COMMENT

A FEARLESS SEARCH FOR THE TRUTH NO LONGER: *STATE V. HENLEY* AND ITS DESTRUCTIVE IMPACT ON NEW TRIALS IN THE INTEREST OF JUSTICE

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Discretionary reversal, also known as the authority to grant new trials in the interest of justice, is one of Wisconsin courts' most crucial powers. It is also one of the most complex. For almost a century, the Wisconsin Supreme Court has given meaning to discretionary reversal by exercising its powers in service of the truth, making discretionary reversal a powerful tool for the wrongfully convicted. However, the supreme court's recent shift toward a tough-on-crime mentality has placed discretionary reversal at risk—and nowhere has the power been so damaged as in *State v. Henley*.

This Comment explores the history of discretionary reversal, the meaning of the statutes' two prongs, and the devastating impact of *Henley*. It explores why the *Henley* court was wrong in stripping circuit courts of the power of discretionary reversal, and recommends the best way for courts and practitioners to administer these powers moving forward as they were meant to be administered—in a fearless search for the truth.

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INTRODUCTION

A man convicted of sexual assault on the strength of several hairs that did not belong to him.[1] A man connected to a crime by video evidence that featured a suspect on tape several inches shorter than he.[2] A young man accused of sexual assault, whose attorney chose to present no defense at trial, and who later discovered a witness who could undermine the testimony of the victim[3] so entirely that his codefendant's attorney's failure to investigate this witness constituted ineffective assistance of counsel.[4] For the first two men, Wisconsin provided a remedy: a new, fair trial. For the third, that remedy was snatched away in a decision that dramatically altered Wisconsin law—and may signal a dangerous decline in Wisconsin courts' ability to ensure that justice is done.

The criminal justice system has no single purpose but instead means many things to many people.[5] Some studies indicate that Americans see its primary purpose as criminal rehabilitation.[6] Others view it as a system to punish wrongdoers,[7] protect society,[8] or deter

1. *See State v. Hicks*, 202 Wis. 2d 150, 549 N.W.2d 435 (1996).

2. *See State v. Avery*, 2011 WI App 148, 337 Wis. 2d 560, 807 N.W.2d 638.

3. *See State v. Henley*, 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350.

4. *See Adams v. Bertrand*, 453 F.3d 428, 436–38 (7th Cir. 2006).

5. *See* CLIFF ROBERSON & DILIP K. DAS, AN INTRODUCTION TO COMPARATIVE LEGAL MODELS OF CRIMINAL JUSTICE 85 (2008) ("The four common goals of criminal sanctions are retribution, deterrence, incapacitation, and rehabilitation."). *See generally* FREDA ADLER ET AL., CRIMINAL JUSTICE 344–51 (Phillip A. Butcher et al. eds., 1994).

6. Brian Pinaire et al., *Barred from the Vote: Public Attitudes toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1543 (2003).

7. *See* AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 69 (Timothy J. Flanagan & Dennis R. Longmire eds., 1996) (noting that 53%

others from criminal activity.[9] Ultimately, whether the system's role is protective or punitive, the concept of ensuring justice[10] is crucial.[11] As such, the system is necessarily designed to ensure justice to all parties, including the accused.[12] Indeed, fundamental principles like the right against self-incrimination,[13] the right to counsel,[14] and the legal standard of "innocent until proven guilty"[15] demonstrate that our system *contemplates* the need for justice for all, no matter where our

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of respondents nationally believed that, in sentencing adults, retribution was the most important purpose).

8. *See id.* at 82 ("[I]n a national survey conducted by the Wirthlin Group in 1994, 61% of Americans chose [as the purpose of prisons] the incapacitation response (to keep criminals out of society).").

9. *See id.* at 69 (noting that 13% of respondents believe deterrence is most important in sentencing adults and 15% believe it is in sentencing juveniles).

10. "Justice" itself, as an abstract concept, can be difficult to define. One criminal defense attorney defines it as "human flourishing and good human functioning." Michael E. Tigar, *Defending*, 74 TEX. L. REV. 101, 106 (1995). A famous folklorist defined it as "the most perfect expression of harmonious relation between individuals or social groups living in peace and friendship with one another on the basis of the freely acknowledged rights of each." Alexander H. Krappe, *Observations on the Origin and Development of the Idea of Justice*, 12 U. CHI. L. REV. 179, 180 (1945). A professor of philosophy, meanwhile, theorized that justice requires both rationality and incorporation of emotion—both "those benign 'moral sentiments' such as sympathy, care and compassion" and "the nastier emotions of envy, jealousy, resentment, and, especially, vengeance." Robert C. Solomon, *Sympathy and Vengeance: The Role of the Emotions in Justice*, *in* EMOTIONS: ESSAYS ON EMOTION THEORY 291, 292 (Stephanie H.M. van Goozen et al. eds., 1994). Ultimately, then, while specific definitions vary, "justice" seems to carry with it the connotation of people getting what they deserve, to the benefit of all.

11. Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219, 219 (1994) ("*Justice*, goodness, rightness, truth, fairness . . . .These are just some of the key political, ethical, and aesthetic values of contemporary American law." (emphasis added)); *see also* Russell E. Carparelli, *Preserving Our Heritage of Justice*, 37 COLO. LAW. 13, 13 (2008) ("When justice is done and is seen to be done, it re-affirms the value of justice in others, maintains a social norm, and promotes respect for the law. If justice is not done and if it is seen that justice has not been done—in our homes, in our communities, in our commerce, and in our government institutions—more of our youth and our fellow citizens will doubt that there is justice."); Pinaire et al., *supra* note 6, at 1521 ("Americans, we assumed, generally value 'justice' . . . and expect the legal system to protect [it].").

12. A SPECIAL COMM. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. & THE NAT'L LEGAL AID & DEFENDER ASS'N, EQUAL JUSTICE FOR THE ACCUSED 34 (1959) [hereinafter EQUAL JUSTICE].

13. U.S. CONST. amend. V.

14. U.S. CONST. amend. VI.

15. WIS. STAT. § 939.70 (2009–10); *e.g.*, *Spick v. State*, 140 Wis. 104, 121 N.W. 664 (1909).

sympathies may lie. Indeed, justice for the accused is crucial not only for defendants' sakes, but for society's sake as well.[16]

In service of this aim, the Wisconsin Supreme Court has the inherent power to grant a new trial in the interest of justice.[17] The Wisconsin Court of Appeals likewise has this inherent right.[18] Wisconsin has also taken an extra step and codified the interest-of-justice power for both the supreme court[19] and the court of appeals.[20] Wisconsin is unique in granting this power to appellate courts, not just trial courts,[21] and has even codified the right separately for civil trials.[22]

However, neither the case law nor the codified text explicitly defines the "interest of justice." The statutes do provide two bases for discretionary reversal: when "it appears from the record that the controversy has not been fully tried"[23] or when "it is probable that justice has for any reason miscarried."[24] Case law has somewhat developed the latter standard: to reverse a conviction for a miscarriage of justice, there must be "a substantial probability that a second trial [would] produce a different result."[25] But the statutes themselves institute no framework for the former standard, leaving practitioners to

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16. EQUAL JUSTICE, *supra* note 12, at 34 ("The individual defendant needs representation because he does not have the technical skills to conduct his own defense; nor can he be protected adequately by judge or prosecutor. Our democratic society needs to have representation provided to all accused so that the scales of justice can be equally balanced and the goal of equal justice under law achieved."). While *Equal Justice* focuses on representation for indigent defendants as a means of ensuring justice, the dual benefit system exists in other contexts as well: the interest of justice power both protects a defendant from wrongful conviction and, by remedying wrongful convictions, ensures "respect for the administration of justice" from society at large. *Id.* at 38.

17. *State v. Penigar*, 139 Wis. 2d 569, 577, 408 N.W.2d 28 (1987) (citing *State v. McConnohie*, 113 Wis. 2d 362, 369–71, 334 N.W.2d 903 (1983)); see *infra* notes 236–238 and accompanying text for a fuller discussion of inherent powers.

18. *State v. Johannes*, 229 Wis. 2d 215, 229, 598 N.W.2d 299 (Ct. App. 1999) (citing *State v. Hicks*, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996)).

19. § 751.06.

20. § 752.35.

21. William D. Mollway, Note, State v. Wyss: *A New Appellate Standard for Granting New Trials in the Interest of Justice*, 1987 WIS. L. REV. 171, 171.

22. § 805.15(1). For a time, even the State conceded that the civil statute was also a proper vehicle for criminal defendants to seek a new trial. *State v. Henley*, 2010 WI 97, ¶ 34, 328 Wis. 2d 544, 787 N.W.2d 350. But in 2010, the Wisconsin Supreme Court held that this statute applies only in civil cases. *Id.* ¶ 5.

23. §§ 751.06, 752.35.

24. §§ 751.06, 752.35.

25. *E.g.*, *State v. Grobstick*, 200 Wis. 2d 242, 253, 546 N.W.2d 187 (Ct. App. 1996).

ask: What constitutes a controversy? Is it tied to newly discovered evidence?[26] Procedural error?[27] Or is the "controversy" merely, as some justices have suggested,[28] the question of guilt or innocence? Likewise, when has justice been miscarried? Is it possible that reversal is appropriate even if the probability of acquittal the second time around is unclear—particularly since the reviewing court looks at the totality of the circumstances in determining whether to exercise its discretionary reversal powers?[29]

The duality of statutes and inherent powers also raises questions. Why is a statute necessary if courts have inherent power to take action in the interest of justice? When should a court use one set of powers versus the other?

One thing is certain: the discretionary reversal power is critical to the justice system, especially now. The Wisconsin Supreme Court reviews fewer criminal cases today than in the past,[30] and in recent years, many of its decisions have come down against defendants.[31] Wisconsin's judicial selection process may also make justices more

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26. *See State v. Armstrong*, 2005 WI 119, ¶¶ 154–56, 283 Wis. 2d 639, 700 N.W.2d 98 (granting a new trial in the interest of justice based on newly available DNA and hemostick testing results).

27. *See State v. Burns*, 2011 WI 22, 332 Wis. 2d 730, 798 N.W.2d 166 (analyzing evidentiary issues in determining whether the defendant was entitled to a new trial).

28. *E.g.*, *Armstrong*, 2005 WI 119, ¶ 164 (Roggensack, J., dissenting) ("[B]ecause I conclude that the real controversy, whether Armstrong raped and murdered [the victim] was fully tried in 1981, I respectfully dissent."). In *Armstrong*, in a four-three decision, the majority found that the real controversy had not been fully tried because "the crucial issue of identification was clouded." *Id.* ¶ 115. The striking contrast between the competing conceptions of the "controversy" at hand—identification versus guilt—exemplifies the open framework of the statute.

29. *State v. Wyss*, 124 Wis. 2d 681, 735–36, 370 N.W.2d 745 (1985).

30. James Briggs, *Spinning the Wheels of Justice*, WIS. L.J., Aug. 22, 2011, at 14, 15, *available at* http://wislawjournal.com/2011/08/22/spinning-the-wheels-of-justice/.

31. *See id.* For example, in the 2010–11 term, five justices were in the majority in criminal cases 95% (or, in one case, 100%) of the time; Chief Justice Shirley Abrahamson and Justice Ann Walsh Bradley voted with the majority just 35% of the time. *Id.* at 14. In contrast, they "concurred with each other in 90 percent of criminal cases, often as dissenters on the side of the defendant." *Id.* at 15. This pattern is not limited to the 2010–11 term: in criminal cases during the 2009–10 term, Chief Justice Abrahamson and Justice Bradley were in the majority just 54% of the time. David Ziemer, *Ziegler in Majority Most Often*, WIS. L.J., Aug. 9, 2010, at 1, 11, *available at* http://wislawjournal.com/2010/08/09/ziegler-in-majority-most-often-2/. This was, in turn, "a stark drop from the previous term, in which Bradley was in the majority in 79 percent, and Abrahamson in 81. Even in that term, however, the two were least often in the majority." *Id.*

likely to be tough on crime.[32] While discretionary reversal is meant "only [for] exceptional cases,"[33] its existence and breadth ensure that relief remains available for those exceptional cases,[34] no matter the makeup and tendencies of the courts.

The Wisconsin Supreme Court's recent decision in *State v. Henley*,[35] however, has both clouded and constricted this critical power when it is more important than ever.[36] In *Henley*, the district court granted the defendant a new trial in the interest of justice under Wisconsin Statutes section 805.15(1).[37] After certification by the court of appeals,[38] the Wisconsin Supreme Court reversed, holding for the first time that the statute was purely civil and "was *not* intended to apply to criminal appeals."[39] The court also altered the very nature of the law, instituting a procedural limit on a circuit court's ability to grant a new trial in the interest of justice[40] and holding that circuit courts lack

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32. Jason J. Czarnezki, *Voting and Electoral Politics in the Wisconsin Supreme Court*, 87 MARQ. L. REV. 323, 346 (2003) (finding that elected justices "are over 60% more likely to vote *against* a defendant's claim in the first term"). Czarnezki theorizes this is due to a sense of responsibility to the electorate, which views crime as a major problem. *See id.* That sense of responsibility to the electorate is a longstanding tradition of Wisconsin courts. Jack Ladinsky & Allan Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128, 128–29. However, given that people generally value fairness, that duty ought not to prevent courts from doing justice in a particular case. *See, e.g.*, *supra* note 11 and accompanying text; *infra* note 221 and accompanying text. Indeed, "[c]itizens want to know that justice is done to all," and wrongful convictions serve only to "create . . . disturbing doubts in the public." EQUAL JUSTICE, *supra* note 12, at 38.

33. *State v. McGuire*, 2010 WI 91, ¶ 59, 328 Wis. 2d 289, 786 N.W.2d 227 (quoting *State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996)).

34. It accomplishes this by its breadth and scope: because it prescribes no formula a defendant must meet, it can apply in any case where a court suspects justice has not been done. *See infra* Part II.C.1 for a discussion of the need to avoid a prescribed formula.

35. 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350.

36. *See* Briggs, *supra* note 30, at 15 (noting that it is more difficult for defendants to obtain relief in recent years); Michael O'Hear, *Can Defendants Get a Fair Hearing in the Wisconsin Supreme Court?*, LIFE SENTENCES BLOG (Aug. 29, 2011, 3:10 PM), http://www.lifesentencesblog.com/?p=3160 (noting an apparent trend toward "antidefendant block voting").

37. *Henley*, 2010 WI 97, ¶ 3.

38. *State v. Henley*, No. 2008AP697-CR, 2009 WL 36880, at *6 (Wis. Ct. App. Jan. 8, 2009).

39. *Henley*, 2010 WI 97, ¶ 61.

40. *Id.* ¶ 63 (holding, on direct appeal, that defendants could seek new trials in the interest of justice under WIS. STAT. § 974.02 (2009–10)); *id.* ¶ 63 n.25 (holding that "a motion for a new trial in the interest of justice under § 974.06 [postconviction relief] would not pass muster unless it involved one of the types of claims allowed by the statute").

the *inherent* authority to grant a new trial in the interest of justice at all.[41] Finally, the court declined to use its own discretionary reversal power in Henley's case.[42]

Discretionary reversal, undefined at the best of times, has become a game of chance. Under *Henley*, a case that raises serious doubts as to a defendant's guilt could be dismissed by a judge who takes *Henley*'s narrow view of either a real controversy fully tried or a miscarriage of justice too much to heart.[43] In other cases, new procedural obstacles might doom a defendant to imprisonment, regardless of actual innocence.[44] Such imprecision is no way to administer the law, and it may violate due process[45] to predicate liberty—and the ability to take that liberty away—on a judge's feelings about what the law surrounding the interest-of-justice power should be, particularly if those opinions are

41. *Id.* ¶ 75.

42. *Id.* ¶ 84. This is disturbing given the situation of Henley's codefendants and the decision of the lower court. *See infra* Part II.C.2. By its own assessment, the supreme court is "especially reluctant to exercise [its] own authority when either the circuit court or the court of appeals has exercised its discretion to order a new trial in the interests of justice." *Stivarius v. DiVall*, 121 Wis. 2d 145, 154, 358 N.W.2d 530 (1984). No trace of that reluctance appears in the majority's opinion in *Henley*: the court grants no deference to the lower court's holding, substituting its own judgments for those of the circuit court. *See Henley*, 2010 WI 97, ¶¶ 82–84. This is far from the articulated standard of review: the lower court's discretion must be upheld "if the decision [is] made on appropriate facts and the correct law is one which a court reasonably could have reached." *State v. McConnohie*, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983). While the circuit court granted relief under the wrong statute, *Henley*, 2010 WI 97, ¶ 39, there is no indication that its decision was unreasonable on the merits or that the lower court used inappropriate facts. The supreme court's decision to ignore the circuit court's decision is therefore technically permissible but raises serious questions as to the actual justice of the situation.

43. *Cf.* C.R. Steinmetz, *Power of Appellate Court to Modify Sentences on Appeal*, 9 WIS. L. REV. 172, 172 (1934) ("If the discrepancies [in sentencing] were based upon differences in the personalities of the criminals, or if they were based upon different degrees of guilt involved they could very well be justified, but they . . . are merely the result of varying attitudes which judges and juries adopt toward certain crimes and certain criminals, often reflecting local prejudices. Despite the fact that no justification for the discrepancies can be found, they remain . . . and offend the sense or concept of justice as equality.").

44. *See Henley*, 2010 WI 97, ¶ 75 (asserting that courts should not be able "to order a new trial in the interest of justice at any time, unbound by concerns for finality").

45. All criminal defendants are entitled to due process. U.S. CONST. amend. XIV, § 2. Indeed, "the criminal trial, when it occurs, is the pinnacle of constitutional 'process.'" Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 3 (2006). "[E]specially in the criminal context, [a fair trial's] most vital element is a neutral, independent adjudicator." Peter M. Friedman, *Don't I Know You from Somewhere?: Why Due Process Should Bar Judges from Presiding over Cases when They Have Previously Prosecuted the Defendant*, 88 J. CRIM. L. & CRIMINOLOGY 683, 684 (1998).

unsupported by precedent. Criminal defendants have certain rights because the stakes are higher when they may lose their liberty or reputations.[46] Therefore, in a case where new evidence[47] or some other consideration has engendered grave doubts about a convicted defendant's guilt, discretionary reversal must be a viable tool for the administration of justice.

This Comment clarifies discretionary reversal powers following *Henley*. It also suggests how courts should interpret and use those powers. Additionally, it asserts that, contrary to the *Henley* decision, circuit courts have the inherent power to grant a new trial in the interest of justice. Part I provides the history of discretionary reversal. Part II.A examines the dual framework of inherent and statutory powers and recommends that the court of appeals utilize the former. Part II.B advocates that the legislature grant circuit courts the latter. Part II.C turns to the statutes themselves: it rejects the idea of a specific test for a controversy not fully tried and advocates a broad analysis, and then contends that "miscarriage of justice" is too narrow in scope. Finally, Part II.D rejects the *Henley* court's denial of circuit courts' inherent powers. This Comment concludes by looking forward in this crucial area of law.

I. THE ORIGINS OF DISCRETIONARY REVERSAL

Justice itself is not a new concept. Philosophers have sought to define it for millennia[48] and it is considered one of the core characteristics of the United States.[49] In fact, some research suggests

46. *In re Winship*, 397 U.S. 358, 363 (1970) ("The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.").

47. New evidence is a valid basis for advancing a claim for a new trial in the "interest of justice." *State v. Maloney*, 2006 WI 15, ¶ 14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (citing *State v. Hicks*, 202 Wis. 2d 150, 160–61, 549 N.W.2d 435 (1996); *see also State v. Plude*, 2008 WI 58, ¶¶ 52–59, 310 Wis. 2d 28, 750 N.W.2d 42 (Ziegler, J., concurring) (arguing that a case presenting new evidence should have been reversed via discretionary reversal); *id.* ¶ 51 (Butler, J., concurring) (agreeing that discretionary reversal was a viable tool in that case). *Contra State v. Armstrong*, 2005 WI 119, ¶¶ 180–88, 283 Wis. 2d 639, 700 N.W.2d 98 (Roggensack, J., dissenting) (arguing that cases involving newly discovered evidence should not be analyzed under the interest of justice standard).

48. *See, e.g.*, PLATO, THE REPUBLIC 46 (Albert A. Anderson ed., Benjamin Jowett, trans., 2001) ("Before we even discovered the nature of justice, I left that question and started asking whether justice is virtue and wisdom, or evil and folly. Then, I couldn't help being diverted by the question about the comparative advantages of justice and injustice. The result is that I learned nothing.").

49. EQUAL JUSTICE, *supra* note 12, at 34.

that human beings have an innate sense of fairness[50]—as have some Supreme Court justices.[51] However, the Wisconsin statutes reflecting that sense arose somewhat more recently.[52] This Part traces the origins of the statutory interest-of-justice power from the statutes' enactments to the present day.

A. The Birth of the Interest-of-Justice Standard in Wisconsin

Wisconsin's statutory reflection of "justice" is nearly a century old. In 1913, the legislature enacted the predecessor to Wisconsin Statutes section 751.06.[53] Though some language has since changed, the original statute still granted the power of discretionary reversal "if it shall appear to [the Wisconsin Supreme Court] from the record, that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried."[54] The purpose of the statute was twofold: to deal with reversals that were necessary due to "mere procedural errors" and to remedy attorneys' failures to file exceptions in a timely manner.[55] Courts soon expanded that power to encompass issues not presented to the lower court.[56] Still, they "did not articulate any consistent legal standard to use in determining when [they] would grant discretionary reversals."[57]

A miscarriage of justice at that time was, as now, a nebulous concept. In *Paladino v. State*,[58] for instance, the Wisconsin Supreme Court ordered a new trial in the interest of justice despite there being "no errors sufficient to work a reversal of the judgment" and, far from

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50. N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 483–84 (6th ed. 2011). *But see* Joseph Henrich, *Does Culture Matter in Economic Behavior? Ultimatum Game Bargaining among the Machiguenga of the Peruvian Amazon*, 90 AM. ECON. REV. 973 (2000) (suggesting that differences in culture affect the perception of what is fair).

51. *E.g.*, EQUAL JUSTICE, *supra* note 12, at 34 ("It is in the nature of man to seek justice.") (quoting Letter from Earl Warren, Chief Justice of the United States, to Orison S. Marden, President, National Legal Aid Association, dated Oct. 10, 1956).

52. Mollway, *supra* note 21, at 173 n.16.

53. *Id.*

54. WIS. STAT. § 2405*m* (1913).

55. Hon. Marvin B. Rosenberry, *Recent Progress in Judicial Administration and Procedure in Wisconsin*, 5 MARQ. L. REV. 3, 9 (1920–21).

56. Mollway, *supra* note 21, at 175; *see, e.g.*, *Gillet v. Flanner-Steger Land & Lumber Co.*, 159 Wis. 578, 583, 150 N.W. 987 (1915) ("On the record, defendant made no complaint except as to the findings on the subject of negligence. If it were not for sec. 2405*m*, Stats., there would be no way, under established practice, to remedy the difficulty.").

57. Mollway, *supra* note 21, at 175.

58. 187 Wis. 605, 205 N.W. 320 (1925). In fact, the court specifically stated that in its view, "the defendant should have an opportunity of presenting the matter to another jury." *Id.*

justifying its decision, the court "purposely refrain[ed] from any comment upon the evidence."[59] In contrast, in *Jacobsen v. State*,[60] a paternity case, the court discussed the facts extensively, including the victim's menstrual cycle, the date of her sexual intercourse with the defendant, and her child's birthdate, before holding that it was probable that justice had miscarried.[61] Ultimately, the court tended to interpret "miscarriage of justice" as "a clear and unauthorized finding resulting in an erroneous judgment and sentence."[62] It also specified that the court would not grant a new trial in the interest of justice unless it was convinced of a probable miscarriage of justice "viewing the case as a whole."[63] When coupled with decisions like *Paladino*, it is unsurprising that the scope of the court's power in the interest of justice "has been subject to much litigation and varying judicial interpretations over the years."[64]

In 1966, the court provided additional guidance as to what constituted a miscarriage of justice. In *Lock v. State*,[65] the Wisconsin Supreme Court held that for a miscarriage of justice to exist, the court "would at least have to be convinced that the defendant should not have been found guilty and that justice demands the defendant be given another trial."[66] However, this standard, which was interpreted to require probability of a different result on retrial,[67] was quickly altered, or at least undermined, by cases that followed. The supreme court just four years later declared that although "it [was] apparent that [it could not] say, using the mechanistic rule . . . that on a retrial the plaintiff would probably win," it was concerned "that in the totality of the circumstances of the case the evidence may not have been fairly weighed."[68] It thereafter reversed in the "interest of justice,"[69] limiting the applicability of *Lock* and leaving the standard open to interpretation.

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59. *Paladino*, 187 Wis. at 605–06. In fact, the court specifically stated that in its view, "the defendant should have an opportunity of presenting the matter to another jury." *Id.*

60. 205 Wis. 304, 237 N.W. 142 (1931).

61. *Id.*

62. Steinmetz, *supra* note 43, at 175.

63. *Puls v. St. Vincent Hosp.*, 36 Wis. 2d 679, 693, 154 N.W.2d 308 (1967).

64. Mollway, *supra* note 21, at 171.

65. 31 Wis. 2d 110, 142 N.W.2d 183 (1966).

66. *Id.* at 118.

67. Mollway, *supra* note 21, at 176.

68. *Lorenz v. Wolff*, 45 Wis. 2d 407, 415, 173 N.W.2d 129 (1970); *id.* at 414 (disclaiming the required use of that same "mechanistic formula" in applying the interest of justice standard); Mollway, *supra* note 21, at 177 (discussing the use of the *Lorenz* exception and the conjunctive-disjunctive dispute of the test itself).

69. *Lorenz*, 45 Wis. 2d at 426.

B. The Court of Appeals and the Struggle for a Definable Standard

Until this point, the statutory interest-of-justice power had rested exclusively with the Wisconsin Supreme Court. When the Wisconsin Court of Appeals came into being in 1977[70] and issued its first judicial opinions on August 16 of the following year,[71] the Senate quickly enacted Wisconsin Statutes section 752.35.[72] It reproduced the text of section 751.06 (renumbered and with minor edits)[73] and granted discretionary reversal power to the newly minted Wisconsin Court of Appeals. Because the language in the statutes is identical,[74] the court of appeals' codified power is the same as that granted to the supreme court.[75] Their powers are therefore equally broad and, in practicality, apply in both direct appeals and in the postconviction context, though the court of appeals' odd (and unique) decision in *State v. Allen*[76] briefly suggested otherwise.[77]

Though neither court articulated a clear standard for discretionary reversal, the general trend at this time was to err on the side of the defendant and ensure that the truth was discovered. For instance, in *Garcia v. State*,[78] the defendant moved for a new trial because an alibi

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70. Matthew E. Gabrys, Comment, *A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years after the Creation of the Wisconsin Court of Appeals*, 1998 WIS. L. REV. 1547, 1549.

71. *Id.* at 1547.

72. S.B. 1, 1977 S., Nov. 1977 Spec. Sess. (Wis. 1977) (the text of WIS. STAT. § 751.06 was reproduced as WIS. STAT. § 752.35); 1977 Wis. Sess. Laws 815.

73. 1977 Wis. Sess. Laws 788.

74. The language is identical to this day. *Compare* WIS. STAT. § 751.06 (2009–10), *with* § 752.35.

75. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990) (holding that "cases . . . which interpret the supreme court's power to reverse judgments, notwithstanding waived error, under sec. 751.06 are equally applicable as interpretations of the court of appeals' power to reverse judgments under sec. 752.35").

76. 159 Wis. 2d 53, 464 N.W.2d 426 (Ct. App. 1990).

77. In *Allen*, the court held that "[s]ection 752.35 [did] not permit [it] to go behind a sec. 974.06 order to reach the judgment of conviction." *Id.* at 56. The Wisconsin Supreme Court has always viewed the decision with suspicion. *See, e.g.*, *State v. Armstrong*, 2005 WI 119, ¶ 113 n.25, 283 Wis. 2d 639, 700 N.W.2d 98 ("*Allen*'s exceedingly narrow view of the broad grant of power of discretionary reversal is strange. . . .[I]f an appeal is here from [a 974.06] order, it does not follow that this court is powerless to reverse the underlying judgment."). Its recent decision in *Henley*, in which it analyzed Henley's 974.06 motion under its statutory powers, seems to be the nail in the coffin for *Allen*: if the court of appeals cannot exercise its statutory discretionary reversal power in postconviction, neither can the Wisconsin Supreme Court. Yet in *Henley*, it performed just that analysis (though ultimately deciding not to grant relief). *Henley*, 2010 WI 97, ¶ 80, 328 Wis. 2d 544, 787 N.W.2d 350.

78. 73 Wis. 2d 651, 245 N.W.2d 654 (1976).

witness had not testified.[79] The defendant had, in fact, known of the witness prior to his trial, but he had "surmised he would not be found guilty and did not want to involve his friends."[80] Despite this self-sabotage, the court granted a new trial, noting that "[t]he administration of justice is and should be a search for the truth."[81] As such, because "[t]he major issue was the credibility of the witnesses," a jury needed the chance to evaluate the missing testimony.[82] This interpretation of the statute is generous, allowing a new trial despite deceptive conduct in the interest of finding truth.[83] The *Garcia* court was not alone; other cases have used similarly broad standards.[84]

In *State v. Wyss*,[85] the Wisconsin Supreme Court attempted to clarify the state of the law. It held that:

> the "real controversy not fully tried" category included situations which arose in two ways: either the jury was not given an opportunity to hear important testimony that bore on an important issue in the case, or the jury had before it improperly admitted [evidence] that obscured a crucial issue and prevented the real controversy from being fully tried.[86]

Likewise, the court required that an appellate court "be convinced that *the defendant should not have been found guilty* and that justice demands the defendant be given another trial,"[87] simply because that "requirement [had] been reiterated repeatedly and [had] become a firm fixture in Wisconsin criminal law."[88]

Wyss could potentially have "greatly contribute[d] to the development of a clear, consistent legal standard."[89] However, the

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79. *Id.* at 653.

80. *Id.* at 654.

81. *Id.* at 655 (citing *State v. Chabonian*, 50 Wis. 2d 574, 580, 185 N.W.2d 289 (1971)).

82. *Id.*

83. *Id.*

84. *See, e.g.*, *State v. Cuyler*, 110 Wis. 2d 133, 327 N.W.2d 662 (1983) (granting a new trial because opinion testimony as to the defendant's reputation for truthfulness had been improperly excluded).

85. 124 Wis. 2d 681, 370 N.W.2d 745 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 451 N.W.2d 752 (1990).

86. Mollway, *supra* note 21, at 181.

87. *Wyss*, 124 Wis. 2d at 736 (quoting *Lock v. State*, 31 Wis. 2d 110, 118, 142 N.W.2d 183 (1966)).

88. *Id.*

89. Mollway, *supra* note 21, at 183.

reality has been somewhat less revolutionary.[90] Wisconsin courts have continued to apply their powers in a manner that suggests each decision is based more on a particular court's disposition and subjective interpretation of the standards than on a defined legal framework.[91] Courts have continued to write of their "broad grant of power of discretionary reversal"[92] as belonging to simpler categories. But the reality is that the power remains as broad as ever. For example, a recent decision of the Wisconsin Supreme Court asserted that "exceptional cases are *generally* limited to cases in which the jury was erroneously denied the opportunity to hear important testimony bearing on an important issue of the case."[93] However, the word "generally" demonstrates that erroneous denial is just one circumstance among many in which the real controversy has not been fully tried.[94] Indeed, even in cases that provide a clearly delineated list of "factors,"[95] the continued good-law status of other cases that do not fit neatly into such

90. *Wyss*'s two categories simply do not encompass all the scenarios that the courts have since faced. For example, *Wyss* did not say that the real controversy might not be fully tried if, for example, evidence was properly admitted and relied upon, only for scientific advances to demonstrate it was not, in fact, probative. Yet the Wisconsin Supreme Court has exercised its discretionary reversal power in not one but two such cases. *See, e.g.*, *State v. Armstrong*, 2005 WI 119, 283 Wis. 2d 639, 700 N.W.2d 98; *State v. Hicks*, 202 Wis. 2d 150, 160–61, 549 N.W.2d 435 (1996).

91. This is not to suggest that courts deliberately misconstrue the statute. Judges are allotted the highest respect and in claims of bias, for example, it is presumed they are fair and impartial. *State v. Gudgeon*, 2006 WI App 143, ¶ 20, 295 Wis. 2d 189, 720 N.W.2d 114. However, the law is in such a state of confusion that inconsistency is nearly inevitable.

92. *Armstrong*, 2005 WI 119, ¶ 113 n.25.

93. *State v. Doss*, 2008 WI 93, ¶ 86, 312 Wis. 2d 570, 754 N.W.2d 150 (emphasis added). If this were the *only* circumstance in which discretionary reversal under the first prong were appropriate, then cases involving new evidence, for example, would no longer fall under the statute, since the jury cannot erroneously be denied the opportunity to hear evidence that did not yet exist.

94. Further support comes in *State v. Maloney*, which states that "the real controversy has not been tried if the jury was not given the opportunity to hear and examine evidence that bears on a significant issue in the case, even if this occurred because the evidence or testimony did not exist at the time of trial." 2006 WI 15, ¶ 14 n.4, 288 Wis. 2d 551, 709 N.W.2d 436 (citing *Hicks*, 202 Wis. 2d at 160–61). Additionally, the Wisconsin Supreme Court has explicitly noted that regardless of a given factual situation, "the court must have the liberty . . . to consider the totality of circumstances and determine whether a new trial is required to accomplish the ends of justice because the real controversy has not been fully tried." *Hicks*, 202 Wis. 2d at 160–61 (quoting *State v. Wyss*, 124 Wis. 2d 681, 735–36, 370 N.W.2d 745 (1985)).

95. *E.g.*, *Hicks*, 202 Wis. 2d at 153 ("[T]he real controversy was not fully tried inasmuch as: (1) the DNA evidence excluding Hicks as the donor of one of the hair specimens was relevant to the critical issue of identification; (2) the jury did not hear this evidence; and (3) instead, the State used the hair evidence assertively and repetitively as affirmative proof of Hicks' guilt.").

lists indicates that there is no single recipe for a real controversy not fully tried.[96]

C. State v. Henley *and the Evisceration of the Standard*

With the interest-of-justice standard in flux, but focused on a conception of justice as uncovering the truth,[97] the Wisconsin Supreme Court has recently thrown the law into disarray with its verdict in *State v. Henley*.[98] The decision ignored the idea of "seeking the truth" espoused in *Garcia*,[99] opining instead that finality, not truth seeking, is the "goal central to the fair and efficient administration of justice."[100] Ultimately, the *Henley* holding slammed the door on what had, prior to the decision, been a generous standard[101]—one that erred on the side of giving defendants a trial that the court could say with surety was fair.[102]

Examining *Henley* illustrates just how aberrant the court's decision was. Henley was on trial for sexual assault.[103] After a long and complex procedural history,[104] the trial court granted Henley a new trial under Wisconsin Statutes section 805.15(1) because "the issue of consent, the real controversy, was not fully tried."[105] The court of appeals certified several questions related to the interest-of-justice power to the supreme court—but noted that "the questions [it] present[ed] [were] not

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96. *See, e.g.*, *id.* at 161 (citing to *Garcia v. State*, 73 Wis. 2d 651, 245 N.W.2d 654 (1976), and *State v. Cuyler*, 110 Wis. 2d 133, 327 N.W.2d 662 (1983), neither of which features the three *Hicks* factors as good law, and failing to overrule either case).

97. *E.g.*, *Garcia*, 73 Wis. 2d at 655.

98. 2010 WI 97, 328 Wis. 2d 544, 787 N.W.2d 350.

99. *See Garcia*, 73 Wis. 2d at 655.

100. *Henley*, 2010 WI 97, ¶ 53.

101. *See, e.g.*, *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983) (granting a new trial to a defendant because opinion testimony as to his reputation for truthfulness had been improperly excluded). Notably, opinion testimony as to reputation "(being at least twice removed from the individual) is the weakest [form of character evidence]." David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 16 (1986). Indeed, character evidence has taken a battering, with the United States Supreme Court calling its governing rules "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other." *Michelson v. United States*, 335 U.S. 469, 486 (1948). For the Wisconsin Supreme Court to grant a new trial due to the exclusion of such evidence indicates a generous standard indeed.

102. *See Garcia*, 73 Wis. 2d at 655–56 ("This is a close case but we believe the integrity of our system of administration of criminal justice should afford a jury the opportunity to hear and evaluate the evidence of the participant.").

103. *Henley*, 2010 WI 97, ¶ 12.

104. *See id.* ¶¶ 11–27.

105. *Id.* ¶ 26.

academic," since there was "merit to Henley's argument" that the court had erred in his case.[106] After invalidating the trial court's decision based on lack of inherent and statutory authority,[107] the Wisconsin Supreme Court then considered the interest-of-justice question and declined to use its inherent authority in favor of its broad statutory powers,[108] initiating a major shift in the statutory standard.

Though the court ostensibly recognized that it "need not find a substantial probability of a different result" to grant a new trial when the "controversy has not been fully tried,"[109] in practice, the holding advocates the exact opposite view.[110] The Wisconsin Supreme Court dismissed the testimony of a neutral witness whom the Seventh Circuit had found "pivotal" and "crucial,"[111] holding that the testimony did not necessitate a new trial in the interest of justice. Though the court conceded that the witness "may have added some benefit to [the controversy of the victim's credibility],"[112] it held that her credibility had been fully tried because she had been cross examined.[113] This dismissive attitude toward a witness who could (and did, in two other cases) "completely undercut" the testimony of the State's star witness[114] is a far cry from earlier holdings, when it was more than enough for evidence to "discredit[] one of the pivotal pieces of proof forming the very foundation of the State's case."[115] Indeed, after the focus on the truth in earlier cases,[116] the aberraton of *Henley* foreshadows far deeper problems to come.

The law's complexity, then, has been compounded by a decision that undermines the statute's whole purpose.[117] More than ever, there is

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106. *State v. Henley*, No. 2008AP697-CR, 2009 WL 36880, at *2 (Wis. Ct. App. Jan. 8, 2009).

107. *Henley*, 2010 WI 97, ¶ 5.

108. *Id.* ¶¶ 79–80.

109. *Id.* ¶¶ 80–81 (citing *State v. Armstrong*, 2005 WI 119, ¶ 114 n.26, 283 Wis. 2d 639, 700 N.W.2d 98).

110. *See id.* ¶¶ 81–82 (noting that the absence of the evidence was not "critical").

111. *Adams v. Bertrand*, 453 F.3d 428, 437–38 (7th Cir. 2006).

112. *Henley*, 2010 WI 97, ¶ 82.

113. *Id.* This string of reasoning is even more disturbing when one considers the fact that Henley's codefendant, Jarrett Adams, had already been granted relief based on the existence of the exact same neutral witness that was available to testify in Henley's proposed retrial. *Adams*, 453 F.3d at 437–38.

114. *Adams*, 453 F.3d at 437–38.

115. *State v. Armstrong*, 2005 WI 119, ¶¶ 155–56, 283 Wis. 2d 639, 700 N.W.2d 98.

116. *E.g.*, *Garcia v. State*, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976).

117. The way the decision does this is threefold. First, it is a harsh precedential analysis. *See infra* Part II.A (discussing the decision as a constriction on the statute).

"no pattern or formula by which the lower courts or attorneys can determine when the supreme court will render a 'discretionary reversal.'"[118] As attitudes toward criminal defendants ebb and flow (as now, in favor of the prosecution),[119] discretionary reversal must retain its integrity to ensure that justice is done.

II. THE STANDARD AFTER *HENLEY*: WHAT IS AND WHAT SHOULD BE

Henley is now enshrined as Wisconsin law. In light of that decision, it is even more important to maintain the soundness of the statute's purpose. This Part offers an interpretation of the discretionary reversal power, grounded in its history and purpose, as well as suggestions for maintaining its integrity.

A. The Court of Appeals and Inherent Power: Avoiding Restrictive Precedents—and Preventing New Ones

While each motion for discretionary reversal is necessarily tied closely to the case's particular facts,[120] this does not mean that courts will not develop some standards around cases with similar fact patterns.[121] Indeed, with little guidance from the text, the disposition of cases is (without amending the statutes)[122] the central way to develop the law. In this way, discretionary reversals are akin to a common-law

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Second, it removes the discretionary reversal power from circuit courts. *See infra* Part II.D (discussing why this is contrary to the courts' purpose). Finally, it perpetuates a shift, however slight, away from discovering the truth and toward finality. *Compare Henley*, 2010 WI 97, ¶ 53 (citing *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994)), *with Garcia*, 73 Wis. 2d at 655.

118. Mollway, *supra* note 21, at 175 n.28 (quoting WISCONSIN ANNOTATIONS 1228 (James J. Burke et al. eds., 5th ed. 1970)).

119. *See* Briggs, *supra* note 30.

120. *See* WIS. STAT. § 751.06 (2009–10) (granting the power of discretionary reversal to the supreme court when "the real controversy has not been fully tried" or when "it is probable that justice has for any reason miscarried"); § 752.35 (same, but granted to the court of appeals). With no test to pass or list of elements to fulfill, the facts in any case could vary widely.

121. *See State v. Armstrong*, 2005 WI 119, ¶ 116, 283 Wis. 2d 639, 700 N.W.2d 98 ("Because of the striking similarities between the present case and *Hicks*, we set forth a detailed discussion of the *Hicks* case."). In fact, the Wisconsin Supreme Court went even further in *Armstrong*, predicating its holding on the *Hicks* decision. *Id.* ¶ 156 (holding that "[b]ecause of the affinity between this case and *Hicks*, we reverse Armstrong's judgment of conviction in the interests of justice because the real controversy was not fully tried").

122. See *infra* Part II.C.1 for a discussion of why additional statutory language, including the imposition of a specific test or formula, is undesirable in the interest of justice context.

doctrine[123]: unlike most criminal statutes, much of what is known about these statutes comes from case law.[124]

Henley takes the generous standard constructed over the years and adds a decision that is, at best, inconsistent with the attitude of prior decisions.[125] At worst, it instructs Wisconsin courts to sacrifice truth for finality.[126] As a decision of the Wisconsin Supreme Court, *Henley* is binding on lower courts.[127] Indeed, the fact that the supreme court chose to analyze the question under the statutory scheme and "decline[d] to use [its] inherent authority"[128] raises the troubling possibility of intent to raise the bar, a new interpretation of the statute inconsistent with its historical character as a last bastion of hope for the wrongfully convicted, regardless of ordinary procedural constraints.[129]

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123. "Common law" is defined as "those rules of law which do not rest for their authority upon any express or positive statute or other written declaration, but rather upon statements of principles found in the decisions of the courts." 15A AM. JUR. 2D *Common Law* § 1 (2012).

124. For example, the statutory text makes no mention of the need to show a reasonable probability of a different result in a miscarriage of justice claim. *See* § 752.35. *Lock v. State*, 31 Wis. 2d 110, 142 N.W.2d 183 (1966), firmly stated that for it to be probable that there has been a miscarriage of justice, the court "would at least have to be convinced that the defendant should not have been found guilty." *Id.* at 118. In *State v. Wyss*, 120 Wis. 2d 677, 356 N.W.2d 495 (Ct. App. 1984), the Wisconsin Court of Appeals distinguished *Lock* and held that "the fact that a juror gave inaccurate responses . . . can be a ground for a discretionary reversal and a new trial"—even when the evidence "sustains the verdict." *Id.* at 12. The Wisconsin Supreme Court reversed, holding that "the *Lock* rule must be followed" in determining whether justice has miscarried and setting in stone the reasonable-probability standard. *State v. Wyss*, 124 Wis. 2d 681, 740–41, 370 N.W.2d 745 (1985). This long, meandering journey to today's standard came about due to case law.

125. *See Garcia v. State*, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976) ("The administration of justice is and should be a search for the truth.").

126. *State v. Henley*, 2010 WI 97, ¶ 53, 328 Wis. 2d 544, 787 N.W.2d 350 ("Section 974.06 . . . was clearly designed to be the primary statutory vehicle for a convicted criminal defendant to challenge his confinement . . . .The goal of this statute, a goal central to the fair and efficient administration of justice, is finality." (footnote omitted) (citing *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994)).

127. *State v. Walters*, 2003 WI App 24, ¶ 26, 260 Wis. 2d 210, 659 N.W.2d 151, *rev'd*, 2004 WI 18, 269 Wis. 2d 142, 675 N.W.2d 778.

128. *Henley*, 2010 WI 97, ¶ 80.

129. Early use of the interest of justice statute indicates it was passed for a specific purpose: namely, to push back against judicial reform that prevented the granting of reversals based on non-prejudicial errors but failed to address minor procedural errors and the failure to make timely objections and take proper exceptions. Mollway, *supra* note 21, at 174–75. However, by the early 1930s, courts were already using it to "consider new questions" not previously presented. Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved* (pt. 3), 8 WIS. L. REV. 147, 150 (1933). Thus, early in its history, the statute already provided a vehicle by which courts could address issues they viewed as critical

In light of *Henley* and the general malleability of the standard, then, Wisconsin courts' inherent powers to grant a new trial in the interest of justice become all the more crucial. *Henley*, with its unforgiving interpretation of the statute, may foreclose relief in later, similar cases[130]: those in which something more admittedly remains to a particular controversy, but a judge independently decides it is simply not enough.[131] Criminal defendants moving under the statutes for new trials in the interest of justice would find their way barred—not because their convictions do not present "grave doubt[]"[132] as to their actual guilt, but because the statute has been drastically narrowed.

In contrast, the inherent powers of the Wisconsin Court of Appeals are subject to no such limitation. Like the statutory power, the courts' inherent powers are to be exercised with great caution and only in exceptional cases.[133] Still, if the Wisconsin Court of Appeals comes across a troubling case, it need not abide by the supreme court's narrow interpretation of the statute, which has limited a defendant's opportunity to seek a new trial in the interest of justice.[134] Instead, it can exercise its discretion to the fullest, able to do justice in a particular case with reversal only possible upon a showing of an abuse of discretion.[135] Until

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given the facts of the case. *See, e.g.*, *Cappon v. O'Day*, 165 Wis. 486, 491, 162 N.W. 655 (1917) ("Whether this court should review a question raised here for the first time depends upon the facts and circumstances disclosed by the particular record. . . .In this case the question . . . has been fully argued. . . .If it were not, we should feel it our duty to remand the record and order a new trial in accordance with the provisions of section 2405m, Stats."). Its open character and long history of allowing courts to address new issues, untethered by specifics, allows defendants the opportunity for the truth of their cases to "fully appear" without specific requirements—beyond the requirement, of course, that it has not *already* "fully appear[ed]." *Id.*

130. For example, it is nearly certain that Cuyler would not have received a new trial in the interest of justice. In that case, the Wisconsin Supreme Court "conclude[d] that the case was not fully tried inasmuch as the circuit court erred . . . and excluded admissible and material evidence on the critical issue of credibility." *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983). The evidence excluded in Henley's trial "may have added some benefit" to Henley's defense, *Henley*, 2010 WI 97, ¶ 82, but the Wisconsin Supreme Court nevertheless elected not to grant a new trial in the interest of justice, *id.* ¶ 84.

131. *Cf. Henley*, 2010 WI 97, ¶ 82 (finding that a case may be fully tried even if some beneficial information was not presented).

132. *State v. Fricke*, 215 Wis. 661, 667, 255 N.W. 724 (1934).

133. *State v. Armstrong*, 2005 WI 119, ¶ 114, 283 Wis. 2d 639, 700 N.W.2d 98 (quoting *Morden v. Continental AG*, 2000 WI 51, ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659).

134. *Henley*, 2010 WI 97, ¶ 104 (Crooks, J., dissenting) ("The majority poses the question, '[C]an convicted criminal defendants still seek a new trial in the interest of justice?' It responds, 'The answer is certainly yes.' Except, as here, when the answer is 'certainly not.'") (footnote omitted).

135. *State v. McConnohie*, 113 Wis. 2d 362, 369, 334 N.W.2d 903 (1983).

Henley no longer presents a danger, then, the court of appeals should ground its decisions in its inherent powers, not its statutory ones.

Additionally, though *Henley* itself seems to abrogate the bizarre decision in *Allen*,[136] technically, the Wisconsin Supreme Court has, as of yet, reserved judgment on the question.[137] Adopting the *Allen* rule would curtail the court's own powers as well as those of the court of appeals,[138] but a string of defeats in important criminal cases has proven discouraging to criminal defense practitioners.[139] There is no guarantee that reconsideration of the question would not now produce a different result. With so many procedural limitations already imposed by *Henley*,[140] the *Allen* approach is not one that courts currently can afford to adopt, as it would eviscerate discretionary reversals in postconviction proceedings on *all* levels.[141] The court of appeals should therefore avoid the uncertainty of *Allen*-based appeals by using its inherent powers in cases where a motion is brought in postconviction.[142]

B. Codification: A Means to Safeguard the Safeguard within the Circuit Courts

While inherent powers provide some advantages, the statutes are also necessary in their own right, because they provide definitive proof of a power that would be otherwise subject to the doubts of opposing parties.[143] Inherent powers' very nature is that they are "power[s] which

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136. *See supra* notes 76–77 and accompanying text.

137. *Armstrong*, 2005 WI 119, ¶ 113 n.25 ("In any event, we leave resolution of [the *Allen* question] for another day.").

138. *See Vollmer v. Luety*, 156 Wis. 2d 1, 18, 456 N.W.2d 797 (1990).

139. Briggs, *supra* note 30. Indeed, there is concern amongst some practitioners that the current court is doing serious damage to the criminal justice system in Wisconsin. O'Hear, *supra* note 36 ("The Wisconsin Supreme Court's antidefendant block voting reflects poorly on the court's neutrality. . . .The resolution of the tough [criminal] questions that reach such a court should not break predictably in just one direction.").

140. *See supra* notes 40–41 and accompanying text.

141. *See State v. Allen*, 159 Wis. 2d 53, 56, 464 N.W.2d 426 (Ct. App. 1990) (arguing that the court cannot reach beyond a section 974.06 order to reverse an underlying conviction).

142. The supreme court has specifically held that, even if *Allen* is correct, it does not apply to the exercise of inherent powers. *Armstrong*, 2005 WI 119, ¶ 113 ("[W]e need not decide whether our statutory power is constrained according to *Allen* because this court has 'both inherent power and express statutory authority to reverse a judgment of conviction and remit a case for a new trial in the interest of justice.'") (quoting *State v. Hicks*, 202 Wis. 2d 150, 159, 549 N.W.2d 435 (1996)).

143. For example, circuit courts had the long-established power to grant new trials in the interest of justice. *State v. Henley*, 2010 WI 97, ¶ 112, 328 Wis. 2d 544, 787 N.W.2d 350 (Crooks, J., dissenting). Because that power was not codified, the

inhere[] in the courts established by the constitution and exist[] by reason of their creation, independent of any affirmative power expressly conferred by the constitution."[144] But no explicit grant of power means that inherent powers are subject to conflicting interpretations. As a result, circuit courts were only recently denied inherent authority after years of possessing the power.[145]

The denial of circuit courts' power demonstrates that sometimes, only codification prevents a power from falling out of the courts' spheres of authority. The statute establishing Wisconsin's circuit courts indicates that the legislature intended their jurisdiction to be broad.[146] If this is a power that circuit courts were meant to have, the legislature should ensconce that power in the statutes themselves. While this Comment takes the view that circuit courts' interest-of-justice power is inherent,[147] in the wake of *Henley*, codification would protect circuit courts' power to oversee "the full and complete administration of justice."[148]

C. The Statutes Themselves: How Courts Should Consider the Two Prongs

As previously noted, the *Wisconsin Statutes* contain no mechanistic tests to define the boundaries of the interest of justice.[149] However, their very breadth, as a matter of statutory interpretation, indicates that they are meant to provide courts with the opportunity to exercise their discretion without constraint.[150] In light of this guiding principle of

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Wisconsin Supreme Court was technically free to strip it from circuit courts—as indeed it did. *Id.* ¶ 77.

144. *In re Kading*, 70 Wis. 2d 508, 518, 235 N.W.2d 409 (1975) (quoting *State v. Cannon*, 206 Wis. 374, 393, 240 N.W. 441 (1932)).

145. See *infra* Part II.D for a discussion of the *Henley* decision and its effect on circuit courts' inherent powers.

146. WIS. STAT. § 753.03 (2009–10) ("The circuit courts have power to hear and determine, within their respective circuits, all civil and criminal actions . . . and they have all the powers . . . necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice.").

147. *See infra* Part II.D.

148. § 753.03.

149. *See* §§ 751.06, 752.35.

150. *See State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110 ("Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language."). The language of the statutes is extremely broad, imbuing courts with an essentially unlimited discretion to do justice in any case.

interpretation, this Section looks to each prong in turn, suggesting the way the legislature intended the power to be exercised.

1. THE FIRST PRONG: WHAT A REAL CONTROVERSY IS NOT

Discretionary reversal under the first prong remains a nebulous area of law. The statutes are silent as to when the interest of justice overwhelms a conviction.[151] Even those decisions which seemed reliable[152] have not proven immutable.[153]

In spite of the frustration that an ambiguous standard can create, the nature of the interest-of-justice new trial does not lend itself to "mechanistic formula[e]."[154] A new trial in the interest of justice can serve as a final safeguard to protect a defendant whose conviction presents grave problems,[155] but who may not meet the more exacting standards of other postconviction remedies.[156] If, as the Wisconsin Supreme Court once proclaimed, "[t]he administration of justice is and should be a search for the truth,"[157] when a defendant is truly innocent, it should not matter how he ultimately proves that innocence.[158] The

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151. *See* §§ 751.06, 752.35.

152. *See, e.g.*, *State v. Wyss*, 124 Wis. 2d 681, 735, 370 N.W.2d 745 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 504–06, 451 N.W.2d 752 (1990) (giving two specific categories into which "controversy not fully tried" cases could fall); *see also* Mollway, *supra* note 21, at 181.

153. *Compare Wyss*, 124 Wis. 2d at 735 (giving only two categories in which the "controversy may not have been fully tried"), *with State v. Hicks*, 202 Wis. 2d 150, 164, 549 N.W.2d 435 (1996) (granting a new trial in a situation that fits neither *Wyss* category).

154. *Lorenz v. Wolff*, 45 Wis. 2d 407, 414, 173 N.W.2d 129 (1970).

155. Interview with Keith Findley, Clinical Professor, Wis. Innocence Project, in Madison, Wis. (Nov. 10, 2011); *State v. Henley*, No. 2008AP697-CR, 2009 WL 36880, at *5 (Wis. Ct. App. Jan. 8, 2009) ("[I]f this relief is available, it would also improve the ability of courts to reach a just result in cases with unusual circumstances, such as this one.").

156. For example, a new trial based on newly discovered evidence may only be granted if the defendant meets a five-factor test: "(1) the evidence was discovered after trial; (2) the moving party was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; (4) the evidence is not merely cumulative to the evidence that was introduced at trial; and (5) it is reasonably probable that a different result would be reached at a new trial." *State v. Terrance J. W.*, 202 Wis. 2d 496, 500, 550 N.W.2d 445 (Ct. App. 1996) (quoting *State v. Kaster*, 148 Wis. 2d 789, 801, 436 N.W.2d 891 (Ct. App. 1989)). Garcia could not have gotten a new trial under this standard, as he was aware of the exculpatory evidence his alibi witness could provide before he went to trial. *See Garcia v. State*, 73 Wis. 2d 651, 653–54, 245 N.W.2d 654 (1976).

157. *Garcia*, 73 Wis. 2d at 655.

158. Of course, this is not to disparage the need for cognizable standards in other contexts. For example, the high bar for a defendant to meet requirements for

controversy in a trial can cover a wide range of possibilities, from consent[159] to identity.[160] Attempting to list all possibilities might corral some cases, but when a new fact pattern arises, too rigid a framework would effectively eliminate discretionary reversal as a safeguard.[161] In such a case, a defendant who might have otherwise merited a new trial could not obtain relief—one of those intolerable instances when the law gets in the way of justice.[162]

This is not to say that there are *no* appropriate guidelines for determining whether the real controversy has been fully tried. A defendant certainly cannot prevail on a claim without identifying some partially untried controversy related to his case.[163] Courts can look to such cases to guide them in the use of their broad powers—without infringing on the wide range of relief the statute is meant to permit.[164]

For instance, in *State v. Maloney*,[165] the defendant was charged with and convicted of first-degree intentional homicide.[166] The Wisconsin Supreme Court on its own motion requested that Maloney brief whether he was entitled to relief in the interest of justice.[167]

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postconviction DNA testing at the court's expense, *see* WIS. STAT. § 974.07 (2009–10), likely prevents a flood of meritless claims and a resultant drain on public resources. However, Wisconsin courts are already warned that they are "[to approach] a request for a new trial with great caution" and to "exercise [their] discretion only in exceptional cases." *Morden v. Continental AG*, 2000 WI 51, ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659. Given the last-resort nature of the interest of justice new trial, adding even stricter standards would simply take away an innocent defendant's chances at a new trial when he has a colorable claim of innocence but does not quite fit the standards for other remedies.

159. *See, e.g.*, *State v. Henley*, 2010 WI 97, ¶ 106, 328 Wis. 2d 544, 787 N.W.2d 350 (Crooks, J., dissenting) ("I would therefore . . . affirm . . . on the grounds that the real controversy in this case, the issue of whether the sex was consensual, was not fully tried.").

160. *See, e.g.*, *State v. Hicks*, 202 Wis. 2d 150, 153, 549 N.W.2d 435 (1996) ("We therefore must conclude the real controversy of identification was not fully tried.").

161. *See State v. Wyss*, 124 Wis. 2d 681, 735–36, 370 N.W.2d 745 (1985), *overruled by State v. Poellinger*, 153 Wis. 2d 493, 504–06, 451 N.W.2d 752 (1990) ("[T]he court is not confined to apply the mechanistic formula articulated in *Lock v. State* . . . .[T]he court must have the liberty . . . to consider the totality of the circumstances.").

162. Interview with Keith Findley, Clinical Professor, Wis. Innocence Project, in Madison, Wis. (Nov. 10, 2011).

163. *See, e.g.*, *State v. Marks*, 2010 WI App 172, ¶ 28, 330 Wis. 2d 693, 794 N.W.2d 547 (declining to grant a new trial in the interest of justice when the defendant "merely repeat[ed] . . . contentions [the court had] already rejected").

164. *See supra* note 150 and accompanying text.

165. 2006 WI 15, 288 Wis. 2d 551, 709 N.W.2d 436.

166. *Id.* ¶¶ 7, 9.

167. *Id.* ¶ 20.

Maloney then suggested he was entitled to relief because the jury did not hear evidence that the Special Prosecutor in his case "accepted bribes in 22 cases in exchange for giving defendants more favorable treatment,"[168] though his own case was not included in that number.[169] The court decried the corruption,[170] but it denied relief because Maloney failed to show "how [the prosecutor's] misconduct had any impact on his trial."[171]

Maloney provides guidance as to when a defendant may not prevail: when the facts he alleges, however troubling, have no direct bearing on the controversy in his case. If some fact has come to light that the jury did not hear, there is no need for the time, expense, and emotional cost of a new trial if that fact is not directly connected to the central question of the *defendant's* case.[172] Given the critical importance of avoiding wrongful convictions,[173] courts should construe this limitation broadly. Still, *Maloney* provides an outer limit to discretionary reversal, distinguishing between facts that are generally troubling and those that implicate the administration of justice in a particular case.[174]

Similarly, the interest-of-justice power is not meant to provide a defendant with unlimited second chances. While this Comment takes the view that the central interest of justice is truth, not finality,[175]

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168. *Id.* ¶ 21.

169. *See id.*

170. *Id.* ¶ 41.

171. *Id.* ¶ 22. It should be noted in this case that "[a]ll of the bribes were received from a single attorney" as part of a pact they had. *United States v. Paulus*, 331 F. Supp. 2d 727, 730 (E.D. Wis. 2004). Additionally, those bribes were paid in exchange for the *favorable* treatment of defendants. *Id.* Maloney showed no connection between that misconduct and any misconduct in his own case. *Maloney*, 2006 WI 15, ¶ 39. The court was careful to note that, if an investigation yielded evidence of misconduct in Maloney's case, Maloney could file a motion raising that misconduct. *Id.* ¶ 41.

172. *Cf.* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). Though applying the harmless error doctrine itself to new trials in the interest of justice would require too much contortion, the general principle—that a new jury need not hear facts that do not bear on the controversy at hand—is in keeping with the general philosophy behind the statute.

173. *See In re Winship*, 397 U.S. 358, 363–64 (1970).

174. *Maloney*, 2006 WI 15, ¶ 41.

175. For example, this is the logic behind the test for newly discovered evidence: it reopens a case to ensure that case's disposition was correct. Hilary S. Ritter, Note, *It's the Prosecution's Story, but They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 833–34 (2005) ("The purpose of post-conviction DNA analysis is to use advanced scientific technology to test the State's identification

finality is nevertheless a real concern of courts, which must ensure that cases eventually come to an end.[176] As such, the interests of justice are not so broad as to allow a defendant to "have a second trial on a different, valid theory"[177] when his first attempt did not bear fruit. Likewise, "[a] judgment is not to be reversed because on second thought it appears that counsel did not try the case perfectly."[178] These cases, like *Maloney*, establish what the interest of justice is *not*: an invitation to retry a case over and over again, even when there is no discernible failure of justice.[179]

For a failsafe provision, though, the greater concern is a standard that slips too far in the direction of unattainability.[180] For that reason, courts should not deem a case's controversy to be the simple question of guilt. *Henley* instigated a shift toward analyzing whether the controversy was tried at all, rather than *fully* tried.[181] If this trend continues, and if courts equate controversy with overall guilt, denying motions for discretionary reversal will be simplicity itself; after all,

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proof—proof which a jury, and reviewing courts, have already determined to be beyond a reasonable doubt—to determine if a wrongful conviction has occurred.").

176. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 185, 517 N.W.2d 157 (1994) ("We need finality in our litigation."); *see also State v. Armstrong*, 2005 WI 119, ¶ 188, 283 Wis. 2d 639, 700 N.W.2d 98 (Roggensack, J., dissenting) ("Using the majority's standard, the real controversy can never be fully tried because scientific advances . . . will continue to improve.").

177. *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 408, 198 N.W.2d 363 (1972).

178. *In re Schaefer's Estate*, 261 Wis. 431, 441, 53 N.W.2d 427 (1952).

179. *See, e.g.*, *State v. Jensen*, 2011 WI App 3, ¶ 97, 331 Wis. 2d 440, 794 N.W.2d 482 ("While this case is 'exceptional,' it is so only because of the staggering weight of the untainted evidence and cumulatively sound evidence presented by the State to a jury of Mark Jensen's peers leading it to convict Jensen beyond a reasonable doubt."). Notably, Jensen did not advance any claims tending to show innocence; rather, his claims were all matters of error. *See id.*

180. This is particularly true given the tendency toward the "resolution of the tough questions" of law in favor of the State in recent years. O'Hear, *supra* note 36. In certain cases, the law has permanently shifted, at least until the court sees fit to overrule its precedents. *E.g.*, *State v. Burns*, 2011 WI 22, ¶ 51–52, 332 Wis. 2d 730, 798 N.W.2d 166 (permitting a prosecutor to make false representations when the evidence that would demonstrate they were false is not in the record). The ability to "do[] justice in an individual case," *Vollmer v. Luety*, 156 Wis. 2d 1, 15, 456 N.W.2d 797 (1990), given the increasing strictness of the law, is all the more crucial in that light.

181. *State v. Henley*, 2010 WI 97, ¶ 82, 328 Wis. 2d 544, 787 N.W.2d 350 ("Counsel for both defendants vigorously cross-examined S.E.S. and challenged her credibility. Although Demain's testimony may have added some benefit to that issue, we cannot say that her credibility was not tried to the jury."). The majority—incorrectly—ignores that the statute allows for discretionary reversal when the controversy has not been *fully* tried, as in this case, when additional testimony would have been beneficial.

rare (probably nonexistent) is the trial that fails to consider guilt at all. As per the statute's intent,[182] it must not be this easy to keep the innocent behind bars. The standard would apply with equal force to defendants seeking to define the controversy in their case: that is, as per *John Mohr & Sons*,[183] it is not enough to claim "the question of innocence" was not fully tried.[184]

Additionally, allowing a judge to analyze whether guilt was fully tried runs contrary to the non-outcome-determinative nature of the standard. The question of guilt is the ultimate question a jury decides.[185] But if the reviewing court determines that guilt is the "real controversy," they would then need to ask if the jury fully debated the ultimate question of guilt—in essence, whether the verdict was correct. This would mislead courts into considering whether the jury would change its mind given a second chance,[186] leading to the (mistaken) imposition of an outcome-determinative standard.[187] The first prong would move dramatically toward the more difficult "miscarriage of justice" standard. Such a shift would run contrary both to the statutes' plain text[188] and to courts' recognition of the statutes' separate prongs, each with its own requirements.[189]

While many cases lend themselves well to this focused definition of what constitutes a controversy,[190] some may require a broader analysis. For example, a single case may present a multiplicity of

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182. *See supra* note 150 and accompanying text.

183. 55 Wis. 2d 402, 198 N.W.2d 363 (1972).

184. *Id.* at 408.

185. *Turner v. Lehman*, 153 Wis. 547, 141 N.W. 1009 (1913) ("If the inference of guilt might properly be drawn from the whole evidence in the case, it present[s] a jury question.").

186. *E.g.*, *State v. Armstrong*, 2005 WI 119, ¶ 107, 283 Wis. 2d 639, 700 N.W.2d 98 (quoting *Armstrong*, Nos. 2001AP2789-CR and 2002AP2979-CR, slip op., ¶ 50 (Wis. Ct. App. May 27, 2004)) ("Here, the sole issue of the case was whether Armstrong murdered [the victim]. . . .The misleading hair and semen evidence did not 'so cloud' or distract the jury from deliberating [Armstrong's guilt].").

187. As previously mentioned, a court need not find a reasonable probability of a different outcome on retrial if it grants relief under the real-controversy prong of the statute. *State v. Hicks*, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996).

188. *See* WIS. STAT. § 751.06 (2009–10) (granting the power of discretionary reversal "if it appears from the record that the real controversy has not been fully tried, *or* that it is probable that justice has for any reason miscarried") (emphasis added).

189. *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990) (noting the two distinct categories under which discretionary reversal powers can be exercised).

190. *See, e.g.*, *State v. Cuyler*, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983) (granting a new trial in the interest of justice solely on the basis of excluded opinion testimony as to the defendant's reputation for truthfulness, which the court termed the defendant's "credibility").

relevant and significant issues (such as credibility,[191] consent,[192] or identity[193]). Arbitrarily choosing just one as "the real controversy" would in those cases be an artificial way to dispose of a complicated problem.

In those cases, the court may elect to conduct its review under the miscarriage of justice standard. As noted, this prong lends itself far better to a totality approach, as it is outcome determinative[194] and can encompass any number of factors.[195] However, if a rare case presents grave concerns but does not meet the miscarriage of justice standard, a court could utilize a broader analysis[196] so long as the focus is not a hypothetical new trial's result (for instance, why the jury did what it did and whether it might have otherwise done differently, as the Wisconsin Court of Appeals did in *Armstrong*[197]). Instead, it should focus on whether the jury could have made a fully informed decision under the circumstances, given the evidence available.[198]

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191. *Id.* at 141–42 (credibility of the defendant); *see also Garcia v. State*, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976) (credibility of witnesses).

192. *State v. Henley*, 2010 WI 97, ¶ 106, 328 Wis. 2d 544, 787 N.W.2d 350 (Crooks, J., dissenting).

193. *State v. Hicks*, 202 Wis. 2d 150, 163, 549 N.W.2d 435 (1996).

194. *See State v. Grobstick*, 200 Wis. 2d 242, 253, 546 N.W.2d 187 (Ct. App. 1996); *see also supra* text accompanying note 25.

195. *Chapnitsky v. McClone*, 20 Wis. 2d 453, 465–67, 122 N.W.2d 400 (1963) ("This court will not exercise this discretion unless it is convinced that there has been a probable miscarriage of justice—viewing the case as a whole.").

196. Certainly, rare would be the case that presents multiple controversies, each with its own problems, that does not meet the miscarriage of justice standard. If the problems with each controversy are truly so minor, the case may simply not prove to be "exceptional" as the power requires. However, the possibility should not be foreclosed, particularly as discretionary reversal is a power peculiarly suited to unusual fact situations due to its breadth. *See supra* note 156.

197. *E.g.*, *State v. Armstrong*, 2005 WI 119, ¶ 107, 283 Wis. 2d 639, 700 N.W.2d 98 (quoting *Armstrong*, Nos. 2001AP2789-CR and 2002AP2979-CR, slip op., ¶ 50 (Wis. Ct. App. May 27, 2004)) ("The misleading hair and semen evidence did not 'so cloud' or distract the jury from deliberating [the question of Armstrong's guilt].").

198. An outcome-determinative standard looks specifically at whether the jury would have come to a different result; that is, whether the outcome would have changed given the change in facts. In contrast, the standard for determining whether the real controversy has been fully tried must only consider whether it was possible for the jury to have come to a decision that encompasses all relevant, material facts. The fact that the real controversy was not fully tried does not necessarily mean that, given the additional information, the jury would not have come to the same result; it simply means that the decision they did reach was not fully informed. *See, e.g.*, *State v. Romero*, 147 Wis. 2d 264, 279, 432 N.W.2d 899 (1988) ("This credibility issue was clouded by the admission of the [improper] testimony . . . .There is a significant possibility that the jurors, when faced with the determination of credibility, simply deferred to witnesses with experience in evaluating the truthfulness of victims of

Given the need for courts to retain a high level of discretion, defining specific elements for a "real controversy not fully tried" would be dangerous. This could strip defendants in unusual or exceptional cases of their only chance at relief—and after all, the interest-of-justice discretionary reversal is actually *meant* for use in those very "exceptional cases."[199] Conversely, a power without at least some guidelines creates the risk of inconsistency[200] and injustice predicated on a court's subjective biases. Armed with the knowledge of what a controversy is *not*, Wisconsin courts will be better equipped to create a consistent and evenhanded jurisprudence that will help ensure that sections 751.06 and 752.35 serve their purpose as a safety net for those defendants who are otherwise out of options.

2. WHEN JUSTICE MISCARRIES: THE NARROW STANDARD AND THE POTENTIAL FOR CASES THAT SLIP THROUGH THE CRACKS

A miscarriage of justice could theoretically present as wide a scope of possible meanings and interpretations as a real controversy. The statute itself indicates that courts have the discretionary power to grant a new trial if "it is probable that justice has *for any reason* miscarried."[201] However, Wisconsin courts have sidestepped the thorny issues of how to define "justice" and have instead developed the standard articulated in *Wyss*,[202] stating that the reviewing court must "determin[e] to a substantial degree of probability that a different result was likely to be produced on retrial."[203]

Wyss provides an accessible framework by which courts can analyze a given case and determine whether justice has miscarried. However, the facts of the *Henley* case are so unusual as to be "exceptional."[204] Ultimately, *Henley* warrants a closer look at whether a broader standard would be more in line with the intent behind the power to grant a new trial for a miscarriage of justice.

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crime."). Note that the court did *not* say the jurors necessarily convicted based on that deferral. *See id.*

199. *Morden v. Continental AG*, 2000 WI 51, ¶ 87, 235 Wis. 2d 325, 611 N.W.2d 659.

200. For example, see the discussion of the *Henley* decision and its inconsistency with previous decisions, *supra* Part II.C.

201. WIS. STAT. § 751.06 (2009–10) (emphasis added).

202. *See supra* notes 85–90 and accompanying text (discussing *Wyss*).

203. *State v. Wyss*, 124 Wis. 2d 681, 741, 370 N.W.2d 745 (1985), *overruled on other grounds by State v. Poellinger*, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990); *see also Roe v. State*, 95 Wis. 2d 226, 242–43, 290 N.W.2d 291 (1980).

204. *Garcia v. State*, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976).

Dimitri Henley was initially tried with two codefendants, Jarrett Adams and Rovaughn Hill, each of whom was tried on the same charges, based upon the same allegations of the same victim.[205] Hill's case was later severed for unrelated procedural reasons.[206] Henley and Adams went to trial and were convicted of five counts each of second-degree sexual assault.[207]

Were this the story's end, it might not appear particularly extraordinary. However, since that conviction, both Hill and Adams have been found innocent: Hill's third trial ended in the State moving to dismiss the case with prejudice based on newly discovered evidence,[208] while Adams was granted federal habeas corpus[209] relief by the Seventh Circuit Court of Appeals after it found that the Wisconsin Court of Appeals had interpreted the ineffective assistance of counsel rules of *Strickland v. Washington*[210] "unreasonably."[211] Adams's counsel had not investigated a key witness who "could have swung the case in his client's favor."[212] Henley's counsel failed likewise: he admitted to "hoping that no defense would . . . outweigh the advantages of a favorable witness."[213] And the court of appeals, in certifying the case to the supreme court, noted that there was "merit to Henley's argument" of ineffective assistance of counsel, pointing to the Seventh Circuit's analysis in his codefendant's case.[214]

Yet the Wisconsin Supreme Court "ignored the analysis and reasoning of the Seventh Circuit."[215] It likewise ignored Henley's codefendants, who were "in the same situation at the time charges were filed against them"[216]—and are now in a wholly different situation

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205. *State v. Henley*, 2010 WI 97, ¶¶ 8–10, 12, 328 Wis. 2d 544, 787 N.W.2d 350.

206. *Id.* ¶ 13.

207. *Id.* ¶ 14.

208. *Id.* ¶ 18.

209. Habeas corpus is "[a] writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." BLACK'S LAW DICTIONARY 322 (9th ed. 2009).

210. 466 U.S. 668 (1984). The ineffective assistance of counsel inquiry requires a defendant to "demonstrate that: (1) his counsel's performance fell below an objective standard of reasonableness, and (2) the deficient performance caused him prejudice." *Adams v. Bertrand*, 453 F.3d 428, 434 (7th Cir. 2006).

211. *Adams*, 453 F.3d at 438.

212. *Id.* at 436.

213. *Id.* at 437.

214. *State v. Henley*, No. 2008AP697-CR, 2009 WL 36880, at *2 (Wis. Ct. App. Jan. 8, 2009).

215. *State v. Henley*, 2010 WI 97, ¶ 144, 328 Wis. 2d 544, 787 N.W.2d 350 (Crooks, J., dissenting).

216. *Id.* ¶ 107.

simply because a four-three majority of justices was "not as persuaded as the Seventh Circuit that the absence of [Demain's testimony] was so critical."[217] As previously noted, imprisoning a defendant solely on judges' personal opinions may very well violate due process.[218] Furthermore, citizens' confidence in the courts is critical[219]—and citizens value justice and fairness.[220] Whatever else the *Henley* holding is, the "disparate treatment of two equivalently situated defendants is repugnant to fundamental fairness."[221] And whatever one's definition of justice, the notion of one man carrying a stigma for an act of which two of his codefendants were ultimately cleared does not fit that ideal. Though the *Henley* court dismissed this objection,[222] to avoid undermining confidence in the judiciary as an institution that will protect the legal rights of *all* people, miscarriage of justice analysis may need to include factors outside the courtroom—those that indicate, albeit unusually, that justice may have miscarried.

D. From Full and Complete to Partial and Limited: The Strange Denial of Circuit Courts' Inherent Authority

In everyday practice, circuit courts historically had the power of discretionary reversal under Wisconsin Statutes section 805.15(1).[223] Henley moved for a new trial under this statute; both he and the State "agree[d] that [it was] a proper vehicle for criminal defendants to seek a new trial in the interest of justice."[224] Indeed, Wisconsin courts (including circuit courts) had used that statute for years in criminal cases without protest from higher courts.[225]

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217. *Id.* ¶ 82.

218. *See supra* note 45 and accompanying text.

219. Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CAL. L. REV. 1619, 1621 (2007).

220. *See supra* note 11 and accompanying text.

221. *Henley*, 2010 WI 97, ¶ 105 (Crooks, J., dissenting).

222. *See id.* ¶ 75 ("The fair administration of justice is not a license for courts . . . to do whatever they think is 'fair' at any given point in time.").

223. The statute provides in part that "[a] party may move to set aside a verdict and for a new trial because of errors in the trial, or because the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice." WIS. STAT. § 805.15(1) (2009–10).

224. *Henley*, 2010 WI 97, ¶ 34.

225. *E.g.*, *State v. Vennemann*, 180 Wis. 2d 81, 98, 508 N.W.2d 404 (1993) ("Additionally, the circuit court denied the motion for new trial in the interest of justice [under Wisconsin Statutes section 805.15(1)]. Based upon this record, we agree with the court of appeals' determination that the real controversy was tried, with no miscarriage of justice.").

Circuit courts also had the inherent authority to order new trials under Wisconsin law.[226] Indeed, their inherent authority was so deeply engrained in the legal consciousness that in *Eggen v. Fox*,[227] the Wisconsin Supreme Court, without entering into analysis, stated that when the trial-level court ordered a new trial, "[s]uch action by the court is clearly within the field of discretion . . . . The court is presumed to have . . . deemed it necessary in furtherance of justice."[228]

However, *Henley* threw both these long-established principles into disarray. The court held that section 805.15(1) "does not provide statutory grounds for a criminal defendant to seek a new trial in the interest of justice."[229] Rather, it said those motions must be brought "under [section] 974.02 and [section] (Rule) 809.30,"[230] which limits defendants seeking relief from the circuit court to motions filed within twenty days of the verdict,[231] a timeline that even the *Henley* court admitted "does not work."[232] The court then foreclosed the only other viable option for relief at the circuit court level,[233] concluding that circuit courts "[do] not have the inherent power to order a new trial . . . in the interest of justice."[234] Indeed, it held that "[r]ecognizing a circuit court's inherent authority to order a new trial in this case

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226. *Behning v. Star Fireworks Mfg. Co.*, 57 Wis. 2d 183, 186, 203 N.W.2d 655 (1973) ("An order for a new trial in the interest of justice is within the discretion of a trial judge, and will be reversed only upon a clear showing there has been an abuse of discretion.").

227. 124 Wis. 534, 102 N.W. 1054 (1905).

228. *Id.* at 535.

229. *Henley*, 2010 WI 97, ¶ 39.

230. *Id.* ¶ 63.

231. WIS. STAT. §§ 809.30, 974.02 (2009–10).

232. *Henley*, 2010 WI 97, ¶ 43. In fact, the Wisconsin Supreme Court cited to Henley's own logic for a justification that the twenty-day timeline is absurd:

> The statute . . . requires motions after verdict to be filed and served within 20 days after the 'verdict' is rendered. But Henley points out that in criminal cases, the verdict is not the end of the case; sentencing still must follow. This means that a motion for a new trial in the interest of justice would, in many cases, need to be filed before the sentence has been imposed and before appellate counsel has even been appointed. This would create piecemeal consideration of postconviction issues, and . . . might foreclose the consideration of issues before a full review of the case by appellate counsel.

Id. ¶ 42.

233. It is true that footnote 25 permits motions in the interest of justice under section 974.06 when they are appended to another claim allowed under the statute and pass the *Escalona* bar. *Id.* ¶ 63 n.25. However, for those cases that do not meet those criteria, but still present exceptional circumstances, discretionary reversal is essentially out of reach.

234. *Id.* ¶ 77.

would unwisely broaden the scope of the circuit court's inherent powers."[235] At this point, this Comment considers the definitions of inherent authority—including that used by the *Henley* court—to determine whether discretionary reversal truly is outside the scope of such powers.

1. INHERENT POWERS IN THEORY: THE VARYING DEFINITIONS

Inherent powers are powers given to a governmental body as a result of its creation: they are powers "which must necessarily be used by the various departments of government in order that they may efficiently perform the functions imposed on them by the people."[236] Inherent powers in Wisconsin have:

> two primary features: (1) the power must be such that it is related to the existence of the court and to the orderly and efficient exercise of its jurisdiction; and (2) the power must not extend the jurisdiction of the court nor abridge or negate those constitutional rights reserved to individuals.[237]

Inherent judicial power, then, depends both upon the underlying purpose of the Wisconsin courts and upon those courts' limitations.

In essence, the Wisconsin Supreme Court has treated inherent powers as those which a court *should* have, without requiring absolute necessity:

> From time immemorial, certain powers have been conceded to courts because they are courts [and] because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence.[238]

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235. *Id.* ¶ 74. This argument is particularly strange considering the majority's recognition that there are many cases, albeit older ones, that support the notion that circuit courts have such authority. *Id.* ¶ 74 n.28. It dismisses this argument by concluding that such power was appropriate prior to the development of a more comprehensive rule scheme but is not now. *Id.* The broadening argument thus falls apart: to continue to recognize an existing power is certainly not the equivalent of "broadening" circuit courts' inherent authority. Additionally, as will be discussed *infra*, this argument fails to recognize that the power to do justice in a particular case is as necessary to the circuit courts as ever before, rule systems notwithstanding.

236. *In re Kading*, 70 Wis. 2d 508, 517, 235 N.W.2d 409 (1975) (quoting *State v. Cannon*, 199 Wis. 401, 402, 226 N.W. 385 (1929)).

237. *Jacobson v. Avestruz*, 81 Wis. 2d 240, 247, 260 N.W.2d 267 (1977).

238. *Cannon*, 196 Wis. at 536.

In contrast, the *Henley* court, though it cited the *Cannon* definition of inherent power,[239] declares that it "should only invoke inherent power when such power is *necessary* to the functioning of the court."[240] While by its very terms the *Cannon* definition throws this statement into some doubt,[241] even if it is accurate, the use of the word in other contexts suggests that *necessary* may not, in fact, be as absolute a term as the *Henley* court indicated.[242] *Necessary* in the context of tax-deductible business expenses, for instance, means "appropriate and helpful."[243] Chief Justice John Marshall indicated that the word *necessary* "did not mean 'an absolute physical necessity,' but rather something 'convenient, or useful, or essential to another.'"[244] Given that the Wisconsin Supreme Court has deemed the "authority to appoint and remove [a] judicial assistant" to be among a court's inherent powers,[245] as well as the powers to appoint special prosecutors and guardians ad litem,[246] to modify sentences,[247] and to dismiss an action entirely "in the interest of orderly administration of justice,"[248] the "appropriate and helpful" designation seems to be the more accurate.

2. INHERENT POWERS IN ACTION: WHY CIRCUIT COURTS HAVE THE POWER TO GRANT NEW TRIALS IN THE INTEREST OF JUSTICE

With these definitions in mind, this Comment turns to the purpose of Wisconsin courts in general and circuit courts in particular. The

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239. *Henley*, 2010 WI 97, ¶ 73.

240. *Id.* ¶ 74 (emphasis added).

241. As noted, the court in *Cannon* declared that inherent powers are not *only* those that deal with the court's ability to "transact their business" or "accomplish the purposes of their existence," but also those that are needed to "maintain their dignity." *Cannon*, 196 Wis. at 536.

239. *Id.*

243. *Welch v. Comm'r*, 290 U.S. 111, 113 (1933).

244. David M. Crowell, Gonzales v. Raich *and the Development of Commerce Clause Jurisprudence: Is the Necessary and Proper Clause the Perfect Drug?*, 38 RUTGERS L.J. 251, 256 (2006) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819)).

245. *Barland v. Eau Claire Cnty.*, 216 Wis. 2d 560, 566, 575 N.W.2d 691 (1998).

246. *State ex rel. Friedrich v. Circuit Court for Dane Cnty.*, 192 Wis. 2d 1, 17, 531 N.W.2d 32 (1995).

247. *State v. Stenklyft*, 2005 WI 71, ¶ 4, 281 Wis. 2d 484, 697 N.W.2d 769. This inherent power is particularly interesting given that one of the *Henley* court's justifications for its decision to deny the circuit court the inherent power to grant new trials in the interest of justice is "the principle of finality." *State v. Henley*, 2010 WI 97, ¶ 75, 328 Wis. 2d 544, 787 N.W.2d 350.

248. *Latham v. Casey & King Corp.*, 23 Wis. 2d 311, 314, 127 N.W.2d 225 (1964).

Wisconsin Supreme Court has held that "[t]he function of the judiciary is the administration of justice."[249] It is striking, then, that in service of the administration of justice, under *Henley*, circuit courts may *not* grant a new trial should they believe justice has not been served in a particular case. Inexplicably, to relieve an innocent defendant of an undeserved sentence is not under *Henley* sufficiently necessary to the administration of justice to allow that court to grant relief in the form of a new trial and fair result.

In contrast, granting circuit courts the inherent power to grant new trials in the interest of justice is consistent with *Cannon*'s definition of "inherent authority." Under Wisconsin law, circuit courts "have all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and *the full and complete administration of justice*."[250] Simply by their terms, new trials in the interest of justice fall into that category: to say a court may administer justice but may not grant new trials in the interest of seeing that justice done makes sense neither semantically nor logically.

The holding is also contrary to circuit courts' purpose. Circuit courts, unlike appellate courts, preside over trial itself. A circuit court is thus "in the best position to evaluate the relevance of undisclosed evidence or later-discovered facts and consider their impact on the outcome of the trial."[251] Therefore, "[b]arring a trial court from reconsidering a prior ruling (or modifying or reversing its prior ruling) unless certain procedural pre-requisites are satisfied defeats the trial court's power to do justice."[252] That defeat has arisen from the *Henley* holding: because *Henley* is binding on lower courts,[253] defendants can no longer move the circuit court for relief unless they do so under section 974.02, within twenty days of their verdicts.[254] This timeline is,

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249. *In re Kading*, 70 Wis. 2d 508, 518, 235 N.W.2d 409 (1975).

250. WIS. STAT. § 753.03 (2009–10) (emphasis added).

251. *United States v. McMahan*, 744 F.2d 647, 652 (8th Cir. 1984).

252. Elizabeth M. Miller & Michel Y. Horton, *About Face*, L.A. LAW., Mar. 2000, at 48 (discussing an amendment to California's Code of Civil Procedure that restricted trial courts' inherent authority to reconsider their rulings). The authors went on to note that "while limiting the trial court's jurisdiction to reconsider may be expedient—trial courts certainly may have fewer motions to hear—it is fundamentally inconsistent with the role of the trial court. The overriding job of the trial court is to do justice, to 'enforce rights and redress wrongs.'" *Id.* at 49.

253. *See State v. Henley*, 2010 WI 97, ¶ 53, 328 Wis. 2d 544, 787 N.W.2d 350.

254. *Henley*, 2010 WI 97, ¶ 104 (Crooks, J., dissenting) ("The majority's decision limits a circuit court's authority to grant a new trial in the interest of justice to those cases where the motion is filed with a 20-day window following sentencing—a rule that implies that circuit courts cannot be trusted with the inherent authority to grant and reject such motions and implies as well that the majority can envision no case

by the court's own recognition, unrealistic,[255] and it essentially forecloses the circuit courts' powers to address unfair convictions at all, despite the *Henley* majority's assertions to the contrary.[256]

3. A NEW DEFINITION OF JUSTICE: *HENLEY*'S EMPHASIS ON FINALITY

The *Henley* majority couched its decision in the language of finality, reasoning that circuit courts' duty to administer justice does not allow "a new trial in the interest of justice at any time,"[257] nor does it require "another crack at the same arguments that failed earlier."[258] However, this logic places the efficiency of finality above the truth of a case—clearly not the correct order for a judiciary whose responsibility is to search for the truth.[259] Likewise, the fear of defendants seeking unlimited cumulative trials is unfounded given the well-established principle that new trials in the interest of justice are appropriate only in exceptional cases.[260] Any circuit court foolish enough to grant "unlimited, duplicative hearings"[261] to a defendant would certainly be reversed for abusing its discretion.[262] And the majority's logic fails for one reason more: the new trial in this case simply would not have been duplicative. As previously noted, Henley's attorney offered no defense at trial and failed to investigate the witness whose testimony proved so crucial in *Adams*.[263] The majority itself recognized that this was not a case of unlimited duplicative hearings when it noted the testimony could have added something to the controversy of the victim's credibility.[264]

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where 'the interest of justice' cannot be ascertained and pursued within 20 days of a case's completion.").

255. *See* §§ 809.30, 974.02.

256. *Henley*, 2010 WI 97, ¶ 104 (Crooks, J., dissenting).

257. *Id.* ¶ 75.

258. *Id.* ¶ 74.

259. *Garcia v. State*, 73 Wis. 2d 651, 655, 245 N.W.2d 654 (1976) (citing *State v. Chabonian*, 50 Wis. 2d 574, 580, 185 N.W.2d 289 (1971)).

260. *Id.* Interestingly, the *Henley* court also failed to address the fact that Henley's new trial, while it would involve the same claim of consensual sexual activity, would also have featured for the first time the testimony of a witness that the Seventh Circuit called "crucial." *Adams v. Bertrand*, 453 F.3d 428, 438 (7th Cir. 2006).

261. *Henley*, 2010 WI 97, ¶ 75.

262. When a lower court exercises its discretionary reversal power, its decision is reviewed for abuse of discretion. This means the lower court's discretion must be upheld if the decision "made on appropriate facts and the correct law is one which a court reasonably could have reached." *State v. McConnohie*, 113 Wis. 2d 362, 370, 334 N.W.2d 903 (1983). Because providing unlimited, duplicative hearings is not the correct law, *Henley*, 2010 WI 97, ¶ 75, any circuit court doing so would be subject to reversal on appeal.

263. *Henley*, 2010 WI 97, ¶¶ 107–09 (Crooks, J., dissenting).

264. *Id.* ¶ 82.

Before *Henley*, then, a circuit court could, under both Wisconsin statutes and its inherent powers, grant a new trial in the interest of justice.[265] Following *Henley*, it can do neither. Defendants must move for such a trial within twenty days or they must look elsewhere for relief: a strange and counterintuitive denial of power for courts that are intended to have any and all powers they require for "the full and complete administration of justice."[266] And, perhaps more tragically, the decision performs an about-face from the Wisconsin Supreme Court's recognition, at the advent of the interest-of-justice power, that it should be:

> very loath to interfere with the discretion to grant new trials that is vested in circuit judges. It is a power that should be courageously and fearlessly exercised whenever a trial judge is convinced that to enter judgment on a verdict returned would result in a miscarriage of justice.[267]

CONCLUSION: THE NEED TO LEAVE *HENLEY* BEHIND

The state of interest-of-justice law in Wisconsin continues to be uncertain. Given the law's nature, some measure of ambiguity (or at least a lack of stringent limitations) is necessary.[268] But *Henley*, which could have provided much-needed clarification, not only upended the law, but also threatens to remove discretionary reversal from the realm of possibility in many cases, however extraordinary.

That *Henley* has not halted all lower courts in their quest to administer justice is clear: the recent court of appeals decision in *State v. Avery*[269] demonstrates that not all courts favor finality at the expense of truth. However, the dangers presented by *Henley* and its movement away from the "safe haven" standard of the past require immediate

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265. *See supra* notes 225–226 and accompanying text.

266. WIS. STAT. § 753.03 (2009–10).

267. *Schlag v. Chicago, Milwaukee & St. Paul Ry. Co.*, 152 Wis. 165, 169–70, 139 N.W. 756 (1913).

268. *See supra* Part II.B.

269. 2011 WI App 148, 337 Wis. 2d 560, 807 N.W.2d 638. *Avery* involved a defendant convicted of armed robbery on the basis of surveillance camera footage. *Id.* ¶ 2. Thirteen years later, Avery moved for a new trial in the interest of justice based on newly available photogrammetric evidence. *Id.* ¶ 3. Specifically, the testimony of a government-certified metrologist indicated that the suspect in the video was under six feet tall, while Avery was six foot three. *Id.* ¶¶ 27–28. The Wisconsin Court of Appeals granted Avery a new trial in the interest of justice, because the real controversy of Avery's identity was not fully tried. *Id.* ¶¶ 45–46.

attention, as they may have already precipitated a shift away from justice.[270]

Quick action is crucial to avoid requiring defendants to "destroy the prosecution's case"[271] just to get a fair trial. Yes, "hard facts make bad law."[272] But hard facts also make for exceptional cases[273]—the very cases for which discretionary reversal was designed. Without granting defendants in those cases a fair trial, those same hard facts can result in an innocent man or woman paying a debt to society he or she does not owe and in a breakdown of society's trust in the judicial system.[274] Instead of shutting the door on a potentially innocent defendant's case, then, Wisconsin courts should return their attention to administering justice as it was meant to be administered: as a "courageous and fearless"[275] search for the truth.

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270. The Wisconsin Supreme Court accepted *Avery* for review on February 23, 2012. *State v. Avery*, 339 Wis. 2d 734, 810 N.W.2d 221. Oral argument was heard on October 5, 2012. *Wisconsin Supreme Court Calendar & Case Synopses October, 2012*, WIS. COURT SYS., http://www.wicourts.gov/sc/orasyn/DisplayDocument.pdf?content=pdf&seqNo=87752 (last visited Oct. 18, 2012).

271. *Avery*, 2011 WI App 148, ¶ 8.

272. *State v. Henley*, 2010 WI 97, ¶ 85, 328 Wis. 2d 544, 787 N.W.2d 350.

273. *State v. McGuire*, 2010 WI 91, ¶ 59, 328 Wis. 2d 289, 786 N.W.2d 227 (citing *State v. Hicks*, 202 Wis. 2d 150, 161, 549 N.W.2d 435 (1996)).

274. *See* EQUAL JUSTICE, *supra* note 12, at 37–38.

275. *Schlag v. Chicago, Milwaukee & St. Paul Ry. Co.*, 152 Wis. 165, 169, 139 N.W. 756 (1913).