Procedure, *supra* note 24, ch. 24, § 15(1). Until recently, a Finnish appellate court generally had to hold an oral hearing when the prisoner so requested. *See* KKO 2000:62. An appellate court need not hold an oral hearing, though, if the appellant raises only a legal claim, *see* VaaHO 1996:4, or if such a hearing is clearly unnecessary, *see* KKO 2002:15. Under a recent statute not yet translated into English, the appeals court has greater authority than formerly to decline to hold an evidentiary hearing. *See* 650/2010 Laki oikeudenkäymiskaaren muuttamisesta, ch. 25a, *available at* http://www.finlex.fi/fi/laki/alkup/2010/20100650.

45. Code of Judicial Procedure, *supra* note 24, ch. 25, § 17 (prohibiting introduction of new evidence in civil cases only, unless the proponent can show cause for failure to present the evidence in the trial court).

46. *See* 650/2010 Laki oikeudenkäymiskaaren muuttamisesta, ch. 25a.

47. *Id.* § 6.

level courts, to the exclusion of appellate courts. Because only trial-level courts receive evidence, their fact-findings are treated with deference by appellate courts, in the sense of being deemed correct unless clearly erroneous.[48] Trial courts have no exclusive prerogative with respect to questions of law, and so appellate courts do not examine trial court legal rulings subject to any deferential standard of review.[49]

In some states, in the case of minor crimes, a defendant has the opportunity first to have a bench trial in a misdemeanor court.[50] Upon conviction in that court, the defendant often can appeal the case to a trial *de novo* before a jury in a higher court. While such provisions allow for the *de novo* reconsideration of the question of guilt, they exist only in the case of relatively minor crimes, and the appeal takes the case from a judge to a jury. In the case of more serious crimes, where by virtue of the case's beginning in a jury court the appeal would take the case from a jury to a judge, no opportunity for *de novo* review exists. The United States is not unique in this quality of offering a *de novo* appeal to a second trial only in the case of minor crimes,[51] but it is revealing that the opportunity for *de novo* appeal of fact should be reserved for circumstances in which a jury is the reviewing body.

In Finland, because appellate courts can receive evidence, appellate review of the factual issues raised on appeal is *de novo*.[52] That is, the Finnish appellate courts need not defer to trial court judgments on identical issues. However, in practice, a certain kind of deference may exist. Because of the passage of time between trial and appeal, it can happen that the quality of the evidence degrades by the time of the appellate court's hearing. However, even when the court of appeals affirms the decision of the trial court, quite often appeals court judges feel that the hearing in the appeals court has been useful, because it has made the case more clear.[53]

Nothing about the American system necessarily requires a functional differentiation between trial and appellate level courts in regards to the receipt or consideration of evidence.[54] Although the Constitution guarantees the right to trial by jury, that guarantee does not preclude the empowerment of appellate courts to

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48. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 369 (1991).

49. *See, e.g.*, Ornelas v. United States, 517 U.S. 690, 696-97 (1996). For a trenchant criticism of the extent to which appellate courts now defer to trial court fact-finding, see Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437 (2004).

50. *See, e.g.*, N.H. REV. STAT. ANN. § 599:1 (2011).

51. Although it lacks juries, Egypt otherwise seems to share the feature of allowing a *de novo* appeal to a higher trial court only in cases involving minor charges. *See* Sadiq Reza, *Egypt, in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 133, 144 (Craig M. Bradley ed., 2009).

52. Code of Judicial Procedure, *supra* note 24, ch. 24, §§ 15-16 (describing decisional procedure of court of appeals, without reference to any principle of deference to the trial court); *Id.* § 19 (providing that except as otherwise specified, the provisions governing a decision in trial court apply also in court of appeals); *Id.* ch. 26 (governing procedure for hearing case in court of appeals; in particular section 15).

53. I am indebted to Anna-Liisa Autio, who has worked as a refendary in the Turku Court of Appeals, for this observation.

54. Oldfather, *supra* note 49, at 470 (noting prevalence in 1930's of proposals for appellate review of facts underlying convictions).

review factual findings.[55] Moreover, scholars have argued that appellate courts have the competence to engage in a high-quality review of factual determinations made by juries.[56]

In the 1930's, "proposals for appellate review of the facts underlying convictions were prevalent."[57] At that time, the case of Sacco and Vanzetti had focused national and international attention on the risk of fact-finding error in American criminal prosecutions.[58] Under present circumstances, a reform allowing American appellate courts to receive evidence seems inconceivable, if only because the American judicial system is understood to be struggling to cope with its caseload, and any proposal that could substantially increase the amount of time devoted to a large number of cases will be seen as impossible to implement in practice.[59] However, scholars have made renewed calls for less deferential appellate review of jury fact-finding.[60]

A few conclusions emerge. First, it would seem impossible in practice for the American system to abandon its exclusive assignment to trial courts of the capacity to receive evidence. That functional specialization may or may not be a virtue, but it is certainly a necessity under present American conditions. The blunt reality of costs here constrains the American system more than the Finnish.

Second, the evidentiary exclusivity of trial courts encourages American appellate courts to defer to trial court findings of fact. Professor Oldfather and others have persuasively argued that appellate courts have the capacity to review trial court findings of fact with skill and insight.[61] In some respects, appellate courts have tools that potentially make them superior to jurors as fact-finders, including written transcripts and the experience of involvement in many cases. The fact that American appellate courts afford much less deference to jury fact-finding in civil cases demonstrates that, at some level, American appellate courts believe in their fact-finding competence.[62] Nevertheless, as discussed in further detail below, post-trial judicial review in America is characterized by the substantial deference afforded by post-trial reviewing courts to trial court fact-finding. American appeals, therefore, operate under a constraint with regard to fact finding that Finnish appeals avoid. Depending on one's view of whether appellate courts, if permitted freer review, will create or correct more errors, deference would improve or impair the capacity of post-trial judicial review to ensure that justice is done in individual cases.[63]

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55. For an argument defending the constitutionality of *de novo* appellate review of facts, see Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 619 (2009).

56. Oldfather, *supra* note 49, at 470.

57. *Id.*

58. For an excellent recent review of the case, see BRUCE WATSON, SACCO & VANZETTI: THE MEN, THE MURDERS, AND THE JUDGMENT OF MANKIND (2007).

59. Oldfather, *supra* note 49, at 470-71.

60. Findley, *supra* note 55, at 618-23.

61. Oldfather, *supra* note 49. *See also generally* Findley, *supra* note 55.

62. Oldfather, *supra* note 49, at 494-502.

63. *Id.* at 483-84.

2. *Federalism.*

A second form of functional specialization of the courts engaged in post-trial judicial review involves not the review of factual findings, but rather the review of legal conclusions. Finland is not a federal republic, and it operates a unified system of criminal courts, applying a unified body of criminal law.[64] By contrast, the United States operates coordinate criminal justice systems, with each state and the federal government defining and enforcing its own criminal laws. Because the United States Constitution imposes a variety of restrictions on the states in regards to criminal law and procedure, in the case of persons prosecuted under state authority, two bodies of law apply. Because both state law and federal constitutional law apply in such cases, their post-trial judicial review can reach both state and federal courts.

In the United States, state courts must apply not only controlling principles of state law, but also controlling principles of federal constitutional law. Federal habeas courts have narrower jurisdiction, in the sense that they have no authority, in the context of the review of state criminal convictions, to decide a prisoner's state law claims.[65] Their jurisdiction, rather, extends only to federal law claims.[66] Moreover, even with regard to federal law claims, the federal habeas courts can review such claims only if the state prisoner has first presented them in the state courts.[67]

Further substantive restrictions on federal habeas review exist. Federal habeas courts are barred from adjudicating certain kinds of claims of violation of federal constitutional rights. In *Stone v. Powell*,[68] the Supreme Court held that federal habeas courts cannot adjudicate claims of violation of the Fourth Amendment if the prisoner had a "full and fair" opportunity to litigate the claim in the state courts.[69] In so ruling, the Court focused on the "judicially created" nature of the exclusionary rule.[70] Through use of the exclusionary rule, courts have sought to promote police compliance with the Fourth Amendment's search and seizure regulations by excluding from criminal trials evidence obtained in violation of those regulations.[71]

The use of the exclusionary rule as a mechanism for promoting police compliance with search and arrest regulations constitutes a characteristic feature of American criminal adjudication.[72] The exclusionary rule has its critics,[73] and their

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64. *See* 39/1889 Rikoslaki (2008) [hereinafter Criminal Code of Finland], *available at* http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf (English translation).

65. *See* Estelle v. McGuire, 502 U.S. 62, 67 (1991).

66. *Id.* at 68.

67. *See* Rose v. Lundy, 455 U.S. 509, 518 (1982).

68. 428 U.S. 465 (1976).

69. *Id.* at 481-82.

70. *Id.* at 482.

71. *Id.* at 486 ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.").

72. It is not, though, unique to the United States. Some other countries employ an exclusionary rule to varying extents for a similar purpose. *See, e.g.*, Binyamin Blum, *Doctrines Without Borders: The "New" Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STAN. L. REV. 2131 (2008); Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1983); Margaret

most fundamental point is that the exclusionary rule deprives courts of reliable evidence tending to prove a defendant's guilt. In Justice Cardozo's famous formulation, the exclusionary rule suffers the defect that the criminal "may go free because the constable has blundered."[74]

Finland does not use an exclusionary rule as the standard remedy for violations by the police of the rules governing criminal investigation.[75] The rules regulating police investigation are largely statutory, and they describe with some specificity the boundaries of proper police practice.[76] In cases of extreme misconduct by the police, Finnish courts have remedies available that could include the exclusion of evidence.[77] More typically, though, the remedy for police misconduct would involve individual discipline of the police officer. For example, in one case, persons arrested by a police officer for theft brought a private prosecution against the officer, on the ground that he had violated his official obligations by calling them "thieves" during the arrest.[78] Although the Finnish courts found the dereliction petty and thus acquitted the officer, a dissenting judge in the court of appeals would have upheld a fine imposed on the officer "mainly because [he] had continued to call [them] 'thieves'" after the arrival at the scene of the arrest of supporting officers, and thus after the situation had calmed down.[79]

In the United States, federal court review of the constitutionality of state convictions serves to ensure that state courts grant due respect to the prisoner's federal rights. The existence of federal review thus manifests a concern that, in the absence of such review, state courts would not vindicate federal rights. By virtue of ruling last on such issues, federal courts have a superior, reviewing role over the decisions of state courts on questions of federal law.

In recent years, however, there has arisen in some quarters a lack of confidence in the regulatory performance of federal habeas courts. A sense that federal habeas

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K. Lewis, *Controlling Abuse to Maintain Control: The Exclusionary Rule in China*, 43 N.Y.U. J. INT'L L. & POL. 629 (2011).

73. *See, e.g.,* Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and (or?) the Exclusionary Rule*, 43 TEX. TECH L. REV. 373 (2010).

74. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926). The truth of the sense of that pithy epigram is contested. In his dissent in *United States v. Leon*, Justice Brennan described it as "misleading," as it is the obligation of compliance with the Fourth Amendment, rather than the exclusionary rule, that "makes it more difficult to catch criminals." 468 U.S. 897, 941 (1984).

75. *See* KKO 2007:58 (holding that the fact that evidence has been obtained by illegal means does not necessarily mean that it is inadmissible; however, evidence which has been obtained in serious violation of the law may be excluded on a case-by-case basis); KouHO 2004:5 (Sept. 23, 2004) (discussing admissibility of unlawfully obtained information; holding that court may on a case-by-case basis consider the admissibility of such evidence, taking into account the values and goals protected by declaring the evidence inadmissible, the requirements of a fair trial, the significance of the evidence as well as the pursuit of finding out the substantive truth).

76. *See* 449/1987 Esitutkintalaki [hereinafter Criminal Investigations Act]. A no-longer-current English translation is on file with the author, and available by e-mail from the Finnish Ministry of Justice. *See* http://www.finlex.fi/en/laki/kaannokset/1987/en19870449. The current Finnish version is available at http://www.finlex.fi/fi/laki/ajantasa/1987/19870449.

77. *See* I-SHO 2005:24 (adjudicating private criminal prosecution brought by arrested persons against arresting officer).

78. *Id.* (describing an effort initiated by a private person to criminally prosecute a police officer for the officer's behavior during the arrest).

79. *Id.*

courts too often or too easily have overturned state court convictions led to the passage, in 1996, of the Anti-Terrorism and Effective Death Penalty Act (AEDPA).[80] Under that act, a federal court can only grant habeas relief on a claim rejected by the state courts if the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[81]

One can therefore understand the standards governing federal habeas review of state convictions as reflecting the prevalent sense of the location of the greatest risk of erroneous appellate judgments. The existence of federal habeas review reflects the concern that state courts will not, in the absence of federal court review, vindicate state prisoners' legitimate claims of violation of federal rights. The current deferential standard of review reflects the concern that federal courts, if entrusted with the power of *de novo* review of federal constitutional claims, will too frequently and improperly overturn state convictions on federal law grounds.

Although not a federal republic, Finland has, by treaty, embarked on a kind of criminal justice federalism by joining international organizations that operate courts having some jurisdiction to decide cases arising out of Finnish convictions. The European Court of Human Rights (ECtHR) is a creature of the European Convention on Human Rights and Fundamental Freedoms (ECHR).[82] The European Court of Justice (ECJ) is an agency of the European Union (EU).

The ECHR obligates member states, including Finland, to respect and protect a broad range of rights, such as the freedom of speech and religion.[83] The Convention also contains guarantees relevant to criminal procedure, such as provisions requiring prompt notification of the charges faced by an arrested person,[84] a speedy trial or release pending trial,[85] a fair and public trial,[86] the assistance of counsel,[87] the opportunity to present evidence and to confront the prosecution's evidence,[88] and the presumption of innocence.[89] Provisions contained in Protocol 7 to the Convention establish a right of appeal in criminal cases[90] and prohibit prosecution or punishment twice for the same offense.[91]

Persons who claim to have suffered a violation of such rights may apply to the ECtHR for redress.[92] In the event that it finds a violation, the Court's primary remedial power is declaratory, but member states have thus far complied with its

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80. Pub. L. No. 104-132, 110 Stat. 1214 (1996). *See, e.g.*, John H. Blume, *AEDPA: The "Hype" and the "Bite*,*"* 91 CORNELL L. REV. 259 (2006) (discussing context in which Congress passed AEDPA).

81. 28 U.S.C. § 2254(d)(1) (2006).

82. Paul L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40 U.S.F. L. REV. 1, 4 (2005).

83. Convention on the Protection of Human Rights and Fundamental Freedom, arts. 9-11, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

84. *Id.* art. 5, § 2.

85. *Id.* art. 5, § 3.

86. *Id.* art. 6, § 1.

87. *Id.* art. 6, § 3(c).

88. *Id.* art. 6, § 3(d).

89. *Id.* art. 6, § 2.

90. Protocol 7, art. 2.

91. Protocol 7, art. 4.

92. ECHR, *supra* note 83, art. 34.

rulings.[93] As a result of the right of individual application and the presence in the ECHR of criminal procedure provisions, in cases raising such issues, "the jurisprudence is beginning to resemble the habeas corpus jurisprudence in the United States whereby federal courts review whether state court criminal trials have complied with the United States Constitution."[94]

The ECJ has jurisdiction to enforce member state compliance with EU laws.[95] Until relatively recently, cooperation among EU member states regarding criminal matters occurred largely outside the EU framework.[96] Nevertheless, and with greater frequency in recent years, criminal cases can raise questions of EU law, as when a defendant argues that the national law on the authority of which the State prosecutes violates EU law.[97] When the possibility of conflict between national and EU law arises in a criminal prosecution in a member state court, that court can refer the legal issue to the ECJ for resolution.[98] The referral must come from the member state court; the defendant has no right to bring the case to the ECJ and no right to insist on a referral to the ECJ.[99] If, after a referral, the ECJ determines that the national law at issue violates EU law, the conviction also violates EU law and must be set aside.[100]

The role of the ECJ in the post-trial judicial review of criminal convictions is, thus, narrow. The ECJ has jurisdiction only to decide questions of EU law, and thus only can act in criminal cases in which a question of EU law arises. Even in such cases, the ECJ can act only when a member state court refers a question involving EU law to it, and "[g]enerally speaking, national courts seem to be reluctant to refer" cases to the ECJ.[101] However, if "a party takes the position that national law must be set aside in favor of overriding Union rules, it may force the national court to take a position" on the legal question.[102]

In some respects, the ECtHR and the ECJ play a role in the architecture of Finnish post-trial judicial review similar to the role played by federal habeas courts in the United States.[103] The international treaties establish a body of law with which Finnish courts must comply, just as the United States Constitution

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93. McKaskle, *supra* note 82, at 31. Finland regards decisions of the ECHR as binding. *See* KKO 2008:24.

94. McKaskle, *supra* note 82, at 25.

95. For a discussion of the ECJ's role in regards to social policy, see Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights under the European Community's Legal Order*, 37 HARV. INT'L L.J. 307 (1996).

96. VALSAMIS MITSILEGAS, EU CRIMINAL LAW 5 (2009). For information about EU member state cooperation in criminal justice, see *Criminal Justice Specific Programme (2007-13)*, EUROPEAN UNION, http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l10110_en.htm (last visited Apr. 4, 2012).

97. *See, e.g.*, KKO 2004:58 (involving defendant's claim that EU law superseded Finnish tax law for evasion for which defendant was prosecuted).

98. ANDRE KLIP, EUROPEAN CRIMINAL LAW 43 (2009).

99. *Id.* at 278, 284.

100. *Id.* at 277.

101. *Id.* at 282.

102. *Id.* at 284.

103. For a comparison of federalism in the United States and in Europe, see generally George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994).

establishes a body of law with which American state courts must comply. The ECtHR and the ECJ can apply that externally-defined body of law to Finnish criminal cases, just as federal habeas courts can apply the United States Constitution in state prosecutions. In both Finland and the United States, the international or federal court applies an "exhaustion" requirement, obliging prisoners to present their claims first in the Finnish or state court before seeking redress in the international or federal court.[104] Even the content of the law enforced by the ECtHR, in declaring general principles of fair procedure, shares much in common with the criminal procedure amendments to the United States Constitution enforced by federal habeas courts.

In some procedural respects as well, the ECtHR and the ECJ function like federal habeas courts. The ECtHR principle of "subsidiarity" illustrates such a similarity. That principle holds that "the primary enforcers of human rights within each member state are the courts of that state."[105] The principle implies "that each member state must be granted some flexibility in applying the principles enunciated in the Convention."[106]

The AEDPA's deferential standard of review has much the same effect of allowing flexibility and permitting different states to interpret constitutional rights differently. Only when the Supreme Court clearly states that some application violates the Constitution will federal habeas courts declare state courts to have violated the Constitution in following the disapproved interpretation. Similarly, the subsidiarity principle does not extend so far as to allow a state to "act in variance to a clearly expressed standard contained in the Convention or in the decisions of the Court that interpret the Convention."[107]

Another similarity involves the reliance of the international and federal courts on Finnish and state court fact-finding, respectively. In the United States, federal habeas courts have the capacity to take new evidence relevant to the federal law claims, but relatively rarely do so.[108] The ECtHR has rules that enable it to engage in fact-finding, but its practical capacity for independent inquiry into the underlying facts is limited.[109]

In other respects, important differences distinguish ECtHR and ECJ review from federal habeas review. The American federal habeas system places federal courts in every state, and circuit courts of appeal provide intermediate appellate review for geographically-defined groups of states. That structure of federal courts beneath the United States Supreme Court allows the federal habeas system to accommodate large numbers of cases from individual states, and thus give an interpretation of federal law that bears directly on local practice and conditions.

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104. *See* Rose v. Lundy, 455 U.S. 509, 518 (1982) (federal habeas exhaustion requirement). The ECJ exhaustion requirement inheres in the rule requiring a reference from a national court, and the ECtHR similarly requires exhaustion. *See* ECHR, *supra* note 83, art. 35(1).

105. McKaskle, *supra* note 82, at 51.

106. *Id.*

107. *Id.* at 52.

108. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 1007 (6th ed. 2011).

109. McKaskle, *supra* note 82, at 22-23, 39.

By contrast, the ECtHR and the ECJ are single courts, without a structure of lower international courts beneath them. As a consequence of that fact and of the obligation, in the case of the ECtHR, to accept for review all cases that present a credible claim,[110] the ECtHR especially has large caseloads and long processing delays.[111] The caseload management problem is aggravated by the fact that the ECtHR serves a community of nations that has an aggregate population three times larger than the population of the United States.[112]

As a result, ECtHR review may not influence practice in any one individual country as much as federal habeas review influences practice in the United States. Two considerations account for this. First, because of the size and number of other countries it serves, the ECtHR has decided relatively few Finnish cases raising criminal procedure issues. Finland ratified the ECHR in 1990, and the first case challenging an action of the Finnish government was decided by the ECtHR in 1994.[113] In the twenty years since ratification, the ECtHR has entered judgments in 151 Finnish cases, and rejected 2874 applications as "inadmissible," a category which includes applications that fail to state a claim of violation, that are untimely, or that do not demonstrate the exhaustion of domestic remedies.[114] In 119 of those 151 cases, the ECtHR found Finland in violation of the Convention.[115] Just twenty-six percent of those findings of violation involved claims of violation of Article 6 right to a fair trial provisions.[116] A further forty percent involved violations of the Article 6 provisions relating to the length of trial proceedings.[117] Not all such cases necessarily involve criminal trials. In 2010, the ECtHR made judgments in 17 cases originating in Finland, finding violations in 16 such cases.[118] Two cases involved fair trial rights, and eight involved length of proceeding claims.[119] Because of the relatively small number of cases the ECtHR can take from Finland, the ECtHR lacks the ability to assess and regulate Finnish criminal procedure as comprehensively as federal habeas courts can assess and regulate a state's criminal procedure.

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110. *Id.* at 39-41.

111. *Id.* at 58.

112. *Id.* at 39-41, 64-72.

113. EUROPEAN COURT OF HUMAN RIGHTS, COUNTRY FACT SHEETS 1959-2010, at 19 (2011) [hereinafter COUNTRY FACT SHEETS], *available at* http://www.echr.coe.int/NR/rdonlyres/C2E5DFA6-B53C-42D2-8512-034BD3C889B0/0/FICHEPARPAYS_ENG_MAI2010.pdf. Data are given as of January 1, 2011.

114. *Id.*; McKaskle, *supra* note 82, at 17.

115. COUNTRY FACT SHEETS, *supra* note 113, at 19.

116. EUROPEAN COURT OF HUMAN RIGHTS, STATISTICS 1959-2010: STATISTICS ON JUDGMENTS BY STATE 3 (2011), *available at* http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf.

117. *Id.* In response to the ECtHR decisions finding Finland in violation, in 2009 Finland passed a statute establishing domestic remedies for unduly delayed cases. *See* 362/2009 Laki oikeudenkäynnin viivästymisen hyvittämisestä, *available at* http://www.finlex.fi/en/laki/kaannokset/2009/en20090362.pdf (English translation).

118. EUROPEAN COURT OF HUMAN RIGHTS, VIOLATIONS BY ARTICLE AND STATE 1 (2011), *available at* http://www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_2010_EN.pdf.

119. *Id.*

Second, because of the greater legal and cultural diversity of the countries within its jurisdiction, ECtHR decisions about practices in other countries may have little to offer, in terms of guidance, to Finnish lawyers and judges. As McKaskle notes, "the participating countries do not share a common source of law and have major cultural differences. A substantial number are, at best, emerging democracies."[120] Though there is some legal and cultural diversity amongst American states, its extent pales in comparison to Europe's. Consequently, federal habeas court decisions from other states and circuits with similar judicial practices can illuminate the meaning, and thus encourage the avoidance of violations, of federal law by a state court.

Another notable distinction between federal habeas and ECtHR jurisprudence is the frequency with which the ECtHR finds violations in the cases that present an admissible claim. Even before the advent of the AEDPA standard of review, the prisoner did not usually prevail. After the AEDPA, federal habeas relief is much harder to win. However, if the preliminary finding of inadmissibility reflects a judgment on the merits of a claim, the proportion of findings of violation to findings of non-violation by the ECtHR may resemble more nearly the proportion in federal habeas courts.

The legal and cultural diversity of Europe also fosters controversy or ambiguity about matters more clearly settled in federal habeas practice. For example, in the ECtHR context, "there are legitimate issues as to exactly what the nature of the review of member state decisions should be."[121] Moreover, there is controversy over the extent to which different cultures and conditions in different member states should permit the ECtHR to find that a practice that would violate the Convention in one state does not violate the Convention in another.[122] Taken together, these considerations make federal habeas a more effective and influential system of oversight than the ECtHR can be.

The comparison of Finnish and American federalism supports one final conclusion. Whereas practical considerations contrived to give Finland greater freedom of action than the United States in the choice of whether to have appellate courts receive evidence, practical considerations in regards to federalism permit in the United States the operation of a more effective federal review than Finland can achieve, at least so long as the only Finnish federalism is international.

II. THE ORIGINS OF POST-TRIAL JUDICIAL REVIEW OF CRIMINAL CONVICTIONS

Both Finland and the United States are relatively young countries, each governed before independence by culturally-influential empires. Prior to its independence in 1917, Finland was for centuries a part of Sweden, and then for a little more than a hundred years the Russian Tsar's Grand Duchy. The United States, of course, was part of the British Empire. As a consequence, both countries received a legal tradition that originated elsewhere, and in both countries, that tradition remains influential. In this Part, the article describes the origins and

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120. McKaskle, *supra* note 82, at 43-44.
121. *Id.* at 44.
122. *Id.* at 49-51.

development of each country's system of post-trial judicial review of criminal convictions.

A. The Origins and Development of Finnish Post-Trial Judicial Review

Although part of the Russian Empire between 1809 and 1917, Finland occupied a special position within that empire, and Russian judicial institutions were not imposed to any great extent on Finland.[123] Only within the last twenty years of Russian rule was any determined effort at Russification undertaken, and it had not progressed very far when interrupted by the Russian Revolution, the fall of the Tsar, and Finnish independence.[124] After independence, a short but bitter civil war between Red and White factions in Finland led to the defeat of the Reds and a repudiation of Russian influences on Finnish civic life.[125] With respect to the legal system, those circumstances left the legal traditions derived from the older Swedish influence, which had persisted through the period of Russian rule, predominant.[126]

A detailed examination of the Swedish legal system falls outside the scope of this article.[127] It is sufficient for present purposes to note that Sweden's legal system belongs within the continental civil law tradition.[128] As Marshall has shown, antecedents of the right to appeal a criminal conviction in that tradition appear in Roman law.[129] After a period of legal decentralization in the feudal middle ages, the right to appeal a criminal conviction was reborn in the continental tradition in the effort of monarchies to re-capture previously dispersed powers.[130]

One mechanism for centralizing power was the assertion of appellate jurisdiction over local courts.[131] Appellate courts could more effectively exert control if not bound by any principle of deference to the decisions of lower courts. Hence, the ecclesiastical court tradition of full *de novo* review proved attractive to the centralizers and became typical in the continental civil law system.[132] Thus did a system of appellate *de novo* review of all questions of law and fact take root in the continental system.

A Swedish law code was promulgated in 1734.[133] That code, though comprehensively amended since, remains the basis of Swedish law.[134] More significantly for present purposes, the 1734 code also forms the basis, though of

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123. DAVID KIRBY, A CONCISE HISTORY OF FINLAND 75-78 (2006).

124. *Id.* at 122-23, 137-49.

125. *Id.* at 161-63.

126. A short summary of Finnish legal history is available in English at *Historical Background of the Finnish Legal System*, FINLAND MINISTRY OF JUSTICE, http://www.om.fi/en/Etusivu/Perussaannoksia/Historicalbackground (last visited Apr. 4, 2012).

127. For useful background, see Bernard Michael Ortwein II, *The Swedish Legal System: An Introduction*, 13 IND. INT'L & COMP. L. REV. 405 (2003).

128. *Id.* at 412.

129. Marshall, *supra* note 16, at 11. *See also* RANDALL LESAFFER, EUROPEAN LEGAL HISTORY 3 (Jan Arriens trans., 2009).

130. LESAFFER, *supra* note 129, at 198-99; Marshall, *supra* note 16, at 12..

131. Marshall, *supra* note 16, at 12-13. *See also* JOHN P. DAWSON, A HISTORY OF LAY JUDGES 103-109 (1960).

132. Marshall, *supra* note 16, at 13-14.

133. Ortwein, *supra* note 127, at 411.

134. *Id.* at 411-12.

course also comprehensively amended, of the code of judicial procedure still in force in Finland.[135]

Several features of it bear mention. As in Sweden,[136] appeals in Finnish criminal cases amount to a trial *de novo* of such issues of law and fact as an appellant wishes to raise.[137] As in Sweden,[138] Finnish law provides for the participation of lay judges in the trial courts.[139]

Finland uses different arrangements of fact-finders at trial.[140] In some cases, a single legally-trained or "professional" judge can return a verdict.[141] In other cases, a panel of three professional judges decides the case.[142] In cases involving more serious charges, a professional judge and three or four lay judges decide the case.

Lay judges are selected by municipal councils to serve four-year terms.[143] During their terms, lay judges do not work full time in their judicial capacities, but rather sit on trials on a regular, but part-time, basis. In cases in which lay judges participate with a professional judge, the verdict is decided by majority vote of all judges, but professional judges have the prerogative to speak first in the deliberations.[144] In returning a verdict, the court prepares a written opinion, explaining the reasoning behind the verdict.[145] Lay judges do not participate in deciding cases in the appellate court, that task being left exclusively to professional judges.[146]

The fact that lay judges participate in the trial courts but not in the *de novo* appeals confirms that the structure of the appellate system puts the lay judges in a relatively marginal position. Not only do they deliberate in common with the professional judges in the trial court, but also the verdicts they reach can be overturned on *de novo* review by a panel composed exclusively of professional judges. While the Finnish system grants a place to lay participation in criminal cases, thereby recognizing some value in a non-professional perspective, that

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135. Code of Judicial Procedure, *supra* note 24. *See also* LAURI LEHTIMAJA, THE PROTECTION OF HUMAN RIGHTS IN FINNISH CRIMINAL PROCEEDINGS 1 (1977). A copy of Lehtimaja's paper is on file with the author.

136. Ortwein, *supra* note 127, at 422.

137. *See id.*

138. *Id.* at 421.

139. Code of Judicial Procedure, *supra* note 24, ch. 2, § 1. *See generally* HANNU TAPANI KLAMI & MERVA HÄMÄLÄINEN, LAWYERS AND LAYMEN ON THE BENCH: A STUDY OF COMPARATIVE LEGAL SOCIOLOGY (1992).

140. Code of Judicial Procedure, *supra* note 24, ch. 1, § 2.

141. *Id.* ch. 2, §§ 1-3a (in criminal cases, quorum is one professional judge and three lay judges; or three professional judges); *id.* § 6 (identifying cases in which judgment can be made by professional judge only).

142. *Id.* § 1.

143. For a general description of Finnish lay judges, see *Lay Judges*, FINNISH MINISTRY OF JUSTICE (Jan. 31, 2012), http://www.oikeus.fi/17306.htm.

144. Code of Judicial Procedure Act, *supra* note 24, ch. 23, § 1; Criminal Procedure Act, *supra* note 36, ch. 10.

145. Code of Judicial Procedure, *supra* note 24, ch. 23; Criminal Procedure Act, *supra* note 36, ch. 11, §§ 4, 6.

146. Code of Judicial Procedure, *supra* note 24, ch. 1, §§ 3-4; *Id.* ch. 2, § 8.

perspective is, ultimately and by means of the system of appellate review, subordinated to the perspective of professional judges.[147]

Probably the most significant recent development in Finnish post-trial judicial review involves the accession in the 1990's by Finland to the treaties that establish the ECtHR and the ECJ. The implications of those courts for Finnish post-trial judicial review have already been described.

B. The Origins and Development of American Post-Trial Judicial Review

As noted above, the American system of post-trial judicial review divides, for state prisoners, into three phases: direct appeal, state post-conviction, and federal habeas. To some extent, each phase developed independently of the others. This article therefore addresses each in turn.

1. Direct Appeal

At common law, post-trial judicial review of a conviction was available to some extent in the trial court, via a motion for a new trial.[148] Such a motion became available in England by the late 17th century.[149] At least two significant limitations applied to such motions. First, because they were filed in the trial court, they did not bring to bear the fresh perspective on the case associated with review by other judges in an appellate court. Second, the law specified that evidence presented through a motion for a new trial be newly discovered.[150] Given the further restriction that the motion be filed during the same term of court in which the trial was held,[151] such motions afforded an opportunity only to prisoners who, very soon after trial, discovered new information bearing on the issue of guilt. In effect, thus, the common law motion for a new trial amounted to the recognition of a brief waiting-period after the verdict designed to allow for the consideration only of slightly delayed information.

At common law, post-trial review of a conviction outside the trial court was, if anything, even more limited. The "criminal appeal, in the common law world, is of recent origin."[152] England's system of common law courts, unlike the civil law courts found on the continent in the Middle Ages, did not confront at that time a similarly powerful centralizing force. As a consequence, in England, such possibilities of post-trial judicial review of criminal convictions as then existed were infrequently invoked and did not develop into vehicles for the comprehensive reconsideration of the trial or the verdict. Similarly, in America and in other common law countries before the mid- to late-nineteenth century, convicted

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147. Moreover, it appears that the frequency of use of lay judges in Finnish cases is dropping. Turun Sanomat, *Number of Lay Judges Plummets*, HELSINKI TIMES (March 31, 2011, 9:29AM), http://www.helsinkitimes.fi/htimes2/finnish-papers/14831-number-of-lay-judges-plummets.html (noting that in 2006, lay judges were used in Finland in about 29,000 cases; in 2010, they were used in about 6,000 cases).

148. *See* Herrera v. Collins, 506 U.S. 390, 408 (1993) (discussing common law provision for motions for a new trial).

149. *Id.*

150. *Id.*

151. *Id.*

152. Marshall, *supra* note 16, at 4.

defendants had few options for post-trial review, and those they did have tended to be "disappointingly impotent."[153]

For example, an early method of reviewing verdicts, attaint, involved a review of the first jury's verdict by a second jury composed of twice as many persons.[154] If the second jury found the first verdict erroneous, "the verdict was reversed, the [original] jurors lost their chattels, were jailed for at least a year, and were accounted infamous."[155] Moreover, to the extent that attaint was available at all in criminal cases, it was not available to review guilty verdicts, and thus was a remedy available to the prosecution but not to the defense.[156]

The common law device for the appellate review of criminal convictions most influential in America was the writ of error.[157] By it, a higher court could require a lower court, after judgment in the lower court, to "send up the record . . . for review of errors apparent on it."[158] The "record" as known to the common law did not include any report of the evidence at trial, but rather consisted of "the judge's commission, the indictment, the plea of the defendant, the verdict, together with entries kept in the minute book, such as the names of the jurors, an abstract of the indictment, a memorandum of the pleas, verdict, and sentence."[159] The writ of error proved "an unsatisfactory appellate remedy" because the "appellate court could review only errors apparent on the record, which on the one hand contained a mass of useless items and on the other hand took no notice of the rulings on the evidence, nor the instructions by the court to the jury, not to mention errors of fact such as the innocence of the defendant."[160]

Succeeding the writ of error in some states was the "bill of exceptions."[161] The bill of exceptions afforded a means by which a disappointed litigant could challenge rulings on motions and objections.[162] Various procedural and practical obstacles, though, delayed the development of the bill of exceptions as a robust vehicle for the review of the fairness of trial. First, not until well into the nineteenth century were bills of exceptions understood to be available in criminal cases.[163] Moreover, even after the expansion of the bill to criminal cases, its filing did not necessarily imply a stay of the judgment. Thus, for example, in a mid-nineteenth century Missouri criminal case, the courts allowed the filing of a bill of exceptions but did not stay the defendant's execution, and he was therefore hung before any appellate examination of the case could take place.[164] Beyond those procedural obstacles, the practical and technological limitations of nineteenth

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153. *Id.* at 6.

154. ORFIELD, *supra* note 21, at 15-16.

155. *Id.* at 16.

156. *Id.*

157. *Id*. at 22.

158. *Id*.

159. *Id*.

160. *Id*. at 24.

161. *See, e.g.*, Frank O. Bowman, III, *Stories of Crimes, Trials, and Appeals in Civil War Era Missouri*, 93 MARQ. L. REV. 349, 359-60 (2009) (describing the development of criminal appeals in Missouri).

162. *Id*. at 359.

163. *Id*. at 360.

164. *Id*. at 362-65.

century practice inhibited the development of appellate review of criminal convictions. As Professor Bowman notes, "the importance of the advent of shorthand reporters in 1887—and of their absence before—can hardly be exaggerated."[165]

Without a tradition of appellate examination of criminal convictions, no substantial body of case law existed, leaving lawyers and trial courts without the materials on which to base and decide appellate arguments challenging the fairness of trial procedures.[166] As a result, to mid-nineteenth century lawyers, "the idea of a fair trial implied one good, thorough airing of the facts before a local judge and jury, with ample opportunity for the lawyers to exercise their rhetorical gifts."[167] In that world, the need for a criminal appeal scarcely existed. Thus, in the United States, "the proposition that those convicted of crimes should have the right to challenge their convictions only took root around the turn of the twentieth century."[168] In the federal system, the Judiciary Act of 1889[169] "first established the right to appeal a conviction in federal court," though limited initially to capital cases.[170]

In England, around the same time, some notorious miscarriages of justice led to the establishment of a right to a more thorough criminal appeal.[171] The appalling case of Adolf Beck would, one must hope, embarrass any legal system into reform. Beck was arrested in London in 1895 and subsequently convicted for thefts perpetrated against a series of vulnerable women to whom the perpetrator presented himself as a nobleman, prospective employer, and lover.[172] The evidence against Beck consisted of the eyewitness identification testimony of the victims. At the time of Beck's prosecution, his lawyer recalled that frauds substantially identical in every detail had been committed in London in 1877, presumably by the same man. In 1877, a man who had given his name as John Smith had been convicted and served time for those crimes. Beck, a 54-year old Norwegian former sailor, offered to prove that he had lived in Peru in 1877; therefore, he could not have committed the prior crimes and thus had not committed the charged crimes. The prosecution found a police officer involved in the 1877 case who would testify that Smith and Beck were the same man. In fact, as was later discovered, a man named Thomas Smith committed both the 1877 and 1895 crimes. The trial court excluded all evidence about the prior crimes, thus rendering irrelevant Beck's proof of his former Peruvian residence. Beck's attempt to appeal on that ground failed because the trial court refused to certify the case for appeal.

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165. *Id*. at 367.
166. *Id*. at 367-72.
167. *Id*. at 372.
168. Marshall, *supra* note 16, at 4.
169. Act of Feb. 6, 1889, ch. 113, § 6, 25 Stat. 655, 656 (1889).
170. Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth Century Perspective*, 93 MARQ. L. REV. 459, 462 (2009).
171. Marshall, *supra* note 16, at 8.
172. This summary of the Beck case is drawn from a 2004 article recalling the case. Brian Cathcart, *The Strange Case of Adolf Beck*, THE INDEPENDENT (Oct. 17, 2004) http://www.independent.co.uk/news/uk/crime/the-strange-case-of--adolf-beck-6159841.html. *See also* Marshall, *supra* note 16, at 8. For a record of the case, see TIM COATES, THE STRANGE STORY OF ADOLPH BECK (Stationary Office ed. 1999) (1904).

Beck served five years. In the second year of his imprisonment, a prison official examined old 1877 prison records relating to Smith and found a reference to the fact that Smith had claimed to be Jewish and was found to be circumcised. Prison officials then examined Beck, discovered that he and Smith could not be the same man, and made a report to that effect to Beck's trial judge. Nevertheless, the judge declined to re-open the case, and nobody informed Beck of the discovery nor took any further action. Beck served his sentence and was released in 1901. Three years later, Smith's commission of several identical frauds brought to the mind of the investigating officer the 1895 cases. In due course, the police arrested Beck and the 1904 victims identified him as the perpetrator. Beck's plea to the jury at trial—"Before God, my maker, I am absolutely innocent of every charge brought against me. I have not spoken to or seen any of these women before they were set against me by the detectives"—proved unavailing in the face of the eyewitness identification testimony, and he was again convicted. Only with Smith's subsequent capture in the course of the commission of an identical fraud, and his confession to all of the crimes, did Beck's ordeal end. The notoriety of such events, in combination with technological and legal advances, ultimately produced in the common law countries our current, more expansive version of criminal appeal.[173]

For present purposes, the crucial point is that a substantial form of appellate review in the United States emerged only after the establishment of the fact-finding primacy of the jury. When appellate review developed, it developed in the light of that established principle and has offered as yet no ultimately successful challenge to it. History, therefore, may account as much as any logic for our characteristic appellate deference to jury fact-finding.

2. *Federal Habeas Corpus*

In the second half of the twentieth century, scholars debated the content of the post-independence and nineteenth century habeas protection.[174] On one account, habeas corpus initially authorized federal courts, in a post-conviction context, to inquire only into the fact of the conviction and the subject matter and territorial jurisdiction of the convicting court. Habeas did not traditionally permit any inquiry into the conviction's substantive justice or the lawfulness of the legal processes that produced it.[175] In the 1870's, the writ expanded to encompass an inquiry into whether a prisoner had been convicted or sentenced under an unconstitutional statute; claims challenging the procedures by which the conviction was obtained remained outside the scope of the writ.[176] Further expansion followed early in the twentieth century to allow federal habeas courts to inquire into whether prior state court proceedings had allowed full and fair presentation of claims. Finally, in a

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173. At least one scholar disputes the claim that criminal appeals did not exist in the United States much before the turn of the twentieth century. *See* Marc M. Arkin, *Rethinking the Constitutional Right to Appeal*, 39 UCLA L. REV. 503, 521-542 (1992).

174. HERTZ & LIEBMAN, *supra* note 108, at 40.

175. *Id.* at 41.

176. *Id*.

series of cases in the middle of the twentieth century, the writ expanded to permit federal court review of claims of any constitutional violation.

The second account is associated with Justice Brennan's opinion in *Fay v. Noia*.[177] On that account, the scope of the habeas inquiry did not enlarge over time; rather, the legal protections granted to defendants evolved. On that view, habeas corpus was always a "forum for providing specified classes of prisoners with review of the legality of their detention under existing standards of due process."[178] The evolution affected only the content of the existing standards of due process.

After noting flaws in both accounts, Hertz and Liebman conclude that federal habeas amounted to a limited appellate procedure, in that "it has lain only to claims of particular national importance."[179] It also constituted a "substitute" procedure, in the sense that "habeas corpus has never duplicated, but has always mirrored the scope of, Supreme Court review on direct appeal."[180]

This article takes no position as between those accounts of the development of federal habeas corpus in America. For present purposes, it is sufficient just to note that "[a]lthough the line between legal and factual questions has changed over time, the scope of both modes of review has always been *de novo* on legal claims and deferential-to-nonexistent on factual findings."[181] Moreover, "innocence claims and their close cousins, claims that the penal statute was not intended to reach a particular prisoner's conduct, are both nationally unimportant because *sui generis,* and subject to no or little review because aimed at the central fact determination at trial."[182] Thus, federal habeas corpus has never provided a forum for *de novo* reconsideration of a prisoner's guilt.

3. State Post-Conviction Review

As early as the colonial period, habeas corpus was known to courts in America.[183] Upon independence, a number of states recognized the writ in their constitutions or by statute.[184] In the first decades after independence, the writ as applied in state courts afforded a relatively narrow basis for reviewing convictions.[185] Only in the mid-twentieth century did the movement toward modernizing and expanding state post-conviction review emerge.[186]

The emergence of state post-conviction review responded to the mid-twentieth century development of a more robust federal habeas review. A federal habeas doctrine developed that required federal habeas courts to respect prior state court decisions denying relief on federal law claims, out of respect for state authority.

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177. 372 U.S. 391, 394 (1963).
178. HERTZ & LIEBMAN, *supra* note 108, at 42.
179. *Id.* at 45.
180. *Id*. at 47.
181. *Id.*
182. *Id*.
183. DONALD E. WILKES, JR., STATE POST-CONVICTION REMEDIES AND RELIEF HANDBOOK 29-31 (2010-2011 ed.).
184. *Id*. at 30-31.
185. *Id*. at 31-32.
186. Nancy J. King & Joseph L. Hoffman, *Envisioning Post-Conviction Review for the Twenty-First Century*, 78 MISS. L.J. 433, 434 (2008). *See also* WILKES, *supra* note 183, at 32, 36-42.

The classic example of such a federal habeas doctrine is the "adequate and independent state law grounds" principle.[187] By that principle, if the state court rejected a prisoner's federal constitutional claim on the basis that the prisoner had, in presenting the federal claim in state court, violated a state law procedural rule, the federal habeas court was bound also to reject the federal claim, out of respect for the state law procedural rule, at least if that rule met certain conditions.[188]

For example, if the state court enforced a rule of procedure that required a defendant to make a federal claim at a certain time in the case, and the prisoner raised the claim later in violation of that rule, the enforcement of the state law timing rule would justify the state court in denying the federal claim, regardless of the federal claim's intrinsic merits. In order to take advantage of the opportunity that federal habeas doctrine presented, the state courts needed to have such "adequate and independent" procedural rules. In order to have those rules, the state needed to offer some judicial forum in which the federal claim could be raised. Because some claims, such as ineffective assistance of counsel, cannot coherently be raised at trial, states therefore needed to have systems of post-trial judicial review available for the litigation of such claims.

No reason exists to think that the direct appeal – state post-conviction review – federal habeas system has reached its final form. Dissatisfaction persists with the system. Some scholars have proposed a radical re-structuring that would change and limit state post-conviction review and federal habeas in favor of an increased emphasis on direct appeal.[189]

For example, evidently frustrated with its system, in 1989, the Arkansas Supreme Court abolished the court rule that provided a comprehensive scheme of post-conviction review in that state's courts.[190] The abolition left available to Arkansas state prisoners only the "narrower" post-conviction remedy defined by Arkansas's version of habeas corpus, in which a court could hear only claims that the "commitment is valid on its face or whether the convicting court had proper jurisdiction."[191] However, soon afterwards, perhaps having realized that the narrowing of state post-conviction review could permit federal courts a freer hand in reviewing federal habeas petitions from Arkansas state prisoners, Arkansas re-established a broader state post-conviction review.[192]

C. Conclusion

In the civil law tradition, the possibility of broad post-trial review of a criminal conviction developed much earlier as a part of the process of centralizing governmental functions and power. In that context, a strong principle of deference to the trial court did not emerge. Centralization through appellate review requires the capacity to communicate information about the case from the local court to the

187. *See generally* HERTZ & LIEBMAN, *supra* note 108, at 1403-1535.
188. *Id*. at 1403-405.
189. King & Hoffman, *supra* note 186, at 433.
190. Whitmore v. State, 771 S.W.2d 266 (Ark. 1989).
191. *Id.* at 267 n.1 (citation to both the text of the opinion and the footnote).
192. ARK. R. CRIM. P. 37.1.

central authority. Before the advent of professional shorthand court reporting, appellate review thus required a predominantly written trial process:

> Writing was . . . the key to this change and it is ironic that almost the first and certainly the most potent use of wider literacy was this capture of criminal justice by the crown and the greater magnates. The major technique adopted by royal judges and prosecutors in France for bringing the seigneurial courts within the jurisdiction of the crown was the revolutionary concept of appellate review, which was facilitated by literacy.[193]

In the common law tradition, the right to appeal a criminal conviction developed relatively recently, and in response more to a concern to avoid miscarriages of justice than as an instrument of the centralization of government power. For centuries, English trials remained primarily oral events, and thus resisted appellate review beyond the formalities subject to examination via the writ of error.[194] As a result, appeals as to matters of substance developed after the emergence and establishment of the idea that jury verdicts in criminal cases are entitled to deference and finality.

III. THE MATERIAL OF POST-TRIAL JUDICIAL REVIEW OF CRIMINAL CONVICTIONS

Having examined the architecture and origins of post-trial judicial review, the article next considers the material of that review. What sort of inquiry do reviewing courts undertake when called upon to examine the legality of a criminal conviction? The article divides its description into two parts. The first focuses on the kinds of claims a prisoner can bring against the validity of a conviction. The second part focuses on waiver arguments by which the prosecution can justify a reviewing court in upholding the conviction, regardless of the merits of a prisoner's challenge to the validity of a conviction.

A. Claims of Error

Finland and the United States differ with regard to the content or focus of post-trial judicial review. In the United States, post-trial judicial review tends to avoid or constrain any direct inquiry into the justice of the jury's verdict. Instead, reviewing courts examine the rulings by which the court structured the trial. However, as shown below, an inclination to find means to inquire into the factual justice of the conviction persists in the United States and has given rise to a number of procedural claims that come close to, without quite being, a direct inquiry into the factual justice of the conviction.

In Finland, post-trial judicial review tends not to focus on procedural or structural complaints about the trial. Instead, appeals typically challenge the outcome of the trial—the factual accuracy of the verdict. Various considerations account for the factual, rather than procedural, focus of the Finnish criminal appeal. These include the relatively less procedurally dense nature of the Finnish trial and

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193. RICHARD VOGLER, A WORLD VIEW OF CRIMINAL JUSTICE 31 (2005).
194. *Id.* at 132.

the opportunity to rectify any procedural errors in the process of re-trying the case on appeal.

The article explores these contrasts further in three categories. The first encompasses challenges to trial court procedural or trial management rulings. The second includes challenges to the factual accuracy or substantive justice of the verdict convicting the defendant. The third contains a kind of composite of the first two: nominally procedural or trial management claims that engage the reviewing court relatively directly in an examination of the factual justice of the conviction.

1. Claims of Procedural Error

In the American system, in each of the three phases of post-trial judicial review (direct appeal, state post-conviction review, and federal habeas), the prisoner's challenge to the conviction most often alleges procedural or structural errors in the trial, rather than an erroneous verdict.[195] Appellants commonly raise arguments about, for example, such matters as the adequacy of the charging document, the State's compliance with its pre-trial disclosure obligations, the content of jury instructions, or such structural considerations as the timing or location of trial and the adequacy of jury selection as a test of the qualifications of the jurors. Significantly, with the exceptions discussed below, post-trial judicial review of a conviction does not directly involve a claim that the prisoner is innocent of the charge.[196]

That being the case, the question of the prisoner's guilt or innocence can be irrelevant to the success of the argument advanced on appeal. A defendant erroneously denied a change of venue, for example, will succeed in an appeal challenging a conviction regardless of the strength of the evidence of guilt. Because the flaw identified by such a successful appeal affects only the trial process, rather than the trial outcome, the consequence of a successful appeal is not acquittal, but rather the cancellation of the conviction on the understanding that the prosecution can usually try to win conviction again after a second trial.

In some instances, the strength of the evidence of guilt can bear on the success of such challenges to trial court procedural rulings. By operation of the harmless error rule, the absence of any doubt about the prisoner's guilt may defeat an appeal that otherwise identifies a genuine procedural flaw in the trial.[197] That rule, though, only applies in one direction. The Supreme Court has not recognized the presence of doubt about guilt as justifying relief in the absence of procedural error,[198] although the Court has held that a strong showing of innocence may excuse a

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195. Findley, *supra* note 55, at 591.

196. *Id.* at 601-602.

197. *See* Chapman v. California, 386 U.S. 18 (1967) (recognizing applicability of harmless error analysis to federal constitutional claims); Brecht v. Abrahamson, 507 U.S. 619 (1993) (discussing harmless error analysis as applied in federal habeas). For a history of the establishment of the harmless error rule, see Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433 (2009). The fact that the harmless error rule came into existence during the first half of the twentieth century supports the conclusion that a right to a broad criminal appeal did not exist in the United States before that time.

198. *See infra* Part III.A.2 (discussing Supreme Court cases noting, without yet deciding, whether convicting innocent person violates Constitution).

prisoner's default of a claim alleging a procedural error.[199] Except in the circumstances described below in which doubt itself forms the basis for the challenge to the conviction, the presence of doubt does not make what would otherwise be a correct procedural ruling into an erroneous one justifying reversal.[200]

American courts recognize an exception to the availability to the prosecution of the harmless error argument. In cases involving a procedural error that is "structural" in nature, the error requires reversal without regard to the strength of the evidence of the defendant's guilt.[201] Some controversy can attend the question of whether a particular error is "structural," and thus immune from harmless error, or is rather a "trial error" subject to a harmless error analysis.

In Finland, procedural complaints about the trial cannot form the basis for an appeal unless a law specifically permits the procedural ground in question to be appealed.[202] Beyond that rule barring the appeal of certain procedural rulings, at least two considerations account for the relative rarity of Finnish procedural appeals. First, many of the procedural complaints that form the bases of American criminal appeals simply do not arise in the Finnish courts. For example, to a large extent, with regard to the regulation of the information available for consideration by the fact-finders at trial, Finland adheres to the principle of free evaluation of evidence.[203] By that rule, the fact-finder is charged with applying an appropriate discount to the value of information introduced in a flawed form, such as hearsay. Trials, therefore, tend to involve disputes about the value and implications of evidence, rather than about the admissibility of evidence. In the absence of trial rulings about the admissibility of evidence, one cannot base a challenge to a conviction on such a ruling. Thus, Finnish appeals tend to focus on a challenge to the trial court's judgment about the value and implications of evidence, as expressed in the written order explaining the verdict.[204]

Also, Finland regulates police investigatory conduct largely by means of training and discipline. Only rarely is evidence excluded from a trial on the ground that the police violated a law in discovering it.[205] As a consequence, Finnish trials

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199. Schlup v. Delo, 513 U.S. 298 (1995).

200. *See infra* Part III.A.2.

201. For a description and critique of the structural error exception to the availability of the harmless error argument, see Steven M. Shepard, *The Case Against Automatic Reversal of Structural Errors*, 117 YALE L.J. 1180 (2008).

202. Code of Judicial Procedure, *supra* note 24, ch. 25, § 1(3). *See also* Criminal Procedure Act, *supra* note 36, ch. 3, § 4 (barring appeal of rulings to separate or join civil claims and criminal charges in single trial); *id.* ch. 4, §§ 8-9 (non-appealability of ruling transferring case from one trial court to another).

203. *See generally* HEIKKI PIHLAJAMÄKI, EVIDENCE, CRIME AND THE LEGAL PROFESSION: THE EMERGENCE OF FREE EVALUATION OF EVIDENCE IN THE FINNISH NINETEENTH CENTURY CRIMINAL PROCEDURE (1997). In adhering to the free evaluation of evidence, Finland's legal system closely resembles Sweden's. Ortwein, *supra* note 127, at 432.

204. *See, e.g.,* RHO 5:2001 (appeal challenging bank robbery conviction on basis of quality of evidence presented).

205. *See* KKO 2007:58 (holding that fact that evidence has been obtained by illegal means does not necessarily mean that it is inadmissible; however, evidence which has been obtained in serious violation of the law may be excluded on a case-by-case basis); KouHO 2004:5 (Sept. 23, 2004) (discussing admissibility of unlawfully obtained information; holding that court may on a case-by-case basis

and pre-trial proceedings typically do not involve litigation about the means by which evidence has been discovered. Thus, Finnish appeals likewise rarely focus on the means by which the police have discovered evidence.

A second reason for the relative absence of procedural complaints as the bases for challenges to Finnish convictions lies in the fact that, in Finland, post-trial judicial review affords an opportunity to redo whatever part of the trial seemed to a litigant to have been incorrectly handled.[206] That being the case, a defendant dissatisfied with the trial court's treatment of some procedural issue can, on appeal, seek in the appellate court a reconsideration of that treatment in the context of a broader reconsideration of the case.[207]

Finnish post-trial judicial review sometimes does involve an examination of trial procedures. Some kinds of procedural or structural errors affecting the trial must be appealable because their nature makes the error not subject to correction in a *de novo* appeal. Classic examples of such errors would include the right to a speedy trial,[208] the right not to be tried twice for the same offense,[209] the denial of an impartial judge,[210] and an error in extraditing a defendant.[211]

In some cases, Finnish post-trial reviewing courts hear claims of procedural error of a sort that could be corrected in a *de novo* appeal.[212] Such claims can arise in the context of a review of the factual justice of the conviction. For example, in KKO 1995:66, the Finish Supreme Court heard the appeal in a case of a father who allegedly, while a passenger in a car driven by his son, grabbed the steering wheel causing an accident. At the father's trial, relying on a testimonial privilege available to close family members of an accused defendant, the son did not testify. The prosecution introduced a statement the son had made during the pre-trial investigation. Because that statement formed the basis for the conviction, the Supreme Court confronted the question of whether its use violated the testimonial privilege. Finding that it did, the Supreme Court held that the statement could not be used, and thus acquitted the defendant.[213]

Moreover, Finland recognizes certain kinds of procedural errors as sufficiently significant that they can be raised even in the extraordinary review phase.[214] Thus,

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consider the admissibility of such evidence, taking into account the values and goals protected by declaring the evidence inadmissible, the requirements of a fair trial, the significance of the evidence as well as the pursuit of finding out the substantive truth).

206. *See, e.g.*, KKO 1995:44 (noting that parties have opportunity in court of appeals to provide additional evidence not provided in the trial court).

207. *See, e.g.*, KKO 1999:123 (noting that appeal of procedural ruling closing the case is not possible, but that consideration of a claim of error in such a ruling could be considered to extent it bears on appeal of trial court's ultimate decision in case).

208. *See, e.g.*, HelHO 2006:5 (adjudicating claim that trial proceedings were excessively long); KKO 2006:33 (same).

209. *See, e.g.*, KKO 2010:82.

210. *See, e.g.*, KKO 2000:21.

211. Code of Judicial Procedure, *supra* note 24, ch. 31, § 9b.

212. *See, e.g.*, KKO 1995:5 (ordering new trial where trial court accepted as evidence statements made during pre-trial investigation, without allowing defendant to pose questions on subject during trial); I-SHO 1993:8 (ordering new trial for violation of defendant's right to call certain witness at trial).

213. *See also* KKO 2000:71 (involving similar procedural error, and similarly resulting in acquittal on appeal); KKO 2008:68 (same).

214. Code of Judicial Procedure, *supra* note 24, ch. 31, § 1.

appeals have addressed claims of procedural error where the procedure in question implicates a human rights principle identified in the ECHR.[215] For example, citing an ECHR provision, a Finnish appellate court held that a trial court erred in denying the defendant's right to examine a co-perpetrator whose statement was used in support of the defendant's conviction.[216] Finally, the possibility of post-trial judicial review of procedural rulings exists in Finland, as it must, as a means for deciding, on a consistent basis, important disputes about the interpretation of those rules.[217]

2. Claims of Factual Injustice in Conviction

Challenges to Finnish convictions tend to focus on questions relating to guilt or innocence. In some cases, such appeals contest, in whole or in part, the trial court's resolution of the factual truth of the charge.[218] In other cases, such appeals raise a legal question about whether the criminal law prohibits the conduct proven to have been committed.[219]

When such an appeal involves a dispute about the facts of the case, if a Finnish appellant believes that the trial court improperly under- or over-valued certain evidence, the appellant can present that evidence again in the appellate court.[220] The prisoner may also present in the appeals court evidence not presented at trial, without regard to whether the evidence could have been presented at the trial.[221] If a Finnish prisoner discovers new evidence after the direct appeal bearing on the justice of the conviction, the prisoner may initiate the extraordinary review process in the intermediate court of appeals and present the evidence there.[222] No deadline focused on the passage of time exists since the trial limits that right.[223] In deciding whether new evidence presented after the conclusion of the ordinary appeal justifies vacating the conviction, the Finnish appellate court determines whether the new evidence "would probably have led to the acquittal of the defendant or to the application of less severe penal provisions to the offence, or there are compelling

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215. *See, e.g.*, KKO 2009:9 (denial of right to impartial judge); KKO 2007:36 (resolving in extraordinary appeal claim of procedural error, and remanding for new trial); KKO 2004:24 (on evidentiary significance of defendant's choice to remain silent); KKO 1993:19 (trial without counsel and without adequate time to prepare and present defense); I-SHO 1993:8 (denial of right to present defense witnesses); VaaHO 1993:5 (denial of right to be present in court during testimony of prosecution witnesses).

216. VaaHO 1992:1.

217. *See, e.g.*, KKO 2003:12 (defendant convicted in trial court of insurance fraud theft; on appeal, prosecutor brings charge of aggravated theft, and appellate court convicts thereon; in Supreme Court, defendant argues that prosecutor could not bring new charge for first time in appellate court; Supreme Court holds that, under particular circumstances here, bringing of new charge in appellate court did not violate defendant's right to fair trial).

218. Code of Judicial Procedure, *supra* note 24, ch. 25, § 1 (barring appeal of district court procedural ruling, except in certain circumstances); *id.* § 7 (can restrict grounds for appeal to part of judgment).

219. *See, e.g.*, KKO 2000:45 (relating to the elements of the crime of slander).

220. Code of Judicial Procedure, *supra* note 24, ch. 25, § 15; *see also, e.g.*, KKO 2000:62 (finding error in appellate court's refusal to hold evidentiary hearing).

221. Code of Judicial Procedure, *supra* note 24, ch. 25, § 17 (civil cases); *Id.* ch. 26, §§ 13-15.

222. *Id.* ch. 31.

223. *Id.* ch. 31, §§ 8-14.

reasons . . . to reconsider the question of whether or not the defendant had committed the offence for which he or she has been convicted."[224]

No discussion of the differences between Finnish and American post-trial judicial review of a conviction would be complete without noting that Finland, unlike the United States,[225] affords the prosecution the opportunity to seek post-trial judicial review of acquittals.[226] In some respects, the prosecution's right to seek review is narrower than the defendant's. For example, the prosecution confronts deadlines not applicable to defendants when the prosecution seeks to invoke the extraordinary review powers of Finnish courts to the detriment of the defendant.[227]

In the American system, an appeal raising a legal question about whether the criminal law prohibits the proven conduct can of course be raised, and because such an appeal poses a legal question, the reviewing court will decide the case without deference to the lower court's judgment on the question of law.[228] To that extent, no significant distinction between the American and Finnish systems of post-trial judicial review exists. A distinction does exist, however, between the systems in regards to their treatment of claims challenging the factual basis of a conviction.

In the American system, in only two circumstances does a claim of innocence become the direct focus of inquiry in post-trial judicial review. The first occurs when a court confronts a claim that the prosecution, at trial, introduced insufficient evidence to support the conviction.[229] Because the court in the context of sufficiency claims considers only the evidence presented at trial, that post-trial review operates on a record that is closed at the end of the trial. The second occurs when a court receives new evidence bearing on the issue of the prisoner's guilt, typically either at a motion for a new trial or at a post-conviction evidentiary hearing. Both types of claims operate under constraints that make them less than a *de novo* reconsideration of the question of the prisoner's guilt.

American courts distinguish between two types of closed-record appellate claims of innocence.[230] A claim that the prosecution introduced insufficient evidence refers to the "legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the

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224. *Id.* ch. 31, § 8(3).

225. For a discussion of the prosecution's right of appeal in American criminal cases, see Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. CIN. L. REV. 1 (2008).

226. *See* Code of Judicial Procedure, *supra* note 24, ch. 25, § 19 (referring to public prosecutor's right of appeal).

227. *Compare id.* ch. 31, §§ 8 & 8a, *with id.* § 9.

228. Such legal questions can arise in various ways, such as, for example, whether the legislature can constitutionally prohibit the conduct, *see, e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (finding unconstitutional the criminal prohibition of consensual homosexual conduct), whether the legislature has enacted a constitutionally-adequate statute for prohibiting certain conduct, *see, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999) (addressing claim that criminal statute is unconstitutionally vague), or simply whether the terms of the statute were intended by the legislature to cover the defendant's conduct.

229. *E.g.*, Jackson v. Virginia, 443 U.S. 307 (1979). *See also* Oldfather, *supra* note 49, at 471-79 (discussing appellate review of claims of insufficient evidence).

230. *See, e.g.*, State v. Spinale, 937 A.2d 938, 944-46 (N. H. 2007) (explaining the distinction).

jury's verdict as a matter of law."[231] The prosecution's proof may be legally insufficient either if there is no evidence at all tending to prove an essential element, or if the evidence that is presented on some essential element is such "that it cannot be said reasonably that that the intended inference" of guilt "may logically be drawn" from that evidence.[232]

This form of closed-record review involves not only the constraint that it may take no account of evidence not presented at trial, but also that the reviewing court must, in reviewing the prisoner's claim of insufficient evidence, "uphold the jury's verdict unless no rational trier of fact could find guilt beyond a reasonable doubt, considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State."[233] In other words, to prevail on a claim of insufficient evidence, a defendant must show that the verdict was irrational. And in considering that question, the court must resolve any conflict in the evidence in favor of the prosecution.

A prisoner can also present a second kind of closed-record review challenge to a conviction, in addition to the sufficiency challenge. Thus, "[a]lthough a verdict may be supported by sufficient evidence, a trial court may nevertheless conclude that the judgment is against the weight of the evidence."[234] Such a claim focuses on the persuasiveness of the evidence, rather than on its capacity to support a logical inference of guilt. Thus, whereas an inquiry into sufficiency investigates whether the prosecution has met its burden of production at trial, an inquiry into the weight of the evidence investigates whether the prosecution has met its burden of persuasion.[235]

But such "weight" claims also operate under significant constraints in the American system. A jury verdict must be unreasonable before the trial court can set it aside on the basis of the weight of the evidence.[236] Moreover, a prisoner who pursues a "weight" claim in an appellate court after losing it in the trial court does not receive the *de novo* review applicable to claims of legal error. Rather, the appellate court will defer to the trial court's judgment denying the motion "unless it was made without evidence or constituted an unsustainable exercise of discretion."[237] However, if the prisoner prevails in the trial court on a "weight" claim and the prosecution appeals, the appellate court exercises a searching review. "This more stringent standard of review is to ensure that proper deference is given to a jury's factual determinations."[238]

Such closed-record claims can also be pursued in federal habeas on the theory that a conviction unsupported by sufficient proof violates the United States Constitution's guarantee of due process of law.[239] The decision in *Jackson v.*

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231. *Id.* at 944.
232. *Id.* at 945.
233. *Id.*
234. *Id.* at 946.
235. *Id. See also* Findley, *supra* note 55, at 618.
236. *Spinale*, 937 A.2d at 947.
237. *Id*.
238. *Id*.
239. *See* Jackson v. Virginia, 443 U.S. 307 (1979) (so holding); Tibbs v. Florida, 457 U.S. 31 (1982) (recognizing that "weight" claims also can raise federal constitutional issues).

Virginia created some controversy as to the nature of the review of the evidence the Federal Constitution requires of appellate courts.[240] In the end, most courts and commentators have concluded that the requisite review is "highly deferential."[241] A measure of the significance of that deference appears in the consensus view that "appellate courts almost never reverse convictions on sufficiency grounds."[242] Regrettably, the record of success on such claims, even when brought by defendants subsequently proven to be innocent, is poor.[243]

While the Supreme Court has, to the extent described above, recognized that the Constitution is violated when a court convicts a defendant on insufficient evidence, the Court has yet to recognize a claim that the Constitution is violated when a court convicts an innocent defendant. In that distinction, one sees revealed the tendency of American post-trial judicial review to examine the trial, rather than the underlying event. The Court has come the closest to recognizing the constitutional status of a claim of innocence in capital cases posing the question whether it would violate the Constitution to execute an innocent person.[244] Even that claim has only tenuous status, having been described by the Court as "hypothetical."[245] No prisoner who has brought such a claim has ever succeeded, even including some defendants subsequently shown by DNA evidence to be innocent.[246] In Troy Davis's case, however, the Court behaved as if such a claim exists in remanding for an evidentiary hearing on Davis's claim of innocence.[247]

Although a claim of innocence brought on the basis of new evidence does not necessarily have constitutional status, most, if not all, states empower their courts by rule or statute to hear such claims. The usual vehicle for such open-record claims is the motion for a new trial. Such motions have traditionally operated under significant limitations.[248]

Many jurisdictions require that the evidence be newly discovered after trial, and not reasonably available or discoverable at the time of trial.[249] Many

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240. Oldfather, *supra* note 49, at 471-79.

241. *Id*. at 478.

242. *Id*.

243. Findley, *supra* note 55, at 602-603.

244. *In re* Davis, 130 S. Ct. 1 (2009); House v. Bell, 547 U.S. 518 (2006); Herrera v. Collins, 506 U.S. 390 (1993). For a discussion of the nuances of those decisions and for an argument that the Court should recognize that the Constitution is violated by the conviction of an innocent person, see Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008). In so arguing, Professor Garrett follows the lead set by Judge Friendly in an influential 1970 article. *See* Henry J. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970). For a discussion of whether the Court may soon recognize such a claim, see Kathleen Callahan, Note, *In Limbo:* In re Davis *and the Future of* Herrera *Innocence Claims in Federal Habeas*, 53 ARIZ. L. REV. 629 (2011).

245. *House*, 547 U.S. at 555. *See also* Dist. Attorney's Office v. Osborne, 557 U.S. 52 (2009) (to same effect).

246. Garrett, *supra* note 244, at 1691.

247. *In re Davis*, 130 S. Ct. 1.

248. *See* Garrett, *supra* note 244, at 1670-73. (describing traditional doctrines governing new evidence claims of innocence). *See also generally* Albert D. Brault & John A. Lynch, Jr., *The Motion for New Trial and Its Constitutional Tensions*, 28 U. BALT. L. REV. 1 (1998); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005) (discussing state motion for new trial restrictions).

249. *See, e.g.*, State v. Cossette, 856 A.2d 732, 737 (N.H. 2004); FLA. R. CRIM. P. 3.850(b)(1); FED. R. CRIM. P. 33.

jurisdictions enforce a time limit that prevents a prisoner from presenting even newly discovered evidence if too much time has passed since trial.[250] The length of those limitations varies, ranging "from a mere twenty-one days to three years."[251] Also, while some jurisdictions grant judges some discretion with respect to the standard by which to evaluate a claim of innocence, others impose a high burden of persuasion on the defendant.[252] Moreover, motions for a new trial are typically filed in the trial court, and when later reviewed by an appellate court, that court's appellate review of the significance of the new evidence is constrained by deference owed to the trial court's judgment.[253] Finally, many jurisdictions regard a motion for a new trial as part of the post-conviction review process, rather than as part of direct appeal, and thus offer the opportunity to the prisoner several years after the trial, and after the constitutional right to the appointment of counsel has expired.[254] For all these reasons, the open-record review implicit in a motion for a new trial does not afford American appellate courts anything close to a *de novo* consideration of the verdict on the basis of fuller information.

A century ago, cases involving miscarriages of justice prompted the emergence in English law, and perhaps in American law also, of a broader form of criminal appeal than had been available via the writ of error.[255] So also in recent years, a new crisis has undermined confidence in the capacity of the criminal adjudication system to distinguish the guilty from the innocent. As a result of DNA testing, some 289 wrongly-convicted prisoners have been exonerated in the United States.[256]

In many of the DNA-exoneration cases, the process of post-conviction judicial review ran its course without vacating the erroneous conviction, and the system of post-trial judicial review had no remaining mechanism available for examining a prisoner's claim to be able to prove innocence through DNA evidence.[257] Some scholars have argued that the American system of post-trial judicial review must, for that reason, be accounted largely a failure, at least by the criterion of whether the review corrects the erroneous convictions of innocent persons.[258] Studies of the DNA-exoneration cases show that persons subsequently proven innocent fared no

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250. *See* Medwed, *supra* note 248, at 666-86. For a discussion of the issues implicated by time limits on motions for a new trial in this context, see Penny White, *Newly Available, Not Newly Discovered*, 2 J. APP. PRAC. & PROCESS 7 (2000).

251. Garrett, *supra* note 244, at 1671; *see also* Herrera v. Collins, 506 U.S. 390, 410-11 (1993) (listing state statutes of limitation, with reference to length).

252. Garrett, *supra* note 244, at 1671.

253. *E.g.*, *Cossette*, 856 A.2d at 737.

254. Findley, *supra* note 55, at 605. Professor Findley notes that, in this regard, Wisconsin constitutes a notable exception, in treating motions for a new trial involving new evidence as part of the direct appeal. *Id*. at 610-13.

255. *See* discussion *supra* Part II.B.1.

256. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/ Content/351.php (last visited January 30, 2012).

257. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (comprehensively analyzing the trial and post-trial reviews of the first 200 prisoners proven innocent by DNA evidence); Garrett, *supra* note 244 (addressing similar issues); David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1028-29 (2010) (discussing limitations and flaws of American post-conviction review as a vehicle for vindication of claims of innocence).

258. *See* Findley, *supra* note 55, at 637; Garrett, *supra* note 257, at 55, 94.

better in the appellate process than do appellants generally.[259] Absent some reform or supplementation of post-trial judicial review, it falls to the possibly uncertain hands of an executive authority, either in the person of a prosecutor who will drop the charges or a parole board that pardons or otherwise releases the prisoner, to end the unjust incarceration of the innocent.[260]

The failure of the prior trials and appeals of the DNA-exonerated prisoners to vindicate their innocence has prompted calls for reform of American post-trial judicial review.[261] Some scholars argue that appellate courts should henceforth review trial court findings of fact with much less deference.[262] A reform of that sort has arrived in English appellate courts with the establishment of their power to review the facts and vacate a conviction deemed to be factually "unsafe."[263] In support of greater appellate scrutiny of jury fact-finding, it has been noted that "[e]mpirical research reveals that appellate courts in the United States uphold sufficiency-of-the-evidence challenges in up to half of all civil appeals—a rate that far exceeds such holdings in criminal cases."[264] The capacity for intensive appellate court review of the facts thus exists; only the will to apply it in criminal cases is presently lacking.

A second, and perhaps narrower, response to the DNA-exoneration crisis has involved the creation of a new form of judicial review, usually focused specifically on DNA evidence.[265] In 1999, only two states, New York and Illinois, had such statutes.[266] Since then, such statutes have spread throughout the country, to the point that almost all states now have such a statute.[267] Consistent with the American predilection for constraining post-trial review of jury factual findings, those statutes have restrictions that limit their availability and effectiveness as vehicles for the reconsideration of guilt in the face of a claim of provable

259. Findley, *supra* note 55, at 593-601; Garrett, *supra* note 257, at 98-104.

260. Garrett, *supra* note 244, at 1672-73 (noting that in 20% of the cases involving the first 200 prisoners proven innocent by DNA evidence, relief ultimately came from a Governor rather than a court); Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771 (2010) (discussing role of prosecutor in context of post-conviction claims of innocence); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) (same); Wolitz, *supra* note 257, at 1030 (noting some hazards associated with reliance on executive review).

261. Oldfather, *supra* note 49, at 481; Findley, *supra* note 55, at 608.

262. Oldfather, *supra* note 49; Findley, *supra* note 55, at 631-36.

263. David J. Feldman, *England and Wales*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 51, at 193-94; D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004).

264. Findley, *supra* note 55, at 633.

265. *See* WILKES, *supra* note 183, at 17-23 (noting that 47 states and the District of Columbia now have such statutes); Garrett, *supra* note 244, at 1719 (in appendix, cataloguing state post-conviction DNA testing statutes). *See also* Dwight Aarons, *Adjudicating Claims of Innocence for the Capitally Condemned in Tennessee: Embracing a Truth Forum*, 76 TENN. L. REV. 511 (2009) (recommending review commission); Wolitz, *supra* note 257 (despairing of post-trial judicial review, and recommending a commission form of review).

266. *See* Garrett, *supra* note 244, at 1673 (summary of types of restrictions).

267. *Id.* *See also* Callahan, *supra* note 244, at 632 (recent listing of such statutes).

innocence.[268] The range of prevalent restrictions includes a threshold showing of materiality that is often strictly construed,[269] a limitation to DNA testing to the exclusion of other kinds of newly discovered evidence,[270] limitations to prisoners convicted of certain serious crimes,[271] a due diligence obligation with regard to the effort to obtain testing, and a bar on testing where defendants had pled guilty,[272] among other restrictions.[273] The United States Supreme Court has held that there is no constitutional right to post-conviction access to prosecution evidence for the purpose of DNA testing.[274]

In the post-trial judicial review of claims challenging the factual basis for the conviction, American courts are constrained by filing deadlines and obligations of deference to the jury and to the trial court. Those rules limit the extent to which a court, engaged in the task of post-trial judicial review of a conviction, can vacate it on the ground of doubts about the prisoner's guilt. As a result of such constraints and restrictions, American "courts consistently have adopted more favorable standards of review for *non*-guilt-related claims than for those claims most likely to be tied to guilt and innocence."[275] By contrast, Finnish courts, engaged in the process of post-trial judicial review of a criminal conviction, do not operate under so many constraints with respect to their consideration of claims of factual innocence.

3. Claims of Factual Injustice Implicit in Procedural Claims

In Finland, because substantive grounds for challenging a conviction do not implicate any principle of deference to the trial court, prisoners have no reason to develop and present procedural claims that conceal within them, or otherwise implicitly involve, a substantive challenge to the conviction. In the United States, on the other hand, direct substantive challenges to convictions are disfavored and constrained because they are perceived as inviting the reviewing court to intrude on the province of the jury. Consequently, prisoners have a reason to develop and present formally procedural claims that involve an inquiry into the substantive or factual accuracy of the conviction.

Indeed, one need not necessarily regard such claims as subterfuges. Procedural claims and substantive claims do not exist in separate universes.[276] If doubts truly exist about a convicted prisoner's guilt, in a well-designed system of criminal adjudication, one might expect, and would hope, to find some procedural

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268. Garrett, *supra* note 244, at 1675-84.

269. *Id.* at 1676-77.

270. *Id.* at 1679.

271. *Id.* at 1680.

272. *Id.* Of the first 200 prisoners exonerated by DNA evidence, nine had pled guilty. *See* Garrett, *supra* note 257, at 74.

273. Dist. Attorney's Office v. Osborne, 557 U.S. 52, 63 (2009).

274. *Id.* at 72.

275. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 61-62 (1997). *See also* Findley, *supra* note 55 (discussing extent to which American appellate process involves inquiry into claims of innocence).

276. Other than Fourth Amendment claims, which do exist in a universe separate from substantive claims about guilt, insofar as Fourth Amendment claims involve the suppression of reliable evidence of guilt.

or structural flaw in a trial that produced such a doubtful conviction. By regulating the quality of the trial, therefore, the American appeal indirectly aims to assure the accuracy of the trial's verdict.[277] A procedurally and structurally flawless trial that produces an erroneous or doubtful verdict should be almost, if not entirely, a contradiction in terms. As noted above, though, recent American experience seems to belie that hope, insofar as persons subsequently proven to be innocent fare no better in their appeals than do the class of appellants in general.

It is perhaps, therefore, not surprising that the American system of post-trial judicial review has developed procedural or structural claims of error that amount almost to a direct inquiry into the prisoner's guilt. Three types of such claims exist. First, there are claims that the trial court erred in an evidentiary ruling, either by admitting prosecution evidence it should have excluded, or by excluding defense evidence it should have admitted. Second, there are claims that the defense lawyer rendered ineffective assistance of counsel.[278] Third, there are claims that the prosecution withheld exculpatory evidence from the defense.[279]

All three types of claims account for the trial's erroneous outcome by reference to a defect in the information presented to the fact-finder. That defect can consist either in the jury hearing and considering information it should not have had or in withholding from the jury some information it should have had. Considered from that point of view, the three claims differ only in their attribution of blame. The first blames the trial judge for an improper ruling about the admission of an important item of evidence. The second blames the defense lawyer for failing to fulfill the responsibility of zealous representation. The third blames the State, usually the prosecutor or the police, for concealing material and exculpatory information.

The three claims together likely amount to an American prisoner's best opportunity for post-trial judicial review of the question of factual guilt. However, even taken together, the three claims do not amount to a *de novo* review of the question of guilt. One can readily imagine circumstances in which the parties are justifiably ignorant of important evidence at the time of trial. In such cases, neither the prosecutor nor defense counsel can be faulted for failing to use or disclose that evidence, and if neither party proffers the evidence, the trial court will have made no ruling, erroneous or otherwise, on its admissibility.

For example, techniques of scientific investigation may come into existence after trial that, when applied to evidence in the case, yield significantly new information. The Troy Davis case arguably involves another example of such late discovered evidence, in the eyewitnesses who professed certain confidence in their identifications of Davis as the perpetrator at the time of trial, but afterwards disclose doubts.[280] Otherwise, though, one or more of the three claims will provide the means for challenging a conviction, as the newly discovered evidence on which the defense relies on appeal will involve matters either known to the prosecution, or

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277. *See, e.g.*, Carrington, *supra* note 170, at 471-72 (offering such a statement of the purpose of the American criminal appeal).

278. The lead case for such claims is *Strickland v. Washington*, 466 U.S. 668 (1984).

279. A foundational case for such claims is *Brady v. Maryland*, 373 U.S. 83 (1963).

280. For a discussion of the *Davis* case, see Joshua M. Lott, *The End of Innocence: Federal Habeas Corpus Law After* In Re Davis, 27 GA. ST. U. L. REV. 443 (2011).

reasonably knowable by the defense lawyer, or known to both and proffered, at the time of trial.

Consistent with their function as vehicles for linking a procedural error with an erroneous outcome, all three claims require the prisoner to show, on appeal, that the error "prejudiced" the defense. Thus, to prevail on a claim of ineffective assistance of counsel, in addition to showing that the lawyer performed deficiently, the prisoner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[281] An essentially identical standard applies to the review of claims that the State withheld exculpatory evidence.[282] When adjudicating a claim of trial court error in the admission or exclusion of evidence, reviewing courts similarly consider whether the ruling "prejudiced" the defense.[283] The claims thus share in common a standard of review. Although phrased in terms that do not require the defendant to prove innocence to prevail, the standard of review does not amount, in theory or in practice, to a *de novo* reconsideration of guilt. Rather, as the poor record of such claims when brought by subsequently-proven prisoners shows, "such procedural claims have not served well the goal of protecting innocent defendants from wrongful convictions."[284]

The claims share another similarity. Although, as noted above, a showing of doubt about the prisoner's guilt is necessary to the success of the claim, it is not sufficient. In the case of a claim of trial court error in an evidentiary ruling, the court's basis for the ruling must have been invalid. In the case of a claim of ineffective assistance of counsel, the prisoner will not prevail merely by showing that defense counsel did or failed to do some action that prejudiced the defense; the prisoner must further show that the judgment that motivated counsel's decision was deficient.[285] In the case of a claim that the prosecution withheld material and exculpatory evidence, the prisoner must show not only that the evidence was material and exculpatory, but also that the State had the information at the time of trial but did not disclose it.[286]

Claims challenging the competency of defense counsel, or alleging the withholding by the State of exculpatory evidence, are almost, if not entirely, unknown to Finnish post-trial judicial review.[287] Like American law, Finnish law recognizes a right to counsel that encompasses, for indigent criminal defendants, a right to the appointment of counsel.[288] Several factors tend to diminish the frequency of claims made by Finnish defendants, relative to American defendants, that their lawyers rendered ineffective assistance of counsel.

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281. *Strickland*, 466 U.S. at 694.

282. Kyles v. Whitley, 514 U.S. 419, 434 (1995).

283. *See, e.g.*, State v. Villeneuve, 999 A.2d 284, 287 (N.H. 2010).

284. Findley, *supra* note 55, at 601.

285. *Strickland*, 466 U.S. at 688.

286. Brady v. Maryland, 373 U.S. 83, 87 (1963).

287. The problem of incompetent attorneys, of course, is recognized by Finnish law. *See* Code of Judicial Procedure, *supra* note 24, ch. 15, §§ 10a, 13. The problem is addressed, though, by sanctions directed at the attorney. The system of post-trial judicial review affords the convicted defendant an opportunity for reconsideration of the question of guilt.

288. Criminal Procedure Act, *supra* note 36, ch. 2.

First, unlike American criminal defendants, Finnish criminal defendants have a right to choose between the appointment of a legal services attorney and a private attorney.[289] The fact that Finnish defendants may choose their attorneys likely diminishes the chance that, after trial, the Finnish defendant will feel dissatisfied with the attorney's performance. Second, Finnish courts tend to impose imprisonment much less often and for shorter periods than their American counterparts. Finland has one of the world's lowest rates of incarceration per capita.[290] A defendant not subjected to the experience of incarceration is less likely than one who is to pursue an appeal to the extent of alleging the defense lawyer ineffective. Finally, and perhaps most importantly, the qualities of the Finnish appeal tend to reduce the occasion for claims of ineffective assistance. As already noted, the appeal offers convicted defendants the opportunity to present new evidence. Thus, a defendant dissatisfied by a lawyer's performance at trial in some respect can remedy it on appeal by presenting the case without the alleged defect.

Finnish law also recognizes the possibility of claims alleging the production of false evidence at trial or the withholding by a witness of significant exculpatory evidence.[291] It does not appear common, though, that the police or a prosecutor would withhold such evidence from the defense. Finnish law establishes essentially an open-file policy, giving both prosecution and defense equal and full access to the police investigative file.[292]

4. Conclusions

These considerations support some conclusions about American and Finnish regulation of the arguments prisoners may make during the post-trial judicial review of the conviction. First, in the United States for the most part, post-trial judicial review of a conviction involves the adjudication of claims alleging error in the procedural or structural management of the trial, rather than in the trial's outcome itself. In that sense, one can say that, in the American system, the trial explores the issue of the defendant's guilt; the post-trial judicial review explores the issue of the fairness of the trial. Post-trial review does not repeat the trial court's inquiry into the question of whether the defendant is in fact guilty of the crime charged. In Finland, the opposite conclusion holds. For the most part, post-trial judicial review does not focus on the trial, but rather on the underlying question of the prisoner's guilt.

Second, in both systems, exceptions to each country's primary orientation exist, as neither system has sustained a purely procedurally or purely factually oriented system of post-trial judicial review. In the United States, prisoners can challenge the finding of guilt, but such claims are constrained by deadlines and by deference to the trial court's fact-finding prerogative. Claims combining a

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289. *See* KKO 1996:48 (recognizing right to defense through chosen legal counsel, even where chosen counsel already represented another suspect in same case).

290. *See Finland Home to Fewer Prisoners*, YLE (Nov. 29, 2010, 7:53PM), http://www.yle.fi/uutiset/news/2010/11/finland_home_to_few_prisoners_2180603.html (noting that Finland has second lowest number of prisoners per capita in European Union).

291. Code of Judicial Procedure, *supra* note 24, ch. 31, § 8.

292. Criminal Investigations Act, *supra* note 76, § 11.

procedural and substantive focus afford the reviewing court a greater freedom with regard to assessing the likelihood of the defendant's guilt than do claims focused exclusively on the substantive justice of the conviction. The recent development of DNA-specific post-trial judicial review constitutes a narrow form of substantive review, but within its scope, it affords reviewing courts authority to inquire into a prisoner's claim of innocence. In Finland, prisoners can make certain kinds of claims about trial procedures not connected directly with the adjudication of guilt, particularly if the claim raises a matter covered by the ECHR, or if the claim involves a matter not susceptible to correction in a *de novo* appeal.

B. Waiver of Claims of Error

Both Finland and the United States have rules that enable courts engaged in post-trial judicial review of convictions to reject a challenge to a conviction regardless of the merits of the prisoner's claims. In the American system's harmless error doctrine, we have already seen one mechanism by which a reviewing court can avoid deciding a claim challenging a ruling relating to trial structure or procedure. Harmless error, though, constitutes a means for avoiding a procedural challenge to a conviction by reference to the conviction's substantive justice. In this section, the article considers mechanisms by which a post-trial reviewing court can avoid a procedural or substantive challenge to a conviction by reference to some other procedural value. For example, in both countries, a prisoner's failure to give timely notice of the intent to appeal a conviction can result in the rejection of an appeal without regard to the merits of the prisoner's challenges.

In Finland, filing deadlines constitute essentially the only mechanism available to reviewing courts to avoid deciding the merits of a prisoner's claim. Thus, a prisoner can lose the right to appeal by an untimely declaration of the intent to appeal.[293] A prisoner can also lose the right to appeal by failing to appear at the appeal hearing.[294] However, Finnish courts do not necessarily enforce those rules rigidly. A defendant who can show an excuse for failing to meet the filing deadlines can obtain merits review of the case.[295]

American courts, on the other hand, tend to enforce filing deadlines fairly rigidly. In *Bowles v. Russell*,[296] for example, a federal judge informed a habeas petitioner, in the presence of the State's counsel, that the petitioner had seventeen days, until February 27, to file a notice of appeal, when in fact the law permitted only fourteen days.[297] Bowles filed his notice on February 26. The appeals court then found Bowles's notice untimely, and dismissed his appeal. The Supreme Court affirmed that ruling.[298] More recently, the Supreme Court has marked an outer limit to the strictness of application of filing deadlines, at least in cases in

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293. Code of Judicial Procedure, *supra* note 24, ch. 25, §§ 9, 12.

294. *Id.* ch. 26, §§ 21-22. *See also, e.g.*, KKO 2004:94 (addressing whether defendant's failure to appear at appeal hearing justified dismissal of appeal).

295. Code of Judicial Procedure, *supra* note 24, ch. 31, §§ 17-18.

296. 551 U.S. 205 (2007).

297. *Id.* at 207.

298. *Id.*

which the petitioner's counsel abandons the petitioner's case without so informing the petitioner, and for that reason a deadline is missed.[299]

Finland allows the re-opening of cases in the extraordinary review process, even after a significant period of time has passed since the trial and initial appeal. For example, in one case, two defendants convicted of theft had lost their case in the court of appeals in 1996.[300] After the passage of some years, and after Finnish law had been amended to strengthen the right of defendants to examine the witnesses against them, the defendants initiated an extraordinary appeal on the grounds that they had not been permitted to question certain prosecution witnesses. The Finnish Supreme Court agreed, annulled the conviction, and ordered the case to be retried in the district court. Beyond timing rules, Finland does not impose waiver rules that allow an appellate court to reject an appeal without regard to its merit.

The situation in the United States differs. At every phase of post-trial judicial review of a criminal conviction, waiver rules exist. In important respects, the idea of waiver of challenges is fundamental to the American system of criminal adjudication.

The availability and prevalence of plea bargaining is perhaps a central defining feature of the American system of criminal adjudication.[301] Certainly, far more cases are adjudicated by guilty plea in the United States than are adjudicated by trial.[302] By pleading guilty, a defendant waives the right to adversarial adjudication and waives many of the claims of innocence and of procedural or structural error that might otherwise form the basis of post-trial judicial review. Many courts hold that a defendant who pleads guilty can only seek post-plea judicial review of claims that allege some improper influence or other defect in the plea process.[303]

The possibility of instituting some limited version of plea bargaining is under consideration in Finland.[304] At present, though, while a defendant's willingness to confess guilt may certainly simplify the trial, it does not avoid the trial's necessity.[305] Finland does not now have any procedure, other than trial, by which a court can enter a criminal conviction.

Even for those American defendants who plead not guilty and stand trial, waiver rules constitute a pervasive limitation on each phase of post-trial judicial review. On direct appeal, a prisoner may not raise any claim not "preserved" in the

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299. Maples v. Thomas, 132 S. Ct. 912 (2012).

300. KKO 2007:36.

301. For a discussion of the role of plea bargaining, see Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753 (1998). For a discussion of the origins of plea bargaining in America, see George Fisher, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003).

302. *See* Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least-Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 33-34 (2007) (noting that more than 95% of American prosecutions resolve by plea bargains).

303. *See* Steven Schmidt, Note, *The Need for Review: Allowing Defendants to Appeal the Factual Basis of a Conviction After Pleading Guilty*, 95 MINN. L. REV. 284 (2010).

304. Jukka Loiva, *Plea Bargaining: The Solution to Problems of Evidence in Economic Offenses*, 2008 HELSINKI L. REV. 67 (2008), *available at* http://www.helsinkilawreview.fi/articles/2008-3.pdf (containing English abstract).

305. *Id*. ("the concept [of plea bargaining] is quite unknown to the Finnish legal system").

trial court.[306] That rule imposes on defendants an obligation to raise their factual and legal arguments in the first instance in the trial court. If a defendant has not so preserved the claim in the trial court, the defendant cannot make the argument in the appellate court.

In many states, appellate courts recognize a "plain error" exception to that rule of non-reviewability of unpreserved claims.[307] However, the significance of that plain error exception is limited by the fact that it permits the appellate court to grant relief to the appealing defendant only in rare circumstances. A typical formulation of the doctrine notes that the plain error rule "should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result."[308] As understood by the United States Supreme Court, the doctrine has four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings.[309] Thus, many claims that would have prevailed if the defendant had raised them in the trial court will not prevail on plain error review unless the error was unusually egregious and prejudicial.

Waiver rules continue to influence the claims available in state post-conviction proceedings. First, as a general matter, post-conviction courts will not review claims previously made and adjudicated during direct appeal.[310] In effect, by having previously raised the claim, the prisoner loses the right to raise it again in post-conviction proceedings. This limitation avoids the waste of time and effort perceived to be inherent in relitigating claims already decided.

Second, courts engaged in state post-conviction review often will decline to address claims that could have been, but were not, presented on direct appeal.[311] This rule creates an incentive on the part of the defendant to raise all available claims at the earliest possible opportunity, for fear of losing the right to raise a claim if not previously raised.

As a result of those two rules, state post-conviction review is reserved for claims that neither were, nor should have been, raised at trial or on direct appeal. To fit within that description, a claim must arise out of circumstances excusably unknown or otherwise unavailable to the defendant at the time of trial. In American criminal procedure, such claims tend to take one of three forms, the first two of which involve facts not available to the defendant before the conclusion of direct appeal, and the third of which involves rules of law not available to the defendant until the conclusion of direct appeal.

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306. *E.g.*, State v. King, 204 P.3d 585 (Kan. 2009) (discussing Kansas statute requiring contemporaneous objection at trial to preserve claim of error for appeal).

307. *E.g.*, Steven W. Becker, *To Review or Not to Review: The Plain Truth About Illinois' Plain Error Rule*, 37 LOY. U. CHI. L.J. 455 (2006); Morton Gitelman, *The Plain Error Rule in Arkansas: Plainly Time for a Change*, 53 ARK. L. REV. 205 (2000); Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922 (2006); Robert J. Labrum, *History and Application of the Plain Error Doctrine in Utah*, 2000 UTAH L. REV. 537 (2000).

308. State v. MacInnes, 867 A.2d 435, 439 (N.H. 2005).

309. Johnson v. United States, 520 U.S. 461, 466-67 (1997).

310. *See, e.g.*, ALA. R. CRIM. P. 32.2(a)(2), (4).

311. *See, e.g.*, ALA. R. CRIM. P. 32.2(a)(3), (5).

The most common factual claim reserved for post-conviction proceedings is the allegation of ineffective assistance of trial or of appellate counsel.[312] On occasion, claims of ineffective assistance arise out of state interference in the relationship between defense counsel and the defendant.[313] In those instances, no obstacle exists to the presentation of the claim at trial and on direct appeal, and the procedural bar restricting post-conviction review would apply. Most ineffective assistance claims, though, involve circumstances which reflect badly on defense counsel's preparation or performance.[314] In recognition of the fact that defense lawyers cannot be expected or required to allege or prove themselves to have performed incompetently, the law understands that a defendant has no obligation to raise that claim while represented by the allegedly ineffective lawyer.[315] Such claims get litigated in state post-conviction proceedings.

The second typical post-conviction claim arises under the due process guarantee associated with the decision in *Brady v. Maryland*.[316] Such claims arise when, after trial, the defense discovers that the prosecution possessed exculpatory information it did not disclose in time to be used at trial. Necessarily, if the defendant was faultlessly ignorant at trial about the facts underlying the claim, no reasonable objection can be made to the defendant's making such a claim for the first time in state post-conviction review.

The two claims described above do not necessarily exhaust the possibilities of post-conviction claims arising out of facts excusably unknown to the defendant at the time of trial. However, to fall within the safe space between the two procedural bars, any such claim must arise from facts the defendant neither knew, nor could reasonably be expected to know, at the time of the trial.

The other variety of post-conviction claim involves matters of law excusably unknown to the defense at the time of the trial. Here, only one situation fits that description: the circumstance in which the legislature has enacted, or a court has recognized, a rule of law that would benefit the defendant but was not acknowledged or enacted at the time of the defendant's trial. American law has

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312. *See* Frank B. Cross & James F. Spriggs, II, *The Most Important (and Best) Supreme Court Opinions and Justices*, 60 EMORY L.J. 407, 434 (2010) (listing *Strickland v. Washington* as the Supreme Court case most cited by federal circuit courts); Adam M. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 144 (2006) (identifying *Strickland* as the third-most-cited case by all courts (and as the most cited criminal case) and as the most cited case, bar none, by state courts). For a case discussing the rare circumstances under which an American court will consider a claim of ineffective assistance on direct appeal, on the basis of the trial record alone, see State v. Thompson, 20 A.3d 242 (N.H. 2011).

313. *E.g.*, Geders v. United States, 425 U.S. 80 (1976) (finding violation of right to counsel in trial court's order barring counsel from consulting with defendant during overnight recess in trial); Herring v. New York, 422 U.S. 853 (1975) (finding violation of right to counsel in trial court's ruling barring counsel from giving closing argument).

314. *See* Steinman, *supra* note 312.

315. *See* Christopher M. Johnson, *Not For Love or Money: Appointing a Public Defender to Litigate a Claim of Ineffective Assistance Involving Another Public Defender*, 78 MISS. L.J. 69 (2008) (discussing principles that preclude lawyer from alleging self ineffective).

316. 373 U.S. 83 (1963). *See also* Findley, *supra* note 55, at 600 ("ineffective assistance and *Brady* claims constitute the largest proportion of postconviction challenges to convictions").

developed principles to determine when such subsequent developments in the law should be applied retroactively in the case of a defendant.[317]

Finally, waiver rules also constrain the review of federal habeas courts. The "exhaustion" requirement obliges a state prisoner to present any federal law claim in state court before presenting it in federal court.[318] The doctrine of independent and adequate state law grounds obliges a federal court to reject an otherwise meritorious claim if the state court previously rejected it on a ground other than its merits, such as a failure to preserve it at trial or to comply with a post-trial filing deadline.[319] The statute of limitations applicable to the filing of federal habeas petitions obliges a federal court to reject otherwise meritorious claims if they were filed a day too late.[320] The restriction on the filing of a second federal habeas petition obliges a federal court to reject otherwise meritorious claims presented in such a petition if the claim was already presented in a prior federal petition.[321] Even new claims may not be presented in successive petitions except in narrow circumstances.[322]

Several considerations motivate the existence of that set of waiver rules. First, the rules serve at each stage of post-trial judicial review to privilege the prior stage. The rule requiring preservation at trial, when regularly applied by appellate courts on direct appeal, creates an incentive for defendants to present their claims at trial, at the cost of losing the opportunity to present them in the direct appeal, except under the unfavorable plain error standard. The post-conviction rule barring the litigation of claims that could have been, but were not, raised on direct appeal creates an incentive to raise the claim on direct appeal, at the cost of losing the opportunity to present it later. The exhaustion rule and the adequate and independent state law doctrine, applied in federal habeas, create incentives for litigants to raise claims in state court proceedings, at the cost of losing the opportunity to raise them in federal habeas. Finally, the special disadvantages associated with a second, or "successive," habeas petition creates an incentive for the prisoner to raise all federal claims in the first habeas petition.

Second, in addition to creating incentives to raise claims at the earliest opportunity, the waiver rules have the effect of protecting the trial verdict, by increasing the likelihood that it will be upheld. Throughout the process of post-trial judicial review, a reviewing court has at least three ways to reject a claim of error. First, the claim can be rejected on its merits because the trial court did not err. Second, the claim can be rejected because, although the trial court did err, that error was harmless in light of all the evidence of the prisoner's guilt. Third, the claim can be rejected, even though meritorious and harmful, if the prisoner waived the

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317. *See, e.g.*, Teague v. Lane, 489 U.S. 288 (1989).

318. Rose v. Lundy, 455 U.S. 509 (1982).

319. *See* discussion *supra* Part II.B.3. *See also* Kermit Roosevelt, III, *Light From Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888 (2003). Very recently, the United States Supreme Court set an outer limit to the severity of that rule, holding that the failure of lawyers, who have abandoned their client, to comply with a deadline will not be held against the client. Maples v. Thomas, 132 S. Ct. 912, 917 (2012).

320. *See* 28 U.S.C. § 2244(d) (2006) (establishing statute of limitations).

321. *Id*. § 2254(b)(1).

322. *See generally* HERTZ & LIEBMAN, *supra* note 108, at 1555-1653.

claim by failing to comply with some procedural requirement defining the claim's proper presentation. As a result of their tendency to protect the jury verdict, waiver rules can interfere with the capacity of courts engaged in post-trial judicial review of criminal convictions to correct errors. Scholars concerned that the American system is failing have accordingly suggested reform of waiver rules.[323]

Third, waiver rules tend to reduce the costs of post-trial judicial review. When the prosecution has more than one argument which, if successful, would defeat an appeal, a reviewing court need not assess all of the arguments. Rather, the court can rely on the one that most readily and simply justifies rejecting the appeal.

IV. CONCLUSION[324]

A prudent comparative legal analysis proceeds modestly and cautiously when the moment comes for drawing conclusions:

> The job of the comparatist is not simply to compare rules since these are nothing more than . . . the surface appearance of law. . . . [W]hat the comparatist must do is get below their surface in order to discover the cultural *mentalité* that these rules express. It is not the rule itself that should be the focus of comparison but what the rule signifies in terms of the political, social, economic and ideological context from which it has emerged.[325]

To understand the meaning of the differences between American and Finnish post-trial judicial review, then, one must look for the underlying policies that have produced those differences. In short, the task of the comparatist is to make the familiar strange, and thereby visible.

The effort begins by identifying general principles by which to measure variations between Finnish and American procedures. Any democracy's system of criminal procedure confronts the challenge of embodying and reconciling four fundamental goals. First, criminal procedure seeks to discover the truth about the particular events that led to the criminal charges. Other things being equal, a democracy's criminal procedure prefers a rule that best promotes the accuracy of that truth-seeking function. Second, criminal procedure aims to respect the rights and dignity of people involved in criminal cases. Third, systems of criminal adjudication operate in a competitive environment, in the sense that other social and governmental priorities compete for resources with the court system. As a consequence, considerations of efficiency, as measured in terms of the required expenditures of money and/or time, can prove important to the evaluation of any given rule of criminal procedure. Fourth, in democracies, public confidence in the criminal justice system matters. A criminal justice system should not only be fair and just: it should also appear to be fair and just.

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323. Findley, *supra* note 55, at 608 n.93 (citing articles to that effect).

324. A version of the first part of this conclusion was published initially in Christopher M. Johnson, *Comparative Criminal Procedure*, *in* TURUN YLIOPISTON OIKEUSTIETEELLINEN TIEDEKUNTA 50 VUOTTA 276-78 (2011).

325. Geoffrey Samuel, *Epistemology and Comparative Law: Contributions from the Sciences and Social Sciences, in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW 35, 60-61 (Mark Van Hoecke ed., 2004).

Within any system of criminal procedure, conflicts between the four goals can arise. Rare is the rule of criminal procedure that improves on any possible alternative rule on every criterion. A legal system's resolution of such conflicts can reveal something fundamental about that system's values, and a comparison of two legal systems' different choices can likewise prove revealing. One can describe a system's enacted rules as "just formalistic shadows of the policy considerations that underlie them."[326] Caution is called for, however, in interpreting differences in enacted rules as reflecting different policy considerations. Ideally, democratic societies choose their rules of procedure advisedly, aware of relevant alternative choices and of the implications of the options. In that ideal situation, the direct consequences of procedural rules are intended, or at least anticipated and understood, and the enacted rules reflect different value judgments.[327]

However, even in democracies, that ideal situation may not exist in fact. Because of the enduring influence of history and legal tradition, at any given time there may be no "necessary logical connection between legal rules, institutions and structures on the one hand, and the society in which they operate on the other."[328] In addition to tradition, a number of other obstacles can intervene between community values and procedural rules, such as would undermine the validity of the assumption that the consequences of the rules are intended and understood. For example, rules of criminal procedure may reflect the values not of the community as a whole, but only of the subset of the community that has won the power to enact procedural rules. With those caveats in mind, some tentative conclusions can be drawn on the basis of the observed similarities and differences between the Finnish and the American systems of post-trial judicial review of criminal convictions.

Let us first consider the provisions and compromises each system makes with respect to the goal of accuracy. Finland does not require courts engaged in post-trial review of convictions to employ deferential standards of review in the consideration of issues of fact. In the absence of such deference, the focus of Finnish post-trial review remains where it was in the trial: on the factual truth of the charge. The Finnish system does not regard lay participation in adjudication as endowed with such special importance as to justify protecting it from non-deferential reconsideration. Rather, Finland's provision of multiple opportunities for *de novo* reconsideration of guilt through the structures of direct and extraordinary review bespeaks a belief that, by repetitive inquiry through the hierarchy of courts, the last examination shall be at least the equal in quality to the first.

By contrast, the United States requires courts engaged in post-trial review of a conviction to enter upon the task in a spirit of substantial deference to the trial court

326. Jan M. Smits, *The Europeanisation of National Legal Systems: Some Consequences for Legal Thinking in Civil Law Countries*, *in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW, *supra* note 325, at 229, 243.

327. In a sense, of course, a rule's mistaken or unintended consequences can also reveal something about the society that enacted the rule. Unintended consequences, perhaps, indicate the society's blind spots, while anticipated consequences permit inferences about the society's preoccupations.

328. Alan Watson, *Legal Culture v. Legal Tradition, in* EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW, *supra* note 325, at 1, 4.

fact-finder. From the point of view of accuracy, the American choice reflects either a faith in the unique superiority of trial court fact-finders (most often jurors), or a compromise of the value of accuracy for the sake of other ends.

Two possible concerns about professional judges as fact-finders could justify a belief in the fact-finding superiority of laypersons. First, professionals may, through experience, suffer a degradation in their ability to find facts if, for example, repeated exposure to cases leads professional judges to form stereotypical beliefs about certain kinds of cases. Professional judges, having formed such stereotypical beliefs, may be relatively blind to the possibility that the particular case under adjudication may not justify the stereotypical conclusion. Second, professionals may perhaps be more subject to venal corruption than laypersons.

It is difficult to assess the extent to which these concerns are justified in American circumstances. One reads occasionally of cases of judicial corruption, but such cases seem quite rare under current American circumstances, and particularly so in appellate courts.[329] With regard to the other possible concern, one can perhaps make a strong case that stereotypical thinking is at least as likely to skew the deliberations of novice laypersons as professional judges. Indeed, professional judges may, by experience, perceive patterns genuinely relevant to fact-finding that inexperienced laypersons will fail to note.[330] Ultimately, given the willingness of American courts in post-trial review of civil cases to engage in less deferential review, and the persuasive criticisms that have been made against the claim that jurors always possess a unique competency as fact-finders, it would seem that, whatever we may tell ourselves, our principle of mandated deference to the jury's fact-finding reflects a compromise of the goal of accuracy in the service of other ends.[331]

Indeed, in the American tradition, we do, in the principle of jury nullification, acknowledge at least one value for which we sacrifice the accuracy associated with judicial adjudication in favor of a desired inaccuracy associated with jury adjudication. In the United States, the right to trial by jury took shape in part as a bulwark against the use of criminal prosecution as an instrument of political repression.[332] Through nullification, the jury disregards the factual truth of allegations, and acts on what it regards as higher political values.

With respect to sensitivity to the value of efficiency, we find the American system more keen than Finland's.[333] In offering repeated opportunities for the presentation of evidence and for the reconsideration of factual issues previously addressed, Finnish post-trial judicial review contemplates significant duplication of effort. American courts, by contrast, tend to seek to avoid duplication of effort.

When confronted with a choice between possible rules for a given situation, American courts often take note of the possibility that a given ruling will invite an

329. One notable story of a corrupt judge involved Martin Manton of the United States Court of Appeals for the Second Circuit. *See* United States v. Manton, 107 F.2d 834 (2d Cir. 1939).

330. *See* People v. McMurtry, 314 N.Y.S.2d 194 (N.Y. Crim. Ct. 1970) (noting pattern of testimony across cases suggestive of police perjury in "dropsy" cases).

331. *See* Oldfather, *supra* note 49, at 490-94 (noting policy of preserving province of the jury).

332. *See generally* Arie M. Rubinstein, Note, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 106 COLUM. L. REV. 959 (2006).

333. Oldfather, *supra* note 49, at 483.

unmanageable deluge of claims.[334] By restricting the presentation of evidence to trial-level courts, the American system allows appellate courts to handle many more cases at present staffing levels than would be possible if litigants could present new evidence on appeal. Through its principle of deference and its waiver rules, the American system privileges earlier phases of post-trial judicial review over later phases, thereby requiring the earliest possible presentation of a claim and avoiding duplication, especially of inquiries into the factual accuracy of the truth. The American system does not altogether lack duplication; our federal system gives federal claims, at least, a hearing both in state and federal courts, albeit a federal hearing that is increasingly deferential to the state court decision. Aside from that federalism-motivated caveat, one finds in the American system a pronounced emphasis on finality – the avoidance of duplication – in criminal adjudication.[335]

The Supreme Court has often emphasized society's interest in the finality of criminal convictions.[336] In *Herrera*, the Court made the point thus:

> Federal courts are not forums in which to relitigate state trials. The guilt or innocence determination in state criminal trials is a decisive and portentous event. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.[337]

With regard to the value of respect for human rights, we see many features shared by the United States and Finland. To the extent that the right to appeal a conviction is itself a human right, that right is now well-established in both countries. Both countries appoint counsel to represent indigent persons on appeal. Finland recognizes victims as having the status of parties in criminal cases and in criminal appeals, and to that extent, the Finnish system manifests a broader vision of human rights than does the American.[338] On the other hand, the rule in the United States barring prosecution appeals of acquittals reveals a particular sensitivity to the predicament faced by an accused defendant, and a determination not to prolong that predicament beyond an acquittal at trial. Otherwise, the precise structure and content of appellate procedure does not very much implicate broader concepts of human rights.

With regards to the last criterion—the goal of enhancing the public reputation of the criminal adjudication system—one finds rather more to say. Here, perhaps, we find the explanation for the privileged position of the jury in the American

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334. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 426 (1993) (O'Connor, J., concurring).

335. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963); Findley, *supra* note 55, at 607; Oldfather, *supra* note 49, at 494, 502.

336. *E.g.*, Duncan v. Walker, 533 U.S. 167, 179 (2001); Herrera v. Collins, 506 U.S. 390, 401 (1993); McCleskey v. Zant, 499 U.S. 467, 491-92 (1991); Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion); Barefoot v. Estelle, 463 U.S. 880, 887 (1983); Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

337. *Herrera*, 506 U.S. at 401 (citations and quotation marks omitted).

338. *See* Johnson, *in* TURUN YLIOPISTON OIKEUSTIETEELLINEN TIEDEKUNTA, *supra* note 324, for a comparative discussion of the implications of the recognition of the party status of victims.

system.[339] Post-trial judicial review of criminal convictions in the United States reflects the fact that, in the United States, the prestige and public reputation of the system requires some substantial lay participation which professional judges, however individually well qualified, cannot supply.

The explanation finds support in a long American tradition of suspicion of expertise. In the years after American independence, some trial judges would instruct jurors in terms explicitly hostile to expertise, as in the following New Hampshire example:

> They [the lawyers] talk of law. Why, gentlemen, it is not law we want, but justice. They would govern us by the common law of England. Trust me, gentlemen, Common sense is a much safer guide for us . . . . A clear head and an honest heart are worth more than all the law of all the lawyers.[340]

That tradition endures:

> Americans are and have always been credulous sceptics. They question the authority of priests, then talk to the dead; they second-guess their cardiologists, then seek out quacks in the jungle. Like people in every society, they do this in moments of crisis when things seem hopeless. They also, unlike people in other societies, do it on the general principle that expertise and authority are inherently suspect.[341]

In Finland, concerns about the possibility of venal corruption are unlikely to influence the construction of the system of post-trial judicial review, as Finland regularly ranks among the least corrupt societies on the planet.[342] Equally inapplicable, perhaps, is the concern that with expertise comes cynicism or stereotypical thinking. In Finland, distrust for authority and expertise may be less prevalent and faith in the wisdom of laymen less widespread.

We close then with an understanding of the Finnish system as relatively more exclusively focused on achieving accurate results, even at some cost in terms of efficiency. We see also a system relatively less dependent on the participation of laypersons for its public legitimacy. In the United States, concerns about costs and about legitimacy have greater influence over the system of post-trial judicial review of convictions. Costs matter in the country that incarcerates a larger proportion of its population than any other. By recent measures, the United States incarcerates 732 people per 100,000 population; Finland incarcerates 64 per 100,000.[343]

One might surmise that a system that so values efficiencies and public confidence, to the extent even of compromising its pursuit of the goal of accuracy,

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339. Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357 (1985).

340. LYNN WARREN TURNER, THE NINTH STATE: NEW HAMPSHIRE'S FORMATIVE YEARS 108 (1983).

341. Mark Lilla, *The Tea Party Jacobins,* N.Y. REV. BOOKS, vol. 57, No. 9, May 27, 2010, at 56.

342. *See Finland Joint Second Least Corrupt Company*, YLE (Dec. 1, 2011), http://yle.fi/uutiset/news/2011/12/finland_joint_second_least_corrupt_country_3071537.html.

343. *See* LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf; ROY WALMSLEY, INT'L CTR. FOR PRISON STUD., WORLD PRISON POPULATION LIST (8TH EDITION) (2009), *available at* http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf.

does so because the system consumes enormous resources and because it does not enjoy unquestioned public confidence. Finland's willingness to permit reconsideration on appeal bespeaks a legal system not so overwhelmed by costs, and not dependent, for public confidence, on the involvement of laypersons. Some corroboration of those assessments would appear in the fact that Finland has been reducing the role of lay judges, and does not operate a criminal justice system that involves nearly so large a proportion of its population as the American system.

These conclusions must remain tentative. A comparison of other aspects of the Finnish and American systems of criminal adjudication could substantiate, or call into doubt, these hypotheses.[344] Comparisons with the systems employed in other countries would surely also enrich our understanding of the Finnish and American systems. Much remains to be done before the premises, hidden assumptions, and purposes of each country's system of criminal procedure stand fully revealed.

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344. A preliminary effort in that direction is made in Johnson, *in* TURUN YLIOPISTON OIKEUSTIETEELLINEN TIEDEKUNTA, *supra* note 324.