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equal protection rights would be to denominate some rights as "important" though not "fundamental." Legislation involving an important right, such as education, could trigger a marginally higher level of judicial suspicion. This would eliminate the mechanical application of the rational basis test but would not change the basic structure of the triggering mechanism. This approach would be analogous to the use of middle-level scrutiny on gender classifications, which though not "suspect," call for a higher level of scrutiny than the rational basis test.

Instead of interpreting *Plyler* as a new method of triggering heightened scrutiny with precedential application to situations such as *Cleburne, Plyler* could simply be interpreted as an anomaly. *Plyler* may represent a unique situation where thousands of innocent children would have been deprived of education if traditional equal protection analysis had been followed. Viewed in this manner, *Plyler* can be seen as a vindication of the rights of the illegal alien children, but not as a great systemic change in the methods of triggering heightened scrutiny. The flexibility illustrated by the approach in *Plyler* demonstrates that under unusual circumstances the Court can move outside the traditional methods of equal protection analysis. A divergence from doctrine to protect rights in a unique situation demonstrates the strength of the judicial function rather than the weakness of the judicially created framework. Interpreted in this manner, *Plyler* supplants rather than extends the methods used to trigger heightened scrutiny under the equal protection clause.

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Editor's Note: The Supreme Court decided the *Cleburne* case in an opinion delivered on July 1, 1985. The majority opinion held that the court of appeals erred in holding mental retardation a quasi-suspect classification calling for more exacting scrutiny. However, the majority held that requiring a special use permit was a violation of the equal protection clause under the *rational basis* test because it was based on an emotional prejudice against the mentally retarded. Justice Marshall, with whom Justice Brennan and Justice Blackmun joined, concurring in the judgment in part and dissenting in part, argued that the majority opinion, which claimed to apply the traditional rational basis test, actually applied heightened scrutiny to strike down the ordinance.

Criminal Law: Sufficiency of the Evidence: The Search for a Constitutional Test in Oklahoma

In more than 22 percent of the cases appealed to the Oklahoma Court of Criminal Appeals, a challenge is made to the sufficiency of the evidence.[1]

1. There are forty Oklahoma Court of Criminal Appeals opinions in volumes 635-637 of the *Pacific Reporter 2d*. Of those, nine involved some issue of sufficiency of the evidence.

Unfortunately, there has been little exposition in the cases of what is meant by "sufficiency of the evidence." Clearly the inquiry goes to whether the prosecution has met its burden of proof, but the ease of that statement belies the true nature of the problem. Professor James has said that "sufficient evidence" is the quantity of evidence presented by a proponent that would "justify or warrant a finding in his favor upon [each proposition essential to his claim]."[2] The problem then becomes: What quantity of evidence will be sufficient? That question has not been an easy one to answer.

The purpose of this note is to examine the tests used by the Oklahoma Court of Criminal Appeals for determining the sufficiency of the evidence, and to see how those tests measure up to the United States Constitution. The note will first define the inquiry and examine a long-standing controversy over the correct test in criminal cases. It will then look to the statements of the United States Supreme Court and the Oklahoma Court of Criminal Appeals on the subject. Finally, recommendations for future cases will be made.[3]

Defining the Inquiry

Professor Wigmore divides the burden of proof for any proponent, civil or criminal, into two elements.[4] The first of these is the burden of persuasion, or as he more accurately terms it, "the risk of nonpersuasion."[5] This element is directed to a proponent's obligation to the jury. The party on whom the burden of persuasion rests must persuade the jury to believe that a given state of affairs is as he claims it to be, or stated inversely, he bears the risk of not persuading the jury.

The second of Wigmore's elements is the "duty of producing evidence."[6] This element is directed to the party's obligation to the judge.[7] Before the prosecution in a criminal case is entitled to have its case submitted to the jury, it "must first satisfy the judge that [it has produced] a quantity of evidence fit to be considered by the jury and to form a reasonable basis for the verdict."[8] Thus, the burden of persuasion operates after the case has gone to the jury, and only after the prosecution has met its burden of production and passed the danger of a directed verdict of acquittal.[9]

In this sense, then, the claim before an appellate court that the evidence is

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The issue of sufficiency of the evidence is a recurring one and can be found in opinions dating back to prestatehood. *See, e.g.*, Meierholtz v. Territory, 14 Okla. 359, 78 P. 90 (1904). There appears to be no lessening of the frequency with which modern cases raise the issue.

2. James, *Sufficiency of the Evidence and Jury Control Devices Available Before Verdict*, 47 VA. L. REV. 218, 218 (1961) (emphasis deleted) [hereinafter cited as James].

3. Special issues of sufficiency, such as whether circumstantial evidence must exclude every reasonable hypothesis other than guilt, will not be discussed in this note.

4. 9 J. WIGMORE, EVIDENCE § 2485 (Chadbourn rev. 1981) [hereinafter cited as WIGMORE].

5. *Id.*

6. *Id.* § 2487.

7. *Id. See also* James, *supra* note 2.

8. WIGMORE, *supra* note 4, § 2487, at 293 (emphasis deleted).

9. *Id.* at 299.

insufficient is much like the question before a trial court when ruling on a demurrer to the evidence.[10] Although in theory the two situations are different, in practice they require the same analysis.[11] Both are directed to the historic function of the trial judge to control and limit the jury by keeping from it cases in which it might reach an unreasonable verdict.[12]

The question remains of when a court should step in, exercise its control, and keep a case from the jury. When the evidence is direct, as when a witness testifies "I saw the defendant shoot the victim," credibility may be in question, but sufficiency is rarely a concern.[13] However, when the prosecution's case, or any material element of it, depends upon circumstantial evidence, the role of the judge (trial or appellate) in determining sufficiency becomes more significant.[14]

Obviously, the clearest case of insufficient evidence is where the prosecution has presented literally no competent evidence at all on an essential proposition. Indeed, the test of sufficiency has sometimes been expressed in just that way by the Oklahoma Court of Criminal Appeals.[15] "But unless the requirement [that the prosecution meet its burden of production] is to be a mockery [the test] must go further than this. . . ."[16] The question is *how much* further. What quantum of competent evidence will satisfy the prosecution's burden of production?

For a number of years, a difference of opinion existed as to whether the standard for sufficiency of the evidence should vary with the different levels of persuasion: preponderance of the evidence, clear and convincing evidence, and proof beyond a reasonable doubt.[17] The brightest luminaries of the bench and legal academia lined up on both sides of the controversy. Judge Learned Hand led those favoring a single test for all levels,[18] and Justice Cardozo was among those favoring a varying standard.[19]

The single test approach was propounded principally by the United States Court of Appeals for the Second Circuit. In fact, the single test position eventually became known as the "Second Circuit Rule."[20] The Second Circuit's leading case, *United States v. Feinberg*,[21] was authored by Learned

10. Sufficiency of the evidence questions can arise as to the entire case or only as to specific issues or elements of an offense.

11. 8A MOORE'S FEDERAL PRACTICE ¶ 29.06 (1984).

12. WIGMORE, *supra* note 4, § 2487.

13. Goldstein, *The State and the Accused: Balance and Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1156 (1960).

14. *Id.* Circumstantial evidence depends for its probative value on inferences, or most often, a series of inferences. Thus, a jury may be able to draw any one of several mutually exclusive possible inferences from a given state of evidence. Some of these inferences may be reasonable, some not. This complex problem often makes sufficiency of the evidence determinations difficult.

15. Hartman v. State, 473 P.2d 257 (Okla. Crim. App. 1970).

16. James, *supra* note 2, at 218.

17. United States v. Melillo, 275 F. Supp. 314 (E.D.N.Y. 1967).

18. United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944).

19. Susquehanna S.S. Co. v. A.O. Anderson & Co., 239 N.Y. 285, 146 N.E. 381 (1925).

20. *See, e.g.*, 8A MOORE'S FEDERAL PRACTICE, *supra* note 11, ¶ 29.06, at 27.

21. 140 F.2d 592 (2d Cir. 1944).

Hand. In *Feinberg*, Judge Hand said: "[G]iven evidence from which a reasonable person might conclude that the charge in an indictment was proved, the court will look no further, the jury must decide, and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt."[22] In rejecting the varying test approach for different levels of persuasion, Judge Hand reasoned that "in the long run the line between them is too thin for day to day use."[23]

Feinberg controlled in the Second Circuit for many years,[24] and a similar position was taken in a number of states,[25] among them Oklahoma.[26] All were not in accord with this position, however, not even in the Second Circuit. In a vigorous dissent to *United States v. Masiello*,[27] Judge Frank noted it would be possible under the Second Circuit rule for a defendant to be found guilty on a mere preponderance of the evidence.[28] Responding to the notion that the differences in the levels of persuasion are too tenuous for judges,[29] Judge Frank asked: "If jurors can differentiate the two tests, cannot judges?"[30]

On the other side of the controversy, Judge Prettyman of the District of Columbia Circuit required a higher test in criminal cases than in civil cases. In *Curley v. United States*,[31] he stated: "If the evidence is such that reasonable jurymen must necessarily have [a reasonable doubt], the judge must require acquittal . . . ."[32] The varied test position was also supported by Judge Traynor in a dissent to *Beeler v. American Trust Co.*[33] In that case, the majority had found the ordinary civil standard applicible where the burden of proof was clear and convincing.[34] Traynor noted: "There is a contradiction in thus destroying the vitality of the rule [requiring clear and convincing evidence] while affirming its soundness."[35]

Thus, while commentators urged that logic demanded a different standard for sufficiency of the evidence, depending on the level of persuasion re-

22. *Id.* at 594.

23. *Id.*

24. Feinberg was expressly overruled in United States v. Taylor, 464 F.2d 240 (2d Cir. 1972). In that opinion, Chief Judge Friendly said: "Despite our reverence for Judge Hand, perhaps in part because of our desire to remove one of his rare ill-advised opinions from public debate, we agree that the time for overruling the *Feinberg* 'single test' standard has arrived." *Id.* at 242.

25. *See, e.g.*, State v. Fouts, 169 Kan. 686, 221 P.2d 841 (1950); State v. Sheppard, 100 Ohio App. 345, 128 N.E.2d 471 (1955); Holland v. State, 129 Fla. 363, 176 So. 169 (1937).

26. Clark v. State, 83 Okla. Crim. 137, 173 P.2d 750 (1946).

27. 235 F.2d 279 (2d Cir. 1956) (Frank, J., dissenting).

28. *Id.* at 288.

29. See *supra* text accompanying note 23.

30. 235 F.2d at 291.

31. 160 F.2d 229 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). The controversy between the single test and the varied test approaches will hereafter be referred to as the *Feinberg/Curley* controversy.

32. 160 F.2d at 232.

33. 24 Cal. 2d 1, 147 P.2d 583 (1944) (Traynor, J., dissenting).

34. *Id.* at 27, 147 P.2d at 596.

35. *Id.* at 33, 147 P.2d at 600.

quired,[36] the courts were unable to reach a concensus. Curiously, the Supreme Court did not enter the fray until 1979.[37]

Supreme Court Holdings on Sufficiency

The United States Supreme Court's first case having a major impact on discussions of sufficiency of the evidence was *Thompson v. City of Louisville*.[38] In *Thompson*, the Court held: "Just as 'conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."[39] The Court found the record in the case entirely lacking in evidence to support any of the charges.[40]

Justice Black, author of *Thompson*, expressly disavowed deciding a question of sufficiency.[41] However, *Thompson* was the basis for what quickly became the prevailing standard for the federal courts in reviewing the sufficiency of the evidence.[42] The test was known as the "no evidence" test. Under this test, if the jury was properly instructed on the burden of proof, the evidence would be insufficient only if the record was totally devoid of *any* evidence on a particular element.[43]

The next case to impact the question of sufficiency of the evidence was *In re Winship*.[44] In *Winship*, the Court held that the due process clause of the Constitution[45] protects an accused from conviction except on proof beyond a reasonable doubt of every element comprising the offense.[46] The immediate effect of *Winship* on the test for sufficiency of the evidence was uncertain. Some courts incorporated *Winship* into their sufficiency standards. One of the more notable cases was *United States v. Taylor*,[47] in which Judge Friendly expressly overruled *Feinberg*.[48] He fashioned a new standard incorporating the concept of "reasonable doubt" based in part on *Winship*.[49] This position was not universal, however, as many other federal circuits continued

36. *See, e.g.*, McNaughton, *Burden of Production of Evidence: A Function of a Burden of Persuasion*, 68 HARV. L. REV. 1382, 1389 (1955).

37. Jackson v. Virginia, 443 U.S. 307 (1979). The Court had hinted as to its ultimate position in some earlier decisions. In Mortensen v. United States, 322 U.S. 369, 374 (1944), the Court held that a criminal verdict can be maintained only where there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt," that the accused is guilty. *See also* American Tobacco Co. v. United States, 328 U.S. 781, 787 (1946).

38. 362 U.S. 199 (1960).

39. *Id.* at 206.

40. *Id.* at 204. Thompson had been convicted of loitering and disorderly conduct. The Supreme Court found no evidence to support either conviction.

41. "Decision of this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all." *Id.* at 199.

42. *See, e.g.*, Young v. Boles, 343 F.2d 136 (4th Cir. 1965).

43. *See, e.g.*, Hall v. Crouse, 339 F.2d 316 (10th Cir. 1964).

44. 397 U.S. 358 (1970).

45. U.S. CONST. amend. XIV, § 1.

46. 397 U.S. at 364.

47. 464 F.2d 240 (2d Cir. 1972).

48. *Id.* at 242.

49. *Id.*

to apply *Thompson*'s "no evidence" test for years after *Winship*.[50] In 1979, however, any doubt remaining as to whether the test for sufficiency of the evidence should incorporate "reasonable doubt" was laid to rest by the Supreme Court's decision in *Jackson v. Virginia*.[51]

The Jackson Standard

Jackson was a habeas corpus proceeding in which the Supreme Court granted certiorari to consider the implications of *Winship* on the prevailing "no evidence" test.[52] Justice Stewart, writing for the majority, first acknowledged that the question of sufficiency of the evidence goes to the "basic nature" of the right recognized in *Winship*.[53] The Court reemphasized that *Thompson* did not decide the question of sufficiency,[54] and it implied that the courts of appeals were incorrect in taking a test for sufficiency from *Thompson*.[55] The Court did not overrule *Thompson*, but explained that its "no evidence" doctrine secures only the "most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty."[56]

The Court concluded that the *Winship* doctrine of proof beyond a reasonable doubt is vital to due process for two reasons. First, it gives "concrete substance" to the presumption of innocence; and, second, it reduces the risk of factual error.[57] More important, the doctrine "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself."[58] On these premises, the Court fashioned a constitutionally based standard for sufficiency of the evidence in criminal cases.

The Court first enunciated the underlying supposition of *Winship* and fourteenth amendment due process. It is that "no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense."[59] This requires more than simply the trial ritual of a jury instruction on reasonable doubt; so fundamental a constitutional standard must be applied rationally.[60] Rational application means protection from the possibility that even a properly instructed jury will return a verdict of guilty when no rational trier of fact could do so.[61]

50. *See, e.g.*, Jones v. Perini, 599 F.2d 129 (6th Cir. 1979); Adams v. Sampson, 588 F.2d 317 (1st Cir. 1978); Bond v. Oklahoma, 546 F.2d 1369 (10th Cir. 1976).

51. 443 U.S. 307 (1979).

52. *Id.* at 312-13.

53. *Id.* at 313.

54. *Id.* at 314.

55. To the interpretation the federal courts of appeals had placed on *Thompson*, the Court merely stated, "We cannot agree." *Id.* at 316.

56. *Id.* at 314. In pointing out the fundamental difference between *Thompson* and *Winship*, the Court noted that *Winship* would have passed the *Thompson* muster.

57. *Id.* at 315.

58. *Id.*

59. *Id.* at 316.

60. *Id.* at 316-17.

61. *Id.* Of course, triers of fact are permitted to return verdicts of not guilty even when

Applying these principles, the Court held that a correct jury instruction will no longer suffice; rather, the appellate court must determine whether the record supports the verdict.[62] It is emphasized that the reviewing court is not to determine whether *it* believes the evidence established guilt beyond a reasonable doubt, but whether *any* rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[63] The role of the jury as the weigher of evidence and the drawer of reasonable inferences from basic facts to ultimate facts is given full weight by the legal conclusion that "upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution."[64]

Ultimately, the Court held in *Jackson* that the fourteenth amendment requires a reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[65] Clearly, *Thompson* is distinguishable, as it would allow a conviction to stand on a mere modicum of evidence. However, it "could not be seriously argued" that such a small amount of evidence could rationally support a conviction beyond a reasonable doubt.[66]

In a concurring opinion,[67] Justice Stevens severely criticized the Court majority's position.[68] Since the judgment of the court of appeals was affirmed, Stevens believed it was unnecesssary to formulate such a broad new rule.[69] This "constitutional lawmaking," as Justice Stevens characterized it, should not be undertaken "unless (1) those efforts are necessary to the decision of the case at hand and (2) powerful reasons favor a change in the law."[70]

Justice Stevens contended that powerful reasons did not favor a change in the law. His view of the Court's opinion was that it

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the evidence makes that verdict unreasonable. But, the Court emphasized that this "mercy" function does not have a corollary permitting unreasonable verdicts of guilt. *Id.* at 317 n.10.

62. *Id.* at 318.

63. *Id.* at 318-19.

64. *Id.* at 319 (emphasis in original).

65. *Id.* (emphasis in original).

66. *Id.* at 320. In footnote 11, the Court discussed the *Feinberg/Curley* controversy. As the ultimate holding in *Jackson* would make obvious, the Court impliedly supported the *Curley* position. Express approval of *Curley* was not necessary, however. The standard the Court had enunciated in *Jackson* was substantially equivalent to *Curley* and was, in effect, approval.

67. Ironically, for his trouble, James A. Jackson, the petitioner in *Jackson*, got only the satisfaction of having a part in the formation of a significant constitutional standard. When the Court reached the merits of the case, it found that the evidence was clearly sufficient under the new test to support the particular element in question, namely, the intent to kill in a murder prosecution. 443 U.S. at 324-25. For this reason, Justice Stevens, though disagreeing with the bulk of the Court's opinion, did agree with the ultimate holding and thus his opinion is a concurrence.

68. *Id.* at 326. Joining Justice Stevens' opinion were Chief Justice Burger and Justice Rehnquist.

69. *Id.* at 327.

70. *Id.*

> now prohibits the criminal conviction of any person . . . against whom the facts have already been found beyond a reasonable doubt by a jury, a trial judge, and one or more levels of state appellate judges—except upon proof sufficient to convince a *federal judge* that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[71]

Justice Stevens, however, misses an important point. Criminal convictions run this gauntlet of appellate review on a number of issues of which sufficiency of the evidence is but one. Changing the test to be used on appeal adds little to the amount of review. It merely alters the form of that review.

Justice Stevens' real disagreement is found in his view that *Winship* is premised on the assumption that judges and juries will act rationally.[72] Of course, the majority was simply unwilling to assume that all triers of fact will always act rationally.[73] Furthermore, Justice Stevens questioned the Court's formulation of its new rule out of *Winship*, saying, "[*Winship*] never mentioned the question of how appellate judges are to know whether the trier of fact really was convinced beyond a reasonable doubt, or indeed, whether the factfinder was a 'rational' person or group of persons."[74] This statement overlooks the fact that the new inquiry fashioned by the court does not look to the certitude of *this* trier of fact, but to whether *any* trier of fact could rationally be convinced beyond a reasonable doubt.[75] In addition, the majority held that the fourteenth amendment insists that the fact finder be rational.[76]

Aftermath of Jackson

Since the decision in *Jackson v. Virginia*, the Supreme Court has had little to say about its new constitutional standard. The Court has discussed *Jackson* only in *Tibbs v. Florida*,[77] which did not directly involve the test for sufficiency of the evidence,[78] and in opinions accompanying denials of writs of certiorari.[79] The federal courts of appeal, however, took up the *Jackson*

71. *Id.* at 326-27 (emphasis in original).
72. *Id.* at 333.
73. *Id.* at 317.
74. *Id.* at 331.
75. *Id.* at 319.
76. *Id.* at 318.
77. 457 U.S. 31 (1982).
78. *Tibbs* involved a reversal of a jury verdict for being against the weight of the evidence. The Court distinguished between that situation and a reversal under *Jackson* for insufficient evidence. When a verdict is reversed for insufficient evidence under *Jackson*, the double jeopardy clause bars retrial. But the Court held in *Tibbs* that when a verdict is reversed as being against the weight of the evidence, the double jeopardy clause does not bar retrial. A dissent by four Justices in *Tibbs* expressed fear that the majority's holding would undermine *Jackson* by encouraging judges to avoid a *Jackson* reversal so that a retrial will be possible.
79. In Anderson v. Fuller, 455 U.S. 1028 (1982), the petition for writ of certiorari from 662 F.2d 420 (6th Cir. 1981) was denied. The court of appeals had reversed, based on *Jackson*. Chief Justice Burger, joined by Justice O'Connor, dissented from the denial of certiorari, saying the case was a classic case of conflicting evidence and the lower court had sat as a jury in setting aside findings of guilt. Justice Stevens, author of the concurrence in *Jackson*, see *supra*

standard immediately, applying it, of course, in habeas corpus proceedings.[80] It is also being applied to questions of sufficiency of the evidence on direct appeals of federal prosecutions.[81]

Adoption of the *Jackson* standard in the state courts has not been so universal,[82] though a majority of states have done so.[83] Inasmuch as the holding in *Jackson* is based on the fourteenth amendment due process clause,[84] the standard is applicable to the states.[85] Ultimately, the *Jackson* test is gaining widespread acceptance in the state courts,[86] not only for appellate review of sufficiency but also for sufficiency of the evidence decisions

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note 67, supported the lower court findings. He said that although he disagreed with *Jackson*, the lower court had applied it correctly and the Chief Justice's dissent was misleading.

Justice Marshall has been the most vociferous in dissenting on *Jackson* grounds from denials of certiorari. In a number of cases he would have had the Court grant certiorari to review cases for conformity with *Jackson*. *See* Baker v. Missouri, 459 U.S. 1183 (1983) (Marshall says Missouri Supreme Court misapplied *Jackson*); White v. Estelle, 459 U.S. 1118 (1983) (Marshall would extend *Jackson* to determination of competency); Butler v. South Carolina, 459 U.S. 932 (1983) (Marshall believes "any evidence . . . reasonably tending to prove . . ." test not in line with *Jackson*).

80. *E.g.*, Sanders/Miller v. Logan, 710 F.2d 645 (10th Cir. 1983).

81. *E.g.*, United States v. Dumas, 688 F.2d 84 (10th Cir. 1982) (reversed); United States v. Golden, 671 F.2d 369 (10th Cir. 1982) (affirmed).

82. Thirty-one states are using a standard identical to, or based on, *Jackson*. See *infra* note 86.

83. The Court in *Jackson* assumed that state courts would use the new test, saying: "[M]ost meritorious challenges to constitutional sufficiency of the evidence undoubtedly will be recognized in the state courts, and, if the state courts have fully considered the issue of sufficiency, the task of a federal habeas court should not be difficult." 443 U.S. 307, 322 (1979).

84. *Id.* at 318.

85. In Freeman v. State, 654 S.W.2d 450 (Tex. Crim. App. 1983) (en banc), the court said: "Although *Jackson* was setting a standard for review of state convictions by federal courts, the due process requirements that it announced were based expressly on the Fourteenth Amendment. They are binding on the states and constitute a minimum standard for our sustaining a conviction." *Id.* at 456.

86. In the following cases, a *Jackson* or equivalent test was applied to a question of sufficiency of the evidence: Winters v. State, 646 P.2d 867 (Alaska 1982); State v. Edwards, 136 Ariz. 177, 665 P.2d 59 (1983); People v. Cook, 33 Cal. 3d 400, 658 P.2d 86, 189 Cal. Rptr. 159 (1983); People v. Derrera, 667 P.2d 1363 (Colo. 1983); State v. Scielzo, 190 Conn. 191, 460 A.2d 951 (1983); Plass v. State, 457 A.2d 362 (Del. 1983); Kaufman v. State, 429 So. 2d 841 (Fla. 1983); Boyd v. State, 244 Ga. 130, 259 S.E.2d 71 (1979); State v. Filson, 101 Idaho 381, 613 P.2d 938 (1980); People v. Minnis, 118 Ill. App. 343, 455 N.E.2d 209 (1983); Hauger v. State, 273 Ind. 481, 405 N.E.2d 526 (1980); State v. Robinson, 288 N.W.2d 337 (Iowa 1980); State v. Van Pham, 234 Kan. 649, 675 P.2d 848 (1984); State v. Abercrombie, 375 So. 2d 1170 (La. 1979); Commonwealth v. Campbell, 378 Mass. 680, 393 N.E.2d 820 (1979); McQueen v. State, 423 So. 2d 800 (Miss. 1982); State v. Siraguso, 610 S.W.2d 338 (Mo. 1980); State v. Roberts, 633 P.2d 1214 (Mont. 1981); State v. Huffman, 214 Neb. 429, 334 N.W.2d 3 (1983); Washington v. State, 98 Nev. 601, 655 P.2d 531 (1982); State v. Glidden, 123 N.H. 126, 459 A.2d 1136 (1983); State v. Peterson, 181 N.J. Super. 261, 404 A.2d 1113 (1981); State v. Davis, 97 N.M. 130, 637 P.2d 561 (1981); People v. Contes, 60 N.Y.2d 620, 454 N.E.2d 932, 467 N.Y.S.2d 349 (1983); State v. Scott, 61 Or. App. 205, 655 P.2d 1094 (1982); State v. Braggs, 604 S.W.2d 883 (Tenn. 1980); State v. Derouchie, 140 Vt. 437, 440 A.2d 146 (1981); Smith v. Commonwealth, 220 Va. 696, 261 S.E.2d 550 (1980); State v. Green, 94 Wash. 2d 216, 616 P.2d 628 (1980); State v. Ivy, 15 Wis. 2d 645, 341 N.W.2d 408 (1983); Hopkinson v. State, 664 P.2d 43 (Wyo. 1983).

in the trial courts.[87] However, the Oklahoma Court of Criminal Appeals has not joined the chorus of states applying the *Jackson* test for sufficiency of the evidence. It cannot be said the court has overlooked *Jackson*: it has cited it twice.[88] But on neither occasion did the court apply the constitutional test for sufficiency of the evidence.[89]

Oklahoma Tests

The Oklahoma Court of Criminal Appeals has actually applied a number of tests to the issue of sufficiency of the evidence. Some of those tests are of little help in that they fail to tell the reader how the court approached the problem.[90] Some of the tests could be interpreted in line with the *Jackson* principles, but that interpretation is not likely.[91] Still others would clearly be erroneous under *Jackson*.[92]

In recent years, two tests have emerged as the most commonly applied. The first of these finds the evidence sufficient where there is "competent evidence in the record from which the jury can conclude the defendant is guilty as charged."[93] The Court of Criminal Appeals has held this standard applicable in that court on appeal,[94] and in the trial court when ruling on

87. State v. Rodriquez, 226 Kan. 558, 601 P.2d 686 (1979) (*Jackson* test applied to motion for directed verdict).

88. Clark v. State, 664 P.2d 1065 (Okla. Crim. App. 1983); Mitchell v. State, 659 P.2d 366 (Okla. Crim. App. 1983).

89. In *Clark*, the Court cited *Jackson* for the proposition that the evidence should be viewed in the light most favorable to the state when reviewing the sufficiency of the evidence. In *Mitchell*, a case involving a jury instruction that shifted the burden of proof, the Court quoted *Jackson*, saying that *In re Winship* created a "fundamental . . . substantive constitutional standard."

90. *See* Foster v. State, 657 P.2d 166, 171 (Okla. Crim. App. 1983) ("Where sufficient evidence in the record exists . . . this Court will not interfere . . . on grounds that the evidence was insufficient."); Camp v. State, 44 Okla. Crim. 70, 70, 279 P.2d 692, 692 (1929) ("manifestly contrary to the evidence"); Ragland v. State, 6 Okla. Crim. 434, 434, 119 P. 277, 277 (1911) ("[insufficient] as a matter of law").

91. *See* Maxville v. State, 629 P.2d 1279, 1281 (Okla. Crim. App. 1981) ("Whether there is any evidence from which the jury could reasonably conclude [guilt]"); Mansfield v. State, 556 P.2d 632 (Okla. Crim. App. 1976) (same); Ball v. State, 507 P.2d 1342 (Okla. Crim. App. 1973) (same); Lazar v. State, 275 P.2d 1003 (Okla. Crim. App. 1954) (same); Disheroon v. State, 357 P.2d 236, 239 (Okla. Crim. App. 1960) ("When . . . the record discloses facts which would have been sufficient either to warrant a verdict of acquittal or to support a verdict of guilty. . ."); Shelton v. State, 554 P.2d 1380 (Okla. Crim. App. 1976) (same, quoting *Disheroon*); Sampson v. State, 473 P.2d 269 (Okla. Crim. App. 1970) (same, quoting *Disheroon*).

92. *See* Bruner v. State, 612 P.2d 1375 (Okla. Crim. App. 1980) (where verdict is "supported by probable testimony"); Heath v. State, 494 P.2d 1248, 1249 (Okla. Crim. App. 1972) (same); Palmer v. State, 493 P.2d 1116 (Okla. Crim. App. 1972) (same); Woodward v. State, 567 P.2d 512, 515 (Okla. Crim. App. 1977) ("Where there is some evidence, . . . we will not interfere."); Hartman v. State, 473 P.2d 257, 259 (Okla. Crim. App. 1970) ("[For reversal] there must be no competent evidence in the record. . ."); Meierholtz v. Territory, 14 Okla. 359, 362, 78 P. 90, 91 (1904) ("entire absence of testimony").

93. *E.g.*, Henderson v. State, 661 P.2d 68, 69 (Okla. Crim. App. 1983); Nichols v. State, 564 P.2d 667, 670 (Okla. Crim. App. 1977); England v. State, 560 P.2d 216, 218 Okla. Crim. App. 1977); Henderson v. State, 513 P.2d 1324, 1326 (Okla. Crim. App. 1973).

94. *See* cases cited *supra* note 93.

demurrers[95] and motions for directed verdict.[96] This standard clearly runs counter to *Jackson*. It is merely an inverse statement of the *Thompson* "no evidence" test[97]: rather than saying reversal is required where there is no evidence, it says reversal is not required where there is evidence. The addition of the modifier "competent" adds nothing to the statement, as it must be assumed that only competent evidence will be considered.[98]

The second of the two most commonly applied tests is whether the state has established a prima facie case.[99] Wigmore notes that the phrase "prima facie case" can have two meanings. It can mean the point where a party has produced enough evidence to entitle him to a directed verdict if the opponent does not produce evidence.[100] This cannot apply to criminal cases because the state is never entitled to a directed verdict in criminal prosecutions.[101] Therefore, the second meaning must be applied. In this instance, "prima facie case" means the proponent has produced enough evidence in the case to make it worthy to go to the jury.[102]

Under this second definition, the "prima facie case" test is as uninformative as those noted previously in this section.[103] If "prima facie case" means "evidence sufficient to go to the jury," then obviously it is correct to send the case to the jury when the state has presented a prima facie case. But this standard does not define when the evidence is sufficient. It is equivalent to saying, "The evidence will not be held insufficient when it is sufficient." One is still left to wonder how the court has determined whether the state has made out a prima facie case.

One clue to the answer to that question lies in a number of cases in which the court uses both the "competent evidence" and the "prima facie case" test.[104] These cases indicate that the court is actually combining the two tests in an analysis that goes something like this: The court first asks, "Has the state established a prima facie case?" To answer that question, it asks, "Is there any competent evidence in the record?" If the answer is yes, the conclu-

95. Eads v. State, 640 P.2d 1370 (Okla. Crim. App. 1982).

96. Maynard v. State, 625 P.2d 111 (Okla. Crim. App. 1981); Morris v. State, 607 P.2d 1187 (Okla. Crim. App. 1980).

97. A test of "any evidence which could rationally support the verdict" was held to be "functionally indistinguishable" from the *Thompson* "no evidence" test (see *supra* text accompanying notes 38-43) in Freeman v. State, 654 S.W.2d 450, 456 (Tex. Crim. App. 1983) (en banc). In Butler v. South Carolina, 459 U.S. 932 (1982) (Marshall, J., dissenting from denial of cert.). Justice Marshall stated that "any evidence . . . reasonably tending to prove. . ." test to be equivalent to *Thompson*'s "no evidence" test. *Id.* at 936.

98. 12 OKLA. STAT. §§ 2601-2606 (1981), provide that all witnesses are competent to testify with a few limited exceptions.

99. *See, e.g.*, Nutter v. State, 658 P.2d 492 (Okla. Crim. App. 1983); Ramseyer v. State, 654 P.2d 1079 (Okla. Crim. App. 1982); Jetton v. State, 632 P.2d 432 (Okla. Crim. App. 1981); Renfro v. State, 607 P.2d 703 (Okla. Crim. App. 1980).

100. WIGMORE, *supra* note 4, § 2494, at 378.

101. U.S. CONST. amend. VI guarantees defendants the right to a trial by jury

102. WIGMORE, *supra* note 4, § 2494, at 378.

103. See *supra* note 90.

104. *E.g.*, Sanchez v. State, 665 P.2d 1218 (Okla. Crim. App. 1983); Copeland v. State, 665 P.2d 325 (Okla. Crim. App. 1983); Clark v. State, 664 P.2d 1065 (Okla. Crim. App. 1983); Mehdipour v. State, 655 P.2d 560 (Okla. Crim. App. 1982).

sion is that the evidence is sufficient.[105] The weakness of this analysis is obvious. It depends for its validity upon a standard that is unacceptable under *Jackson*.[106]

Approaching this problem from the point of view of the *Feinberg/Curley* controversy,[107] one can see that the Court of Criminal Appeals is actually applying a civil standard for sufficiency of the evidence to criminal cases. Indeed, the language the Court of Criminal Appeals uses is nearly the same as that used by the Oklahoma Supreme Court in civil cases. For example, in *Special Indemnity Fund v. Stockton*,[108] the Oklahoma Supreme Court said it would "examine . . . the record only to ascertain whether there is *any competent probative evidence* to support the finding reviewed."[109] Thus, it is clear that the Court is taking the *Feinberg* approach that was condemned in *Jackson*.[110]

Why, then, is the Court of Criminal Appeals so reluctant to incorporate "reasonable doubt" into any of its tests for sufficiency of the evidence? The answer is uncertain, but it may be inferred from the cases. In many cases that discuss sufficiency of evidence, the court states that it is the province of the jury to weigh the evidence and resolve conflicts and questions of credibility.[111] Thus, the court may be assuming that reasonable doubt is a state of mind of the jury and that using the *Jackson* standard would invade the province of the jury. However, it must be remembered that one of the underlying principles of the sufficiency of the evidence problem is that it looks at the burden of production, which is strictly a question of law and does not involve the jury.[112]

105. One question to be considered in this analysis is what evidence will be considered by the court when reviewing for the sufficiency of the evidence. The Court of Criminal Appeals has often stated that the evidence will be viewed "in the light most favorable to the state." Ozbun v. State, 659 P.2d 954 (Okla. Crim. App. 1983). This is, of course, in line with the *Jackson* holdings. See *supra* text accompanying note 64. However, this principle must not be taken too far. "[It] does not mean that *all* of the conflicts are to be so resolved, or that *all* evidence unfavorable to the proponent is to be disregarded." James, *supra* note 2, at 225 (emphasis in original). Factors such as state's evidence that is incredible or contradicted by the physical facts or laws of nature, or defendant's evidence that is highly credible and uncontradicted should be considered by the reviewing court. "While credibility is for the jury, courts set the outer limits of it." *Id.*

106. *See supra* notes 100-105 and accompanying text.

107. *See supra* text accompanying notes 16-34.

108. 653 P.2d 194 (Okla. 1982).

109. *Id.* at 198 (emphasis added). *See also* Bullard v. Grisham Constr. Co., 660 P.2d 1045, 1048 (Okla. 1983) ("there must be an utter absence of evidence."); Sisler v. Jackson, 460 P.2d 903, 911 (Okla. 1969) ("Evidence reasonably tending to prove essential facts. . .").

110. 443 U.S. at 318 n.11.

111. "[W]e have consistently held that the weight of all evidence—circumstantial as well as direct—is for the jury." Carter v. State, 595 P.2d 1352, 1354 (Okla. Crim. App. 1979). *See also* Barlor v. State, 665 P.2d 318 (Okla. Crim. App. 1983); Jones v. State, 660 P.2d 634 (Okla. Crim. App. 1983); Lovick v. State, 646 P.2d 1296 (Okla. Crim App. 1982).

112. See *supra* text accompanying note 7. As one commentator cogently stated:

> The concept of sufficiency is not concerned with the question of whether the trier of fact will in fact make such a finding; it has nothing to do with ordinary

Under the *Jackson* standard, the role of the jury is protected by viewing the evidence in the light most favorable to the prosecution.[113] This, in effect, assumes that the jury did resolve the conflicts in the evidence and questions of credibility for the state. Having made that assumption, such deference to the jury is no longer necessary. The appellate court is not second-guessing the jury, but rather is simply controlling its decision-making process.[114]

The Court of Criminal Appeals may also be reluctant to change to the *Jackson* test because of an apprehension that the higher standard will result in more reversals. The Supreme Court said in *Jackson* that it would not;[115] unfortunately, the Court did not explain why. One reason could be that if the Court of Criminal Appeals adopted a standard for sufficiency that incorporated reasonable doubt, it must be assumed that the trial courts would use a like standard in ruling on demurrers and directed verdict motions.[116] Furthermore, prosecutors will be forced to more thoroughly screen cases going to trial. This change at all phases of the criminal trial process should result in the Court of Criminal Appeals seeing no more cases requiring reversal for insufficient evidence than it does now. Of course, prosecutors may find it more difficult to obtain a conviction, but if they cannot gather the quantity of evidence the Constitution requires, surely they cannot complain.

Conclusion

Simply stated, the Oklahoma Court of Criminal Appeals should adopt the *Jackson* test and incorporate reasonable doubt principles into its review of the sufficiency of the evidence. However, it may be argued that, in application, there is no substantial difference between the *Jackson* test and the tests currently applied in Oklahoma, particularly the prima facie case test.[117] Indeed, some commentators have questioned whether there is a difference,[118] and some courts, while professing adoption of *Jackson*, continue to use pre-

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> questions of credibility or the persuasive effect which evidence will actually have upon the mind of this particular jury or judge as trier of fact. It does not ordinarily matter therefore that the testimony of the fact may be contradicted or impeached.

James, *supra* note 2, at 220.

113. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

114. *Id.* at 318.

115. *Id.* at 317 n.10.

116. This would be analogous to the statement in *Jackson* refuting the argument that the new standard will result in the granting of more writs of habeas corpus by the federal courts. The Supreme Court said this would not occur if the state courts recognized the constitutional test of sufficiency of the evidence. *Id.* at 322.

117. It is conceivable that the Oklahoma Court of Criminal Appeals is applying a *Jackson*-like standard within the context of its "prima facie case" test. That is, the court may be using the *Jackson* standard to determine whether the state has made a prima facie case. This, however, is not likely. See *supra* notes 104-106, and accompanying text.

118. "Assuming there is some substantive difference between the *Curley* rule and the former 'Second Circuit Rule,' which is by no means clear, it is doubtful whether the use of one as opposed to the other would materially affect the decision in a given case." 8A MOORE'S FEDERAL PRACTICE, *supra* note 11, ¶ 29.06, at 29.

Jackson language.[119] If this argument is accepted, the question then arises, "Why change?"

The answer is that the bench and the bar need to know what standard is to be used in criminal cases to determine whether the prosecution has met its burden of production. If, in the context of some other standard, the Court of Criminal Appeals is in fact reaching the *Jackson* inquiry, only the judges of that court know it, and the lower courts receive no guidance. Professor Goldstein stated the reasons for using the correct words:

> If words in opinions can be said to reflect or to shape attitudes, it seems fair to say that the [statements incorporating reasonable doubt] invite more careful judicial scrutiny of evidence in criminal cases than in civil. In contrast, the Second Circuit rule tells trial judges they are under no obligation to approach criminal cases as involving especially opprobrious or painful sanctions.[120]

Moreover, stating a constitutional rule for sufficiency of the evidence will do more than help trial judges in ruling on demurrers and motions for directed verdicts. It will put pressure on prosecutors to screen out those cases that are not fit for trial.[121] It will also force police to amass the amount of evidence the Constitution requires to deprive a person of freedom.[122]

The foregoing discussion is based upon an assumption that there is no substantive difference between the *Jackson* test and those currently in use in Oklahoma. But that assumption is not likely to be valid. As previously stated, the Court of Criminal Appeals appears to be using a "no evidence" test.[123] Therefore, adoption of the *Jackson* standard would be a departure from current practice. Nonetheless, *Jackson* clearly requires that departure.[124]

The Supreme Court could not have been more explicit in stating that the *Jackson* decision was founded on the fourteenth amendment due process clause.[125] This makes discussions of whether the new standard should be adopted purely academic. If the fourteenth amendment requires the new test, states do not have the option of accepting or declining it. Thus, the Court of Criminal Appeals has no choice but to adopt the *Jackson* standard and bring its sufficiency of the evidence analysis in line with constitutional mandates.

C. Kevin Morrison

119. In State v. Van Pham, 234 Kan. 649, 675 P.2d 848 (1984), the Kansas Supreme Court recited the *Jackson* test with approval, then stated: "[I]f the essential elements of the charge are sustained by any competent evidence, the conviction stands." *Id.* at 688, 675 P.2d at 864.

120. Goldstein, *supra* note 13, at 1161.

121. *Id.*

122. *Id.*

123. See *supra* notes 97, 104-106, and accompanying text.

124. 443 U.S. at 317-18.

125. *Id.* "Under *Winship*, which established proof beyond a reasonable doubt as an essential of Fourteenth Amendment due process, it follows that when such a conviction [based on insufficient evidence] occurs in a state trial, it cannot constitutionally stand."