Legal Theory, **9** (2003), 295–331. Printed in the United States of America
Published by Cambridge University Press 0361-6843/03 $12.00 + 00

IS REASONABLE DOUBT REASONABLE?

Larry Laudan*
Institute for Philosophical Research, National Autonomous University of México

> It is difficult, if not impossible, to so define the term "reasonable doubt" as to satisfy a subtle and metaphysical mind, bent on the detection of some point, however attenuated, upon which to hang a criticism. —Supreme Court of Virginia[1]

> I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.
> —Jon Newman, Chief Judge of the U.S. Court of Appeals for the 2nd Circuit[2]

> The complete lack of controversy that surrounds the reasonable doubt standard implies that we are pretty happy with the way the standard operates. —Erik Lillquist[3]

INTRODUCTION

At the core of criminal jurisprudence in our time lurks a fundamental conceptual confusion. Stated succinctly, the notion of guilt "beyond a reasonable doubt"—the only accepted, explicit yardstick for reaching a just verdict in a criminal trial—is obscure, incoherent, and muddled. One symptom of the problem emerges out of recent research (discussed below) on mock juries that makes it vividly clear that jurors, ordinary citizens that they are, have only the haziest notion of what a "reasonable doubt" is.

In theory, that difficulty could be resolved by having judges instruct juries about the meaning of reasonable doubt. Indeed, such instructions are already routine in some legal jurisdictions. Sadly, as we will see in detail

*I am indebted to the Law School at the University of Texas for extending to me many courtesies, not the least of which was access to its impressive holding of law reviews, without which it would have been impossible to write this article. I am likewise grateful to Brian Leiter, who has unflaggingly encouraged my dalliance with the law of evidence.

1. McCue v. Commonwealth, 103 Va. 870 at 1002 (1905).
2. Jon. O. Newman, *Beyond "Reasonable Doubt,"* N.Y.U. L. Rev. 979, 984 (1993).
3. Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability,* U.C. Davis L. Rev. 85, 190–191 (2002).

https://doi.org/10.1017/S1352325203000132 Published online by Cambridge University Press

shortly, any serious scrutiny of judges' oral instructions to jurors shows that trial judges, as much as jurors, have strikingly discrepant understandings of this key notion. Ordinarily, when confusion of this sort exists at the trial bar, one looks to higher courts to dispel it. Yet a careful reading of the opinions of appellate courts that have explicitly sought to clarify this crucial doctrine leads to the inescapable conclusion that not even the sharpest minds in the criminal justice system have been able to hammer out a shared understanding about the level of proof appropriate to convict someone of a crime. In sum, the muddle can be found not only in the minds of jurors but in the written opinions of judges, jurists, and attorneys as well and at every level from the trial bench to the Supreme Court.

Of course, not every conceptual confusion need occasion widespread hand-wringing. That we lack fully coherent ideas about free will or the origins of the big bang or how language maps onto the world need not worry anyone who does not relish such conundrums. Still, occasionally we discover incoherencies in the notions that profoundly impinge on the affairs of everyday life. The rest of us cannot so blithely ignore that sort of problem. The lack of clarity surrounding proof beyond a reasonable doubt is surely one of those. Its existence immediately implies that in any given criminal trial, both the accused and the prosecution, unable to predict what level of proof will be necessary, face a crapshoot. The risk here is neither that of the bleeding-heart juror, moved by sympathy to acquit the accused no matter how powerful the evidence, nor that of the law-and-order juror, minded to convict no matter how exculpatory the evidence. The problem is more systemic. The most earnest juries, packed with twelve people desirous of doing the right thing and eager to see that justice is done, are left dangling with respect to how powerful a case is required before they are entitled to affirm that they believe the guilt of the defendant beyond a reasonable doubt. Simply muddling on in such circumstances is not a happy prospect.

Clearly, justice (in the specific sense of fairness and due process) cannot be assured, nor is it even likely, in a system where different judges recommend and different juries use discrepant standards for guilt and innocence. When the height of the bar for conviction is left as indeterminate as it currently is, you have no assurance that a jury will decide any given case at trial according to the same standard that a rival jury, handling the identical case, would use. The system, in short, *lacks reliability* (in the sense of uniformity and predictability). It is hence inherently unjust.

One sign among many of the desperateness of the current situation and of the general judicial uneasiness about the prevailing standard for conviction is that many appellate courts in the United States have taken to advising trial judges to tell juries that conviction requires belief in guilt beyond a reasonable doubt—period—without spelling out what that means, hence leaving it to inexperienced jurors to haggle among themselves about the appropriate height of the bar for conviction. Another and more telling sign of the same uneasiness is that England, which has the same common-law

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tradition as our own, has recently abandoned its two-hundred-year-old practice of having judges instruct jurors about the nature of reasonable doubt. Instead, they simply tell jurors that conviction requires that they must be "sure" of the guilt of the accused. England made this change because senior legal theorists decided that reasonable doubt could not be defined, uniformly understood, nor consistently applied.

The aims of this essay are twofold. In due course, we will be asking ourselves whether "beyond a reasonable doubt" is the right standard to use for furthering the truth-finding aims of a criminal trial. However, before we can turn to that question, much preliminary spadework will be required to get a reasonably clear picture about how the reasonable-doubt standard has been and should be understood. In the next two sections I describe in detail the nature of the conundrum posed by the current, confusing accounts of reasonable doubt and in the third section I suggest some more or less radical remedies for this defect. One's initial unease that the remedies are unconventional should be mitigated by and balanced against the desperateness of the status quo as I describe it. In the last section I ask whether even a cleaned-up version of the reasonable-doubt standard can function as the all-purpose standard of proof that it is now expected to be.

INTERPRETATIONS OF REASONABLE DOUBT

The Early History

The reasonable-doubt standard of proof has a long and checkered history. Although I do not intend to tell that story here, a few salient points should be made by way of setting the context. Until the end of the eighteenth century, jurors were sworn—not unlike witnesses—simply to deliver a true verdict about the case before them. Given the presumption of the innocence of the accused, this was generally construed to mean that guilty verdicts were legitimate only if the jurors were *certain* of that guilt.

This was, of course, a very exacting standard; too exacting as it turned out, because philosophers and jurists during the Enlightenment came to realize that in human affairs (as opposed to, say, mathematics or logic) no full certainty was to be had. The next best thing, according to such philosophers as John Locke and John Wilkins, was what they called *"moral certainty."* They dubbed this sort of certainty "moral" not because it had anything to do with ethics and morality but to contrast it with the "mathematical" certainty traditionally associated with a rigorous demonstration. Morally certain beliefs could not be proven beyond all doubt but they were nonetheless firm and settled truths, supported by multiple lines of evidence and testimony. You could be morally certain, for instance, that Julius Caesar had once been emperor of Rome or that the earth was round, though there remained room for the thoroughgoing skeptic to point out that we may be deluded about such matters. Jurists were quick to notice that, given these new insights in

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epistemology, the proper criterion for determining guilt should be moral, not full, certainty that the accused committed the crime. What characterized morally certain beliefs was that although they were open to the skeptics' doubt in theory, there were no real or rational grounds for doubting them in practice—whence arose the notion that a guilty verdict required the jury to believe "beyond a reasonable doubt" or "to a moral certainty" in the guilt of the accused.

By the 1850s, this principle that guilt must be established beyond a reasonable doubt (henceforth BARD) had become widely accepted wherever Anglo-Saxon common-law traditions of law were in play. In the United States, the BARD rule was acknowledged as the standard for criminal conviction in most U.S. state and territorial courts and also throughout the federal court system. Accordingly, judges' instructions to juries, delivered just before jury deliberation, uniformly incorporated an admonition to the effect that the presumption of innocence of the accused required that a guilty verdict could be pronounced only if juries were morally certain or certain beyond a reasonable doubt that the accused had committed the crime with which he or she was charged.

Chief Justice Shaw of the Supreme Judicial Court of Massachusetts nicely summed up the equation between moral certainty and proof beyond a reasonable doubt in a famous case from 1850. Because it was to become the canonical formulation of BARD for more than fifty years, it is worth quoting in its entirety:

> Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt.[4]

Although language to this effect became standard by the late nineteenth century, judges would often expand on or embellish Shaw's phraseology.

4. Commonwealth v. Webster, 59 Mass. 320 (1850).

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Sometimes they would say that a belief was beyond reasonable doubt when it was "highly probable" or when the jurors had an "abiding conviction" about it, or when their "consciences were satisfied" that conviction was the right thing to do. But even in those early days of the BARD rule, many judges inclined to the view that the less said by way of explanation of this relatively new standard, the better. In one classic case dating from 1894 in the Utah Territory, we see precisely such hemming and hawing from the bench. The judge in a trial for criminal polygamy artfully explained to the jury that "a reasonable doubt is not an unreasonable doubt." Indeed. Armed with this powerful tautology, the jury convicted the defendant. Defendant's attorney appealed the case, arguing that the judge had failed to explain BARD satisfactorily. The U.S. Supreme Court upheld the conviction, insisting that the judge's language "gives all the definition of reasonable doubt which a court can be required to give."[5] As we will see shortly, this wholly unhelpful response, with its endorsement by the highest court in the land, was a potent augury of things to come.

The Current State of Play

Although BARD was very widely used in both state and federal courts from the middle of the nineteenth century until the middle of the twentieth, it was there chiefly by custom and common-law precedent rather than by law. A famous ruling in 1970, In re Wingate, changed all that. There, the Supreme Court found, by a creative act of interpretation—creative in the sense that the Constitution nowhere addresses the question of the standard of proof in criminal trials—that the U.S. Constitution *required* that all criminal juries were to be instructed that BARD was the applicable bar for conviction.[6] A judge's failure so to instruct a jury thereby became automatic grounds for reversing a conviction. *Wingate* further made clear that *every* key element of the prosecution's case must be established beyond a reasonable doubt before conviction was justified.[7] For more than thirty years, then, BARD has enjoyed constitutional status, equivalent to that of the presumption of innocence or the right to trial by jury.

In the wake of BARD's increasing centrality in the criminal justice system, trial judges, appellate courts, and even legislators have been trying to make sense of what the doctrine means and, in more practical terms, how they

5. Dunbar v. United States, 156 U.S. 185 (1894).

6. The Supreme Court itself, in Cage v. Louisiana, argued that In re Winship established that the Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"; Cage v. Louisiana, 498 U.S. 39 (1990). In dissent in In re Winship, Justice Black pointed out that "in two places the Constitution provides for trial by jury, but nowhere in that document is there any statement that conviction of crime requires proof of guilt beyond a reasonable doubt"; In Re Winship, 397 U.S. 358, at 383 (1970).

7. While this claim is generally true, there are exceptions to the "every element" rule. One of them, discussed towards the end of this article, involves affirmative defenses.

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should explain it (if at all) to puzzled jurors. From about 1850 until about 1950, the most common way of handling it was for judges, following Shaw, to explain to jurors that proof beyond a reasonable doubt meant "belief to a moral certainty." We have already seen powerful precedent for this gloss, since BARD itself had evolved out of the philosophical literature on moral certainty. In the last thirty years, however, the Supreme Court has discouraged this usage, holding that the terminology is archaic, unhelpful at best, and misleading, because, as Justice Blackmun put it in a famous dissent, there exists:

> the real possibility that such language would lead jurors reasonably to believe that they could base their decision to convict upon moral standards or emotion in addition to or instead of evidentiary standards. The risk that jurors would understand "moral certainty" to authorize convictions based in part on value judgments regarding the defendant's behavior is particularly high in cases where the defendant is alleged to have committed a repugnant or brutal crime.[8]

In a related case (Victor v. Nebraska), Justice O'Connor , writing for a unanimous Supreme Court, said emphatically that "this Court does not condone the use of the antiquated 'moral certainty' phrase." In the same case, Justice Ginsberg opined that "the phrase 'moral certainty,' though not so misleading as to render the instructions [to jurors] unconstitutional, should be avoided as unhelpful in defining reasonable doubt." Taking their cues from Ginsberg and O'Connor, several state supreme courts have recently overturned convictions in cases because the judges' instructions referred to "moral certainty."[9]

These passages already hint at the conclusion that a more detailed scrutiny of Supreme Court rulings would bear out, to wit, that the Supreme Court in the last generation has attempted to disconnect the standard of proof (BARD) from that set of philosophical notions that originally provided its grounding and coherence. This disconnect reveals itself not only in an understandable reticence to use the archaic term "moral certainty" but, more important, in an abandonment of the kinds of proof that moral certainty represented. The key question, to which we will return later, is whether BARD, stripped of its embedding in a particular epistemic context, is capable of standing independently, that is, whether it is a coherent notion in its own right.

With the most common traditional definition—moral certainty—excluded (or at least sternly frowned on), judges and legal scholars have been casting about for other ways of explaining BARD to jurors. I want to

8. From Justice Blackmun's dissent in Victor v. Nebraska, 511 U.S. 1, 37 (1994).

9. *Cf.* N. Carolina v. Bryant, 432 S.E. 2d 291 (1993); and S. Carolina v. Manning, 409 S.E. 2d 372 (1991).

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review briefly some (though hardly all) of the proposed alternative explications by way of underscoring just how confused the notion of reasonable doubt has become. The various versions of BARD that I will reprise are not those proposed by some legal scholar or other; all but one have been extensively used by trial judges and endorsed (and sometimes later disowned) by appellate courts:

1. *BARD as that Security of Belief Appropriate to Important Decisions in One's Life*

Ever since the nineteenth century, one popular legal explanation of the idea of belief beyond a reasonable doubt has involved comparing it with important decisions in the lives of ordinary citizens. Juries are told that just as they do not undertake major life decisions unless they are sure of the beliefs undergirding them, so they should not find the defendant guilty unless their confidence in his or her guilt is as great as the confidence they demand in their own important decision-making. The analogy here is that of a prudent person who undertakes an important action vital to his or her affairs only when very confident about the beliefs that drive his or her actions. We find a typical formulation of this idea in the pattern jury instruction recommended by the Fifth U.S. Circuit Court:

> Proof beyond reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.[10]

Although this instruction to jurors is very common, it takes no savvy to see how misleading it can be. Ponder a typical range of actions that most individuals may count among the most important life decisions they make: Do you give up your current job and change employers or careers only when you are almost certain about the results of the action? Do you decide to marry only when you are certain beyond a reasonable doubt that it will work out? If a doctor recommends surgery to a patient with a life-threatening disease, does the rational patient refuse to have the surgery unless he knows beyond a reasonable doubt that it will cure what ails him? You do not hesitate to call the police when you suspect you have heard the sound of someone moving around your living room in the middle of the night, even though you surely have significant and reasonable doubts about whether the noises really came from an intruder. In our ordinary lives, as I just said, the existence of even sizable doubts often produces no hesitancy to act. The point is that many, perhaps most, of the important life decisions that each of us makes are taken under conditions of significant uncertainty, where doubt is not only rational but rampant. In these circumstances, we act *even though there is considerable doubt*. Ironically, that is precisely what the legal system wants jurors to *avoid*

10. 5TH CIR. CRIM. JURY INSTR. 1.06 (1990).

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doing when deciding guilt in a criminal trial. Yet the analogy on offer invites jurors to convict on the same precarious beliefs that typically guide their practical actions.

The Supreme Judicial Court of Massachusetts has forcefully argued against this analogy for understanding BARD, believing that determinations of criminal guilt are typically much more important than decisions citizens ordinarily make:

> The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia. Individuals may often have the luxury of undoing private mistakes; a verdict of guilty is frequently irrevocable.[11]

2. *BARD as the Sort of Doubt that Would Make a Prudent Person Hesitate to Act*

Eventually mindful of such problems, the Supreme Court has of late been conceding that the analogy just discussed can be misleading, and has proposed an alternative. Specifically, appellate courts (including the Supreme Court) have suggested that judges use a variant of this analogy not to explain what a belief *beyond* a reasonable doubt is but rather to illustrate what a rational doubt would be.[12] Typically, they formulate the point in this fashion: A rational doubt is the sort of doubt about your beliefs that would cause you to *hesitate* to act on those beliefs. By contrast, a less-than-rational doubt (and hence the sort jurors should ignore) would not cause you to hesitate. The courts are saying that the only sort of doubt that a juror should allow to prevent him from finding the accused guilty is the sort of doubt that would cause him to hesitate to act in his own personal but important affairs. Here is the language proposed in the model jury instruction endorsed by the Second Circuit:

> A reasonable doubt is a doubt based on reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.[13]

11. Commonwealth v. Ferreira, 373 Mass. 116, 130 (1977). While I agree with the general sentiment expressed here, I do not understand why the Massachusetts court argued that guilty verdicts are "frequently irrevocable." Given the near-ubiquity of judicial review of convictions, it would seem fairer to say that they are frequently not revoked.

12. In a landmark 1954 case, Holland v. United States, the Supreme Court approved the jury instruction described in the preceding section but added: "we think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act rather than the kind on which he would be willing to act." 348 U.S. 140 (1954).

13. Edward J. Devitt et al., FEDERAL JURY PRACTICE AND INSTRUCTIONS, §12.10, 354 (4th ed. 1987).

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Sadly, this twist in the analogy does not really get around the previous problem. Ask ourselves: are *reasonable* doubts the only ones that make us hesitant to act? Scarcely. Many people, when confronted by major life decisions, fidget and fret even when it is wholly clear and beyond doubt what course of action they should take. A battered wife, who knows perfectly well that her husband will continue beating her when money is short in the household, will very often hesitate about extricating herself from the situation. Does that imply, as the Second Circuit would have it, that she has reasonable doubts about her husband's violent streak? Such inertia, inherent in many situations, leads to hesitancy and inaction even when the parties involved have no real doubt that their current situation is contrary to their own best interests. Clearly, ordinary people often hesitate to act even lacking reasonable doubts. A committee of distinguished federal judges reporting to the Judicial Conference of the United States has criticized all such glosses on BARD that assimilate it to ordinary situations of personal choice and decision-making:

> because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases.[14]

Accordingly, the identification of the process of reaching a criminal verdict with such practical decision-making can only mislead. BARD, after all, is supposed to set a *high* standard for conviction, higher than we ordinarily insist on in our practical affairs. It is meant to exemplify the old saw that it is better that ten guilty men go free than that one innocent man is condemned. Yet, if a judge tells jurors that they can convict if they are as sure of the defendant's guilt as they are about the beliefs that guide their important practical decisions, this is an open invitation to convict on quite low levels of belief in guilt.

Either of these glosses hence undermines the rationale for insisting on guilt beyond a reasonable doubt. Worse, both dilute the reasonable-doubt standard to the point of trivializing it, since we often act, and it is often rational to act, even when the beliefs driving an important action (think of the suspicion of the prowler in the house) are little more than bare possibilities. Rational actions about important life matters are not generally grounded in nearly certain beliefs. Guilty verdicts, by contrast, are meant to be based on beliefs that are virtually certain.

14. Federal Judicial Center, PATTERN CRIMINAL JURY INSTRUCTIONS 18–19 (1987) (commentary on instruction 21).

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3. *BARD as an Abiding Conviction of Guilt*

Another common way for judges to describe what it is to believe in guilt beyond a reasonable doubt is to suggest that jurors have such a belief when they have "an abiding conviction that the defendant is guilty." Here, for instance, is a model jury instruction adopted by California courts:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible doubt or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.[15]

So, how does the ordinary person, right now, determine whether she has a conviction, a moral certainty, that is *abiding?* Taken literally, an abiding conviction is one that one will have for a long time—as opposed to a transitory or fleeting belief. Still, who can say of any inference-based belief that he has just formed that he will not eventually develop second thoughts about it? *Retrospectively,* of course, you can say of someone's belief, including your own, that it was an abiding conviction. The issue is how, *prospectively,* a juror can determine that a newly formed belief of hers will be one of those. Since, on pain of incoherence, this cannot be what is meant by an "abiding conviction," we have to look elsewhere for its meaning than on its surface. The legal literature on this question tends to suggest that in asking jurors to decide whether their belief in guilt is abiding, the courts really are asking whether they hold the belief with firmness and unwaveringly. That presumably would be an abiding conviction.

On this construal, you *can* figure out here and now whether a fresh belief will be an abiding one by asking whether it is firmly held. Still, does this feature of a belief in guilt show that it is a belief beyond a reasonable doubt? The firmness of a belief, that is, the depth of one's conviction in it, does nothing to settle whether the belief is rational or founded on the evidence. For instance, I may have an abiding belief that my recently departed Fido is now in dog heaven. I may even go to my grave believing it. Nevertheless, the endurance of this belief or my current tenacity in asserting it has little to do with whether it is rationally well founded. Similarly, a juror may come to an abiding conviction about a defendant's guilt for all sorts of ill-considered reasons, for example, that the accused was a Scorpio. If it is true, as surely it is, that we do not want jurors to be deterred from convicting someone because of *irrational* doubts those jurors may entertain about the defendant's guilt, it must be equally true that we do not want to encourage jurors to rush to convict someone based on irrational suspicions of that person's culpability.

15. Quoted in 114 S. Ct. at 1244. The careful reader will note that the California language is lifted almost verbatim from Justice Shaw's instruction of 1850.

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There can be no acceptable exegesis of BARD that fails to make clear that acquittals cannot be grounded on ill-considered foundations any more than convictions can. This gloss fails on those grounds.

Saying to a juror that he ought not convict unless he has strong and abiding convictions about the guilt of the accused is unacceptable because it confuses a necessary condition with a sufficient one. We do indeed want jurors to be persuaded of the guilt of the accused before they convict; but such persuasion is of no probative value unless it derives from a careful reflection on and wise inferences from the evidence. True, the model California instruction quoted above enjoins the juror to "consider" all the evidence; but considering all the evidence and weighing it in an appropriate way are very distinct things. Unfortunately, most jury instructions say nothing about the kind of evidence necessary for conviction, focusing instead almost entirely on the *subjective* state of the juror—a point that we will return to in much detail farther along.

BARD, we must remember, was designed, among other things, to protect a defendant from the rush to judgment that we associate with tribal or vigilante justice. It was meant to codify the meaning of the presumption of the innocence of the accused. Instructing juries that they should not convict unless firmly convinced that the defendant is guilty does nothing to insure that their beliefs about guilt and innocence will be based on a careful assessment of the evidence of the case. If it is important to stress that doubts, if they lead to acquittal, must be rational doubts, it is similarly crucial to insist that beliefs in guilt, if they lead to conviction, must be rationally well founded.

You may think that the problem could be remedied here by combining the language of "abiding convictions" with an insistence that jurors must attend carefully to the evidence in coming to their belief about guilt. That is, the judge might say that the evidence must make the defendant's guilt overwhelmingly likely, or some words to that effect, as well as referring to an abiding conviction. Yet if he says the former, then the talk about an abiding conviction is gratuitous. If genuinely reasonable doubt vanishes when the evidence points powerfully to the guilt of the accused, then the juror need only decide whether the evidence presented is of that character. It is irrelevant whether, in addition, he has a firm or abiding conviction about it.

It only further muddies the waters that some courts have argued that the language of "firm conviction of guilt" represents a seriously *weakening* of the BARD standard and that it makes the prosecutorial burden much lighter than it had been when "moral certainty" was required.[16]

16. Here is the opinion of the Ohio Supreme Court in the face of a legislative redefinition of BARD from moral certainty to a firm conviction: "It is apparent that a significant change has been made reducing the test of an abiding conviction to a moral certainty to a *present, firm conviction*. The changes in the substance of the definition of reasonable doubt reduce the

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4. *Reasonable Doubt as a Doubt for Which a Reason Could Be Given*

This construal of BARD *appears* to be almost tautologous and thus harmless, if uninformative. A reasonable doubt is said to be a doubt that is reasonable, that is, for which you could give a reason. On this view, doubts for which no reason can be given fail to be reasonable and thus cannot legitimately block conviction. As obvious as it may seem, this explication of reasonable doubt has been frequently frowned upon and sometimes explicitly repudiated by appellate courts.

In Burnett v. Nebraska, for example, the bench instructed the jury that a reasonable doubt was a doubt that you could explain to your fellow jurors and for which some reason could be given in light of the evidence adduced in the case. The judge instructed the jury, in part: "by reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means some actual doubt having some *reason* for its basis." This seemingly innocuous language was faulted on appeal; the appellate court held that this definition was in error and the guilty verdict was reversed.[17] Again, in a higher court's review of Carr v. Nebraska, we read: "It is error to charge a jury that [reasonable doubt] is a doubt for the having of which the juror can give a reason derived from the testimony."[18] The Supreme Court holds a similar view, claiming in Young v. Oklahoma, "an instruction containing the phrase 'a doubt that you can give a reason for' is wrong."[19]

How, you may ask, can it possibly be reversible error—sufficiently serious to overturn a conviction—to say that a reasonable doubt is a doubt for which a juror has and can give a reason? Some of the thinking behind the tendency to see this reading of BARD as incorrect comes from an appellate court's review of another case, Morgan v. Ohio, in which the judge had used the "doubt-for-which-you-have-a-reason" language. The appellate court asked:

> What kind of a reason is meant? Would a poor reason answer, or must the reason be a strong one? Who is to judge? The definition fails to enlighten, and further explanation would seem to be needed to relieve the test of indefiniteness. The expression is, also, calculated to mislead. To whom is the reason to be given? The juror himself? The charge does not say so. And jurors are not required to assign to others reasons in support of their verdict.[20]

A Pennsylvania appeals court inclines the same way:

degree of certainty required and eliminate the implication of a steadfast certainty or conviction. The changes are not mere semantics or philosophical differences. They are significant. This significance lends itself to a unique advantage to the state in its argument to the jury and a disadvantage to the accused"; Ohio v. Crenshaw, 51 Ohio App. 2d 63 (1977).

17. Burnett v. Nebraska, 86 Neb. 11 (1910).
18. Carr v. Nebraska, 23 Neb. 749, 750 (1888).
19. Young v. Oklahoma, 1962 OK CR 70 (1962).
20. Morgan v. Ohio, 48 Ohio St. 371, 376 (1891).

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> In order to be "reasonable," the doubt must be substantial as opposed to fanciful, but it is not essential that a juror be able to give "some proper reason for entertaining it"; *it may exist without his being able to formulate any reason for it.*[21]

Or we find this similar gem of wisdom from Pennsylvania v. Baker: "A reasonable doubt may exist in the mind of a juror without his being able to formulate a reason."[22]

Some courts fret that it might put undue psychological pressure on a juror to tell him that he needs some reason or basis for his doubts before he can consider them to be reasonable. The U.S. Second Circuit Court, in particular, mentions a concern that this instruction might "intimidate a juror by suggesting that he may be called upon to explain his doubts, although it surely does not require him to justify them."[23] Such psychobabble, if it came from a politician, might be in keeping with the apparent need for leaders visibly to feel the pain of the electorate. Still, it is scarcely what we expect from our courts when insisting that jurors make sure that their acquittal is founded on conviction beyond a reasonable doubt. If a juror feels doubtful about guilt but cannot identify or formulate the reason for that doubt, then how can she possibly decide *whether* the doubt in question is rational or irrational?

A second, to my mind equally specious, line of thinking about why reasonable doubts need not be doubts for which you have a reason is linked to the notion that the accused in a criminal trial is not obliged to mount a defense. Requiring a juror to have a reason for acquittal, it is said, is like requiring the defendant to present a case. Here is the argument of the appellate court in Iowa v. Cohen:

> Who shall determine whether [a juror is] able to give a reason, and what kind of a reason will suffice? To whom shall it be given? One juror may declare he does not believe the defendant guilty. Under this instruction, another may demand his reason for so thinking. Indeed, each juror may in turn be held by his fellows to give his reasons for acquitting, though the better rule would seem to require these for convicting. The burden of furnishing reasons for not finding guilt established is thus cast on the defendant, whereas it is on the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached.[24]

Precisely the same argument is found in an early and influential Indiana case. There the appellate court found incorrect an instruction that jurors

21. Pennsylvania v. Dauphinee, 121 Pa. Super. 565, 590 (1936). My italics.
22. Pennsylvania v. Baker, 93 Pa. Super 360 (1928).
23. U.S. v. Davis, 328 F.2d 864, 867 (1964).
24. Iowa v. Cohen, 108 Iowa 208, 214 (1899).

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must have some reason for such doubts as they entertain about the defendant's guilt. To the contrary, the appeals judges insisted:

> Such an instruction as the one we are considering can, we think, only lead to confusion, and to the detriment of the defendant. A juror may say he does not believe the defendant is guilty of the crime with which he is charged. Another juror answers that if you have a reasonable doubt of the defendant's guilt give a reason for your doubt. And, under the instruction given in this cause, the defendant should be found guilty unless every juror is able to give an affirmative reason why he has a reasonable doubt of the defendant's guilt. It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt, with the certainty which the law requires, before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case.[25]

Ultimately, this analysis tears asunder the distinction between doubt and reasonable doubt. We can surely grant that a juror, after hearing all the evidence in a case, may be able to say that she still has lingering doubts about the guilt of the accused. What I think that juror cannot possibly do is to certify that those doubts are *reasonable* doubts unless she can formulate them to herself and scrutinize them, preferably with the aid of fellow jurors. If a juror cannot put her finger on any element in the prosecution's case that seems less than fully convincing, then it is impossible, even for her, to figure out whether her hesitation to accept a verdict of guilty is rational or not. Obviously, the prosecution should not be lumbered with having to eliminate all *possible* doubts from the minds of jurors, only their *reasonable* doubts. Indeed, that was the motive two hundred years ago for replacing the older criterion ("acquit if you have *any* doubt about guilt") with BARD. If a juror's doubt cannot be expressed, we cannot parse it along the axis that separates the rational from the irrational. Nor can the juror. The inevitable corollary of the unwillingness of the courts to distinguish for jurors between reasonable and unreasonable doubts is that BARD has ceased to be a criterion that allows a juror to convict even if she has certain doubts. Instead, it has become a rule whose import is: "If you have *any* doubts, vote to acquit." The rationality test for doubts has simply dropped out of the picture. The profound insight that initially motivated BARD—that conviction was appropriate even in the face of certain sorts of doubts—has been abandoned in favor of an epistemically naïve view that conviction requires the total absence of doubt.

As for the analogy in this passage between reason-giving by a juror and defense-constructing by the accused, the parallel is a red herring. Requiring a juror to have some reason for doubting the guilt of the defendant in *no* way requires that reason to have come from testimony offered by the defendant or arguments offered by his counsel. The juror may disbelieve some prosecution witness or doubt some expert witness offered by the state

25. Siberry v. Indiana, 133 Ind. 677, 685 (1893).

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or have any of a thousand other good reasons for doubt. Requiring the juror to be able to express such doubts to fellow jurors or at least to herself is perfectly compatible with the presumption of innocence and the placing of the full burden of proof on the prosecution.

It is tempting to wonder aloud about what possible model of jury deliberation the courts who take this view of non-reason-giving have in mind. Imagine a case, U.S. v. Jones. Half an hour into jury deliberation, a straw ballot indicates nine in favor of convicting and three voting to acquit Jones. By way of blocking the deadlock, several in the guilty camp review the chief elements of the case, as they see it, for the assembly. The three holdouts remain silent. "Well," says one of the guilty voters, "are you persuaded." Holdouts A, B, and C chorus: "No." "Why not?" asks the foreman. A: "Well, I can't put my finger on it exactly. I'm just not fully persuaded." B: "I don't have to give you a reason." C: "I don't even have to have a reason." At this point, they may decide to report to the judge that the jury is split and that prospects for further communication look limited. This imaginary scenario makes a mockery of the notion of jury *deliberation*. One might have hoped that judges would take steps to see that it will not occur. And of course, they do. Here is a model jury instruction from the First Circuit:

> Each of you must decide the case for yourself, but you should do so only after considering all the evidence, discussing it fully with the other jurors, and listening to the views of the other jurors. Do not be afraid to change your opinion if you think you are wrong. But do not come to a decision simply because other jurors think it is right. . . . If it looks at some point as if you may have difficulty in reaching a unanimous verdict, and if the greater number of you are agreed on a verdict, the jurors in both the majority and the minority should reexamine their positions to see whether they have given careful consideration and sufficient weight to the evidence that has favorably impressed the jurors who disagree with them. You should not hesitate to reconsider your views from time to time and to change them if you are persuaded that this is appropriate.[26]

The vital sort of interchange recommended here cannot occur if jurors believe that they need give no reasons for their decisions, to themselves and to one another, to acquit or convict.

Happily, not all U.S. courts have been so quick as those quoted above to say that you can genuinely have a reasonable doubt about guilt even if unable to give any reasons for that doubt. The Supreme Court of Wisconsin has held specifically that: "An instruction in a criminal case that a reasonable doubt is a doubt for which a reason can be given based on the evidence in the case, is correct," adding for good measure: "A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given."[27]

26. First Circuit Criminal Pattern Instruction 6.04.
27. Butler v. Wisconsin, 102 Wis. 364 (1899).

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Unfortunately, this exemplary and rudimentary requirement is not the prevalent one, and it stands directly opposed to the view of the U.S. Supreme Court that this is an incorrect construal of BARD.

5. *BARD as High Probability*

According to this approach, much more popular with legal scholars and the public than among judges, the right way to understand what is involved in believing in the guilt of the accused beyond a reasonable doubt is to say that such a belief must be highly probable. One obvious inspiration for this approach is found in the *civil*-law standard of proof. There, courts agree that you should find for one party rather than the other if the "preponderance of the evidence" favors the former. That is normally taken to mean that the trier of fact should favor plaintiff over defendant if the case of the plaintiff is more likely than not, that is, if it has a probability greater than 0.5. The criminal standard, of course, is meant to be much higher than the civil standard, so the relevant probabilities would have to be much higher for conviction (0.9 or 0.95 are commonly cited unofficial estimates).

Proponents of this construal of BARD argue that judges should instruct juries that they must acquit unless their confidence or degree of belief in the guilt of the accused is close to certainty (in numerical terms, close to 1.0). Judges, as I have already insinuated, generally reject this formulation of BARD out of hand. It will prove worth our time to investigate with some care their basis for doing so.

Probabilities, of course, run along a scale from 0.0 to 1.0. It is customary (if not strictly correct) to identify a probability of 1.0 with complete certainty. Since (as BARD recognizes) we cannot be completely certain about anything to do with human affairs, this entails that jurors can never be fully certain of the guilt of an accused party. This naturally invites the suggestion that the standard for conviction could be defined by specifying a threshold probability, a numerical degree of confidence, that belief in guilt must reach before conviction (in both senses of this term) can be justified. Although lower-court judges from time to time explain BARD to jurors in just such terms, virtually no appellate court in the land will endorse such a gloss of reasonable doubt. On the contrary, they hold to the view that *any* such quantification must be stoutly resisted. Reversing a conviction in a trial where the judge had defined BARD in probabilistic language, an appeals court in Massachusetts insisted: "The idea of reasonable doubt is not susceptible to quantification; it is inherently qualitative."[28] The Supreme Court of Nevada agrees: "The idea of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify."[29]

These, of course, are not arguments but bare assertions. The Nevada court's observation that a judge might define the probability too low is surely

28. Massachusetts v. Sullivan, 482 N.E.2d 1198 (1985).
29. McCulloch v. Nevada, 99 Nev. 72, 75 (1983).

https://doi.org/10.1017/S1352325203000132 Published online by Cambridge University Press

remediable in principle by setting the requisite probability quite high. This is no argument against using the language of probabilities per se but simply against failing to specify that a very high probability would be required to convict. The same shortsighted analysis afflicts a dissenting opinion of Justices Blackmun and Souter on the high court when they argued that:

> The word "probability" brings to mind terms such as "chance," "possibility," "likelihood" and "plausibility"—none of which appear to suggest the high level of certainty which is required to be convinced of a defendant's guilt "beyond a reasonable doubt."[30]

Although the bare term "probability" may have the implications that worry Blackmun and Souter, the phrase "high probability" suggests nothing so weak as mere possibility or plausibility or even bare likelihood. Because these arguments are so shabby, I think that the real worry among jurists about specifying probabilities must be sought elsewhere.

One source of their worry is this: *Any* specification of a degree of belief necessary for a finding of guilt (say 95 percent confidence) involves an *explicit* admission that wrongful convictions will inevitably occur. For instance, if jurors could somehow discover that they had a confidence of 95 percent in the guilt of the accused, this would automatically entail that one time in twenty they would be convicting an innocent defendant. While acknowledging in the abstract that no method of proof is infallible and hence admitting in principle that mistakes will occur from time to time, the judiciary has an entrenched resistance to any *explicit* admission that the system has this inbuilt tolerance for wrongful convictions. Some elements of this problem come out clearly in Justice Brennan's remarks in a case we have already discussed, In re Wingate.[31] Brennan worries that the law would lose much of its "moral force" if it left room for the suspicion that "innocent men are being condemned." To avoid this problem, he says, the ordinary man in the street must believe that he cannot be sent to jail unless his guilt has been proved "with utmost certainty." (These are remarkable utterances to be made in an age that has supposedly come to terms with the fallibility of human judgment. But leave that curious anachronism to one side.)

What should be clear is that identifying BARD with *any* level of probability less than unity would mark an explicit admission that the system officially condones a certain fraction of wrongful convictions. That in turn would supposedly threaten the ordinary person's faith in the justice system. Better,

30. From the dissent of Blackmun and Souter in *Victor*, 511 U.S. 1 (1994).

31. Brennan wrote: "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty"; In re Winship, 397 U.S. 358, at 364 (1970). According to a LexisNexis search, no fewer than fifty-three other appellate rulings since 1970 quote and endorse this incoherent sentiment of Brennan's.

https://doi.org/10.1017/S1352325203000132 Published online by Cambridge University Press

it seems, to avoid any talk of probability as the standard for conviction than to acknowledge publicly that the system expressly expects incorrect judgments of guilt. Daniel Shaviro has argued that the criminal justice system goes to heroic lengths to reduce the *appearance* of the possibility of error even while acknowledging that such a possibility is omnipresent. He suggests that this "may reflect the self-serving interest of lawyers [and, we may add, judges] in promoting the appearance of justice under the legal system" rather than the true state of affairs.[32]

Perhaps the most powerful formulation of the argument against defining reasonable doubt as a specific level of probability comes from the influential English legal writer Thomas Starkie, who put the point this way in 1824:

> To hold that any finite degree of probability shall constitute proof adequate to the conviction of an offender would in reality be to assert that, out of some finite number of persons accused, an innocent man should be sacrificed for the sake of punishing the rest—a proposition which is as inconsistent with the humane spirit of our law as it is with the suggestion of reason and justice.[33]

Another problem lying at the core of the preoccupation with making BARD explicitly probabilistic is the long-held legal dogma to the effect that conviction of the accused requires that a juror's state of mind must be one of "firm belief in guilt," that is, the juror must be "fully convinced." How, you may ask, can you be fully convinced of a proposition that you believe to have a likelihood of (say) 95 percent? Indeed, the 5 percent uncertainty implies that the juror is less than fully convinced. But according to this way of thinking, nothing short of full certainty, a probability of 100 percent, should be enough to convict, and virtually no one believes that kind of proof is available. The courts want to eat their cake and have it too. They acknowledge that juries make mistakes from time to time. They even say to jurors that no certainty can be had in human affairs. On the other hand, they apparently do not want jurors to bring to their deliberative process the epistemic savvy that the judges themselves have. They want jurors to be "fully convinced" even when they as judges know that even a fully convinced jury can make mistakes *and* when they know that no one has the right to claim to be *fully* convinced about the kinds of complex decisions that juries must usually make. Jurists apparently want to keep any overt token of *fallibilism* out of the jury room, demanding that jurors be persuaded of guilt with (repeating Justice Brennan's characterization) "utmost certainty," all the while conceding that certainty in human affairs is a will-o'-the-wisp.

Even if the worries about the "message" being sent by using probabilities could be quelled, it is quite unclear what level of probability should be associated with BARD. An English study thirty years ago interviewed judges and

32. Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice,* 105 HARVARD L REV 531 (1989).

33. Thomas Starkie, TREATISE ON EVIDENCE, 507 (1824).

https://doi.org/10.1017/S1352325203000132 Published online by Cambridge University Press

jurors about the level of probability that should be required for conviction in a criminal trial. Among judges, fully a third located it between 0.7 and 0.9, almost all the rest pegging it above 0.9. Among jurors, by contrast, 26 percent were willing to convict on probabilities below 0.7 and a bare majority (54 percent) thought that probabilities of 0.9 and above should be required for conviction.[34] Let us leave the last word on this subject to Lawrence Tribe, who insisted, in a classic article on the importance of not quantifying criteria of proof, that:

> [BARD] signifies not any mathematical measure of the precise degree of certitude we require of juries in criminal cases, but a subtle compromise between the knowledge, on the one hand, that we cannot realistically insist on acquittal wherever guilt is less than absolutely certain, and the realization, on the other hand, that the cost of spelling that out explicitly and with calculated precision in the trial itself would be too high.[35]

THE ULTIMATE ACT OF DESPERATION: AVOIDING CLARIFICATION

The coexistence of several different definitions of BARD is not necessarily a bad thing. After all, we can define most complex notions in a variety of ways. What *is* troublesome is that most of these definitions fail to be characterizations of the *same* underlying idea. Believing firmly in or having an abiding conviction about someone's guilt is not the same thing as having no doubts for which you can give a reason. And neither of these is the same as a belief on which you would base important actions in your life. What we face are not different glosses of the same notion but *different conceptions* of the level of proof necessary to convict someone of a crime. To make matters worse, courts have faulted *all* these definitions as wrong, misleading, or unintelligible. Versions that some courts have found acceptable, even exemplary, have been dismissed by other courts as violating the constitutional rights of the accused.

This situation has prompted many appellate courts to inform trial judges that they should not define BARD for jurors in their instructions. At least ten states now insist on this. In some (e.g., Oklahoma), if a judge offers a jury *any* explanation of what reasonable doubt is, this is automatic grounds for *reversing* a conviction.[36] By contrast, another fifteen states require judges to define BARD for jurors. We see the same confusion at the federal level. Four of the eleven U.S. circuit courts require a definition, failure to give one being grounds for reversal. Most of the rest hold that judges need not

34. Cohen and Christensen, 1970, p. 62.

35. Laurence Tribe, *Trial by Mathematics,* 84 Harv. L. Rev. 1329, 1379 (1970).

36. The case establishing that any explanation of reasonable doubt is a reversible error in Oklahoma is Pannell v. Oklahoma, 640 P.2d 568, 570 (1982). For Wyoming's similar rule, *see* Cosco v. Wyoming, 521 P.2d 1345, 1346 (1974).

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define rational doubt. Nearly all appellate courts warn that most efforts to explain BARD either create confusion in the minds of jurors or else mischaracterize the appropriate burden of proof that is the essence of BARD. As the Seventh Circuit Court of Appeal put it in 1982: "We have repeatedly admonished district courts not to define 'reasonable doubt."'[37] Six years later, and faced with lower-court judges who were still explaining reasonable doubt to perplexed juries, the judges of the Seventh Circuit were even more insistent, asserting that "no attempt should be made to define reasonable doubt."[38] They argued in 1988:

> "Reasonable doubt" must speak for itself. Jurors know what is "reasonable" and are quite familiar with the meaning of "doubt." Judges' and lawyers' attempts to inject other amorphous catch-phrases into the "reasonable doubt" standard, such as "matter of the highest importance," only muddy the water. It is, therefore, inappropriate for judges to give an instruction defining "reasonable doubt," and it is equally inappropriate for trial counsel to provide their own definition. [39]

The idea that reasonable doubt must already be clear to all because ordinary people understand each of its two constituent terms is laughable. "Reasonable doubt," like many other compound terms of art (think of "civil servant" or "black box"), carries a freight not implied by either of its constituent terms. If you still wonder about that, recall that many courts have argued that reasonable doubt is not to be understood as a doubt for which you can give a reason. This single feature is sufficient to undermine the Seventh Circuit's claim that the meaning of BARD can be "read off" from its constituent terms, for that is surely its most natural reading in ordinary language.

If *this* argument for avoiding definition will not work, there is a long line of appellate judges and legal scholars willing to find other reasons for not defining BARD. Hence, Justice Woodlock, U.S. district judge for Massachusetts, insisted that it is "a basic philosophical precept that the concept of reasonable doubt has an *a priori* existence in the minds of all jurors."[40] If we all understand it a priori, there is obviously no need to define it. Another common excuse for not defining BARD is that any such definition would detract from the intrinsic simplicity of the concept. One scholar's version of this silliness: "One of the benefits of providing no definition [for BARD] is simplicity–such an instruction includes nothing complicated or convoluted to distract jurors from [BARD's] essential meaning."[41] (What

37. U.S. v. Martin-Tregora, 684 F.2d 485, 493 (7th Cir. 1982).

38. U.S. v. Hall, 854 F.2d 1036, 1039 (7th Cir. 1988). The shifting reactions of appellate courts to the use of BARD instructions are discussed in detail in Jessica Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept,* 22 AM. J. CRIM. L. 677 (1995).

39. U.S. v. Glass, 846 F.2d 386 (1988).

40. Smith v. Butler, 696 F. Supp. 748, 765 (1988).

41. Anonymous Note, *Reasonable Doubt: An Argument Against Definition,* 108 HARV. L. REV. 1955, 1965 (1995).

https://doi.org/10.1017/S1352325203000132 Published online by Cambridge University Press

might Dr. Johnson have said if someone told him that definitions merely distract from a term's "essential meaning"?) The same author goes on to say that definitions of BARD "belie the concept's inherent quality of vagueness."[42] If I have this right, the argument is that definition should be resisted because it might clarify the situation.

In 1994, the Fourth Circuit Court held that, even when the jury asks the judge to define "reasonable doubt," the judge may properly refuse to do so.[43] The Supreme Court, for its part, has never made up its mind whether reasonable doubt should be defined, holding, as Justice O'Connor wrote in 1994, that the Constitution is noncommittal about whether trial judges may or must define reasonable doubt.[44]

It is more than mildly curious that such a large body of legal opinion would favor a policy according to which juries must be told that conviction for a crime requires belief in guilt beyond a reasonable doubt although judges are to say nothing to clarify what reasonable doubt is, not even when the jury requests such clarification. The *explicit* rationale for discouraging a definition of BARD avoids admitting that the notion itself is deeply confused. The most common line is that BARD is "self-evident" or "self-defining," and hence not in need of further commentary. Hence the Seventh Circuit has gone on record saying that the idea of reasonable doubt is so transparent that definitions of BARD, attempts—as they put it—to make "the clear more clear," can only confuse.[45] But this is false on its face. Juries frequently *request* that judges explain to them what reasonable doubt is. That would never occur were it clear and self-evident. More to the point, we have already seen from this very brief survey that different judges and different legal jurisdictions have profoundly different understandings of what BARD amounts to. If judges cannot agree amongst themselves about this crucial notion, and it is clear that they cannot, it is a dangerous act of self-deception (or worse) to suggest that lay jurors, completely unschooled in the law, will have some common, shared understanding of this doctrine.

We also have impressive, *direct* evidence that jurors are deeply confused about what the reasonable-doubt standard demands of them. In a study of some 600 Michigan jurors, Kramer and Koenig discovered that a quarter of jurors believed that "you have a reasonable doubt if you can see *any* possibility, no matter how slight, that the defendant is innocent."[46] Not surprisingly in light of this confusion, roughly the same proportion of jurors agreed that "to find the defendant guilty, beyond a reasonable doubt, you must be 100% certain of the defendant's guilt." Appellate courts have rejected both these

42. *Id.* at 1968.
43. *See* U.S. v. Reives, 114 S. Ct. 2679 (1994).
44. *Victor*, 114 S. Ct. at 1243 (1994).
45. U.S. v. Lawson 507 F.2d 433, 422 (7th Cir. 1974).
46. Geoffrey Kramer & Doorean Koenig, *Do Jurors Understand Criminal Jury Instructions?* U. MICH. J. L. REF. 401, 414 (1990).

https://doi.org/10.1017/S1352325203000132 Published online by Cambridge University Press

construals of BARD countless times. That is because it is not true that *any* doubt is a *reasonable* doubt, nor is it true that jurors must be fully certain of guilt. Another study of jurors in Florida discovered that one in four of them believed that when the weight of evidence was equally balanced between prosecution and defense, the defendant should be found guilty. Only half of the jurors realized that the defendant was not obliged to offer proof of his innocence.[47]

How can jurors rationally apply a standard of proof to the evidence when they have such divergent interpretations of that standard and when so many courts refuse to clarify the standard for them? If judges can tell jurors no more than that a guilty verdict requires belief in guilt beyond a reasonable doubt, we have reason to expect that almost every jury will contain jurors who are bringing inappropriate construals of that standard to bear. In such circumstances, failure to explain BARD to jurors is unconscionable. For such reasons, it is difficult to resist the conclusion that what really drives the growing reluctance to define BARD is not so much the purported truth that its meaning is clear to all as an abiding worry on the part of the judiciary that the persistence of conflicting definitions of BARD will bring to public notice the fact that *no univocal sense can be attached to the phrase "beyond a reasonable doubt."* Rather than concede that fact and do something to remedy it, many courts—especially at the federal level—seem disposed to paper over the real differences that exist by pretending that the conception requires no further explication or clarification. A system founded on the idea that justice can be secured simply by having the judge, with a wink and a nod, tell jurors that "you know what reasonable doubt means" is in drastic need of repair.

There is doubtless another engine driving the growing disinclination of courts to instruct jurors in the subtleties of BARD. I refer to the fact that if a judge says something to the jury about BARD with which a higher court disagrees, and if the accused is subsequently convicted and the case is appealed, then the guilty verdict may be overturned. Better, apparently, to say nothing—leaving the problem unresolved, the guilty verdict in place, and the jury perplexed—than to say something that might trigger a successful appeal. A vacuous BARD instruction is not likely to be reversed, while one with content may well be. By the way, my favorite BARD misinstruction (which was properly deemed unacceptable by a higher court) comes from a New York state court. Here is how the judge instructed the jury about what a reasonable doubt is:

> It is not a doubt based upon sympathy or a whim or prejudice or bias or a caprice, or a sentimentality, or upon a reluctance of a weak-kneed, timid, jellyfish of a juror who is seeking to avoid the performance of a disagreeable

47. David Strawn & Raymond Buchanan, *Jury Confusion: A Threat to Justice,* 59 JUDICATURE 478, 480–481 (1976).

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> duty, namely, to convict another human being of the commission of a serious crime.[48]

Whatever the precise combination of motives for discouraging explanations of BARD, we have every ground for suspecting that there is no uniform standard for determining guilt in contemporary American criminal law courts. As the Justices of the U.S. Ninth Circuit sagely noted:

> The term "beyond a reasonable doubt" may be in common usage by the populace of this nation, but there is no demonstrable or reliable evidence that a reasonably appropriate *definition* is in common usage or well understood by prospective citizen jurors.[49]

Where the standard of proof is concerned, our criminal justice system is blind, not in the traditional and commendable sense of being impartial but in the more literal sense of not knowing what it is doing or where it is going. The wheels of justice keep grinding, and juries keep producing verdicts, but the deliberate obscurity and obfuscation surrounding the standard for conviction does little to inspire confidence in the fairness of the system.

TAKING A STEP BACK FROM THE ABYSS

Most critics familiar with the many twists and turns in the recent handling of BARD by the courts seek the remedy for the problem in a newly crafted set of jury instructions, instructions that will in plain language explain to jurors what the idea of (beyond a) reasonable doubt means. I have to part ways with my fellow critics at this point because I believe that the proper moral to draw from this sordid story is that no canonical notion of reasonable doubt is on the table.

The sad fact is that we have been expecting one doctrine to do multiple tasks for us. To begin with, we have wanted a way to stress to jurors that the burden of proof in criminal proceedings falls on the state, not the defendant. Then we have wanted a way to warn jurors that they must not let exaggerated, hyperbolic doubts stand in the way of conviction. We have wanted to make clear that guilty verdicts in criminal trials must depend on much higher levels of proof than those associated with civil actions or practical life. We have wanted to impress on jurors just how much is at stake and how somber must be the decision when they decide to send someone to prison, depriving her of her liberty and blackening her good name. Finally, we have wanted to insure—insofar as possible—uniformity of standards, making sure that

48. People v. Feldman, 71 N.E. 2d 433, 439 (1947). (This was drawn to my attention by L. Solan in his *Refocusing the Burden of Proof,* TEX. L. REV. 105, 113 (1999).

49. U. S. v. Witt, 648 F.2d 608, 612 (9th Cir. 1981) (Anderson, J., concurring).

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every criminal verdict hews to the same bar for conviction. On most of these scores, BARD is failing.

It is time to try to diagnose the causes of that failure. It will probably not have escaped notice that almost all the familiar glosses on BARD (as moral certainty, as firm or abiding conviction, as belief on which you would base important actions, etc.) define it in terms of the target *mental state* of the juror. He or she must be "firmly convinced," "almost certain," "fully persuaded," with a "satisfied conscience" about guilt before a vote for conviction is indicated. It is no accident that almost all the proposed definitions focus on the subjective state of the juror. On several occasions, the Supreme Court has underscored its belief that the right way to characterize the bar for conviction is in terms of the "subjective state of mind" that jurors should be in if they are to condemn or acquit the accused.[50]

On reflection, this focus on the juror's mental state is more than a little curious. Suppose that we tried to teach young scientists how to judge when a theory was acceptable by telling them what their mental state should be before they should accept a theory? Such advice would be seen as missing the point, for what matters is not their mental state per se, but *how they came to that state*. You become a scientist not by learning the state of mind you should be in before accepting a theory but by learning how to evaluate evidence and its bearing on theory. Likewise, doctors do not decide whether they have the right diagnosis of a puzzling disease by scrutinizing their own mental states but rather by reviewing the clues and symptoms that they have to hand and seeing whether those factors strongly support the diagnosis, according to accepted rules of theory evaluation. Pharmacologists do not decide whether a proposed new drug is really safe and effective by reaching a certain predefined mental attitude. On the contrary, they do so by hewing to accepted principles for designing and assessing clinical trials of new therapies. Imagine saying to a mathematician that he knows he has an important result when he believes it without the slightest hesitation! What establishes a mathematical theorem as a theorem is the robustness of its proof, *not* the confidence of its discoverer.

Even in the law, at least the civil law, we see the same pattern. When John sues Sally for breach of contract, the members of the jury are not told that they can find for John only if they are in a particular mental state. Instead, they are told to look to the evidence and see whether the evidence makes John's claims more powerful, more probable, or better supported than Sally's. When civil law borders on to criminal law (for instance, if Bill sues Bob on the grounds that Bob committed arson on Bill's warehouse), a new standard comes into play. It insists that a finding in favor of the plaintiff requires "clear and convincing evidence" that Bob did what Bill alleges. This bar, like the preponderance-of-evidence rule, characterizes what is necessary

50. *See especially* Jackson v. Virginia, 443 U.S. 307, 315 (1979); and In re Winship, 397 U.S. 358, 364 (1970), which both speak of BARD as denoting a "subjective state."

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for a jury's finding in terms of the *kind of evidence* brought into play. These two legal standards of proof stand in sharp contrast to BARD, which refers to evidence, if at all, only obliquely and which focuses instead on the juror's state of mind.

Putting the point a bit more philosophically, we can note that, in most of the areas of life where inquiry after the truth is at stake, the usual kind of advice offered to insure that such inquiry is rational involves specifying the kinds of evidence, or tests, or proofs necessary to justify you in having a well-founded belief. Such advice explains (for instance) when an hypothesis is well- or ill-supported by the evidence or when it is proper to infer a certain conclusion from given premises. During the last two centuries, Anglo-American criminal law has generally sought to avoid saying anything about the kind of evidence needed for a conviction. (Contrast this with European, Talmudic, or Church law, which for hundreds of years specified precisely how much proof or evidence was needed to convict.)

Perhaps one reason why characterizations of BARD seem so vacuous or unsatisfactory is that they studiously avoid saying to juries anything about the *structure* of proof or about the case the prosecution must present in order for it to be a powerful indicator of the guilt of the accused. Instead, those characterizations focus single-mindedly on the mental state of the juror. It is true that every jury is enjoined to attend carefully to the evidence and to weigh it, but even the most general features of that process are regarded as a black box, something that happens behind the closed doors of the jury room, as if that territory ought not be invaded by a judge telling the jury what a compelling case looks like. Instead, the judge in effect simply says "Open your mind to all the evidence and then see if you are fully persuaded (or firmly convinced, etc.) at the end of the trial." What this formula ignores, as we have noted before, is that persuasion is supposed to be a process of *reasoning through the evidence*. Judges do not even hint to jurors as to how they should do that. Worse, it is not even clear that jurists believe that jurors should arrive at their verdict by reasoning their way to it. If that appraisal seems harsh, remember that the highest court has repeatedly insisted that a doubt can legitimately block conviction even if jurors can give no reasons for it. David Hume famously argued that belief may simply be an "animal instinct," beyond the control of one's critical faculties of reason and rational evaluation. By refusing to say anything to jurors about how they to reach their verdict and by exempting them from the obligation that one has in every other branch of inquiry to explain to one's peers the basis for one's conclusions, the Supreme Court seems tacitly to concur.

This would be forgivable if we could suppose that all, or even most, competent jurors already knew how to engage in the ampliative reasoning (as Peirce called it) that leads you from the disparate, purported facts of the case presented as evidence to a conclusion about the guilt of the accused. If everyone were implanted with a kind of "natural" disposition to reason correctly about complex matters of fact, such information would be

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superfluous. But there is nothing innate about making correct inferences from confused bodies of protoevidence. It took scientists more or less two millennia before they figured out how to test their theories correctly. The logic governing clinical trials of drugs emerged only in the twentieth century, after eons of the use of medications on only the flimsiest empirical basis. In the law itself, we have learned much about what distinguishes a powerful case for the prosecution from a weak one. I submit that the bar for conviction would be better defined in terms of *the features of the case needed to convict rather than in terms of the jurors' inner states of mind,* especially since the latter—if not disciplined by certain guidelines about the appropriate logical connections between evidence and verdict—are apt to be ill-founded, prejudicial, and irrational, however powerfully they may lead to a firm belief in guilt.

There is a different way of approaching the same point. Whatever else BARD might mean, it insists that juries should not convict the accused if they have a rational doubt about his guilt. Subjective criteria of the sort that appellate courts favor get at only half of this demand. Basically, they tell the juror that he must have no doubts. But precisely because the criteria they offer are purely subjective, they cannot address the question about the *rationality* of the jurors' confidence or lack of confidence in the guilt of the accused. That discrimination between rational and irrational doubts can never be resolved if one remains focused exclusively at the level of the jurors' degree of conviction. What distinguishes a rational doubt from an irrational one is that the former reacts to a weakness in the case offered by the prosecution, while the latter does not.

Let us remember that in a trial by jury, the jurors are supposed to be "the finders of fact." They are the ones who have to decide whether a crime was committed and whether the defendant committed it. The prosecution will generally lay out a "theory" about the crime, that is, a narrative of supposed events in which the defendant participated. The prosecution, if it is savvy, will adduce evidence in the form of testimony or documents or physical evidence for every key part of its theory. The aim of presenting the evidence is to corroborate the prosecution's theory of the crime. For its part, the defense may (but is not obliged to) present an alternative theory of the events associated with the crime. At a minimum, the defense will seek to identify weak points or implausibilities in the prosecution's narrative. This critique may involve challenging the evidence or testimony or it may focus on the large inferential leaps required to move from the evidence presented to the thesis that the defendant is guilty.

The task of the jury is to evaluate the prosecution's theory or story, deciding whether it points unambiguously to the conclusion that the defendant is guilty. In making that decision, jurors must decide whether the evidence presented is powerful enough to *justify* them in concluding that the defendant committed the crime. The principal question is not whether the jurors, individually and collectively, are convinced by the prosecution. The issue is whether the evidence they have seen and heard should be convincing in

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terms of the level of support it offers to the prosecution's hypothesis that the defendant is guilty.

The key point is that the question: How strongly does the evidence support the theory of guilt? is an *objective* question about logical relations between events, not merely or primarily a question about the subjective state of the jurors' minds. The issue at trial should not be whether, as a contingent matter of fact, the twelve jurors are all fully convinced of the guilt of the accused. Instead, it should be: Does this evidence strongly support the theory that the defendant is guilty? Putting it differently: Would a rational and sober-minded person confronted with this evidence find that it made a compelling case for guilt? For jurors to be able to answer such questions, it is of little or no avail to tell them that they must be firmly convinced or have an abiding conviction of guilt. Rather, they must be able to say to themselves and to one another precisely *why* the evidence to hand does or does not point unambiguously to the guilt of the accused. Doing so requires them to make a whole series of decisions about whether the evidence supports each key claim of the prosecution's theory to the requisite degree.

What the jurors may well be unclear about is how to tell whether the evidence provides powerful or only mild support for the prosecution. For instance, is one credible witness to a crime sufficient to convict? Is circumstantial evidence potentially as powerful as eyewitness testimony? Are some sorts of physical evidence more damning than others? And so on. Given the practical demands of the criminal justice system, the judge cannot give a mini-course in inductive inference to every empaneled jury. Nevertheless, I think that some things could be said briefly that would provide models or paradigms of powerful forms of argument. Armed with these paradigmatic examples, jurors could go to the jury room ready to struggle with the question of whether the case in hand has the sorts of features that make up powerful proof.

Such a course of action is not wholly without precedent, although the current Supreme Court would surely fault it. Consider, for instance, what the presiding judge said to the jury in the famous 1882 case of the assassination of President Garfield:

> If, for example, facts not improbable are attested by numerous witnesses who are credible, consistent, and uncontradicted, and who had every opportunity of knowing the truth, a reasonable or moral certainty would be inspired by their testimony. In such case, a doubt would be unreasonable, or imaginary, or speculative, which the books say it ought not to be. And it is not a doubt whether the party may not *possibly* be innocent in the face of strong proof of his guilt, but a sincere doubt whether he has been proved guilty, that is called reasonable.[51]

51. Guiteau's Case, 10 F. 161, 163–64 (1882).

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Here the focus was on eyewitness testimony, and the judge offered a simple rule for determining whether the evidence reached the BARD threshold.

A more compelling example of the judge instructing the jury about the logic of the decision they face comes from the way in which, until very recent times, a case resting on circumstantial evidence was explained to jurors. From early on in American criminal trials, it was common for judges to define when it was reasonable to accept circumstantial evidence as establishing guilt beyond a reasonable doubt. Indeed, for almost a century, it was a common-law rule in cases involving circumstantial evidence for the judge to give a brief explanation as to when such evidence could be taken as probative. Typically, this instruction would inform the jurors that a case based on circumstantial evidence was powerful enough to convict only if "it ruled out every reasonable hypothesis except that of the guilt of the defendant." This instruction goes directly to the question of the nature of the evidence and avoids dalliance with characterizing how the jurors should feel about the matter. It tells jurors that they should not convict unless the evidence before them has refuted every version of the events in the case that would be exculpatory for the defendant. It says to the jurors: Figure out whether the facts established by the prosecution preclude any hypothesis you can think of that would leave the defendant innocent. If they do, you should convict. Otherwise, you must acquit.

Unfortunately (in my view), this type of instruction vanished when the Supreme Court decided, and rightly so on other grounds, that circumstantial evidence was on an evidential par with eyewitness testimony and hence required no special instruction in its own right. In Holland v. U.S., the defendant had requested the customary circumstantial evidence instruction, which the judge refused to provide to the jury. On appeal, the Supreme Court responded:

> The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions. . . . *But the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect.*[52]

The trouble, of course, is that the Supreme Court has repeatedly held that judges need not and probably ought not "instruct jurors on the standards for reasonable doubt." In my view, the Holland Court missed a splendid opportunity to take the traditional instruction about the character of the inference that jurors should make about cases involving circumstantial evidence (what we might call "the no-other-reasonable-hypothesis rule") and generalize it to all criminal cases. Instead, the court has opted for the idea

52. *Holland*, 348 U.S. 121 at 139–40 (1954). My italics.

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that the mere mention of BARD, construed as describing the subjective state of the jurors' mind, is adequate guidance for jurors.[53]

It would be well to recall at this point that for almost two hundred years in Anglo-American law, the notion of belief beyond a reasonable doubt was identified with *moral certainty*. Although such certainty surely alludes to a subjective state of mind, those thinkers who were most influential in articulating the idea never left it at that. Philosophers from John Wilkins and Robert Boyle in the seventeenth century through William Whewell in the nineteenth century always identified the kinds of circumstances in which a morally certain judgment would be appropriate. Specifically, they held that you properly reach a morally certain conclusion when and only when you have *several* independent lines of evidence, no one of which establishes the conclusion with certainty but each of which points with likelihood in the same direction. It is important to stress that both the *independence* and the *multiplicity* of lines of evidence were required before you were entitled to hold that a belief was morally certain. A single piece of evidence (for instance, one eyewitness alleging that an event occurred or one incriminating piece of physical evidence of guilt) was never sufficient for moral certainty. Rather, what was required were two and preferably more strong indicators of guilt. Their independence was likewise important. Two witnesses likely to be in cahoots with one another would not count as two. Neither would two distinct bloodstains on the accused's knife count for more than one since we suppose that they are not independent.

The idea behind the independence requirement is that you "triangulate" in on a morally certain conclusion by discovering several distinct lines of inquiry or analysis that point to the same conclusion. Arguably, it was a rudimentary version of this intuition that provided the rationale for the famous two-witnesses-or-a-confession rule in Roman and biblical law. One witness to a crime would not be sufficient to convict, for such testimony would simply be gainsaid by the defendant's denial of guilt. But if several, noncolluding witnesses attested to the same thing, it became increasingly difficult to doubt it. Similarly, where circumstantial evidence is concerned, theorists of moral certainty stressed that such certainty could emerge only when a series of independent lines of evidence converged on the same conclusion. This kind of "proof" is by no means unique to the law. As both Boyle and Whewell argued persuasively, powerful theories in the natural sciences likewise exhibit this feature.[54] For instance, the physics of Newton was supported alike by observations of the heavens and by experiments involving terrestrial phenomena. The persuasiveness of the so-called Newtonian synthesis is often thought to hinge on Newton's ability to marshal evidence in support of his theory from such different quarters.

53. The Supreme Court opined: "If the jury is convinced beyond a reasonable doubt, we can require no more." *Holland*, 348 U.S. 121 at 138 (1954).

54. Brief discussions of Boyle's and Whewell's views can be found in chaps. 4 and 10 of my SCIENCE AND HYPOTHESIS (1981).

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The salient point is that moral certainty or proof beyond a reasonable doubt, if we identify the one with the other, arises only in certain special situations. On this analysis, conviction of a defendant BARD requires that the prosecution's theory of the crime must enjoy support of this powerful type. Instead of instructing jurors as to what mental state they should have in order to vote to convict, courts would do better to inform jurors in a general way about the epistemic or logical features that a case must exhibit before it can properly be regarded as putting the accused's guilt beyond reasonable doubt.

I do not mean to suggest—I hasten to add—that the evaluation of a complex case can be reduced to a mechanical algorithm or simplistic rule. Most of them patently cannot. Inevitably, jurors must bring their own judgment to bear. But as things currently stand, jurors are provided with no examples of inferences that achieve BARD or moral certainty–examples that they could use as a baseline for determining whether the case in hand was powerful enough to warrant conviction. They are simply charged with determining guilt beyond a reasonable doubt when they generally have only the foggiest notion of what that requires.

I have belabored the question of the standard for conviction at such length because the ambiguities surrounding it may be the single largest impediment to insuring that the criminal justice system acts so as to minimize error and maximize truth. "Beyond a reasonable doubt" has become a mantra rather than the well-defined standard of proof that it once was. Divested of its entire substantive content by a series of well-meaning but ill-advised judicial findings, it now serves at best as an admonition to jurors not to take their tasks lightly. What it does not do in its present form is to provide the slightest clue to jurors as to what a convincing proof of guilt should look like.

IS BARD A PROOF FOR ALL SEASONS?

A question we must face now is whether, supposing jurors could be made to understand just how demanding the BARD standard is meant to be, it should be the appropriate standard to use across the board in criminal cases. At the end of the eighteenth century, when BARD was introduced in Britain and the United States, the justice system was much less nuanced than it now is. All felonies implied the same punishment (death) and all were judged to the same standard. (Misdemeanors were another matter altogether.) As a part of the penal reforms of the nineteenth century, legislatures and courts accepted the notion that the punishment should fit the crime. The range of crimes that were potentially capital shrank drastically and it continues to do so in our time. If the U.S. has not followed England's example of eliminating the death penalty altogether, it is not very far from it in practice if not yet in theory. Of the roughly 10,000 persons convicted of murder every year in the

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U.S., about 260 receive the death sentence and, after the process of appeals and pardons, fewer than one quarter of those will actually be executed.[55]

If punishments have become drastically less severe, there has been another sea change in the justice system that is likewise relevant. I refer to the introduction in the nineteenth century of a system allowing for the appeal and reversal of convictions if appellate courts find that serious errors occurred during the trial. When BARD was introduced, the principal argument for making it such a tough standard to satisfy depended on (1) the very high price associated with the punishments for convictions; and (2) the virtual irreversibility of convictions. Mistakenly convicting someone of a felony in those times extracted a very high price. It was natural under such circumstances to set the bar for conviction extremely high for all crimes.

It is appropriate to ask whether changed circumstances ought not alter the calculation we do when comparing the relative costs of false acquittals and false convictions. Given that (statistically speaking) the death penalty has vanished, and given that guilty verdicts are routinely vetted by higher courts, does it remain plausible that it is better that ten (or twenty or ninety-nine, depending upon which eighteenth-century authority you cite) guilty persons go free than that one innocent person is convicted? The question takes on particular force when we are dealing with felonies that have quite mild punishments associated with them.

Clearly, the costs of false convictions for most crimes are now a great deal less than they once were. Since there is elaborate appellate machinery for catching and canceling the sometimes-deadly effects of many such convictions, an incorrect conviction is no longer the guarantee of a very nasty fate that it once was. Despite this sea change in the openness of convictions to review, we are still hostage to the clichés of an earlier era when justice was both harsh and swift and where the jury was the final arbiter of guilt. We continue to mouth slogans about the egregiously high costs of false convictions—slogans that once made a lot of sense—even though the introduction of appellate machinery and of a graded scale of punishments deprives those slogans of much of their conceptual and emotive rationale. A conviction in a court of law is no longer the irrevocable decision by society that it once was. Moreover, as we just saw, a felony conviction no longer implies the gallows except in very rare cases. This change to the once-irrevocable character of convictions has, I suspect, yet to be factored into the question of how we think about the relative costs of false convictions and false acquittals.

Does it make sense to have a one-size-fits-all standard of proof when the costs associated with an erroneous finding of guilt are as low as they now are in many cases? It is common knowledge that a great many crimes now carry punishments that are little more than fines. Others, including felonies, can

55. These data come from James Liebman, *The Overproduction of Death,* 100 COLUM. L. REV., 2030 (2000).

https://doi.org/10.1017/S1352325203000132 Published online by Cambridge University Press

involve nothing more than probation or relatively brief times of incarceration. Are the costs of mistaken guilty verdicts in such circumstances so steep that we still want (say) ten or a hundred guilty defendants to be acquitted for every innocent defendant convicted? One's hunches about the relative costs of mistakes, perhaps crystal clear in the case of capital crimes, become clouded when it we turn to much milder punishments. Such differences invite the suggestion that the standard for conviction, instead of being the same for every crime from homicide to shoplifting, should—as the punishment does—vary with the severity of the crime. After all, many crimes now carry punishments less harsh than one's potential liability in civil cases, where the standard of proof is simply "more probable than not." In a civil court, for instance, you can be sued for your life savings if you are shown to be probably liable for harm to some third party. Civil proceedings can—on the strength of a proof that is merely more probable than not—deny someone their parental rights, commit them indefinitely to a mental institution, and deprive them of their citizenship. Are these fates less severe than being found guilty of felony drunk driving and facing a year's probation? If they are not, what is the sense in holding to such different standards of proof in the two cases?

It is also worth asking whether it is an efficient use of money and other resources to require the state to mount the same sort of proof to send an embezzler to jail for six months as it invests to convict a serial killer. Part of the problem, of course, is that it is not easy to see how to construct a graded scale of standards of conviction that might be mapped on to a scale of criminal severity. Essentially, the U.S. court system recognizes only three degrees of proof: BARD, proof by a preponderance of the evidence, and proof by clear and convincing evidence. If courts were disposed to think of standards of proof as probabilities (which they are not), you could imagine at least in principle having a graded series of probabilities associated with increasingly serious punishments, perhaps reserving BARD for only the most serious.

Since that proposal would probably go nowhere—given the courts' (probably correct) aversion to thinking of standards of proof as degrees of probability—a more realistic option would be to use the intermediate standard of proof by "clear and convincing evidence" for lesser crimes, by which I mean not only misdemeanors but also the less serious felonies. This standard, like BARD, is defendant-friendly in that it requires the state to establish much more than the bare probability of guilt, and it has the added virtue of presumably being intelligible to juries and familiar to judges, since civil trials already make frequent use of it. It is, moreover, fully compatible with the much-prized principle of the presumption of innocence. Such a proposal *would* require the Supreme Court to reverse its famous opinion in In re Wingate that all criminal defendants are entitled to be tried according to the BARD standard, but (as we have already seen) there are powerful, independent reasons for believing that the framers of the Constitution never

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contemplated laying down a specific standard for criminal conviction, let alone contemplated using BARD, not the least of which is that BARD was not even entrenched in the common law when the Constitution was adopted.

An ideal case in point of the anomalies produced by an omnibus standard of proof is offered by In re Wingate itself. In this case, a juvenile of twelve was facing a hearing to determine whether, having committed larceny, he should be sent to reformatory for eighteen months. According to then prevailing New York state law, decisions in juvenile hearings could be settled using the preponderance-of-the-evidence standard. The costs associated with erroneous incarceration under these circumstances were relatively modest. Unlike a normal conviction for theft, the juvenile court's finding would not form part of the defendant's criminal record. His incarceration would not involve a loss of any citizenship rights or privileges. Because the juvenile hearing was conducted in private, there would be no otiose public stigma associated with its outcome. All this notwithstanding, the Supreme Court declared the New York provision for settling such matters by a preponderance of the evidence unconstitutional. In essence, the Court denied the relevancy of a calculation of the costs of error to a decision about the standard of proof.

This is more than mildly curious since, for more than a century, the Supreme Court itself had *justified* a standard as tough as BARD precisely on the grounds that the costs of a mistaken conviction are so enormous that the bar for conviction must be set extremely high. Here, confronted by a case in which the costs were no more severe than those imposed in many civil trials, the Court went out of its way to insist nonetheless on BARD's application across the entire spectrum of punishments, saying that due process required as much. With respect, I confess to finding this ruling unintelligible. If the motive for a tough version of BARD is the importance of avoiding mistakes that can exact very high costs, and no one denies that, then there can be no rationale for the insistence on BARD in the adjudication of cases in which the costs of error are comparatively modest. The same twelve-year-old whom the Court protects from a reformatory with BARD can be sent to a mental institution or denied parental visitations or taken from his parents and put into foster care or an orphanage on the strength of the preponderance of the evidence. The attractiveness of the clear-and-convincing-evidence criterion is that, being intermediate between BARD and a preponderance of the evidence, it seems tailor-made for cases of this sort.

Against my suggestion it can be argued, not that it is wrongheaded to link severity of punishment with standard of proof, but rather that it is *superfluous*. We have already seen that BARD is generally left quite vague by the courts, usually deliberately so. That means, of course, that jurors have plenty of room for discretion in deciding just how demanding BARD is in any particular case. Several scholars, most especially Erik Lillquist, have argued that jurors will adjust the standard of proof to the circumstances of the case and of the defendant. Making a virtue out of the necessities imposed by the ambiguities of BARD, Lillquist holds that: "The use of a flexible standard

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allows the decision maker [that is, the jury] to apply the level of certainty that is most appropriate to a particular case."[56] Bearing out Lillquist's thesis, some empirical studies have shown that responses of judges and prospective jurors to questions about the level of proof appropriate to assorted crimes do indeed vary with perceptions of the seriousness of the crime. In one such study, jurors held that 95 percent certainty was appropriate for murder, 92 percent for manslaughter, and only 74 percent for petty larceny.[57]

While intriguing, these studies do *not* show that jurors exploit the ambiguities in BARD so as to vary the standard of proof with the *punishment* for a crime. On the contrary, as Lillquist concedes, leaving capital cases aside, "there is also reason to believe that the severity of the punishment has no actual effect on jurors' decision to convict or acquit."[58] This is curious since, of course, the seriousness of a mistake ensuing from a false conviction is measured by the penalty imposed, not by the severity of the crime committed. The difference in the magnitudes of the mistakes involved in (on the one hand) locking someone up and throwing away the key and (on the other hand) sending them to prison for a year is enormous. If we have the standard of proof that we do because we want the height of the bar to reflect the seriousness of the errors we might be making, then the case for moving to a standard of clear and convincing evidence for lessor felonies seems clear-cut.

THE UNCERTAIN REACH OF THE BENEFIT OF THE DOUBT

If it is plausible to suggest that BARD is not an appropriate standard for judging all crimes, it is equally important to stress that BARD, or something like it, *is* appropriate for serious crimes. Curiously, despite the Supreme Court's recent fetish for BARD, it has allowed BARD's role, even in serious cases, to atrophy. The result has been that many crucial decisions about a defendant's fate hinge on much weaker standards of proof. These weaker standards are especially clear in the case of so-called "affirmative" or "excuse" defenses.

When someone is charged with a crime, his defense may consist in offering an alibi, pleading diminished responsibility, or insisting that he was acting in self-defense. Any one of these excuses, if true, should lead to an acquittal. The question at issue is: Who carries the burden of proof with respect to these defenses? Speaking in general terms, American criminal law permits the judge to instruct the jury—in cases where such defenses arise—that acquittal requires that the defendant must show "by a preponderance of the evidence" the truth of his excuse. This policy is, in my view, a flagrant violation of both the spirit and the letter of BARD.

56. Lillquist, *supra* note 4, at 92.

57. Rita Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury and the Classroom,* 5 LAW & SOC'Y. REV. 319, 322 (1971).

58. Lillquist, *supra* note 4, at 144.

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If, for instance, defendant is charged with the robbery of a jewelry store at 1 PM on June 3 and he offers testimony from those claiming that he was in another city at the appointed hour, the testimony in question, the alibi, should only have to be strong enough to raise a reasonable doubt in jurors' minds about the prosecution's claim that the defendant was the felon. The demand that the credibility of the alibi must reach the civil standard of proof before the jury can credit it is plainly inconsistent with the claim that the prosecution must prove defendant's guilt beyond a reasonable doubt.

What is curious here is not so much that the defendant propounding an affirmative defense is obliged to assume an evidential burden—that seems fair enough, since the prosecution has (we are supposing) already established what it needs for a conviction. Leaving the alibi case to one side, the defendant is attempting to block a conviction not by disputing the claims against her but by putting them in a larger, exculpatory context. It is reasonable that she should have to do something to make her claim of self-defense or insanity plausible. What grates on one's epistemic sensibilities slightly, however, is the level or quantum of proof that the defendant's case must achieve. In general, a defendant is supposed to be acquitted unless the evidence of her guilt reaches the level of BARD. You would have thought, therefore, that all that was required of an affirmative defense was that it should establish some modest probability of its truth, enough to raise a reasonable doubt about its denial. Instead, state legislatures are at liberty to insist (and many do) that affirmative defenses must be more probable than not before a jury is instructed to use them to acquit in an otherwise airtight case for the guilt of the defendant.

In re Wingate supposedly established that every criminal defendant was entitled to a not-guilty verdict unless every element of the state's case against him was proved BARD. The epistemology of affirmative defenses seems to violate that doctrine. A juror cannot say to himself, "Although the accused clearly committed the crime with which she is charged, there are some grounds to suspect that she acted in self-defense." (Well, the juror can say it but he will be instructed in many jurisdictions that such a belief is not an adequate basis to acquit.) Acquittal, he will be told, requires that he believe the self-defense hypothesis to be more likely than not. The tensions here pose an imminent threat of an invalid verdict, in the sense of a verdict incompatible with BARD. If a juror has reasonable suspicions that the defendant acted in self-defense, then that juror cannot be said to believe in the guilt of the defendant BARD, since guilt already presupposes that there was no element of exculpatory justification in the act of the defendant. Nonetheless, the juror will be instructed that he must convict unless he positively believes (instead of merely suspects) that the defendant acted in self-defense.

So long as legislators are left free to specify a standard for affirmative defenses that is weaker than BARD, it will be possible to bypass Wingate's insistence that defendants have a constitutional right to have their guilt proved beyond a reasonable doubt. I have earlier expressed doubts as to

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whether BARD is not too demanding a standard for relatively minor crimes. Nevertheless, those doubts do not extend to the question of whether, for a crime for which the BARD standard is appropriate, that standard should be scrupulously followed.

Similar worries arise with respect to the appellate stage in judicial proceedings. When, for instance, someone convicted of a crime appeals the conviction on the grounds that the jurors were wrongly instructed by the judge about some key point of law, the appellate court requires the appellee to show "a reasonable likelihood" that his conviction was due to the improper instruction.[59] When someone convicted of a crime alleges that he was convicted because of his attorney's gross incompetence or because the state withheld exculpatory evidence, the same standard of reasonable likelihood applies. While the courts have not yet settled on a uniform definition of reasonable likelihood (are we surprised?), it seems clear that it is significantly *higher* than would be required merely to raise a reasonable doubt about the outcome. Here, too, the protections offered by BARD seem to be seriously compromised. Even more egregious is the insistence by the courts that to petition successfully for a new trial after the discovery of significant exculpatory evidence, the accused must persuade the court that it is more likely than not that a jury would have acquitted had they heard the evidence in question.

CONCLUSION

I have suggested that clarification of the meaning of BARD is urgently required. We have seen that various confused and mutually conflicting versions of it abound in the justice system. Pretending that the problem does not exist because BARD is self-explanatory is a ruse which the courts should be ashamed of perpetuating. Still, more is needed than a clear statement of what BARD means. The fetish during the last century and a half for defining BARD in terms of jurors' subjective states of mind should give way to definitions and illustrations of BARD that focus on the kind of evidence needed to make a rational person reasonably certain of someone's guilt. Jurors (and judges as well) need to be informed about the logical and epistemic features that the prosecution's case must exhibit before conviction is justified. So long as definitions of BARD fail to address the robustness of the evidence and so long as they remain fixated purely on the strength of the juror's belief, BARD will remain open to the devastating criticism that it confuses mere strength of belief (which may be wildly irrational) with warranted belief. Likewise obfuscatory is the court's unwillingness to insist that jurors be able to give (at least to and among themselves) reasons for such doubts as they may entertain about guilt. As we have seen, an inarticulable or

59. This standard was laid down in *Victor*, 114 S. Ct. at 1243 (1994) and in Boyde v. California, 494 U.S. 370, 380 (1990).

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even an unarticulated doubt cannot claim to be a rational one. Yet current practice allows acquittal on precisely such inexpressible worries. Historical research shows incontrovertibly that BARD was introduced around the turn of the nineteenth century in order to urge jurors to distinguish between trivial, elusive, and ill-founded doubts, which ought not block conviction, and reasonable doubts, which should. Current practice makes it next to impossible for judges to say anything to jurors about how to draw that crucial distinction. Without it, reasonable doubt simply reduces to doubt per se, and since any contingent statement whatever can be doubted if we are so minded, the currently accepted instructions are tantamount to demanding certainty in order to convict. The profound Enlightenment lesson that everything is open to skeptical doubt—a lesson that BARD was designed to incorporate—has been lost in the shuffle.

The systemic failure to address the question of the structure of the proof of guilt demanded from the prosecution invites invalid convictions and invalid acquittals alike. Simply identifying subjective levels of confidence required from jurors does nothing to enhance verdict validity, nor does it assist juries in attempting to distinguish reasonable doubts from unreasonable ones.

The title of this essay posed a seemingly simple question: Is reasonable doubt reasonable? It should be clear by now, if it was not from the beginning, that this is a question with multiple senses. One version of the question asks whether "reasonable" in the phrase "reasonable doubt" has the same meaning as "reasonable" does in ordinary language. A second version asks whether BARD is reasonable in the sense of being a justified and well-argued standard of proof. The third version asks whether BARD is an appropriate standard to use in all criminal cases. The melancholy truth is that *however* one glosses the question, the answer is a simple: No. Short of some form of radical surgery, BARD's day has come and gone.

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