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REASONABLE CERTAINTY AND REASONABLE DOUBT

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"I come from a state that raises corn and cotton and cockleburs and Democrats, and frothy eloquence neither convinces nor satisfies me. I am from Missouri. You have got to show me."—Sen. Willard Duncan Vandiver[1]

"Skepticism is my only gospel, but I don't want to make a dogma out of it."—Learned Hand[2]

I. INTRODUCTION

As the quotes that open this article suggest, skepticism is good, but dogmatic skepticism may not be. Skepticism helps us discover truth; excessive skepticism may obscure truth.[3] Finding the amount of skepticism that illuminates the truth without hiding it should be a goal of any

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1. STATE OF MISSOURI, OFFICIAL MANUAL, 1961-1962 1486 (quoting the Senator's 1899 speech).

2. Justice Lewis F. Powell, Jr., *Foreword to* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE at xii (1994).

3. For the purposes of this article, skepticism refers to a refusal to believe or a reason to doubt. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY UNABRIDGED 2353 (2nd ed. 1952) (defining skepticism as "[a]n incredulous or doubting state of mind . . . "); RANDOM HOUSE COLLEGE DICTIONARY 1232 (1st ed. 1988) (defining skeptic as "a person who questions the validity or authenticity of something purporting to be factual").

system that seeks truth. These ideas apply with special force to the criminal justice system.

The goals of the criminal justice system are simple: find the truth, convict the guilty and acquit the innocent.[4] In order to help guarantee that those goals are met, the system employs skepticism by requiring that each juror presume a defendant's innocence until that defendant's guilt is proven and requiring that each juror be convinced beyond a reasonable doubt that the defendant is guilty before a defendant is convicted. In combination, these requirements ensure that jurors are initially skeptical of a defendant's guilt and that their skepticism is overcome before that defendant is convicted. Mandating skepticism helps to ensure that guilty verdicts are based on proof of guilt rather than conjecture regarding defendant's guilt and leads society to trust in a criminal justice system calculated both to find truth and, necessarily, to imprison innocent defendants very rarely, if at all.[5]

Applying some level of skepticism in a criminal trial is necessary; deciding what level should be applied is crucial. The appropriate level of skepticism to be applied in the criminal justice system depends on the results society wants from the system. How reasonable doubt and the presumption of innocence are defined and applied can result in jurors applying too high a level or too low a level of skepticism.[6] An overabundance of skepticism may lead jurors to require evidence stronger than necessary for conviction, lessen the likelihood that a juror will be

4. Of course, these goals are utopian. Our imperfect ability to identify the innocent and guilty correctly leads to rules that determine what to do when we are unable to identify guilt with certainty. That juries will be uncertain in some cases and that such uncertainty should redound to the defendant's benefit guarantees that only the clearly guilty will be imprisoned. *See* Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 980-81(1993) (recognizing that a jury's fallibility causes the justice system to allocate error such that some number of guilty defendants will be acquitted to make sure that few innocent defendants are convicted). The criminal justice system's best hope is to find the probable truth, convict the clearly guilty and acquit the possibly innocent.

5. That society trust jury verdicts is essential. *See* Adrian A. S. Zuckerman, *Law, Fact or Justice?*, 66 B.U. L. REV. 487, 496 (1986) ("Juries are suited to be put in charge of adjudicating on the merits because of the trust they command in the community. Since the efficacy of any judicial system depends on its ability to generate public confidence in its judgments, the element of trust in the tribunal is crucial."); Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1225 (1979) (arguing that confidence in criminal adjudication is necessary for society to feel that injustice has not been done) [hereinafter *Permissive Inferences*].

6. Whether the level of skepticism set is too high or too low depends on precisely what the realistic goals of the criminal justice system are. The appropriate level of skepticism in a system that seeks to convict the probably guilty is different than the appropriate level of skepticism in a system that seeks to convict only the certainly guilty.

convinced of a defendant's guilt, and lead to verdicts that do not comport with society's vision of justice.[7] Such an overabundance can flow from a strict application of the reasonable doubt standard and the presumption of innocence, can lead jurors to be extraordinarily difficult to convince of guilt and set a standard of proof for conviction that would result in very few convictions. That could wreak havoc on a system that must imprison some reasonable or substantial number of guilty defendants to remain viable.[8]

Conversely, a somewhat relaxed definition of the reasonable doubt standard and the presumption of innocence may lead to the application of a somewhat lower level of skepticism in the system. Such a level of skepticism may allow juries to identify correctly a reasonable number of guilty defendants, but may allow a higher number of innocent defendants to be convicted than under a higher level of skepticism.[9] Therein lies the trade-off. A strict (or perhaps overly strict) application of the reasonable doubt standard may yield few convictions, but almost guarantee that convicted defendants are guilty. A more relaxed application may yield more convictions of guilty defendants but allow the conviction of additional innocent defendants. Even though proof beyond a reasonable doubt and the presumption of innocence are required under the criminal justice system, how they are applied may lead to results that conflict with the goals of the justice system.

Ultimately, this article is about how well different definitions of reasonable doubt fit society's goals for the criminal justice system. To be clear, this article is not about which definition is best. That question is far broader than the one I seek to explore. Determining what definition of reasonable doubt is best for the system is a question for another time.

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7. While the fact that a defendant appears clearly guilty to society does not mean that he is, society will craft its rules to catch a reasonable number of defendants. *See* George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1, 8-9 (1992) (suggesting that society's opinion regarding guilt is important to a well-functioning justice system).

8. At some point, the risk of acquitting too many guilty defendants will outweigh the risk of imprisoning an innocent defendant. *See* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 460 (1989) ("The level at which the presumption of innocence [and reasonable doubt] is set reflects society's weighing of . . . two injustices—acquitting the guilty and convicting the innocent—and at some point the cost of the presumption of innocence would be too great.").

9. This article should not be taken to suggest that significant numbers of innocent defendants are currently being convicted. Rather, this article notes the distinct likelihood that some number of defendants are being incarcerated without being proven guilty beyond a reasonable doubt as strictly defined. Whether these defendants are innocent depends on how often the possibility of innocence reflects the reality of innocence.

Rather, this article describes a few different ways that reasonable doubt and the presumption of innocence can be interpreted and considers the implications of applying those differing interpretations. Part II of this article examines how the criminal justice system employs skepticism to determine guilt accurately. Part III explains how strict and relaxed applications of the reasonable doubt standard and the presumption of innocence impacts jury verdicts. Part IV suggests that we adopt a meaning for reasonable doubt that matches society's goals for the justice system. The criminal justice system uses skepticism in the form of reasonable doubt and the presumption of innocence to determine who is imprisoned. The question remains: Could the system allow jurors to use the wrong amount of skepticism?

II. DOUBT, SKEPTICISM, AND CERTAINTY IN THE CRIMINAL JUSTICE SYSTEM

Criminal trials are one-sided searches for the truth that answer one question: Is the defendant certainly guilty?[10] If the answer is yes, the defendant is convicted; if the answer is probably yes, possibly yes, possibly no or anything other than an unequivocal yes, the defendant is acquitted. If the system could perfectly discriminate between the guilty and innocent, only guilty defendants would be convicted, and only innocent defendants would be acquitted. In a perfect world, every verdict would accurately reflect the truth, that is, whether the defendant actually committed the crime charge. However, because the criminal justice system, like all systems that depend on human judgment, is not perfect, errors will occur in the criminal justice system, and society must determine how to manage such errors.[11] Consequently, the question that is ultimately asked in a criminal trial is not merely whether the defendant is guilty, but rather, whether the defendant is certainly guilty.

The criminal justice system uses skepticism, in the form of the rea-

10. *See* Ronald J. Allen, *A Reconceptualization of Civil Trials*, 66 B.U. L. REV. 401, 436 (1986) ("The objective of a criminal trial is not to choose among the stories of the parties. Rather, it is to determine whether or not the only plausible explanation of the event in question is that the defendant is guilty as charged."). Indeed, the focus is so much on defendant's guilt that other serious issues may become obscured. *See* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 376 (1995) (suggesting that trials can become so focused on guilt that "an accused's factual innocence may never be at issue").

11. The errors referenced are not procedural errors or clear errors in evidentiary evaluation that can be easily corrected on appeal. Rather, they refer to those that occur even when a trial is fair. These errors occur because even in cases where the evidence points undoubtedly to guilt, a defendant may be innocent, and even in cases where the evidence points undoubtedly to reasonable doubt or innocence, a defendant may have committed the crime.

sonable doubt standard and the presumption of innocence, to determine whether a defendant is certainly guilty. If the prosecution overcomes the presumption of innocence[12] and proves a defendant's guilt beyond a reasonable doubt,[13] the prosecution will have proven that the defendant is certainly guilty to society's satisfaction. These rules help ensure that guilty verdicts accurately reflect the truth, i.e., defendant's actual guilt, by employing skepticism to test prosecution cases. The results of using the reasonable doubt standard and the presumption of innocence to test the prosecution's claim of guilt are two-fold. First, ostensibly, only guilty defendants are convicted. Second, some number of defendants are acquitted, not because they are innocent, but because the prosecution could not prove they are guilty. This result is not accidental. Rather, it is consistent with a societal preference of the acquittal of guilty[14] defendants over the conviction of innocent defendants.[15]

In the criminal justice system, possible error is allocated in favor of the defendant. The defendant receives the benefit of all reasonable doubts and is acquitted whenever the possibility of his innocence remains after trial. That allocation is the result of asking whether a defendant is certainly guilty and only allowing proof beyond a reasonable doubt to serve as proof of certain guilt. The reasonable doubt standard and the presumption of innocence are the system's attempt to eliminate erroneous convictions by requiring that jurors be very certain of a defendant's guilt before convicting him. However, at least two inter-

12. *See* Herrera v. Collins, 506 U.S. 390, 398 (1993) ("A person when first charged with a crime is entitled to a presumption of innocence, and may insist that his guilt be established beyond a reasonable doubt."); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

13. *See* In re Winship, 397 U.S. 358, 362 (1970) ("Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required."); Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept*, 22 AM. J. CRIM. L. 677, 678 (1995) ("Today it is well established that trial courts must instruct juries that they may convict only if convinced of the defendant's guilt beyond a reasonable doubt."). *Cf.* Sullivan v. Louisiana, 508 U.S. 275, 277-82 (1993)(confirming that defective reasonable doubt instruction is not subject to harmless error review); Jackson v. Virginia, 443 U.S. 307, 320 n. 14 (1979) ("[F]ailure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error.").

14. In this context, guilty means that the defendant actually committed the crime, not that the jury acquitted a defendant it knew had been proven guilty beyond a reasonable doubt.

15. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 ("[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."). This notion continues in our Anglo-American justice system.

twined questions remain: How certain of a defendant's guilt does a jury need to be to imprison another citizen and how does one determine that one is certain that a defendant is guilty?

A. Absolute Certainty

If a criminal trial could determine truth absolutely, it would be the perfect vehicle for determining guilt and innocence. Unfortunately, absolute or mathematical certainty is unattainable in the context of a criminal trial because such certainty is demonstrated through strict logical proof.[16] Such a level of proof is not attainable given the nature of trial evidence.[17] All trial evidence that bears directly on guilt is fallible.[18] Consequently, conclusions drawn from that evidence are fallible. This is a limitation of evidence, not a limitation of jurors or the justice system. While a juror (or non-juror) might be willing to say, and may believe, that he is absolutely certain that a defendant is guilty, he cannot be in the mathematical sense.

A criminal justice system requiring absolute certainty for conviction would be ineffectual. Guilty verdicts would require that a juror believe that absolutely no possibility of innocence existed.[19] Such belief would

16. *See* Barbara J. Shapiro, *"To A Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153, 192-93 (1986) ("[T]here are two realms of human knowledge. In one it is possible to obtain the absolute certainty of mathematical demonstration . . . In the other, which is the empirical realm of events, absolute certainty of this kind is not possible . . . . The highest level of certainty in this realm in which no absolute certainty is possible is what traditionally has been called moral certainty."); Steven J. Burton, *Judge Posner's Jurisprudence of Skepticism*, 87 MICH. L. REV. 710 (1988) (arguing that one should not mix scientific discourse's quest for certainty with legal discourse's search for truth); Colin Moran, *Cardinal Newman and Jury Verdicts: Reason, Belief, and Certitude*, 8 YALE J.L. & HUMAN. 63, 73 (1996) ("Seventeenth-century thought distinguished between knowledge and probability. One could have 'absolute certainty' of a conclusion if it could be empirically verified, or proven like a geometric theorem.").

17. Of course, scientists may argue that the legal system can barely claim to be able to find even practical truth. *See, e.g.*, Carl Sagan, *Crop Circles and Aliens: What's The Evidence*, PARADE, Dec. 3, 1995, at 10 ("In college, in the early 1950s, I began to learn a little about how science works—the secrets of its great success: how rigorous the standards of evidence must be if we are really to know something is true; how many false starts and dead ends have plagued human thinking; how our biases can color our interpretation of the evidence; how belief systems widely held and supported by the political, religious and academic hierarchies often turn out to be not just slightly in error but grotesquely wrong.").

18. *See* Shapiro, *supra* note 16, at 158 (Moral certainty is "based on testimony and secondhand reports of sense data."); Moran, *supra* note 16, at 73 ("Propositions which could not be verified through sensory observation or logically proved would be affirmed or rejected on the basis of probabilistic judgments. About this kind of proposition, one could have 'moral certainty' but not 'absolute certainty.'").

19. Interestingly, historically, juries were told that they needed to be convinced to near-

likely require a juror's faith in defendant's guilt, a juror's actual knowledge of the crime, a juror's complete trust in an eyewitness's testimony or a juror's refusal to apply the absolute certainty standard.[20] Faith seems an insufficient and fleeting basis for a verdict that is to be grounded in reason.[21] People with actual knowledge of the crime or its perpetrator are witnesses incapable of serving on the subject jury.[22] Eyewitness testimony is very often susceptible to possible doubt,[23] as

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absolute certainty to convict. *See* Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 511 (1975) (suggesting that the burden of persuasion prior to the widespread adoption of the reasonable doubt rule "closely approximated absolute certainty—jurors were to acquit if they had any doubts.").

20. Of course, it may seem odd to suggest that a jury could misapply a standard of proof in a hypothetical criminal justice system. However, misapplication might best explain a guilty verdict in a hypothetical system requiring absolute certainty. If the hypothetical system allows guilty verdicts based on evidence that is not sufficiently powerful to meet the prosecution's burden of proof, a jury must act improperly when it convicts based on evidence that is as strong as it can possibly be, but is still not strong enough to reach the required standard of proof. *See generally* Part III.

21. Basing guilt or innocence on faith or religious belief is inappropriate if it results in discounting evidence that the juror believes. *But see* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 67 (1993) ("The truth—an awkward one for the guardians of the public square—is that tens of millions of Americans rely on their religious traditions for the moral knowledge that tells them how to conduct their lives, including their political lives."). Consider whether signals from a divine being directing that the juror reach a particular verdict would be sufficiently reasonable for American society to imprison or release a defendant. Arguably, a verdict based on faith is not based on reason. *See* Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 456 (1996) ("The lasting accomplishment of the Enlightenment, then, was its development of an epistemological method.... Personal revelation and institutional power were no longer valid sources of authority. Instead, the human capacity to reason, in all its splendor, would control the future."); CARTER, *supra* note 21, at 217 ("[I]n the world of post-Enlightenment liberalism, science deals with *knowledge* about the natural world, whereas religion is simply a system of *belief*, based on faith."). Nonetheless, the verdict may be reasonable (or at least acceptable) either because the process of letting a higher being decide a case is reasonable or because society authorizes jurors to decide cases by reference to divine beings.

22. In the past, jurors were people who may have known the basics about the charged crime before impaneled. *See* Peter G. Keane, *The Jury—Some Thoughts, Historical and Personal*, 47 HASTINGS L.J. 1249, 1251 (1996) ("The early jury bore little resemblance to the protected and carefully insulated creature which we know today. Jurors were a group of neighbors who came together and pooled their collective knowledge about a dispute to reach an agreement on the proper resolution. How ironic that over centuries the modern jury evolved into its present form. Today, if a potential juror has any personal information about the case, it is a complete bar to that person serving."); Morano, *supra* note 19, at 509 (Jurors "could have either witnessed the event personally or undertaken an independent investigation as means of gathering the evidence necessary to decide the issues presented to them.").

23. *See* C. RONALD HUFF ET AL., CONVICTED *BUT* INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 69 (1996) (suggesting that in many circumstances eyewitness testimony is unreliable).

eyewitness testimony reflects what the witness believes she saw rather than what undoubtedly occurred.[24]

Absolute certainty entails the elimination of all theoretical doubt and allows no uncertainty.[25] While the elimination of all theoretical doubt, as would be required under a system requiring absolute certainty, would guarantee that only guilty defendants would be convicted, such would also make convictions nearly impossible to obtain.[26] An absolute certainty requirement would demand an inappropriately high level of proof given the limitations of trial evidence, would put too heavy a burden on any justice system that sought to punish any reasonable number of guilty defendants, and would be unacceptable in practice.[27] Not surprisingly, absolute certainty is not the standard that our justice system uses. Instead, the American criminal justice system attempts to use practical certainty, in the form of reasonable doubt, to determine when a defendant should be imprisoned.

B. Practical Certainty and Reasonable Doubt

As requiring absolute certainty before conviction is not viable in our criminal justice system, the system instead requires moral certainty or proof beyond a reasonable doubt before conviction.[28] Moral or practical certainty[29] is the highest level of certainty an individual can have in

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24. Of course, some reasonable amount of trust in a witness's testimony can lead to a jury's belief beyond a reasonable doubt loosely defined. *Cf.* Shapiro, *supra* note 16, at 177 ("Verdicts would necessarily be devoid of absolute certainty or demonstration, but trials, at least those with appropriately credible witnesses, might proceed to verdicts which the jury had no reason to doubt."). If a mother were an eyewitness to her son's armed robbery, there would be no reason to doubt the accuracy of her identification or conversely, no reason to believe that she was mistaken.

25. *See* Paul C. Smith, Note, *The Process of Reasonable Doubt: A Proposed Instruction in Response to* Victor v. Nebraska, 41 WAYNE L. REV. 1811, 1832 (1995) ("In all human matters there exists what has been described as 'free-floating existential doubt.' Standing alone, this ever-present doubt cannot *reasonably* dissuade a juror's belief, and therefore it should not preclude conviction.").

26. *See* HUFF, *supra* note 23, at 144 ("It is not within the realm of possibility to prevent all wrongful convictions. A system of law that never caught an innocent person in its web would probably be so ineffectual that it would catch few of the guilty as well.").

27. *See* Sundby, *supra* note 8.

28. Proof beyond a reasonable doubt is constitutionally required for a defendant to be legally convicted. *See supra* note 13.

29. In this article, moral and practical certainty will be used interchangeably because the slight differences that some find between them do not matter for the purposes of this article. For various explanations of moral certainty or practical certainty or both see BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE 1-41 (1991); Peter Tillers, *Intellectual History, Probability, and the Law of Evidence*, 91 MICH. L. REV. 1465 (reviewing *Beyond Reasonable Doubt and Probable Cause*); Steven L. Smith, *Skepticism,*

the absence of absolute certainty[30] and has been equated with proof beyond a reasonable doubt.[31] Practical certainty requires that jurors be as sure as possible of a defendant's guilt before convicting him and is given effect through the reasonable doubt standard. While practical certainty is a lower standard than absolute certainty, it is still a very high standard. Because it is a high standard, it helps the system avoid convicting the innocent. Conversely, practical certainty is a low enough standard to allow the conviction of the guilty. However, a closer look at practical certainty and reasonable doubt is necessary to determine how they serve these purposes.

A criminal trial focuses on the single proposition that a defendant is guilty.[32] A juror can have at least three positions with respect to that proposition. A juror can be certain of the proposition's falsity, uncertain of its falsity (or truth) or certain of its truth. If a juror is certain that a defendant is not guilty, the content of the reasonable doubt standard does not matter because the juror must acquit. Similarly, if the juror knows that she is uncertain about whether the defendant committed the crime, she must acquit. However, where the line is between being certain that the defendant committed the crime and being uncertain that the defendant committed the crime is crucial to the justice system because that line separates a guilty vote from a not guilty vote. However, that line may not be nearly as crucial, in a juror's mind, as the line that separates belief from disbelief. The line between guilt and innocence and the line between belief and disbelief are drawn in different places. A juror may believe that the defendant committed the crime yet be uncertain that he did and, consequently, have to vote for acquittal.

Tolerance, and Truth in the Theory of Free Expression, 60 S. CAL. L. REV. 651 (1987); Moran, *supra* note 16, generally. For the purposes of this article, practical certainty and moral certainty will be defined as the highest level of proof attainable in the absence of absolute certainty.

30. Reasonable doubt is the highest practical standard of proof that exists. *See* Moran, *supra* note 16, at 76-77 ("In Adrian A.S. Zuckerman's view, the 'beyond a reasonable doubt' standard is 'the highest attainable standard for the proof of guilt.' By 'highest *attainable*,' Zuckerman means not the highest assurance which can be attained without witnessing the crime, but the highest assurance of which the mind is capable, whether a person has seen the crime firsthand or not. 'The highest attainable standard,' he writes, 'is one that so approximates to certainty as to make no difference.' One has to admit the 'theoretical possibility' of error, but insofar as a juror's evaluation of the evidence is concerned, this possibility is 'imperceptible.' Every juror who properly votes for a guilty verdict feels as certain of the defendant's guilt as if she witnessed the accused perform the crime firsthand.") (quoting ADRIAN A.S. ZUCKERMAN, PRINCIPLES OF CRIMINAL EVIDENCE 135 (1989)).

31. *See* Victor v. Nebraska, 511 U.S. 1, 11 (1994); Morano, *supra* note 19, at 513 (equating moral certainty and lack of reasonable doubt).

32. *See supra* note 10.

The relationship and difference between belief in a defendant's guilt and certainty of a defendant's guilt is important.

A juror who is certain that a defendant committed a crime must believe that the defendant committed the crime. However, a juror may believe that a defendant committed a crime while being uncertain that he committed the crime. While acting based on belief may be appropriate in many situations, convicting a defendant can only occur based on certainty. More importantly, a conviction must be based on justified certainty. Belief may appear to be certainty when it is not. While a person can believe he is certain of truth, if that certainty rests on insufficient proof, the certainty is unjustified. In such a situation, the certainty is mere belief or trust.[33] Although evidence may support a belief and the belief may ultimately be proven true, mere belief does not require evidence sufficient to reach justified certainty.[34] Both belief and justified certainty suggest that the subject individual finds the subject proposition likely true. However, belief can entail lingering doubt and the legitimate possibility that conflicting propositions may be true; certainty cannot.[35]

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33. Possibly, the certainty that the perceiver embraces is little more than a hunch. *See* Moran, *supra* note 16, at 68-69 ("[A] practiced eye may note the faces of two people thirty years apart in age and, without more information, discern that they are members of the same family. If asked, the observer might not be able to articulate the common characteristics which gave rise to the inference of familial relationship."). What is left is whether words are inadequate to explain the relationship between the evidence and the conclusion or whether the perceiver is unable to find the words to express the relationship. Of course, the fact of familial relationship can be easily verified. Arguably, the level of certainty held by the perceiver matters little because the accuracy of the perception can be tested. A more fundamental question is whether the subjective certainty should be trusted in a matter not susceptible to accurate testing. *See id.* at 88-89 ("[W]e would not be reasonable to continue trusting a person's ability to see family resemblances if the person repeatedly proved incorrect. When a person cannot articulate a reason for his conclusion, placing confidence in his conclusion is not necessarily reasonable. The reasonableness of the confidence does depend upon evidence, even if the evidence is demonstrably reliable judgment rather than articulated reasons.").

34. *See* Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 764 (1989) ("Justified certainty rests not on a belief in infallibility, but on a belief that one is not in fact mistaken, that there is no reason to suspect a mistake, and every reason, based on evidence and on one's situation, to trust one's beliefs."). *See also* Moran, *supra* note 16, at 63-64 ("Judicial finders of fact also reach definite conclusions on the basis of incomplete proof. Every juror at a criminal trial, like every religious inquirer, must decide on a proposition without verifying the conclusion empirically or proving it through explicit logic . . . [T]he juror [is] forced to reason by probability, which implies qualification and reservation.").

35. Nonetheless, certainty does afford the theoretical possibility of fallibility. *See* Leslie Pickering Francis, *Law and Philosophy: From Skepticism to Value Theory*, 27 LOY. L.A. L. REV. 65, 71 (1993) ("Knowledge is not dogmatic certainty. It is a process of achieving justified belief, belief that can best withstand criticism at a given time, yet is always open to reex-

Reasonable doubt is doubt based on uncertainty.[36] Jurors may not convict a defendant if they have a reasonable doubt about any element of the crime charged.[37] Though many definitions of reasonable doubt exist, giving precise content to reasonable doubt is difficult.[38] Defining reasonable doubt is easy;[39] defining what makes a particular doubt reasonable is not. Although reasonable doubt instructions command that the jury be as certain as possible that defendant is guilty before convicting him, even the most well-versed in the justice system have difficulty capturing the essence of reasonable doubt.[40]

Reasonable doubt is a justifiably high standard for conviction.[41] More important decisions require greater certainty before action than less important decisions. Being wrong is of greater consequence when the decision being made is of greater consequence.[42] Our justice system

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amination."); Raz, *supra* note 34, at 764 ("The point is that uncertainty is an awareness of a flaw . . . , inadequate evidence, or an inferior situation one is in . . . . Mere realization of fallibility is not a discovery of a flaw, but an awareness of the conditions of knowledge.").

36. A reasonable doubt has been defined as, among other things, a doubt that would cause a reasonable person to hesitate before acting in matters of serious importance. *See* Victor v. Nebraska, 511 U.S. 1 (1994) (upholding jury instruction that defined a reasonable doubt as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon"); BLACK'S LAW DICTIONARY 1138 (5th ed. 1979) (defining reasonable doubt as, inter alia, "doubt based on reason and arising from evidence or lack of evidence, and it is doubt which reasonable man or woman might entertain, and it is not fanciful doubt, is not imagined doubt, and is not doubt that juror might conjure up to avoid performing an unpleasant task or duty").

37. *See* Sullivan v. Louisiana, 508 U.S. 275, 276 (1993); Estelle v. McGuire, 502 U.S. 62, 69 (1991).

38. The precise content of the reasonable doubt standard is unclear. Many varied instructions have been deemed sufficient to convey the essence of reasonable doubt. *See generally, Victor*, 511 U.S. at 1 (upholding jury instructions in principal case and a related case, *Sandoval v. California*); Jackson v. Virginia, 443 U.S. 307 (1979); Holland v. United States, 348 U.S. 121 (1954); Perovich v. United States, 205 U.S. 86, 92 (1907); Hopt v. Utah, 120 U.S. 430, 441 (1887).

39. The concept is so easy to explain that some courts do not allow its explanation. *See* Jessica Cohen, *supra* note 13, at 685 (explaining that in *United States v. Reives*, 15 F.3d 42 (4th Cir. 1994), the 4th Circuit Court of Appeals forbade its courts to define reasonable doubt).

40. *See Victor*, 511 U.S. at 5 ("Although [the reasonable doubt] standard . . . is an ancient and honored aspect of our criminal justice system, it defies easy explication."); Harry A. Diamond, Note, *Reasonable Doubt: To Define, or Not To Define*, 90 COLUM. L. REV. 1716, 1722 (1990) ("Judges, with all their legal knowledge and experience, sometimes have difficulty construing the meaning of reasonable doubt.").

41. *Cf.* Gary J. Jacobsohn, *The Unanimous Verdict: Politics and the Jury Trial*, 1977 WASH. U. L.Q. 39, 51 ("Truth, as the philosophers tell us, is the highest and most difficult standard upon which to base one's actions.").

42. This is not to suggest that decisional paralysis generally results from uncertainty.

explicitly recognizes this by requiring differing levels of proof in criminal and civil trials.[43] In a criminal trial, a guilty verdict restricts a citizen's life or liberty. That is arguably the most important decision citizens make regarding one another.[44] The importance of that decision and the certainty that must accompany it drives the level of certainty required before action is taken on the basis of that decision. Consequently, proof beyond a reasonable doubt is required before a court may impose a criminal sanction. In civil actions, where often only the redistribution of money occurs, a preponderance of the evidence, or "more likely than not" standard, is required before a court may impose liability.[45] The relative importance that society places on the consequences of civil and criminal verdicts is reflected in how certain a jury must be before it can sanction a criminal or civil defendant.[46]

The justice system requires a high level of certainty of guilt before conviction. Reaching moral or practical certainty requires the elimination of uncertainty and doubt. Skepticism is uncertainty and is the refusal to believe insufficiently proven facts or conclusions.[47] Essentially, skepticism is doubt. At a criminal trial, skepticism manifests itself as the refusal to believe particular pieces of evidence and, ultimately, can mean a refusal to believe defendant's guilt. As the backdrop against which individuals and society determine and act on truth, skepticism is important for reasoned analysis and is indispensable for anyone searching for truth.[48]

Rather, one has a greater need of certainty the more important a decision is.

43. *See generally,* Addington v. Texas, 441 U.S. 418 (1979).

44. *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1339 (1977) ("Because the criminal sanction is an especially serious matter for both the defendant and the community, it is especially important to ensure that it is imposed only on a defendant who has forfeited his right to be free from punishment."); Jacobsohn, *supra* note 41, at 54 (arguing that a jury's legitimacy rests on the belief that its process was consistent with the gravity of the decision made).

45. *See generally,* Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).

46. However, great legal minds have been skeptical regarding the usefulness of differentiating among burdens of proof. *See* Underwood, *supra* note 44, at 1309 (explaining Judge Learned Hand's reluctance to differentiate the preponderance of the evidence standard and the reasonable doubt standard). Nonetheless, other judges have been able to distinguish between various standards of proof. *See Winship*, 397 U.S. at 367 ("Finally, we reject the Court of Appeals' suggestion that there is, in any event, only a 'tenuous difference' between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt that he conceded he might not have made under the standard of proof beyond a reasonable doubt.").

47. *See supra* note 3.

48. Arguably, skepticism is an important trait even for those not engaged in a search for

Justified certainty and reasonable doubt are roughly equivalent because both require the elimination of lingering doubts in the mind of the believer regarding the truth of a proposition. One who is justifiably certain of the truth of a proposition is not skeptical of the same proposition. An individual may be convinced that a proposition is true, but cannot be justifiably certain of its truth unless he was uncertain of its truth at some point in the past.[49] The person need not have disbelieved the subject proposition. Rather, he must have been unconvinced that the proposition was true. Strength of evidence moves that individual from a state of uncertainty to a state of justified certainty. Whether a person is certain of the truth of a particular proposition may depend, in part, on how skeptical that individual was of the proposition when first posited.[50] If a person is relatively sure of the truth of the proposition when initially stated, little evidence may be necessary to convince that individual of the truth of the proposition.[51]

Evidence convinces jurors, creates justified certainty, drives the trial process, and determines verdicts.[52] However, neither evidence nor justified certainty foreclose the possibility of error. That a jury is convinced of defendant's guilt after a trial does not guarantee that the defendant actually committed the crime. The case that the jury hears reflects events surrounding the subject crime. Considering the differing quality of prosecutors, defense attorneys and judges, the evidence presented

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truth. *See* Sagan, *supra* note 17, at 17 ("The whole idea of a democratic application of skepticism is that everyone should have the essential tools to effectively and constructively evaluate claims to knowledge.").

49. People may be absolutely, but unjustifiably, certain of the truth of various propositions. Consider a person who denies that the Holocaust occurred. While that person may believe the Holocaust did not occur for various reasons, in order to be justifiably certain that the Holocaust did not occur, he must contemplate the possibility that the Holocaust occurred and face the overwhelming evidence that it did occur. For an exposition against Holocaust denial theory, see generally DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1993).

50. *See* L. Jonathan Cohen, *The Role of Evidentiary Weight in Criminal Proof*, 66 B.U. L. REV. 635, 637-39 (1986) (suggesting that the completeness of facts on which a judgment is made is important); *but see* Raz, *supra* note 34, at 765 ("Sometimes it is appropriate to embrace certain beliefs on fairly slender evidence, while at others an assurance that the matter was thoroughly investigated is a condition of rationality.").

51. *See* Laufer, *supra* note 10, at 372-73, 399-400 (suggesting that predispositions toward guilt or innocence have effects on final determinations of guilt or innocence).

52. *See* Neil B. Cohen, *The Costs of Acceptability: Blue Buses, Agent Orange, and Aversion To Statistical Evidence*, 66 B.U. L. REV. 563, 566 (1986) ("Jurors are not witnesses to the events in question. Because jurors must rely on statements witnesses make, their verdicts can only be statements about the evidence presented, not statements about the underlying event."); Thomas & Pollack, *supra* note 7, at 5-6 (suggesting that since no one has perfect access to the truth, decisions are made based on evidence presented).

will re-create the events surrounding the crime with varying degrees of accuracy. What the jury believes, based on the evidence presented and the credibility of witnesses, will also reflect the related events with varying degrees of accuracy. What a jury believes (as represented by the verdict) and what actually occurred may be quite different.[53]

At trial, a defendant's actual innocence or guilt may be an abstraction.[54] What is true is what the evidence indicates is true.[55] If a jury incorrectly believes evidence of innocence, guilty defendants will be acquitted. Similarly, when a jury incorrectly believes evidence of guilt, innocent defendants will be convicted. Verdicts do not necessarily reflect truth; they reflect the evidence presented.[56] Rather than signifying society's moral condemnation of defendant,[57] a guilty verdict may reflect the recognition that no exculpatory evidence was presented at trial.[58] Nonetheless, society must trust that verdicts reflect correct con-

53. *See* Jacobsohn, *supra* note 41, at 53 ("The jury's objective—discovering the 'truth'—is perhaps more accurately described as 'the truth as perceived by twelve individual jurors.'").

54. This may explain the practice of some lawyers of ignoring the question of a client's guilt or innocence, since ultimately the system will declare what is guilt or the system's best guess regarding the truth. *Cf.* EVAN THOMAS, THE MAN TO SEE 121 (1991) (in distinguishing legal and moral guilt, renowned attorney Edward Bennett Williams has said that he leaves moral guilt "to the majestic vengeance of God.").

55. *See* L. Jonathan Cohen, *supra* note 50, at 636-37 (reiterating the distinction between probability that defendant is guilty based on the facts presented and probability that defendant is actually guilty).

56. *See* Furman v. Georgia, 408 U.S. 238, 367-68 (1972) ("No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some.") (Marshall, J., concurring); Sundby, *supra* note 8, at 461-2 ("Given the limits of investigatory techniques and human knowledge, a system that convicts only the guilty is generally acknowledged to be impossible.").

57. Guilty verdicts often signify the moral condemnation of the defendant as one who does not live by society's standards. *See* In re Winship, 397 U.S. 358, 363 (1970) (criminal conviction is stigmatic to defendant); Sundby, *supra* note 8, at 490 (suggesting that guilty verdict indicates jury's belief that societal norms defined by legislature have been broken); Underwood, *supra* note 44, at 1307 ("The second function of the reasonable doubt rule, its symbolic function, is to single out criminal convictions as peculiarly serious among the adjudications made by courts. The reason for doing this may be to enhance the moral force and deterrent effect of criminal sanctions. On this view, the rule increases the cost of conviction by increasing the opprobrium and stigma that accrue to those who are convicted."). Indeed, even in the civil setting, certain conduct that deviates from the norm is treated as quasi-criminal. *See* Addington v. Texas, 441 U.S. 418, 424 (1979) (explaining that the preponderance of the evidence standard of proof is raised to clear and convincing in some situations when a civil defendant's reputation may be tarnished by a verdict).

58. This somewhat cynical view of reasonable doubt is supported by the fact that many substantive trial errors, including objections that could have stopped the consideration of incriminating evidence, are waived once the trial concludes. If society were truly concerned

clusions even while recognizing that, in some cases, verdicts are wrong.[59]

If one is morally or practically certain of a defendant's guilt, he has no reasonable doubt about it. In order to eliminate reasonable doubt, a prosecutor must present evidence so compelling that no reasonable juror could reasonably conclude that the defendant might be innocent.[60] However, a reasonable doubt is not just any conceivable doubt.[61] Mere possible or unreasonable doubts are discounted as legitimate reasons for acquittal under the reasonable doubt standard. If such doubts were deemed sufficient to support an acquittal,[62] the resulting standard would have similar effects as requiring absolute certainty for conviction: Few defendants would be held responsible for crimes that juries were reasonably certain that the defendants committed.[63]

That the reasonable doubt standard forces jurors to ignore unreasonable doubts when determining guilt is particularly important. Un-

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about incarcerating or continuing to incarcerate only guilty individuals, all arguments that *might* create subsequent actual reasonable doubt would be cognizable, regardless of when discovered.

59. *Cf. Winship*, 397 U.S. at 364 ("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.").

60. This does not mean that only airtight cases will garner convictions. A prosecutor need not prove that the subject crime happened in any particular manner. The prosecutor need only prove that defendant is guilty regardless of the manner in which the crime occurred. For example, in a homicide case, a jury need not believe that the prosecutor proved precisely how the victim was killed; the jury need only believe that regardless of how the homicide occurred, the defendant must have been guilty. The prosecution's goal is to prove the facts in a way that jurors cannot infer from unproven facts that the defendant may be innocent. An airtight case is helpful, but is not necessary for conviction.

61. *See* Morano, *supra* note 19, at 523 n.119 ("[W]hat is reasonable doubt? . . . It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.") (quoting Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850)). *But see* Cage v. Louisiana, 498 U.S. 39, 40 (1990) (striking as unconstitutional an instruction that defined a reasonable doubt as follows: "[O]ne that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain.").

62. A version of an all-possible doubt rule may have been in place before the use of the reasonable doubt rule became widespread. *See* Morano, *supra* note 19, at 508, 511. *But see* Shapiro, *supra* note 16, at 170 (arguing that juries were never allowed to acquit based on frivolous or unreasonable doubts).

63. *See* Sundby, *supra* note 8, at 460 (suggesting that an all-possible doubt rule would result in far more guilty defendants being found not guilty than would be tolerated by society).

reasonable doubts are still doubts, and as long as those doubts do not encompass literal impossibilities, they may reflect truth. Therefore, ignoring unreasonable doubts may result in the conviction of some number of innocent defendants.[64] Innocent defendants occasionally may be convicted based on evidence sufficient to overcome all reasonable doubts but insufficient to overcome some ostensibly unreasonable doubts that actually reflect reality. Rather than guaranteeing unerringly accurate verdicts, the reasonable doubt standard requires the elimination of sufficient doubt that society is comfortable sending a defendant to prison.[65] Society has considered the possibility that a small percentage of defendants convicted pursuant to a reasonable doubt standard might be innocent, but has determined that the likelihood that defendants convicted under a reasonable doubt standard are guilty far outweighs the likelihood that they are innocent.

Reasonable doubt flows from insufficient evidence, the lack of which makes certainty of the prosecution's assertion of defendant's guilt unwarranted. Unreasonable doubt stems largely from the possibility that nonexistent or unpresented evidence may explain a defendant's actions and exonerate him. Although the difference between reasonable and unreasonable doubt can be explained, whether a particular doubt is reasonable or unreasonable may be impossible to determine with any certainty in the context of a trial. The edge of reasonable doubt is, by definition, the edge of unreasonable doubt.

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64. *See Victor*, 511 U.S. 1, 18 (1994) (relating part of the jury charge in the trial court: "[A]bsolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken."); *Winship*, 397 U.S. at 370 (Harlan, J., concurring) ("[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the fact finder cannot acquire unassailably accurate knowledge of what happened. Instead, all the fact finder can acquire is a belief of what *probably* happened."). Presumably, the doubt that may linger is based on the fact that jurors can never be completely certain about anything, rather than that a possible doubt *based on the evidence* suggests defendant may not have committed the crime charged.

65. *See* Note, *Reasonable Doubt: An Argument Against Definition*, 108 HARV. L. REV. 1955, 1968 (1995) ("Reasonable doubt is an amorphous standard that embodies that degree of certainty for conviction or doubt for acquittal necessary for society to tolerate a judgment that an individual is guilty of a crime."); Note, Winship *on Rough Waters: The Erosion of the Reasonable Doubt Standard*, 106 HARV. L. REV. 1093, 1095 (1993) ("[A]s society's interest in crime control changes, society's assessment of the proper balance between erroneous convictions and erroneous acquittals may change[.]"). Such a recognition is not negative. At different times in history, different societies have required differing levels of proof. *See* Morano, *supra* note 19, at 508 ("[T]he reasonable doubt rule was actually a prosecutorial innovation that had the effect of *decreasing* the burden of proof in criminal cases. Prior to the rule's adoption, juries were expected to acquit if they had *any* doubts—reasonable or unreasonable—of the accused's guilt.").

Practical certainty requires that jurors be as certain as possible of a defendant's guilt before convicting the defendant. The reasonable doubt rule makes this requirement concrete by forcing the prosecution to eliminate all reasonable doubts from the minds of the jurors and is the mechanism by which society convinces itself that punishment is just. Whether such punishment is substantially just rests on the content of the reasonable doubt rule. How well the reasonable doubt standard serves its function depends largely on how jurors can construct and define reasonable doubt, how jurors can become convinced of a defendant's guilt, and why jurors may remain unconvinced of a defendant's guilt. Before exploring the reasonable doubt rule further, we must see how the presumption of innocence helps further illuminate the goals of the reasonable doubt rule.

C. Presumption of Innocence

The reasonable doubt standard and the presumption of innocence work in tandem to help assure that defendants are convicted fairly. Reasonable doubt requires that jurors be thoroughly convinced of a defendant's guilt before conviction. The presumption of innocence effectively requires that jurors begin and end their inquiry with a skeptical mindset. That combination of enforced skepticism and a high level of proof helps lead to the identification and conviction of guilty defendants almost exclusively.[66]

Although termed a presumption, the presumption of innocence can be considered both something less than an evidentiary presumption and something more than an evidentiary presumption. Evidentiary presumptions can take very different forms and serve different purposes. Presumptions, weak or strong, require that an antecedent fact be proven before the presumption is effective. The presumption of innocence requires no such proof. Weak presumptions can be rebutted and their effect eliminated with very little evidence.[67] If the presumption of innocence only served a weak presumption's limited purpose, and only

66. *See Winship*, 397 U.S. at 363 ("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence[.]"); Sundby, *supra* note 8, at 509 (suggesting that the presumption of innocence guards against erroneous convictions).

67. For example, the mandatory presumption of discrimination that flows from a prima facie case in Title VII cases is a weak presumption that can be rebutted with very little evidence. *See generally*, Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 12 (1996).

required weak evidence of guilt before it was rebutted, it would hardly be necessary at all and certainly would not deserve the significance that has been attached to it.[68] Because the reasonable doubt standard requires that strong proof of defendant's guilt be presented before conviction, a presumption of innocence that functioned as a weak presumption would serve no purpose.[69] Similarly, the presumption of innocence is not a strong or conclusive presumption as that term is generally understood.[70] Once proven, conclusive presumptions cannot be rebutted.[71] Thus, the presumption of innocence is neither a strong nor weak presumption.

The presumption of innocence is not really a presumption at all;[72] it is a concept that requires that guilt be proven beyond a reasonable doubt before a defendant is convicted.[73] Rather than being a procedural

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68. Over one hundred years ago, the Supreme Court outlined the import of the presumption of innocence. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."). *See also* Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."); Sundby, *supra* note 8, at 457 ("More grandiose prose rarely is found than that used to describe the role of the presumption of innocence in Anglo-American criminal law."). Some commentators have suggested that our reverence for the presumption of innocence has waned. *See, e.g.*, Laufer, *supra* note 10; LeRoy Pernell, *The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence—A Brief Commentary*, 37 CLEV. ST. L. REV. 393 (1989)

69. If society needs a presumption of innocence to stop juries that have heard no evidence of guilt from convicting, the system needs to confront a much larger problem. That problem is what to do about the same juries convicting based on slim evidence of guilt. If society is concerned about juries convicting on no evidence of guilt, it must be concerned about juries convicting based on evidence that is sufficient rebut the presumption of innocence, but really strong enough to convince a reasonable jury beyond a reasonable doubt. The obvious answer is to rely on the reasonable doubt standard to stop those juries. The circular problem is that if the reasonable doubt standard stands in the way of convicting based on slim evidence, it should stand in the way of convicting based on no evidence. If reasonable doubt does stand in the way, the presumption of innocence is unnecessary.

70. Conclusive presumptions are those which, after proof of a basic fact, have the effect of a substantive rule of law. *See* RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 803 (2d Ed. 1982).

71. For a general review of presumptions, see id. at 803-37.

72. *See* Laufer *supra* note 10, at 403 (suggesting that if the presumption of innocence were a presumption, it would be treated differently than it is).

73. *See* Taylor v. Kentucky, 436 U.S. 478, 484 n.12 (1978) (stating that the presumption of innocence "is better characterized as an 'assumption' that is indulged in the absence of contrary evidence"). The presumption of innocence and proof beyond a reasonable doubt are mirror images. If guilt has not been proven beyond a reasonable doubt, the presumption of innocence requires acquittal; if guilt has been proven beyond a reasonable doubt, no presumption of innocence exists. *See* Delo v. Lashley, 507 U.S. 272, 278 (1993) ("Once the de-

mechanism, the presumption of innocence has a substantive and important effect. The presumption of innocence encourages a skeptical mindset in jurors that must be overcome before jurors can reach practical certainty and render a guilty verdict.[74] Such a mindset encourages jurors to view the prosecution's claims of defendant's guilt guardedly until rendering a verdict.[75] By requiring that jurors default to innocence unless the prosecution presents enough evidence of guilt to convince them of defendant's guilt beyond a reasonable doubt, the presumption of innocence serves as a constant reminder to jurors that the prosecution must prove its case and validates the skeptical mindset necessary to reach justified certainty.[76] As thus conceived, the presumption of innocence and reasonable doubt work in tandem to produce sound verdicts while serving similar, but not identical, purposes.[77]

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fendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears."); Sundby, *supra* note 8, at 488 ("In short, innocence represents the interests at stake in a criminal trial which, as a result of the presumption of innocence, can be taken away only after every reasonable doubt has been given to the defendant."). *But see* Laufer, *supra* note 10, at 340-42 (criticizing the notion that the presumption of innocence's only function is to require that proof beyond a reasonable doubt be presented).

74. In some corners, there are concerns regarding just how the presumption should be interpreted. For example, under a Bayesian model of guilt in which a defendant's guilt can be expressed as a probability, a strict presumption of innocence may require one to begin assuming a zero probability of defendant's guilt. The concern becomes that one who begins with a zero probability of guilt may not be able to be moved from that probability. The result would be an impossibility of conviction. Therefore, seemingly, one must entertain some probability of guilt before a trial begins. That notion troubles some Bayesians. *See* Stephen E. Fienberg & Mark J. Schervish, *The Relevance of Bayesian Inference For the Presentation of Statistical Evidence and for Legal Decisionmaking*, 66 B.U. L. REV. 771, 780 (1986) (stating the "somewhat uncomfortable presumption" that from a Bayesian evidentiary perspective, jurors must entertain some probability that defendant is guilty even before evidence is presented). For a different type of analysis on how jurors should approach the presumption of innocence, see Laufer, *supra* note 10, at 403-11.

75. Even though the presumption of innocence is a rule of thumb, a defendant is not automatically entitled to a presumption of innocence instruction. *See Delo*, 507 U.S. at 278 ("But even at the guilt phase, the defendant is not entitled automatically to an instruction that he is presumed innocent of the charged offense."); Kentucky v. Whorton, 441 U.S. 786, 789 (1979) (per curiam) ("In short, the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution."). The key consideration is whether, given the totality of the circumstances, the risk exists that a jury might convict based on something less than proof beyond a reasonable doubt. *See Taylor*, 436 U.S. 478, 485-86 (1978) (suggesting that while the 14th Amendment does not require a presumption of innocence instruction, 14th Amendment due process protects what a presumption of innocence protects—the right to have a case decided purely on the evidence).

76. *See Delo v. Lashley*, 507 U.S. 272, 278 (1993) ("The presumption operates at the guilt phase of a trial to remind the jury that the State has the burden of establishing every element of the offense beyond a reasonable doubt.").

77. *See Whorton*, 441 U.S. at 789-90 ("Quite apart from considerations of the burden of proof, the presumption of innocence 'cautions the jury to put away from their minds all the

That reasonable doubt and the presumption of innocence are related is undeniable.[78] Understanding the relationship between them requires recognizing that the pairing of the two concepts forces a juror to move from a subjective state of disbelief regarding the prosecution's claims of defendant's guilt to a subjective state of justified certainty regarding defendant's guilt. That the juror must be so transformed ensures that the evidence used to convict a defendant will be powerful. Reasonable doubt requires only that a juror be subjectively certain that defendant committed the crime before voting for guilt. A juror can reach a subjective, but possibly unjustified, state of certainty in the absence of a presumption of innocence.[79] The presumption of innocence requires that jurors think more deeply than they otherwise would about whether all reasonable doubts have been eliminated before convicting a defendant.

Theoretically, the justice system could employ a weak presumption of guilt, yet retain a reasonable doubt standard. However, under such a system, the prosecution might not have to produce nearly as much evidence to convince the jury to a reasonable certainty than it does under the current system.[80] If a presumption of guilt were coupled with a rea-

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suspicion that arises form the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced.'") (citing 9 J. WIGMORE, EVIDENCE sec. 2511, at 407 (3d ed. 1940)) (Stewart, J., dissenting).

78. *See* Sundby, *supra* note 8, at 458 ("In the criminal trial setting, the presumption of innocence is given vitality primarily through the requirement that the government prove the defendant's guilt beyond a reasonable doubt."); Smith, *supra* note 25, at 1843 n. 179 ("The presumption of innocence does not represent the same concept as does the reasonable doubt standard of proof. The presumption of innocence merely places the burden of proof on the state, while the reasonable doubt standard represents the degree of proof necessary to satisfy this burden."); *see also* Diamond, *supra* note 40, at 1717 (arguing that reasonable doubt provides teeth for the presumption of innocence).

79. The system counts on the presumption of innocence to make sure that guilt is proven rather than assumed. *See* Holbrook v. Flynn, 475 U.S. 560, 567 (1986) ("Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence."). *But see* Laufer, *supra* note 10, at 390 (opining that eliminating the presumption of innocence as currently conceived would have a minimal effect on trials).

80. Jurors would not have to disregard suspicion arising from fact that the defendant had been brought to court to answer charges. *Cf.* Kentucky v. Whorton, 441 U.S. 786, 789-90 (1979) (per curiam) (stating that presumption of innocence requires that defendants be convicted based solely on trial evidence); *Taylor*, 436 U.S. at 485 (1978) ("[O]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or

sonable doubt standard, the quantity and quality of evidence necessary to convince a jury of a defendant's guilt could be relatively low. Such a low evidentiary threshold might result in a substantial number of innocent defendants being convicted and would provide little confidence in guilty verdicts.[81]

Similarly, a presumption of innocence can function independently of the level of proof necessary for conviction. A presumption of innocence could be effective even if a clear and convincing standard were the level of proof required for criminal conviction. That system would simply lower the level of certainty that a juror would need to reach before convicting. The presumption of innocence would guide the jury's decision whenever guilt had not been proven to a clear and convincing standard. The conceptual independence of the presumption of innocence and reasonable doubt suggests that their coupling may reinforce the goals that each protects separately. Indeed, the coupling functionally protects defendants and society from guilty verdicts based on an insufficient level of proof or relatively weak evidence that might flow if either were applied in isolation.[82]

When combined with the reasonable doubt rule, the presumption of innocence ensures that a jury's verdict reflects antecedent skepticism. A juror is required to be skeptical of the prosecution's claim of guilt until all reasonable doubts have been removed because that jury must embrace innocence unless guilt is proven beyond a reasonable doubt.[83] A reasonable doubt standard applied without skepticism amounts to little, because skepticism creates the doubt that must be overcome before conviction. Overcoming the doubts of an unskeptical juror proves little and should not yield a verdict in which society should be confident, even though the verdict may reflect truth. However, by forcing jurors to view the prosecution's claim of guilt through the lens of innocence,

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other circumstances not adduced as proof at trial.").

81. Obviously, a high level of proof results in some guilty defendants being acquitted, which can also become problematic at a point. *See* Sundby, *supra* note 8, at 500 ("The undeniable cost of the presumption of innocence and the reasonable doubt rule is that some guilty individuals will avoid conviction (of course, the cost does buy a significant gain in that innocent individuals are spared erroneous condemnation and punishment).").

82. *Cf.* Sundby, *supra* note 8, at 494 ("The presumption of innocence . . . as expressed through the reasonable doubt rule, developed within the very specific context of ensuring against erroneous jury verdicts of guilty."); Underwood, *supra* note 44, at 1306 ("[T]he [reasonable doubt] rule is meant to affect the outcome of individual cases, reducing the likelihood of an erroneous conviction.").

83. At least one commentator has suggested that the presumption of innocence be restructured as an assumption of a defendant's factual innocence. *See* Laufer, *supra* note 10.

society recognizes that using a skeptical mindset is the best way to determine whether a particular proposition is correct,[84] particularly when being correct can be the difference between incarcerating an innocent defendant or a guilty one.[85]

For a jury to assert guilt, it should be quite certain of defendant's guilt after first being skeptical or uncertain of the defendant's guilt. Only when these two conditions are met should society accept a guilty verdict and incarcerate a defendant. The presumption of innocence and the reasonable doubt standard are the mechanisms the criminal justice system uses to inject the required certainty and skepticism that produces reliable verdicts. Part III will explore differing interpretations and uses of reasonable doubt and consider their possible impact on the criminal justice system.

III. APPLYING SKEPTICISM

In order to determine truth, the criminal justice system requires that jurors listen to evidence and apply their common sense and experience to that evidence. In that process, jurors must determine what evidence they believe, then determine what they think occurred based on their evaluation of the evidence. Once jurors determine what they believe happened, they apply the reasonable doubt standard to assure themselves of a defendant's guilt or lack of guilt. Finally, they issue a verdict. Though the process sounds simple, it may be more detailed in practice.

Reasonable doubt and the presumption of innocence require jurors to ask and answer difficult questions. Given the limits of evidence and our truth-seeking abilities, many of those questions may lead to uneasy conclusions about guilt, innocence, and the fairness of incarceration. This section will review the questions that the system should force jurors to ask themselves and explain how they should answer those questions in light of the requirements of practical certainty and reasonable doubt. In some circumstances, the strict demands of reasonable doubt, practical certainty, and the presumption of innocence may create an atmosphere in which jurors must suspend the ideals of the justice system in order to keep the justice system functioning reasonably.

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84. *Cf. Winship*, 397 U.S. at 363 (1970) (indicating that the presumption of innocence and reasonable doubt are tools to lower the incidence of factual error); Sundby, *supra* note 8, at 459 ("How far we extend the presumption of innocence is an issue of balancing society's interest in controlling crime and society's interest in not convicting innocent individuals.").

85. For a criminal defense counsel's view on the moral, ethical and philosophical underpinnings of the presumption of innocence, *see* Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, 41 AM. J. JURIS. 229 (1996).

A. The Search for Truth (or Practical Certainty)

Determining how to find truth is possibly the most important part of finding truth.[86] Society, through the justice system, attempts to find truth by directing jurors to look at a body of evidence and analyze it through the lens of their experiences.[87] Though this process seems the only reasonable method to determine truth, the requirement that legal facts be proven through evidence rather than through irrational proof was a watershed in the development of evidence law.[88] That epistemological change has had a profound effect on the Anglo-American justice system.[89] Whether future changes in legal thought processes are accepted as viable methods of proof will depend on how helpful they appear to be in discovering truth.[90]

The justice system's rules and procedures should, and to some degree do, mirror how individuals attempt to determine truth.[91] The sys-

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86. As Part II made clear, absolute certainty of truth is impossible to attain in the context of a criminal trial. For purposes of the rest of this article, truth should generally be read as "the truth as we believe it to be." Where truth refers to absolute truth, the reference will be clear.

87. *See* Holland v. United States, 348 U.S. 121, 140 (1954) ("the jury must use its experience with people and events in weighing the probabilities" regarding guilt and innocence); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 838 (1988) (stating that experience is one of many analytical methods included in practical reason); Francis, *supra*, note 35, at 72, 73 (commenting on pragmatists' view that experience can create knowledge); Ronald J. Allen, *Rationality, Mythology, and the "Acceptability of Verdicts" Thesis*, 66 B.U. L. REV. 541, 549 (1986) (stating that in evaluating evidence, whatever conclusion is reached "will be a function of analyzing what the person perceives in the context of that person's knowledge and experience."); Sundby, *supra* note 8, at 501 (suggesting that juries use common sense and experience when deliberating).

88. *See* Laufer, *supra* note 10, at 330-31 (describing trials by ordeal and irrational proofs); Shapiro, *supra* note 16, at 155 (noting the demise of irrational proofs such as trial by ordeal); Keane, *supra* note 22, at 1250 (providing examples of trial by ordeal); Thomas & Pollack, *supra* note 7, at 4 (detailing parts of the epistemological change away from irrational proof). Of course, enlightenment thought and the development of the scientific method forever altered society's view of the world surrounding it. *See generally* Sherry, *supra*, note 21.

89. Some social commentators believe that the rules underlying why we believe what we believe are changing for the worse. *See, e.g.*, Neal Gabler, *O.J. Could Walk in an Unthinking Nation*, NEWSDAY, Aug. 14, 1995, at A19 ("Change the rules of epistemology, and you change the culture. Make people doubt what their reason tells them to be true, and you have altered reality... [F]or more than 20 years, we have been immersed in a culture of distrust. We have not only become wary of everything we see and hear but increasingly susceptible to the most outrageous leaps of illogic. In a world where the rational is under steady attack, the preposterous fills the vacuum.").

90. *See* Zuckerman, *supra* note 5, at 497 ("Trust in the fact-finding process is, to a considerable extent, a function of confidence in the reasoning processes employed in factfinding."). *Cf.* Thomas & Pollack, *supra* note 7, at 3 ("The purpose of a mechanism for deciding guilt is to impose punishment only on those who deserve it.").

91. Indeed, some definitions of reasonable doubt reference the state of certainty that

tem's reliance on various procedures and rules is a recognition that society believes those procedures and rules are or have been reliable aids to truth-seeking.[92] For example, direct and cross examination are used in the adversarial justice system because they are reasonable methods to discover truth.[93] Indeed, the perceived success of the adversary system explains its continued use here in the United States.[94]

The processes through which society and individuals determine truth are grounded in experience. Everyday experience informs what information should be used to make decisions, as well as that information's trustworthiness.[95] Rules of evidence reflect society's generalized calculus regarding what evidence is useful in proving propositions true.[96] Those rules block out evidence so that jurors can determine guilt based on an appropriate set of evidence.[97] Consequently, rules of evidence also reflect societal skepticism and epistemology.[98] Various kinds of evi-

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non-jurors need when deciding life's decisions outside of the context of a criminal trial. However, some commentators do not like such instructions. *See, e.g.,* Stephen J. Fortunato, Jr., *Instructing on Reasonable Doubt After* Victor v. Nebraska*: A Trial Judge's Certain Thoughts on Certainty*, 41 VILL. L. REV. 365, 428 (1996) (criticizing the "hesitate to act" jury instruction as inappropriately comparing everyday tasks with adjudication); Newman, *supra* note 4, at 982-83.

92. Other societies rely on other methods to seek truth. *See* Myron Moskovitz, *The O.J. Inquisition: A United States Encounter With Continental Criminal Justice,* 28 VAND. J. TRANSNAT'L L. 1121 (1995) (using the O. J. Simpson case to illuminate differences in fact-finding processes between the Anglo-American and Continental systems). The continental inquisitorial method is a different method of truth seeking. Presumably, societies that use these other methods believe that such methods have been successful in discovering truth.

93. *See* 5 J. JOHN HENRY WIGMORE, EVIDENCE § 1367, (J. Chadbourn rev., 1974) ("Cross-examination" is beyond any doubt the greatest legal engine ever invented for the discovery of truth . . . .").

94. Comments proclaiming the glory of the adversarial system abound. *See, e.g.*, David A. Schum, Comment, 66 B.U. L. REV. 817, 817 (1986) ("Anyone who reads scholarly works on evidence law will eventually encounter Sir Matthew Hale's assertion that our adversarial legal system—involving the parties in contention, their counsels, and the tribunal—'beats and boults out the truth.'").

95. *See* Allen, *supra* note 87.

96. *See* Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 U.C.L.A. L. REV. 143, 155 (1996) (suggesting that the rules of evidence reflect the legislature's possibly incorrect judgment of the facts relevant to adjudication). *Cf.* Morano, *supra* note 19, at 514 ("The [early] rules of evidence attempted to prevent the jurors from reaching irrational or erroneous conclusions based upon irrelevant or unreliable information."); Shapiro, *supra* note 16 at 185 (in referencing an historical treatise on evidence: "[L]egal facts were no different from others, although the law sometimes added special requirements such as excluding certain kinds of testimony to insure that the search for truth would in no way be contaminated.").

97. Obviously, rules of evidence can serve other purposes as well. Nonetheless, if rules of evidence are not generally calculated to help find the truth, it is unclear why they exist.

98. *See* Shapiro, *supra* note 16, at 155 (stating that rules regarding "the evaluation by

dence have been deemed useful or not useful in determining truth.[99] Hearsay evidence is generally inadmissible, in large part, because it is not trustworthy in the trial context.[100] Conversely, bias evidence is specifically admissible because society believes that knowing a witness's interest in a case may help in evaluating the truth of the evidence that the witness provides.[101] Generally, if evidentiary rules do not reflect how society *actually determines* truth, those rules ought not exist.[102] If these rules do not reflect how society *should* determine truth generally, they should not exist because they are unhelpful in finding truth as society defines truth. Once society determines what types of evidence may help determine truth and how they may do so,[103] how to determine what the

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the jury of the evidence... are drawn from the culture's general understanding of how we 'know' things to be true.").

99. *See* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in... promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."); Shapiro, *supra* note 16, at 175 (Traditionally, legal and evidentiary rules "though not directly derived from philosophical principles, ha[ve] to be seen as conforming to the sound epistemological and logical principles developed by contemporary philosophy.").

100. *See* Charles Nesson, *The Evidence or The Event?, On Judicial Proof and The Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1369 n.33 (1985) ("Hearsay rules and exceptions, for example, are typically rationalized in terms of the reliability of the evidence and the necessity of its use.") [hereinafter Nesson, *The Evidence or The Event?*]. Of course, there are many hearsay exceptions that override the system's general distrust of hearsay. *See* FED. R. EVID. 803. Of course, some European courts allow hearsay even more broadly than we do in the United States. *See* Moskovitz, *supra* note 92, at 1143-44 (explaining hearsay differences between the United States system of justice and the European system through a colloquy among American lawyers and various actors in the European system).

101. *See* United States v. Abel, 469 U.S. 45, 52 (1984) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.").

102. Obviously, particular evidentiary rules exist to serve interests broader than or tangential to absolute truth-seeking. *See* Newman, *supra* note 4, at 1000 ("For example, courts do not permit juries to consider evidence that all the world regards as probative in ordinary dealings among people—the fact that the defendant has committed the same offense on prior occasions. We accept such evidence, somewhat hypocritically, for the 'limited' purpose of impeaching the credibility of the occasional defendant who testifies. But when the defendant does not testify, we normally exclude such evidence, not because it is irrelevant, but because it is too relevant—that is, because it might too readily lead the jury to convict.").

103. Of course, rules of evidence can change over time. DNA matching is an example of evidence whose credibility has increased over time. *See generally*, Development in the Law, *Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1557 (1995) (discussing DNA Evidence). While the conclusions to be drawn from DNA evidence are championed and questioned daily, its general utility is not. It is viewed as some of the most reliable evidence available. Technology may raise expectations and affect evidentiary analysis. Before fingerprint analysis was widely accepted as reliable, no reasonable juror could suggest that the lack of fingerprints at the scene of a crime suggested a weakness in a

truth is, or at least what we can be justifiably certain is true becomes important. After a body of evidence has been gathered, one must determine what evidence is credible and determine how that evidence helps illuminate truth. Reason, experience and intuition combine to help jurors do this.

Whether a particular piece of information or evidence is considered trustworthy or truthful often depends on intuition and experience. Consider the fairy tale of the boy who cried wolf. In the tale, the boy untruthfully cried wolf several times. After being fooled repeatedly, townspeople became skeptical of the boy's cries. The boy was later eaten by a wolf when townspeople subsequently disbelieved his truthful cries. Although the townspeople were wrong about the boy's truthfulness the final time the boy cried wolf, their evaluation of the evidence was sound. As earlier cries were verifiably false, the townspeople reasonably concluded that the boy's cries were not to be believed. Since nothing differentiated the boy's last cry from his first, no reason existed to believe that the boy's last cry was truthful. Based on experience, the last cry was treated as untruthful, with tragic results. Indeed, a lesson of the fairy tale is not to lie, because people may not believe you when you tell the truth.[104]

In evaluating evidence, people reason from known experiences to unknown experiences.[105] Since people rarely analyze situations identical to past experiences, how people evaluate evidence when no direct analog from experience exists is very important. If a direct analog existed, people could confidently judge new experiences solely by reference to past experiences. Although the conclusion regarding the new situation might be incorrect, the evaluative process would be reasonable. At some point, uncorroborated statements must be analyzed and the juror must believe that evidence is credible based on intuition rather than proof.[106] How an individual evaluates uncorroborated statements may

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prosecution's case. Today, a lack of fingerprints can reasonably suggest that defendant was not involved in the subject crime or that the defendant used gloves to prevent leaving fingerprints. Regardless of which inference is made, the evidentiary landscape has changed from the pre-fingerprint days.

104. Society has essentially codified this lesson in the rules of evidence. *See* FED. R. EVID. 608 (allowing evidence regarding a witness's character for truthfulness or untruthfulness.)

105. Indeed, experience may be our only guide. *See, e.g.*, Zuckerman, *supra* note 5, at 488 ("[W]hen we hear that a suspect ran away from the scene of the crime after being accused of committing it, we tend to conclude that he was guilty, because experience has taught us that guilt is most frequently the reason for escape.").

106. *Cf.* ANDREAS KAPARDIS, PSYCHOLOGY AND LAW 149-50 (1997) (suggesting that

depend largely on the truth of similar statements that she has heard.[107] The next time a townsperson hears a boy cry wolf, how she reacts will depend on the lessons learned from prior experience with boys crying wolf.

B. A Juror's Search for Truth

While jurors likely determine truth in the same manner as non-jurors,[108] their decisionmaking is more constrained than that of non-jurors. Society at-large can assume truth based on probable truth or unproven belief. A juror can only find truth when she finds practical certainty of guilt.[109] The juror's search for truth entails extra burdens and different considerations than the general public's search for truth. First, jurors often survey a different set of evidence than non-jurors in making decisions.[110] Second, that a defendant's liberty is at stake means a juror's search for and location of guilt must be accurate.[111]

Practical certainty and the presumption of innocence ensure that in searching for guilt, jurors must consider innocence. The accuracy of the determination of guilt depends heavily on the reasonable elimination of

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stories that jurors construct to explain evidence track their "gut feelings").

107. Whenever people are confronted with information, they must assimilate it into the knowledge that they already possess regarding the world. *See* Sally Frank, *Eve Was Right To Eat the "Apple": The Importance of Narrative in the Art of Lawyering*, 8 YALE J.L. & FEMINISM 79, 83 (1996) ("An understanding of the meaning of a narrative is often culturally bound.... The reader interprets the story based on that reader's own culture and the resources of his or her imagination. The reader then assimilates the narrative into the drama of his or her own life. The subjectivity of the reader is developed both by his or her position in society and his or her personal history.").

108. There is little reason to believe that a juror's basic powers of analysis change when they become jurors. Indeed, jurors are told to analyze evidence as they would in real life. *See id.*

109. *See supra* Part II.

110. *See* Jeremy Osher, Note, *Jury Unanimity in California: Should It Stay Or Should It Go?*, 29 LOY. L.A. L. REV. 1319, 1366 (1996) ("The jury's role is to adjudicate the guilt or innocence of the defendant based on the evidence presented in court. Any criticism of jury verdicts that fails to take into account the difference between the information that the public has access to and that the jury actually heard should be viewed with extreme caution."). Of course, the evidence the jury sees is often of higher quality than the evidence the public digests. The body of evidence on which jurors make decisions is a filtered body that ostensibly includes just the evidence that is relevant to the case the jury must decide. The court of public opinion is merely a referendum of citizens' opinions based on every snippet of information available, including information that society deems so irrelevant to determining truth that the jury is not allowed to hear it. That the jury hear important evidence and not consider unimportant evidence is, in part, what the Rules of Evidence guarantee. *See* FED. R. EVID. 402 (excluding irrelevant evidence from trial).

111. *See supra* notes 41-46 and accompanying text.

possible innocence. A juror cannot reasonably find guilt unless she has searched in the context of innocence. In considering how a body of evidence comports with a theory of innocence, technical definitions of reasonable doubt are little more than admonitions to the jury to be very sure that a guilty verdict is correct before it is rendered.[112] Of course, barring serious misconduct, a jury will always believe that its guilty verdict is correct before sending a defendant to jail. While definitions of practical certainty and reasonable doubt are good starting points for the jury, a functional test capturing how jurors should determine whether they have reached practical certainty or whether their doubts are reasonable may be helpful. A simple test for practical certainty and reasonable doubt could require that a juror vote to acquit if he can construct a reasonable scenario flowing from the evidence he believes that suggests defendant's innocence. This formulation comports with practical certainty because it assures that a juror is as certain as possible of defendant's guilt before convicting. [113] Conversely, even if one does not believe that this is the only way to view reasonable doubt, it certainly is a reasonable way to apply the reasonable doubt standard.[114]

This test of practical certainty and reasonable doubt describes a precise path to guilt or innocence by focusing on the process by which the juror reaches her verdict, rather than what the verdict is.[115] Rather than being a different approach to guilt, it is merely a description of how to remove reasonable doubt. While not guaranteeing that innocent defendants will never go to jail, this calculus of reasonable doubt helps guarantee that innocent defendants will not be imprisoned due to a jury's

112. Unfortunately, reasonable doubt may simply be whatever the twelve jurors think it should mean. *See* Diamond, *supra* note 40, at 1722 (arguing reasonable doubt lacks common usage and understanding).

113. This is what practical certainty requires. *See supra* notes 28-32 and accompanying text.

114. *See Victor*, 511 U.S. at 12 ("Proof beyond a reasonable doubt... signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.") (quoting Commonwealth v. Costley, 118 Mass. 1, 24 (1875)); Nesson, *The Evidence or The Event?, supra* note 100, at 1371 (suggesting that reasonable alternative hypotheses suggesting innocence can reasonably yield acquittal); Nesson, *Permissive Inferences, supra* note 5, at 1208-15 (suggesting that satisfactory explanations in the face of evidence sufficient to indicate lack of reasonable doubt may indicate reasonable doubt).

115. *See* Smith, *supra* note 25, at 1834 ("The essence of the reasonable doubt standard is the reasoning *process*. It is easier to think of the reasonable doubt standard as a qualitative state of mind than as a quantifiable degree of belief. This is because proof beyond a reasonable doubt is only accomplished when the trier of fact has reached that self-defined state of mind which is free of reasonable doubt.").

possible misapplication of the reasonable doubt standard. Consequently, it should mirror a jury's deliberation process, even if it actually does not.

Reasonable doubt and the presumption of innocence require that a juror explore her assertion (by a guilty verdict) that she is convinced to a practical certainty that defendant committed the crime by forcing her to consider whether the defendant plausibly did not commit the crime.[116] Examining the argument from the perspective of innocence may alter or cement the juror's certainty regarding guilt.[117] Unless a juror refocuses on the possibility of innocence, she may reach his verdict without fully appreciating what convinced her of guilt.[118] This functional formulation is not an extra burden on the jury. Any juror who is convinced beyond a reasonable doubt should have no problem meeting the functional test. If a jury adequately considers defendant's possible innocence, it loses nothing by explicitly following the aforementioned test.[119]

If trial evidence affords any reasonable possibility of defendant's innocence that cannot be explained away by additional evidence or inferences from additional evidence, a juror cannot be sufficiently certain of defendant's guilt to convict under the reasonable doubt standard. Conversely, if no reasonable explanations suggesting defendant's innocence exist, all doubts based on reason are gone, and the defendant should be

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116. The functional formulation of reasonable doubt forces jurors to take a final serious look at their work before rendering a verdict. In reviewing cases at the appellate level, courts seem unwilling to review seriously the sufficiency of evidence in criminal cases. *See* Newman, *supra* note 4, at 993 ("My concern is that federal appellate courts, including my own, examine a record to satisfy themselves only that there is *some* evidence of guilt and do not conscientiously assess whether the evidence suffices to permit a finding by the high degree of persuasion required by the 'reasonable doubt' standard.").

117. *See* Moran, *supra* note 16, at 71 ("Certitude is a type of assent, but it describes only those types of assents which one has self-consciously evaluated. If such self-scrutiny does not reveal some conditionality in one's attitude to the proposition, one has certitude. One who merely assents without reflection has no thought of any doubt but might find one if she examined her assent closely. In contrast, someone who has certitude cannot be made any more sure of the proposition. In Newman's example, a person who has certitude that India exists cannot be made more certain of its existence by personally visiting it.").

118. For example, a parent may be certain that her child is well-behaved, even though insufficient evidence exists to make such a general statement. The child may be ill-mannered whenever she is outside of the parent's view. The parent's certainty is not unreasonable given the child's actions while in the parent's presence. However, the evidence on which the parent bases her observation must be considered incomplete. *See* L. Jonathan Cohen, *supra* note 50, at 639-43 (relating weight of evidence to completeness of the evidence offered).

119. Even if one does not agree that this is the only way to eliminate reasonable doubt, a juror who believes that she cannot be practically certain of a defendant's guilt if the real possibility of innocence exists can hardly be deemed to be acting outside of the definition of reasonable doubt.

convicted. By definition, this approach eliminates the possibility that a juror will find a defendant guilty while knowing that a plausible scenario exists under which defendant is innocent.[120] If a juror can construct a reasonable scenario, consistent with the evidence, under which a defendant is innocent, that juror ought to have a reasonable doubt as to defendant's guilt because that reasonable scenario may reflect truth.

This is the logical conclusion of the application of practical certainty, reasonable doubt and the presumption of innocence. A concern may be that this functional approach appears to allow the hypothecation of facts that may lead to unreasonable doubts. It does not. This functional formulation of reasonable doubt focuses only on the evidence that the jury has heard and believes. Rather than hypothesizing facts favorable to the defense, jurors will only examine the facts as they believe them to be and assure themselves that the defendant is guilty.[121] Any reasonable doubt formulation suggesting that all hypothetical facts pointing to defendant's innocence must be considered or credited by the jury or both does not comport with historical conceptions of reasonable doubt,[122] contemporary conceptions of reasonable doubt,[123] or this Article's functional conception of reasonable doubt.

Any alternative scenario is somewhat hypothesized if it is fashioned from facts that are unproven or unprovable. However, the use of unproven facts does not necessarily make an alternative scenario unrea-

120. A not guilty verdict is a statement that the defendant might be innocent. If no reason exists to believe that defendant might be innocent, a jury should convict defendant.

121. More than 100 years ago, the Supreme Court ruled that hypothesizing facts in the trial setting is improper. *See* Hopt v. Utah, 120 U.S. 430, 440 (1887). Nonetheless, a jury must be allowed to evaluate the evidence, jettison disbelieved "facts" and even refuse to make certain inferences that arguably flow from the credited evidence. To that end, a jury may ultimately believe a set of facts that does not embrace or completely comport with all of the evidence presented at trial. For example, Joe is on trial for stabbing Jane. Jane testifies that Joe stabbed her. Other evidence shows that after Jane was stabbed, she fell on her attacker. When Joe was arrested at the scene of the crime, he had blood on his clothes, as did Bob, the only other person at the scene of the crime. Assuming that the jury is not completely convinced that Jane knows who stabbed her, the jury will have to examine the remaining evidence and hypothesize regarding Joe's guilt or innocence. Regardless of the jury's verdict, it has been the product of analysis and guess work. This is the jury process, and it is wholly appropriate.

122. *See, e.g.*, Morano, *supra* note 19, at 522 (recalling the Massachusetts Supreme Judicial Court's 1841 denial of a defense counsel's request that the "trial judge . . . instruct the jury that they could not find the defendant guilty unless all the circumstances were such as to be inconsistent with any other hypothesis than an intention to [commit the offense].") (internal quotations omitted).

123. *See* Jackson v. Virginia, 443 U.S. 307 (1979).

sonable.[124] If we believe that a defendant need not present evidence of innocence to be acquitted, an acquittal can be based, in part, on unproven facts and inferences flowing from unproven facts. If a prosecution team fails to meet its initial burden of proof due to facts left unproven and inferences left unexplored, a defendant who does not present a defense must be acquitted because the prosecution has not foreclosed the possibility that an innocent explanation exists for the facts presented by the prosecution. Although the facts on which the acquittal rests may have been hypothesized by the jury, that they were not even marginally foreclosed by the prosecution makes their hypothecation reasonable.[125] The key to fashioning a reasonable alternative scenario is to rely on reasonable facts whose truth has not been foreclosed by the prosecution's case. Such reasonable hypothecation stems from reasonable inferences made by jurors skeptical of defendant's guilt.

Conversely, doubts rooted in unreasonably hypothetical facts having no basis in evidence are either unreasonable or existential doubts.[126] Reasonable doubt based on the real possibility of innocence is not existential doubt that exists regarding all legal facts. If a juror has a reasonable doubt, she should vote to acquit because the defendant plausibly and arguably did not commit the crime. A juror need not be convinced that the defendant did not commit the crime in order to acquit. Rather, a juror need only believe that the defendant might not have committed the crime. Any lesser requirement arguably lowers the reasonable doubt standard. While belief that a defendant probably committed the crime might suffice under a preponderance of the evidence or clear and convincing standard, such a belief does not rise to the belief beyond a reasonable doubt necessary for criminal conviction.[127] The existence of a reasonable alternative scenario of innocence indicates reasonable doubt because a juror cannot be certain of a defendant's guilt if a rea-

124. *Cf.* L. Jonathan Cohen, *supra* note 50, at 642 ("Sometimes the prosecution cannot prove guilt beyond a reasonable doubt because some crucial issue happens in practice to be undeterminable.").

125. Problems may arise when jurors hypothesize unreasonable facts and inferences that have not been foreclosed by the prosecution. This is particularly so when the facts are so unusual that a reasonable prosecutor or society would not deem the foreclosure of the facts necessary to remove reasonable doubt. If the facts hypothesized are particularly unusual, foreclosure of those facts becomes necessary only to remove unreasonable doubt. Since unreasonable doubt is not an appropriate ground for acquittal, a jury that requires that unreasonable doubts be removed before conviction acts improperly.

126. This is the existential doubt that cannot be the basis for reasonable doubt. *See supra* Part II, generally.

127. *See supra* Part II.B.

sonable possibility of innocence exists.[128] The presumption of innocence forces jurors to default to innocence in such cases.[129]

Either evidence presented by the defendant, including cross-examination, or the lack of evidence presented by the prosecution can lead to belief in a reasonable alternative scenario.[130] Since a defendant need not prove anything in order to be acquitted, how much evidence is necessary to convince a juror that an alternative scenario is reasonable is important. What evidence particular jurors credit and what facts they believe will vary. The inferences that jurors will derive from those facts will vary even more widely.[131] Consequently, alternative scenarios deemed reasonable by some will be considered unreasonable by others. If jurors believe different facts and make different inferences, they can reach different conclusions regarding the existence of reasonable alternative scenarios regarding a defendant's guilt. The reasonableness of an alternative scenario and the reasonableness of the doubt depends on the evidence a juror believes rather than the conclusion of guilt or innocence that the juror reaches.

Under the functional formulation, distinguishing unreasonable alternative scenarios from reasonable alternative scenarios distinguishes unreasonable doubt from reasonable doubt. The willingness to believe reasonable alternative scenarios for which little or no hard evidence exists is the jury's fact-finding prerogative. In some cases, the jury can reasonably doubt the prosecution's case just because the case lacks air-tight evidence or can reasonably doubt uncontroverted evidence when such doubt is based on a lack of credibility. Simply, a jury can legitimately acquit even in the face of strong evidence. Since a conviction

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128. *See supra* note 112.

129. *See supra* Part II.C.

130. That evidence is not presented may lead to the inference that such evidence does not exist. *See* David H. Kaye, *Do We Need A Calculus of Weight To Understand Proof Beyond A Reasonable Doubt?*, 66 B.U. L. REV. 657, 663-64 (1986) (stating that jurors make negative inferences when they do not hear evidence that they expected to hear). *Cf.* Craig R. Callen, Comment *Second-Order Considerations, Weight, Sufficiency and Schema Theory: A Comment on Professor Brilmayer's Theory*, 66 B.U. L. REV. 715, 716 (1986) ("Cohen explains that for a juror to infer that there exists no reasonable doubt that the defendant is guilty, the juror must rely not only on her judgment based on the evidence introduced at trial, but also on her judgment that relevant data which was not presented would not have exonerated the defendant.").

131. *See* KAPARDIS, *supra* note 106, at 150 ("It is thus possible for two members of the same jury, exposed to the same evidence, to arrive at a different verdict because of differences in how they have understood and interpreted the same evidence."); Raz, *supra* note 34, at 768 (suggesting that even when different people have the same evidence, reasonable differences of opinion may occur based on "differences in judgment understood as differences in the assessment of the evidence").

rests on a jury's abiding belief that each element of the subject crime has been proven beyond a reasonable doubt, and slender evidence can destroy a juror's abiding belief, slender evidence can block a conviction.[132]

Conversely, problems may arise when jurors hypothesize unreasonable facts and inferences that have not been foreclosed by the prosecution. This is particularly so when the facts are so unusual that a reasonable prosecutor would not deem the foreclosure of the facts necessary to remove reasonable doubt.[133] If the facts are particularly unusual, foreclosure of those facts becomes necessary only to remove unreasonable doubt. Since unreasonable doubt is not an appropriate ground for acquittal, a jury that requires that unreasonable doubts be removed acts improperly. Now we must begin to consider what makes a doubt reasonable or unreasonable.

C. Applying Practical Certainty and Reasonable Doubt

Having provided a functional formulation of practical certainty and reasonable doubt, applying this standard to concrete hypotheticals to see how it works in practice may be useful. Reasonable doubt (as defined by practical certainty) and the presumption of innocence require the juror to consider whether defendant reasonably could be innocent based on the evidence the juror believes. In analyzing how jurors determine the reasonable possibility of innocence, we will consider two hypothetical cases, one loosely based on a hypothetical traffic stop and one loosely based on the Oklahoma City bombing case.[134]

In the first hypothetical case, the defendant is charged with resisting arrest. The evidence in this hypothetical case is follows. During trial, the police officers who were at the scene testify that the defendant stood up and ran while he was in the process of being subdued. The officers admitted that several officers were at the seen when the defendant was subdued and that they were using the force necessary to sub-

132. *See* Newman, *supra* note 4, at 983 (suggesting that "generalized unease or skepticism" may be a valid basis for reasonable doubt).

133. For example, hypothesizing the existence of defendant's identical twin who actually committed the subject crime would be improper. However, hypothesizing that someone of similar height, build and facial structure committed the subject crime might not be improper, particularly if a witness testifies to some uncertainty in the identification.

134. On April 19, 1995, the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, was blown up in the worst act of domestic terrorism in the history of the United States. Timothy McVeigh was charged and convicted in the bombing. *See* Tom Kenworthy, *McVeigh Appeal Alleges Errors In Bomb Case; Lawyers Cite Publicity, Inflammatory Evidence*, WASH. POST, Jan. 17, 1998, at A8.

due the defendant when he fled. The defendant did not testify in his own defense. Defendant's defense is that he stood up and ran only because he was afraid of being beaten to death. Assume that the fear of being beaten to death would be a legitimate defense to resisting arrest.

Consider how the jury may evaluate the evidence and defendant's defense. Based on real-life experience, jurors must be aware that suspects may be beaten and can die when police officers subdue them.[135] Consequently, it cannot be outside of the realm of reasonable possibility that a suspect might be afraid for his life when being subdued by force by several police officers. Importantly, the jury may be left without enough evidence to eliminate all reasonable scenarios of innocence. While the jury may have enough evidence to convict, if it believes the police officers, the jurors may exercise their common sense and mine their experiences to find a reasonable alternative scenario of innocence. The jurors may be unable to determine guilt to a practical certainty because practical certainty requires that a juror be as sure as possible that the defendant is guilty before conviction. Given what experience may tell some jurors, they may not be certain of the defendant's guilt.

Some may suggest that the jurors' doubts are based not on the evidence, but on limitations inherent in evidence. These suggestions may be correct, but they are irrelevant to the practical certainty inquiry. Practical certainty or reasonable doubt is the standard the criminal justice system uses because of the inherent limitations of fallible evidence, not the specific limitations of the evidence presented at trial. If the trial evidence does not foreclose reasonable alternative scenarios of innocence, it is not necessarily due to inherent limitations of evidence, but rather may be due to the weakness of the evidence presented. That leaves the question of what to do when evidence bearing directly on a key factual issue to be determined in trial is unavailable. In this hypothetical case, that evidence could be evidence of precisely how defendants' being subdued affected his fear of being beaten.

In order to make convictions possible in situations where direct evidence is unavailable, courts have redefined the reasonable doubt standards in circumstantial evidence cases. The Supreme Court has indicated that the burden of proof in circumstantial evidence cases should be articulated differently and that jurors may simply focus on convinc-

135. For example, on October 12, 1995, Johnny Gammage was killed during a traffic stop in suburban Pittsburgh after allegedly speeding and driving erratically. His story was well-publicized, in part, because Ray Seals, one of Gammage's cousins, is a former Pittsburgh Steeler professional football player. *See* Jan Ackerman, *DA's Task in Gammage Death Case a Handful*, PITTSBURGH POST-GAZETTE, Dec. 31, 1995, at A1.

ing themselves that a defendant is guilty.[136] This distinction between direct evidence cases and circumstantial evidence cases appears to be necessary because the practical certainty burden of proof may be insurmountable in circumstantial evidence cases.[137] However, this distinction is not really just limited to pure circumstantial evidence cases because many ultimate factual issues at trial can be based on circumstantial evidence. Once jurors determine what evidence they believe, if a question about a legal fact remains, it often will be because no direct evidence bears on that specific legal fact. When no such evidence exists, the remaining evidence regarding that issue is essentially circumstantial. Applying a somewhat lessened standard to issues which must be evaluated by circumstantial evidence may lead to applying that standard to many difficult cases or at least to the most difficult aspects of many cases.

Nonetheless, the jury still must decide whether the defendant was afraid for his life. To answer that question the jury must rely on reason. Let us assume that the jurors in this case take two basic paths to their decision. One set of jurors believes that the defendant could have been afraid for his life, but because they are convinced beyond a reasonable doubt that he was not afraid for his life, they convict. The other set of jurors believes that the defendant could have been afraid for his life and because they cannot be convinced that he was not afraid for his life (due to the lack of evidence), they acquit. Though they come to different conclusions, both sets of jurors arguably evaluate the evidence correctly

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136. In cases where the evidence is purely circumstantial, courts suggest that a the juror should not focus solely on the reasonable possibility of innocence. *See* Holland v. United States, 348 U.S. 121, 139-40 (1954) ("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.") (citations omitted); United States v. Russell, 971 F.2d 1098, 1109 (4th Cir. 1992) ("It is well settled that as long as a proper reasonable doubt instruction is given, a jury need not be instructed that circumstantial evidence must be so strong as to exclude every reasonable hypothesis other than guilt."); United States v. Stone, 748 F.2d 361, 363 (6th Cir. 1984) ("It is not necessary that circumstantial evidence remove every reasonable hypothesis except that of guilt."). Arguably, speculation regarding alternative scenarios in circumstantial evidence cases is somewhat like speculation regarding existential doubt in direct evidence cases. If the prosecution were required to remove reasonable doubt in circumstantial evidence cases, few criminals would ever be convicted.

137. While this may appear to be a reasonable attempt to deal with the reality that a strict application of the reasonable doubt standard to purely circumstantial cases would likely yield very few convictions, it actually illuminates the reality that a strict application of reasonable doubt may yield few convictions in both circumstantial and direct evidence cases.

under our system.[138]

The first set of jurors engage in a subjective reasonable doubt evaluation. They ask whether they have a reasonable doubt as to defendant's guilt and answer that they do not. While the defendant could have been afraid for his life, those jurors have no reason to believe that the defendant was afraid for his life, so they convict. This is the essence of reasonable doubt as applied in circumstantial evidence cases. The second set of jurors engage in a slightly more objective reasonable doubt evaluation. They ask whether it is possible that the defendant was afraid for his life in this situation, and hence, is not guilty. Since the real possibility that defendant was afraid for his life has not been disproved, those jurors believe that it is possible within reason that the defendant is not guilty.[139] This is the essence of practical certainty. Applying subjective reasonable doubt will likely allow juries to convict some reasonable number of guilty defendants; applying objective reasonable doubt may not.[140] Objective reasonable doubt describes the highest standard of proof that jurors can have in the absence of absolute certainty, and is practical certainty. However, the jurors do not act inappropriately when they apply subjective reasonable doubt because the criminal justice system allows subjective reasonable doubt to support guilt.[141]

Now we can apply subjective and objective reasonable doubt to our second hypothetical. In the hypothetical, defendant is charged with various crimes stemming from the bombing of the Murrah Federal Building in Oklahoma City. For purposes of the hypothetical, assume that the simple question that the jury must answer is whether the defen-

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138. I am not suggesting that all jurors will fit into one of these camps, just that it would be reasonable for jurors to fit into either of these camps.

139. Some may argue that proving fear is likely an affirmative defense that must be proven by the defense. While that is likely true, it makes little difference to the concept of practical certainty. In the abstract, practical certainty requires that one be as certain of the proposition of guilt as possible. Regardless of who must prove what, the jury must be as sure as possible that the defendant is guilty of the crime charged. This concern falls away in the second hypothetical.

140. Rarely will an objective reasonable doubt standard lead to a guilty verdict when a subjective reasonable doubt standard would not. It is possible, but unlikely, that a juror could conclude that no objective reasonable possibility of innocence exists, but that a subjective reasonable possibility of innocence does. The juror would have to be certain that the defendant committed the crime, but remain unsure about his guilt for completely unarticulable reasons.

141. *See* note 136. Jurors may interpret the reasonable doubt standard as a command to apply subjective reasonable doubt. The lack of guidance that some reasonable doubt instructions provide and the desire to convict defendants who appear guilty may combine to convince jurors that they are applying the correct reasonable doubt standard. *See infra* Part IV.

dant parked a truck containing explosives in front of the Murrah Building on the morning of the attack.[142] Assume that the relevant testimony is as follows. Defendant was identified as the person who last rented the truck that blew up the Murrah Building and was seen in close proximity to the truck in Oklahoma City on the day before the bombing. Additionally, defendant's fingerprints were found on a fragment of the truck and on items found close to where the truck had been parked the day before the bombing. Assume that the jury credits and believes all of this testimony.

Assume that in response to the evidence, defendant's attorney claims that the truck was stolen from the defendant. The only evidence regarding the putative theft of the truck is defendant's police report that the truck was stolen. However, the truck had already exploded by the time the defendant made the police report. The government argues that the truck was not stolen and that defendant's report was a ruse. The evidence is arguably unclear regarding whether the defendant parked the truck in front of the Murrah building. While jurors could force themselves to decide whether the truck was actually stolen, such does not eliminate the impossibility of certainty regarding whether the defendant actually parked the truck. Rather, it merely forces the jurors to make a possibly ill-supported conclusion. The evidence whether the defendant drove the truck to the Murrah Building is largely circumstantial.[143] That no evidence places defendant with the truck the day of the bombing makes the relevant evidence circumstantial rather than direct. If the defendant does not testify, the jury may have no reasonable way of evaluating the veracity of the claim of theft except to ask how likely it is that the truck was stolen.[144] A juror who is unsure if the truck was

142. Asking this single question simplifies the analysis, but does not diminish it. Given that the jury must find each element of the crime satisfied to a reasonable doubt, a reasonable jury could rest its decision on a very specific question. Parking the truck could be an act necessary to complete whatever crime the hypothetical defendant was charged with committing or could be the act the jury focused on to determine intent.

143. *See* LEMPERT & SALTZBURG, *supra* note 70, at 151 ("Direct evidence is testimonial evidence which, if believed, resolves a matter in issue. Circumstantial evidence serves as a basis from which the trier of fact may make reasonable inferences about a matter at issue.") Nonetheless, circumstantial evidence is not to be treated with less respect that direct evidence. *Id.*

144. Nonetheless, the juror may answer the question. *See* Reid Hastie & Nancy Pennington, *The O.J. Simpson Stories: Behavioral Scientists' Reflections on The People of the State of California v. Orenthal James Simpson*, 67 U. COLO. L. REV. 957 (1996) (suggesting generally that in order to determine their version of truth, jurors construct stories regarding what happened based on the evidence they believe and their background guesses regarding how to fill gaps in the evidence left by prosecutors and defense counsel).

stolen because the evidence does not sufficiently illuminate the issue cannot claim to be practically certain regarding whether the defendant parked the truck in front of the Murrah Building.

Requiring the functional formulation of practical certainty to prove guilt becomes more troublesome if we consider doubts for which literally no evidence has been presented at trial. Assume that instead of offering evidence that the truck was stolen, defendant's attorney argues that the prosecution has failed to offer any evidence suggesting that defendant had driven the truck on the day of the bombing. A juror who suggests that no proof exists to foreclose the possibility that someone other than defendant drove the truck to the site may be exercising skepticism reasonably. That no explicit evidence exists to support a particular doubt does not necessarily make the doubt unreasonable. Some doubts are based purely on common sense or experience, rather than on evidence presented at trial.[145] Indeed, inferences in support of or in opposition to guilt must flow from common sense and experience rather than from evidence that directly proves the statement to be inferred. If direct evidence of the inference to be made existed, the inference would not need to be made because the proof could simply be believed or disbelieved.

Whether a particular inference is made depends on the experiences of the person hearing the evidence or making the inference. The doubt based on the putative theft of the truck is a refusal to make an inference. The doubting juror may refuse to infer that the defendant drove the truck to the Murrah Building because the evidence, that defendant was seen with the truck on the day before the bombing and that defendant did not report the truck stolen until after it had exploded, was insufficient support for the inference that the defendant drove the truck to the Murrah Building. While one could argue that this is an unreasonable doubt, the doubt would be better characterized as an unreasonable refusal to infer.[146] However, refusing to make an inference of

145. At some point, a prosecution's case may be deemed insufficient to raise the inference of guilt. Preliminary hearings and grand juries may dispose of most of these cases, but if a defendant waives his rights to those safeguards and goes to trial, the prosecution may present a case that, standing alone, is insufficient to remove reasonable doubt. Such a determination would likely be based on a common sense evaluation of the evidence suggesting that no reason to make an inference of guilt existed. *See* Jackson v. Virginia, 443 U.S. 307, 320 (1979) ("Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, . . . —could be deemed a 'mere modicum.' But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt.").

146. Conversely, a juror who willingly makes a possibly suspect inference may engage in

which a juror is not practically certain can hardly be considered unreasonable. Indeed, refusing to make such an inference is very appropriate. Again, applying subjective reasonable doubt can yield a conviction in a situation where applying objective reasonable doubt may not.

Differences in opinion will always occur when jurors evaluate evidence.[147] As different experiences layer upon another, different people will analyze evidence in markedly different ways. Consider Rodney King's very real videotaped beating at the hands of Los Angeles police.[148] The lessons that can be drawn from the beating are very different. One could draw the lesson that Los Angeles police officers are willing to beat anyone who disobeys them or are willing to break the law to catch someone they believe to be guilty of a particular offense. Another person could draw the lesson that Los Angeles police officers are trained to deal with street confrontations with enough force to subdue the suspect. If people who draw these very different conclusions sat on the same jury, they would likely analyze differently a defendant's claim that his assault of a police officer was justified as self-defense after police allegedly beat him for refusing to consent voluntarily to a search. The juror who believes police officers will break the law to catch a suspect may reasonably believe that the police would beat a suspect for refusing to consent to a search. More importantly, he may believe that based on slender evidence.[149] Conversely, the juror who believes that police officers use only the force necessary to do their job

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subtle burden shifting. In making an unsupported inference, the juror suggests that defendant must disprove the inference. While forcing a defendant to disprove an inference of guilt is proper when the evidence indicates no conclusion other than guilt, it may be improper when a reasonable possibility of innocence exists. The point where a juror justifiably shifts the burden to defendant to disprove the inference is the same point at which a reasonable doubt ostensibly becomes unreasonable. As a compromise, courts could require that reasonable hypotheses of innocence have some tangible basis in the evidence presented rather than merely being created by the jury's mind. The process would be similar to treating reasonable hypotheses of innocence like affirmative defenses to be proven or at least be made plausible by the defense. *See* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1668-77 (1987) (commenting on the shifting burden of proof regarding affirmative defenses in criminal cases). While this compromise may be reasonable, it may allow jurors to apply some level of proof lower than practical certainty.

147. *See supra* note 131.

148. The legal literature is full of references to various aspects of the King case. *See, e.g.*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1 (1995); Elizabeth F. Loftus & Laura A. Rosenwald, *The Rodney King Videotape: Why The Case Was Not Black And White*, 66 S. CAL. L. REV. 1637 (1993).

149. How slender that evidence can be could be the focus of serious concern. *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 321-23 (1996) (advocating use of special verdicts in certain situations in order to decrease the likelihood of acquittal based on impermissible theories).

may need much more evidence to convince them that a police officer would beat a suspect for refusing to consent to a search. Indeed, that juror may need a videotape to be convinced. Applying subjective reasonable doubt over a jury provides a wide range of evidence evaluation. Different jurors will find different doubts reasonable.[150] When all of those doubts are foreclosed, a defendant will be convicted.

Differing modes of evidentiary analysis do not indicate the existence of improper or improperly exercised skepticism,[151] flawed thought processes or juror misconduct. If rational, differing modes of evidentiary analysis should be seen as wholly valid and appropriate.[152] That evidentiary analysis is idiosyncratic does not make it inappropriate. For instance, that a particular individual might not believe uncorroborated testimony given by a police officer based on prior experience with untrue uncorroborated police testimony is reasonable.[153] Only when the individual disbelieves police testimony for literally no reason or relies on a reason that does not actually explain the disbelief should the juror's evidentiary analysis be deemed suspect.[154]

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150. *See* Rory K. Little, *Guilt, Reasonable Doubt and the Reasonable Woman*, 6 HASTINGS WOMEN'S L.J. 275, 281 (1995) ("[I]f 'juror's minds' can differ, then so too may their perspectives. For all the anxiety about defining the level of certainty, our reasonable doubt instructions spend no energy at all on guiding twelve diverse jurors about perspective."); Moran, *supra* note 16, at 71 ("One person may have certitude that India exists because she has read about it in a book. Another person may read the book and not believe its existence with certitude until a close acquaintance has visited the place and returned to tell about it.").

151. *See* Little, *supra* note 150, at 280 ("[D]oes reasonable doubt really mean 'idiosyncratic doubt'—a doubt reasonable to a particular juror, perhaps, yet 'unreasonable' to the bulk of objective observers at large?"); Richard Cohen, *The Fuhrman Tapes*, WASH. POST, Aug. 17, 1995, at A29 (After explaining the Tuskegee experiment, in which the U.S. government left hundreds of black syphilitics untreated in order to study the effects of the disease, Cohen states: "The word 'paranoid' is sometimes applied to the black community but as Tuskegee shows, it is utterly without meaning. For African Americans, even the most unreasonable fears have been reasonable.").

152. Indeed, if a reason for a twelve-member jury is to force a prosecutor to convince a cross-section of society, those with heightened or reasoned skepticism regarding various issues should be jurors. Skeptical jurors may counterbalance overly deferential jurors. This should increase societal confidence in jury verdicts. *Cf.* Barbara A. Babcock, *A Unanimous Jury is Fundamental to Our Democracy*, 20 HARV. J. OF L. & PUB. POL'Y 469, 472 (1997) ("An important benefit of the unanimity requirement is that a group who must persuade those who see the world differently is more likely to deliberate and discuss the evidence thoroughly. This point is particularly relevant because we have just recently arrived at a time when white women and minorities are finally being summoned to jury service in significant numbers.").

153. *See* Zuckerman, *supra* note 5, at 497 (noting that in the mid-1980s "English juries [had] shown a marked reluctance to convict on the uncorroborated evidence of policemen.").

154. An individual who has an unarticulated reason for disbelieving the testimony may

However, changing times may change how jurors view evidence. That bizarre incidents continually impact our experiences may lead particular jurors to refuse to be practically certain unless some doubts now considered unreasonable are foreclosed by evidence presented. This is particularly worrisome.[155] Experiences change our perceptions of truth. As the news of the absurd becomes more common, doubts that today appear unreasonable may actually be reasonable and soon become mainstream.[156] As reports of strange occurrences increase, the likelihood that our reasonable alternative scenarios will become more unconventional increases. Over time, as new layers of experience and fact add to society's storehouse of experience, previously held truths may be discarded or altered.[157] That may make either an objective or subjective reasonable doubt standard more difficult to overcome over time. Incidents that may have seemed odd in the past now appear to occur so frequently as to seem commonplace.[158] As a result, doubts previously deemed unreasonable may soon be deemed reasonable.[159] At that point,

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not exhibit inappropriate skepticism. The inability to articulate the reason does not discount its reasonableness. *See, e.g.*, Moran, *supra* note 16, at 68-69 (suggesting that inability to articulate reasons for belief does not necessary mean the belief is irrational or incorrect). Antecedent issues that will affect verdicts need not be based on articulated reasons. Credibility determinations are quintessentially decisions that need not be based on articulated reasons. If reasons for a particularly important credibility determination were inarticulable, a verdict based on a credibility determination could be said to be based on something other than reason. *Cf.* CARTER, *supra* note 21, at 223 ("What the foregoing analysis indicates is that the very question—fact or value—has meaning only in a particular epistemology that considers as factual only those propositions that are testable against the material world, and considers a proposition falsified when the evidence of the material world runs against it.").

155. One United States Attorney has complained that jurors are beginning to demand evidence that has no reason to be collected. *See* Jeffrey Rosen, *One Angry Woman*, THE NEW YORKER, Feb. 24, 1997, at 64 (U.S. Attorney Eric Holder complaining: "We've got to the point now where police dust guns in situations where it doesn't make sense to dust, because one juror out of twelve will say, 'Well maybe it wasn't his gun.'").

156. Before seeing the Rodney King beating video, consider how many people inside of the American majority would have believed Rodney King had he merely testified about the beating he received from the Los Angeles police officers. Would the people who believed King been labeled unreasonable for believing the police capable of such brutality and acting on such belief?

157. Little reason remains to rely on information that has proven unreliable. *See* HUFF, *supra* note 23, at 87-92 (suggesting that the American justice system relies too heavily on witness identification evidence in the face of indications that it is often not accurate).

158. Newspapers are littered with references to misconduct committed by those sworn to uphold the law. *See, e.g.*, Kim Bell, *Tape Allegedly Shows Abuse of Missouri Inmates*, ST. LOUIS POST-DISPATCH, Aug. 14, 1997, at A1 (reporting alleged brutalization of inmates during a prison search); *N.Y. Police Officer Charged in Brutal Assault on Detainee*, WASH. POST, Aug. 14, 1997, at A9 (reporting story regarding alleged sodomizing of suspect in custody).

159. *See* Richard Cohen, *supra* note 151, at A29 ("Christopher A. Darden, a prosecutor

even a subjective reasonable doubt standard may become unadministrable as it becomes less effective at identifying almost certainly guilty defendants.[160]

Although subjective reasonable doubt is a high standard, it is not as high as practical certainty and cannot claim to provide results that are consistent with the application of practical certainty. Nonetheless, none of the foregoing analysis means that either of our hypothetical defendants must or even should be acquitted.[161] Rather, it suggests that practical certainty or objective reasonable doubt may be a higher standard of proof than the justice system can tolerate.[162] Any reasonable doubt standard that does not conform to practical certainty risks allowing the conviction of defendants who have the reasonable possibility of being innocent, but the key question is how high a risk society is willing to take and how to manage that risk.

The decision to imprison a citizen is a societal decision. Society has the right and duty to define guilt and the conditions under which defendants will be incarcerated,[163] subject to constitutional limitation.[164] Soci-

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in the O.J. Simpson trial, summed it all up: 'You have to understand, I'm black. Nothing surprises me.' But me, I'm white, and I admit to both surprise and second thoughts of a kind. It just could turn out that the cop the defense called a racist perjurer is in fact a racist perjurer. You don't have to be white to be surprised by that but—as Darden suggests—it sure helps.").

160. Conversely, others have suggested that the reasonable doubt standard has weakened and might continue to do so. *See* George M. Dery III, *The Atrophying of the Reasonable Doubt Standard: The United States Supreme Court's Missed Opportunity in* Victor v. Nebraska *And its Implications in the Courtroom*, 99 DICK. L. REV. 613, 615 (1995) ("despite its position at the core of our criminal justice system, the reasonable doubt standard has been severely weakened over the past quarter of a century"); *see generally* Note, Winship *on Rough Waters, supra*, note 65 (arguing that societal attitudes have lead to the implementation of various devices that have resulted in a functional lowering of the reasonable doubt standard).

161. *See* Hopt v. Utah, 120 U.S. 430, 440 (1886) ("Persons of speculative minds may in almost every such case suggest possibilities of truth being different from that established by the most convincing proof. The jurors are not to be led away by such speculative notions as to such possibilities.").

162. Current conviction rates can be explained by juries that use the subjective reasonable doubt standard because that is how they understand the standard. Conversely, some of the recent disenchantment with jury verdicts may be explained by jurors applying an objective reasonable doubt standard.

163. Verdicts are not just a reckoning of the jury's opinion regarding the evidence; they are statements that a defendant has committed a crime and deserves to be punished. *Cf.* Nesson, *Permissive Inferences*, *supra* note 5, at 1194-95 (arguing that one key to the justice system is to have society defer to and respect verdicts regardless of the verdict's accuracy).

164. The Constitution allows limited experimentation with state trial procedures. *See* Apodaca v. Oregon, 406 U.S. 404 (1972) (allowing states to experiment with nonunanimous verdict).

ety seeks to punish the guilty and free the innocent through a justice system that functions to insure that society's goals are met. If particular procedures become impediments to successfully identifying and punishing the guilty, those procedures may be reinterpreted and restructured in order to allow the system to function properly. The functional formulation of reasonable doubt presented above flows directly from practical certainty and the presumption of innocence, and is the logical method for jurors to determine guilt. That formulation creates a test that may be too high to catch any reasonable number of actually guilty defendants.[165] Objective reasonable doubt is the standard that guarantees that jurors are as certain of a defendant's guilt as possible before convicting. Subjective reasonable doubt is the standard that is high enough for society to feel comfortable imprisoning another citizen. Part IV considers how society can address the differences between objective and subjective reasonable doubt.

IV. HARNESSING REASONABLE DOUBT

That the reasonable doubt standard can be explained in multiple equally legitimate ways is a part of the problem with how juries may apply the reasonable doubt standard.[166] Commentators have attempted to provide comprehensive definitions of reasonable doubt,[167] but none has been broadly accepted. Indeed, the reasonable doubt standard need not be defined for the jury.[168] Consequently, each state and the

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165. Crime exists. The system's question is whether the defendant is the perpetrator. The standard of proof the system uses determines how many probably guilty defendants will be acquitted.

166. Some commentators suggest that the reasonable doubt standard must be somewhat subjective since each juror must decide when she is convinced of defendant's guilt. *See, e.g.*, Nesson, *Permissive Inferences, supra* note 5, at 1197 (suggesting first that the reasonable doubt standard must be individualistic because that gives most people a sense that the standard is the same as their standard and is fair and second that if reasonable doubt were quantified, the fact that it would be at odds with many people's conception of reasonable doubt would render the standard objectionable). *See also* Fienberg and Schervish, *supra*, note 74, at 779 ("There is general agreement among commentators that the meaning of the [reasonable doubt] standard can vary with the crime as well as with other aspects of the trial, but there seems to be little discussion of whether the standard should be interpreted by all decisionmakers in each trial in exactly the same manner.").

167. *See, e.g.*, Stephen J. Fortunato, Jr., *Instructing on Reasonable Doubt After* Victor v. Nebraska*: A Judge's Certain Thoughts on Certainty*, 41 VILL. L. REV. 365, 427 (1996).

168. *See* Victor v. Nebraska, 511 U.S. 1, 5 (1984) ("[T]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."). Of course, not defining the term may leave the jury hopelessly confused regarding reasonable doubt. *See* Jessica Cohen, *supra* note 13, at 678, 693 n.128 (suggesting that an uninstructed jury may inadvertently raise or lower the standard for conviction); Dery, *supra*

federal system may independently define reasonable doubt and determine the conditions under which a defendant can be incarcerated. The lack of definition may leave juries to their own devices to determine how to apply the reasonable doubt standard. If a jury plausibly can get an accurate notion of the meaning of reasonable doubt, a conviction rendered by such a jury will be affirmed, barring other constitutional problems.[169] This can lead to differing applications of the reasonable doubt standard. How the jury gleans what the law considers a reasonable doubt is unclear,[170] and no reason exists to expect jurors to apply any particular reasonable doubt standard with any regularity. Of course, this may not be problematic at all, since in many cases objective reasonable doubt would not be the favored standard.[171]

Since the Supreme Court deems reasonable doubt easy to under-

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note 160, at 629 (providing an uncomprehended standard as the definition of reasonable doubt may lead to "the government's burden... be[ing] impermissibly lowered, raised, or substituted by a juror's own standards of certainty"); Smith, *supra* note 25, at 1818 nn.46-47 (referring to studies suggesting that juries often do not understand reasonable doubt and the presumption of innocence); Diamond, *supra* note 40, at 1721 ("The term reasonable doubt cannot be understood by the lay juror without further definition."). *But see* Note, *Reasonable Doubt: An Argument Against Definition*, *supra* note 65, at 1955 ("This Note... concludes that courts should not attempt to define the term [reasonable doubt] in conveying the reasonable doubt concept to juries.").

169. The jury may be left to its own devices or may be given instructions that only accurately represent the flavor of reasonable doubt. *See Victor*, 511 U.S. at 5 ("taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury") (quoting Holland v. United States, 348 U.S. 121, 140 (1954) (internal quotations omitted)). Of course, nothing suggests that a juror who believes he knows what a term means actually does. *See* Jessica Cohen, *supra* note 13, at 690 (suggesting that the fact that layman can fashion a definition for reasonable doubt without knowing what it means suggests that reasonable doubt will be incorrectly defined); Diamond, *supra* note 40, at 1729 (suggesting that "refusal to define reasonable doubt upon request by the... jury must be per se constitutional error" in part because a jury that does not understand the standard will not likely apply the correct one).

170. Oddly enough, some commentators seem to believe that if jurors are not told what reasonable doubt means, the jurors will fashion a very good meaning for themselves. For this to be so, a jury's intuitive notion of reasonable doubt would have to be superior to a description provided by those trained in the law. *See* Dery, *supra* note 160, at 618 ("Thus, the Supreme Court perceives the reasonable doubt standard as so basic that, in many cases, it may be read to lay persons without any explanation. Yet, this same rule can suddenly become confused if defined by judges who are supposed to be expert in the law."); *see also*, Newman, *supra* note 4, at 984 ("I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it."). If this is the case, the jury's intuitive notion of reasonable doubt should be recorded and used for future jury instructions. Of course, it is possible that reasonable doubt may only exist on an intuitive level. *See* Little, *supra* note 150, at 278 ("[T]he concept of 'beyond a reasonable doubt' may be like a 'prime' number in mathematics: indivisible into lesser components.").

171. *See supra* Part II.B. and III.C.

stand, almost any reasonable doubt instruction that does not wildly misstate the standard may be deemed constitutionally sufficient for conviction.[172] Even instructions that may be easily misunderstood have been considered sufficient.[173] The Court's willingness to uphold arguably confusing reasonable doubt instructions seems problematic since it could lead to juror miscomprehension of the standard.[174] However, the Court's focus on the juror's possible understanding, rather than probable misunderstanding, of the instructions likely reflects the Court's belief that jurors can recognize reasonable doubt when they see it.

This context of little and possibly confusing guidance regarding the content of reasonable doubt allows jurors to choose subjective reasonable doubt or objective reasonable doubt or any standard in between as their method for analyzing evidence and cases. At least two problems arise from this situation. First, different standards of proof may be applied to different defendants. Applying different levels of proof to different defendants effectively results in defendants being given different levels of justice. That is unacceptable. Second, jurors are allowed to

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172. Of course, the Court has invalidated instructions that have been found wanting. *See, e.g.*, Cage v. Louisiana, 498 U.S. 39, 41 (1990) (invalidating instruction that "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt'"). Some commentators have suggested that defining certain legal terms, including reasonable doubt, might lead to a loss of flexibility in their meaning. *See* Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure To Communicate*, 67 N. C. L. REV. 77, 100 (1988) ("[G]reater specificity might rob the law of its flexibility, its ability to evolve with changing times and changing community standards. Because of these problems, we would not propose a redefinition of the concepts to achieve greater clarity."). Whether society wants such terms to retain flexibility and whether community decision making should include decisions of rogue jurors remains to be seen. Interestingly, a student commentator suggests a flexible view of reasonable doubt should exist. *See* Note, *Reasonable Doubt: An Argument Against Definition*, *supra* note 65, at 1967-68 ("Leaving reasonable doubt undefined both avoids the pitfalls of attempting to define a term that defies precise definition, and harnesses the collective wisdom of the community as embodied in the jury to determine the appropriate meaning of the term through deliberation."). The idea that reasonable doubt should change based on the community's definition suggests a ceding of power from the legislature that made the rules to a jury that applies the rules in both a micro and macro sense. *See id.* at 1970-72 (suggesting that the decision regarding reasonable doubt should be a community decision made by the jury as the community's representative in the judicial system).

173. For example, in *Victor v. Nebraska*, the Supreme Court upheld instructions incorporating "moral certainty" because, when defined, moral certainty accurately describes the level of certitude a jury must have before rendering a guilty verdict. The Court did so while acknowledging that the definition of moral certainty could be unknown to many jurors. *Victor*, 511 U.S. at 12-15 (1984) (admitting that "moral certainty" may be an archaic term that may not be understood by jurors unless defined).

174. Of course, how courts define the reasonable doubt standard may not matter. *See* Laufer, *supra* note 10, at 364-371 (suggesting that jurors often miscomprehend reasonable doubt and the presumption of innocence).

apply standards that may be higher than society desires for the criminal justice system. That may lead to the acquittal of defendants that society would have expected to and would have wanted to have been convicted. Either concern should be cause for alarm.

In response to allowing juries to apply varying standards for reasonable doubt, society should rethink the issue of what standard it wants to use to convict defendants. The problem is not necessarily with any standard between subjective and objective reasonable doubt. Rather the problem is that any standard could be fairly used to evaluate cases. The rethinking can move in at least three broad directions. First, reasonable doubt could be redefined explicitly to mean practical certainty or objective reasonable doubt. Second, subjective reasonable doubt could be explicitly defined as the standard. Third, subjective reasonable doubt could remain the standard while courts continue to assert that practical or moral certainty is the standard. These three directions are not exhaustive, but they may be a start to the process of reconsidering how certain of guilt society wants juries to be before convicting defendants.

Redefining reasonable doubt as objective reasonable doubt or practical certainty has benefits and shortcomings. Ultimately, the justice system must serve its goals of convicting the clearly guilty and acquitting the possibly innocent or it will cease to function. Although objective reasonable doubt nearly guarantees that very few innocent defendants will ever be convicted, it also suggests that not many guilty defendants will be convicted. At some point, the risk of acquitting too many guilty defendants and leaving crime unpunished will overcome the risk of imprisoning innocent defendants.[175] Society, not commentators, must decide how to evaluate those risks. Redefining reasonable doubt as objective reasonable doubt might be perfect, if criminal trials were the perfect vehicle for finding truth.[176] However, because criminal trials are not perfect, that solution is not perfect. Ultimately, if society wanted objective reasonable doubt to be the standard of proof, it might have to restrict the conviction of defendants to cases in which the evidence indicating guilt is airtight. It is unclear that society is willing to do that.

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175. *See supra* note 8.

176. Redefining reasonable doubt as objective reasonable doubt might be the best solution in a perfect world where everyone could agree what a reasonable doubt is. *Cf.* In re Winship, 397 U.S. 358, 363-64 (1970) ("[A] society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.").

Similarly, explicitly indicating that subjective reasonable doubt is generally the standard of proof and explicitly defining what makes a doubt reasonable is a difficult and possibly dangerous solution.[177] Explicitly defining subjective reasonable doubt could subtly lower the burden of proof. Such definition might require letting jurors know that they may convict defendants even if they know that a plausible possibility exists that the defendant is innocent. How jurors interpret such a definition would be the most dangerous part of the proposal. Any significant change or addition to the definition might yield a misinterpretation of how much doubt is allowed to exist when voting to convict. A significant misinterpretation could, in some case, change the reasonable doubt standard into one approaching a clear and convincing doubt standard. The effect of a redefinition would depend on how the redefined standard was implemented. Generally, if the standard did not clearly lower the constitutional minimum for reasonable doubt, such experimentation might be allowed.[178]

If the redefinition attempted to specify what doubt short of objective reasonable doubt an individual juror could have and still convict, significant problems could occur if jurors were prone to lower their standard of conviction even below subjective reasonable doubt. However, if the change were a structural one that merely eliminated a traditional element of reasonable doubt, the change might not have quite so bad an effect. For example, if the structural change were a widespread move to non-unanimous jury verdicts, the change might not be problematic at all from the Supreme Court's perspective.[179] A change to non-unanimity would allow jurors to ignore the doubts, reasonable or unreasonable, of the most skeptical jurors on the panel. The result would allow jurors to ignore the possibly reasonable doubts that a small minority of jurors had. These doubts that would have yielded a possible acquittal or hung jury under a unanimous jury scheme would not stop a conviction if a substantial majority of jurors deemed those doubts un-

177. *Cf.* Jacobsohn, *supra* note 41, at 57 (considering the possibility that the reasonable doubt standard be lowered, but recognizing that the idea "is so foreign to Anglo-Saxon traditions of criminal justice that it is a political impossibility").

178. *But see id.* at 57 (suggesting that lowering the burden of proof would probably fall outside of the experimentation that the Supreme Court would allow).

179. Arguably, the unanimity requirement is part and parcel of reasonable doubt. *See, e.g.* Osher, *supra* note 110, at 1339 ("Justice Story also believed that unanimity was an essential constitutional guarantee, reasoning that '[a] trial by jury is generally understood to mean . . . a trial by a jury of *twelve* [men], impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had.'") (citation omitted). Of course, the Supreme Court has disagreed. *See* Apodaca v. Oregon, 406 U.S. 404 (1972).

reasonable. The belief that the doubts of a small minority probably are not the doubts that most in society would want to allow to stop a conviction would probably underlie such a change. Unfortunately, any scheme that allows some reasonable doubts to be ignored may yield the conviction of some innocent defendants.[180] As a standard of proof falls, the likelihood that innocent defendants will be convicted increases.[181] Given that reasonable doubt was meant to make certain that innocent defendants would be acquitted, a tacit lowering of the reasonable doubt standard seems at odds with historical norms.[182]

Lastly, society could continue with the current system which touts objective reasonable doubt as the standard of proof while allowing and in some cases enforcing subjective reasonable doubt as the standard. Maintaining the status quo is somewhat problematic. The current system could be said to suffer from the application of standards that are alternately too high and not high enough. The result of this may be the acquittal of some defendants who should be convicted and the conviction of some defendants who should be acquitted. Such a system may function properly on the macro level by convicting the correct proportion of guilty defendants, but it may not function well on the micro level in that it produces a number of incorrect verdicts.[183]

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180. Inexplicably, members of the Supreme Court appear to disagree. *See* Johnson v. Louisiana, 406 U.S. 356, 374 (1972) (Powell, J., concurring) ("There is no reason to believe . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined in by 10 members of a jury of 12."). The Supreme Court has stated that defendants should be content with nonunanimous verdicts. *See Apodaca*, 406 U.S. at 411 (1972) ("In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.").

181. Increasing the pool of possibly innocent defendants who are convicted suggests that the number of innocent defendants who are convicted may rise. *See* Underwood, *supra* note 44, at 1333 ("No [burden of proof] rule can enable a fact finder with low power of discrimination or little evidence to increase the chance of a true conviction without causing a proportional increase in the chance of a false conviction.").

182. *See* Sundby, *supra* note 8, at 458 ("This deliberate imbalance [that the reasonable doubt standard creates] in favor of the defendant is a societal judgment that an individual's liberty interest transcends the state's interest in obtaining a criminal conviction[.]").

183. Recognizing that possibility of innocence may require shifting public resources to appeals that are based on factual innocence. This is a suggestion whose full analysis is beyond the scope of this article. A full analysis would require a full reexamination of habeas corpus procedures and other related appeal procedures. However, it is not sufficient for the system to act as though a guilty verdict eliminates all possibility of defendant's innocence.

However, the current system does have a few large benefits. First, the system is already accepted. Second, when subjective reasonable doubt is enforced over a unanimous jury that represents a cross-section of the citizenry, the effective standard of proof may begin to approach objective reasonable doubt without actually reaching it. A cross-section of jurors will likely yield a cross-section of reasonable doubts that must be overcome. When those doubts are aggregated, they may approach the doubts that would have to be foreclosed if objective reasonable doubt were required.[184]

V. CONCLUSION

In the wake of publicized trials whose verdicts did not seem to match widely held beliefs regarding the defendants' guilt, calls for jury reform have become loud and persistent.[185] These calls almost certainly stem from the putative reformers' belief that juries have rendered palpably incorrect verdicts.[186] However, how the reasonable doubt stan-

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While the system may make few mistakes, the chance of mistake remains. Society must be vigilant to make sure that when mistakes are made, they are corrected through appeal when possible.

184. The reasonable doubt standard and presumption of innocence guarantees that every juror who votes for guilt must have been presented with a strong case for guilt. The unanimity requirement assures that a strong case has been presented across a spectrum of views. The defendant must appear certainly guilty from twelve different perspectives and after twelve different applications of skepticism. Only when a defendant is so thoroughly proven guilty does a verdict reflect community consensus and is a verdict worthy of societal agreement. The unanimity requirement ensures that a broad range of skepticism is applied to the prosecution's case and that the verdict likely reflects what broad community consensus would be if the entire community actually sat in judgment of the defendant. Juries represent a cross-section of the community. *See* Johnson v. Louisiana, 406 U.S. 356, 378 (1972) (Powell, J., concurring) ("[T]he Court has held that criminal defendants are entitled, as a matter of due process, to a jury drawn from a representative cross section of the community. This is an essential element of a fair and impartial jury trial."). *See also* Mitchell Zuklie, *Comment, Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 107-09 (1996) (detailing the doctrinal history of the cross-section requirement). *Cf.* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1188 (1995) (arguing that juries should contain at least twelve people so that the likelihood of a cross-section of society sitting on the jury be maximized).

185. *See, e.g.*, Gerald F. Uelmen, *Jury-Bashing and the O.J. Simpson Verdict*, 20 HARV. J. OF LAW AND PUB. POL'Y 475, 477 (1997) (detailing California's 'The Public Safety Protection Act of 1996,' an attempt to abolish the requirement of juror unanimity in all California criminal trials except capital trials); Osher, *supra* note 110 (detailing California's flirtations with nonunanimous verdicts).

186. At least many believe that recent verdicts have been unpopular with the general public. *See, e.g.*, ALAN M. DERSHOWITZ, REASONABLE DOUBTS 16-17 (1996) ("[It is my intention to explain how, under our system of criminal justice, the Simpson jury could properly have reached a verdict so at odds with the conclusion reached by millions of intelligent

dard is defined or left undefined, rather than the jury system, may be the source of the perceived problem. The reasonable doubt rule and presumption of innocence reflect society's desires for the justice system and set the standard of proof necessary for conviction. Those requirements reflect two simple commands: Analyze evidence with a skeptical mind and be very sure that a defendant is guilty before convicting him.

Those commands, when left unexplained or ill-defined, can cause confusion. Society would like to apply practical certainty or objective reasonable doubt in criminal cases to avoid the conviction of innocent defendants. However, subjective reasonable doubt is viewed as being a high enough standard for conviction because it requires that jurors be quite certain of a defendant's guilt before conviction. This reality reflects the tension between allowing the innocent to go free, but convicting some reasonable number of guilty defendants. If it does nothing else, hopefully, this article has served to indicate to society and the courts that tension exists between objective and subjective reasonable doubt. If society does recognize the difference in those standards of proof and at least alters our rhetoric to reflect that reality, this article has done enough. The time has come to face the difference between objective and subjective reasonable doubt. If subjective reasonable doubt is a sufficiently high level of proof, society needs to say that and accept any shortcomings that come with that level of proof.

The jury is the conduit for societal goals. When society's goals are clear, the jury will function properly.[187] If society wants practical certainty to be the required level of proof, juries can react by acquitting all but a few defendants. Similarly, if society wants to convict a reasonable number of defendants, it can use subjective reasonable doubt or any other level of proof that is constitutionally acceptable. The key is to design a system that is consistent and forces juries to provide the same level of justice for all defendants.

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and decent people who watched what they believed was the same trial."); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 329-30 (1995) ("[T]he popular press, the entertainment media, and highly esteemed legal scholars have bemoaned the unpredictability and the 'irrational' behavior of juries.").

187. *See* Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1326 (1996) (suggesting that juries are as accurate as any other decisionmaker society may choose).