

## TAKING REASONABLE DOUBT SERIOUSLY

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### INTRODUCTION

In recent years, much has been written about convicting the innocent.<sup>1</sup> Given the magnitude of the problem,<sup>2</sup> this is a positive trend to which I am pleased to say I have contributed.<sup>3</sup> The usual suspects for wrongful conviction are faulty identification, false confessions, bad forensics, false testimony from jailhouse snitches, and prosecutorial misconduct.

Only rarely is the jury's failure to apply reasonable doubt even mentioned. Of course, one reason for that is that a jury will rarely say that it did not apply reasonable doubt. And, indeed, in general I do believe that jurors do conscientiously try to apply that standard. Nevertheless, I am convinced that in many cases, especially serious crimes, a jury that is convinced of the defendant's guilt will unconsciously fail to give the defendant the benefit of a reasonable doubt.

If juries conscientiously try to follow instructions, why, one may ask, would they not take reasonable doubt seriously? I think that the answer is two-fold: (1) there is a reluctance to let someone who is probably guilty get away with it, and (2) there is genuine fear of what the probably guilty perpetrator will do if acquitted.

Let us take a hypothetical case. Assume that thirty-year-old Charles Davidson is on trial for raping his five year old daughter, Carla. The case arose when Charles brought Carla to her pediatrician, Dr. Harvey Sanders, to be treated for vaginal tearing. Charles told Dr. Sanders that the injuries were caused by her falling out of a tree. Dr. Sanders, after examining Carla, concluded that the injuries were consistent with rape. He therefore arranged

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1. See, e.g., Symposium, 41 TEX. TECH L. REV. 1 (2008).

2. See, e.g., JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003).

3. See Arnold H. Loewy, *Systemic Changes that Could Reduce the Conviction of the Innocent*, 18 CRIM. L.F. 137 (2007); Arnold H. Loewy, *The Death Penalty in a World Where the Innocent Are Sometimes Convicted*, 41 TEX. TECH L. REV. 187 (2008).

for Carla to speak to a social worker, Mary Thompson. According to Mary, Carla at first confirmed that she had fallen out of tree, but after several interviews, punctuated by Mary's insistence that it could not have happened that way, finally yielded to Mary's suggestion that Charles had raped Carla.

At trial, Dr. Sanders testified that in his professional opinion, Carla appeared to have been raped. Dr. Thompson testified that in her opinion Carla was telling the truth when she said she had been raped after first having been in denial. Carla testified at trial that "Daddy hurt me, but I didn't remember it until Mary helped me remember."

For the defense, Charles testified that he was watching in their backyard when Carla fell out of the tree. Seeing the blood, he immediately rushed her to the doctor. He further testified that he in no way touched her inappropriately. On cross examination, however, he did admit that he was currently on probation for fondling a six-year-old neighbor girl. Holly Davidson, Charles's wife and Carla's mother, testified that she believes her husband although she was not present at the time. There was no conclusive forensic evidence in regard to the rape. However, a small amount of blood determined to have come from Carla was found at the tree where Charles alleges she fell.

What's a jury to do? There are at least two reasonable possibilities: (1) Charles raped his daughter. The doctor thought she was raped. Carla told the social worker she was raped. Charles has a history of sex with children. The small trace of blood could have been from a prior incident (or even where he raped her). He has fooled his poor unsuspecting wife, so her testimony is unpersuasive.

Or (2) the jury might say the doctor could not be certain of rape. Carla was manipulated by the social worker, Mary Thompson, into believing that something which was not true in fact happened.<sup>4</sup> The blood by the tree shows that she probably fell there. Carla's mother vouched for Charles, as did Carla originally. And, Charles's prior conviction was not even admitted to prove he committed the crime, but only to impeach his credibility. Besides, rape is different from and more reprehensible than fondling.

If the jury chooses the first alternative and it is wrong it sends an innocent man to prison for raping his own daughter, where, for sure, he will

4. To illustrate, the interviewing techniques utilized by the social workers in the famous McMartin case have received vast criticism due to their strong suggestive nature which led to over 300 children alleging abuse. Sena Garven et al., *More Than Suggestion: The Effect of Interviewing Techniques From the McMartin Preschool Case*, 83 J. APPLIED PSYCHOL. 347 (1998); John E. Lee, *Modern Witch Hunts: From Manhattan Beach to Malden; Coerced Child Testimony and Denial of Confrontation Rights in Day Care Center Sex Abuse Trials*, 2 HOLY CROSS J.L. & PUB. POL'Y 83 (1997).

not live happily ever after. On the other hand, if the jury wrongly (in the sense that he is really guilty) acquits him, he is returned to the daughter that he raped to be chaperoned only by her oblivious mother.

Now suppose that the jury is fairly (let's say 75%) sure that Charles is guilty, but still has nagging doubts. Is the jury going to turn him loose back to be with his daughter, who he may very well rape again? I do not think so. While I do not think that jurors willfully violate their oath, I do think that many would be tempted to describe their doubts as unreasonable and convict the defendant.

### I. WHAT DO WE WANT THE JURY TO DO?

Classically, I think that the answer to the title question of this section is "acquit." We think that it is far worse to convict an innocent person than to acquit a guilty one. But is that always true? Is it better to send Charles back to his family when we are 75% sure that he raped his daughter than it is to send him to prison when there is a 25% chance of his innocence?

Historically, Blackstone talked about supporting a ten-to-one ratio, claiming that it would be better to acquit ten guilty people than convict one innocent.<sup>5</sup> *In Re Winship* explained the importance of being sure of guilt for three reasons: (1) the interest of the defendant in not being convicted unless we are substantially sure of his guilt; (2) the interest of society in knowing that those imprisoned are in fact guilty of the crime with which they were charged; and finally, (3) the interest of each individual member of society, knowing that if he is ever charged with a crime, he cannot be convicted unless the State proves him guilty beyond a reasonable doubt.<sup>6</sup>

Are things any different now than they were in the time of Blackstone or even since *Winship* was decided? Well, certainly the interests of a defendant in not being wrongfully convicted remain the same. The interest of society in being certain that those it imprisons are in fact guilty, I think remains the same. And if anything, the concern of the average citizen that no matter what he is accused of he cannot be convicted unless proven

5. "[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*358, available at [http://avalon.law.yale.edu/18th\\_century/blackstone\\_bk4ch27.asp](http://avalon.law.yale.edu/18th_century/blackstone_bk4ch27.asp) (last visited October 30, 2008); see also George C. Thomas III, *Bigotry, Jury Failures, and the Supreme Court's Feeble Response*, 55 BUFF. L. REV. 947, 978 (2007) ("Benjamin Franklin . . . upped the ante on Blackstone in a letter in 1785, stating that 'it is better [that] 100 guilty Persons should escape than that one innocent Person should suffer.'" (quoting Letter from Benjamin Franklin to Benjamin Vaughn (Mar. 14, 1785), in 9 THE WRITINGS OF BENJAMIN FRANKLIN, at 293 (Albert Henry Smith ed., 1907))).

6. *In re Winship*, 397 U.S. 358, 363-64 (1970).

guilty beyond a reasonable doubt is stronger today.

The reason for this last point is that a generation ago, most of the citizenry truly believed that innocent people were rarely, if ever, convicted.<sup>7</sup> Although I have no idea how one could measure this, with the number of highly publicized instances of people being released from prison or death row after having been wrongfully convicted,<sup>8</sup> I suspect that the citizenry must be far less at ease about being wrongfully convicted than they used to be. For sure, I would think that an innocent person arrested for a crime that she did not commit must be far more afraid than she would have been a generation ago, when her natural thinking would be that “the police will soon realize their mistake and let me go.”

Thus, it seems fair to say that the *Winship* reasons for applying Blackstonian logic are at least as strong today as they were a generation ago. But what about the countervailing points? Is there a need to protect victims which has either changed or was not fully perceived in earlier times? For example, do we really want to put probable child predators in a position where they can injure more children, or serial killers in a position where they can kill again?

I think that the answer is that other entities than criminal courts and juries can deal with these situations. If in the hypothetical problem, Charles were acquitted, other agencies could still monitor the safety of his daughter. Presumably, Child Protective Services would still be able to interview the child, and if appropriate remove the child from parental custody. Most jurisdictions do not require proof beyond a reasonable doubt for Child Protective Services to do that.<sup>9</sup> Thus, if despite Charles’s acquittal Carla is still

7. See *infra* note 21 and accompanying text.

8. According to the Death Penalty Information Center, from 1973 to September 18, 2008, 130 individuals on death row in the United States either had their convictions overturned (either acquitted at re-trial or all charges were dropped) or they were given an absolute pardon by the governor based on new evidence of innocence. Death Penalty Information Center, Innocence: List of Those Freed from Death Row, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Oct. 30, 2008); see also Adam Liptak, *Fewer Death Sentences Being Imposed in U.S.*, N.Y. TIMES, Sept. 15, 2004, at A16 (“The Death Penalty Information Center . . . attributes the decline largely to growing public awareness of death-row exonerations and concerns that innocent people might be sentenced to die.”).

9. Some states apply a preponderance of evidence standard, which places the risk of error equally on both parties—unlike the reasonable-doubt standard, which places all of the risk of error on the State. See, e.g., *Larkin v. Pridgett*, 407 S.W.2d 374, 374, 376 (Ark. 1966); *Shurupoff v. Vockroth*, 814 A.2d 543, 555–56 (Md. 2003); *In re Perales*, 369 N.E.2d 1047, 1052 (Ohio 1977). “Some have articulated other tests [such as] ‘satisfactory evidence.’” *Shurupoff*, 814 A.2d at 553 (citing *In re Dependency of Terry Klugman*, 97 N.W.2d 425 (Minn. 1959)). Other states apply a more demanding standard than preponderance of the evidence, such as “clear and convincing.” For example, the Connecticut Appellate Court found that in reviewing whether a parent achieved rehabilitation to regain custody of the child, rehabilitation must be proven by clear and convincing evidence. See *In re Michael L.*, 745 A.2d 847, 851 (Conn. App. Ct. 2000); accord *In re Baby Girl T.*, 715 A.2d 99, 102 (Del. Fam. Ct. 1998) (requir-

frightened of her dad, and Child Protective Services can convince a court, even if not beyond a reasonable doubt, that Charles did rape Carla, a court would likely remove the child from his custody.

But do we want people like Charles to have to run that gauntlet? Once he is acquitted, in what had to be an emotionally trying trial, do we want him to be subject to yet another proceeding in which he can lose his child? I think that the answer is “yes.”

In child custody (or most other civil) trials, we want to get it right. An error on either side is equally bad. A finding that Charles is an unfit parent (because he raped his daughter) results in his losing custody. If incorrect, this is a brutally painful loss for him (and his wife) and possibly for his daughter, if he is in fact a good parent. On the other hand, his loss is not so severe as the loss of liberty and gain of the stigma of criminality that occur in a criminal trial. Consequently, in a child custody proceeding, the harm of a wrongful decision is roughly equal. Wrongfully leaving a child with an abusive parent is roughly as bad as taking a child from a good parent.

Buttressing this conclusion is the fact that *res judicata* does not apply as fully to child custody proceedings as it does to other cases.<sup>10</sup> Thus, if six months after Carla is removed from Charles and Holly, Carla tells her social worker that “Daddy never really hurt me. I just remembered wrong because of what Mary told me,” there is a reasonable chance that custody can be returned to the parents.<sup>11</sup> In a criminal case, however, recanted testimony is frequently insufficient to undo or ameliorate the damage.<sup>12</sup> Thus,

ing clear and convincing standard of proof in order to terminate parental rights due to the “fundamental liberty interest at stake and the unique type of deprivation that may occur”). “Clear and convincing evidence is something more than preponderance of the evidence, required in neglect proceedings and in other civil cases, but something less than proof beyond a reasonable doubt, required in criminal cases.” *Michael L.*, 745 A.2d at 851 (citing *In re Michael M.*, 614 A.2d 832 (Conn. App. Ct. 1992)). Most states have not defined a particular standard of proof for the judicial resolution of child custody disputes between the child’s parents and a third party but rather “have sought to protect parental rights through the heavy substantive burden placed on the third party—to show unfitness, ‘compelling’ or ‘cogent’ reasons, or ‘convincing reasons.’” *Shurupoff*, 814 A.2d at 553 (citations omitted).

10. *See, e.g.*, TEX. FAM. CODE ANN. § 263.501 (2008) (requiring a placement review hearing at least once every six months until the date the child is adopted or the child becomes an adult, even if there is a final order terminating the parent’s parental rights).

11. *See, e.g.*, MINN. STAT. ANN. § 260.012(a) (2007) (“Once a child alleged to be in need of protection or services is under the court’s jurisdiction, the court shall ensure that reasonable efforts . . . by the social services agency are made to prevent placement or to eliminate the need for removal and to reunite the child with the child’s family at the earliest possible time. . . .”).

12. Most state courts apply the fairly demanding tests set forth in either *Berry v. State* or *Larrison v. United States* when determining whether to grant a new criminal trial based on recanted testimony. *See Berry v. State*, 10 Ga. 511, 512–13 (1851); *Larrison v. United States*, 24 F.2d 82, 87–88 (7th Cir. 1928). The *Berry* test sets forth six factors:

- 1st. That the evidence has come to [the party requesting a new trial’s] knowledge since the trial.
- 2d. That it was not owing to the want of due diligence that he did not acquire it sooner.
- 3d. That it is so material, that it would probably produce a different verdict.
- 4th. That it is not

in a criminal case, if one is going to be convicted, it is far more important to be sure that we get it right.

## II. SHOULD REASONABLE DOUBT BE DEFINED?

Once we determine that concepts of reasonable doubt ought to have contemporary vitality, the next question is how that concept should be conveyed to the jury. There are two schools of thought on that question. One school suggests that attempting a definition is a bad idea. It reasons that the concept speaks for itself, and that any additional language will simply obfuscate the issue.<sup>13</sup>

The other school of thought believes that the concept is not intuitively obvious to the jury, and that definitional guidelines are helpful.<sup>14</sup> I align myself with the latter group. Although I think average jurors have an idea of what reasonable doubt means, I do not believe that typically they understand all of its nuances. For example, I do not believe that a typical jury will intuitively understand the difference between “clear and convincing evidence” and “beyond a reasonable doubt.”<sup>15</sup>

Furthermore, the fact that so many wrongful convictions have been

cumulative only, viz.: speaking to facts in relation to which there was evidence on the trial. 5th. The affidavit of the witness himself should be procured or its absence accounted for; and 6th. The new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

*Berry*, 10 Ga. at 512–13. The *Larrison* test includes three factors:

(a) The court is reasonably well satisfied that the testimony given by a material witness is false. (b) That without it the jury *might* have reached a different conclusion. (c) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.

*Larrison*, 24 F.2d at 87–88.

13. See *Murphy v. Holland*, 776 F.2d 470, 475 (4th Cir. 1985) (“The term reasonable doubt itself has a self-evident meaning comprehensible to the lay juror.”); *People v. Barkas*, 99 N.E. 698, 702–03 (Ill. 1912) (“[I]t is very questionable whether any good purpose is ever served by giving involved and labored definitions of the words ‘reasonable doubt’ in stating the law to juries in criminal cases. . . . It is doubtful whether any better definition of the term can be found than the words themselves.”).

14. See, e.g., *Commonwealth v. Young*, 317 A.2d 258, 262–63 (Pa. 1974) (“Our cases require that the jury be given a positive instruction fully and accurately defining reasonable doubt. Only in this way, can a jury fulfill its responsibility to decide the guilt or innocence of an accused. In the absence of a proper reasonable doubt charge, an accused is denied his right to a fair trial.”).

15. The Supreme Court explained proof beyond reasonable doubt as “our society impos[ing] almost the entire risk of error upon itself” because of the Due Process Clause and the value society places on individual liberty. *Addington v. Texas*, 441 U.S. 418, 424 (1979). The intermediate standard, often described with words like “clear” and “convincing,” is applied in civil cases typically involving a quasi-criminal accusation and interests at stake that are more substantial than the mere loss of money; thus the defendant’s risk of having his reputation tarnished erroneously is reduced by increasing the plaintiff’s burden of proof. *Id.* The preponderance of the evidence standard is the lowest of the three standards identified by the Court and is applied to “typical civil case[s] involving a monetary dispute between private parties.” *Id.* at 423. Society has little concern with the outcome of such cases and “[t]he litigants thus share the risk of error in roughly equal fashion.” *Id.*

uncovered in recent years<sup>16</sup> is pretty good evidence that jurors do not always understand reasonable doubt. To be sure, most of these wrongful convictions can be blamed on some other cause, but I do believe that failure to take reasonable doubt seriously enough contributed to the problem. Consider the following examples:

(A) A teenager after many hours of questioning confesses to the murder of his parents after police falsely tell him that his father woke up from his coma and identified the teenager as the shooter. Believing that his father would never lie, the boy confesses. Despite the absence of forensic evidence, or serious motive, the teenager is convicted.<sup>17</sup> Classically, the false confession is thought to be the culprit in the wrongful conviction; and indeed it was. But, perhaps if the jury took reasonable doubt more seriously, it would have realized that there was a possibility that the confession was false, and perhaps it would have given the defendant the benefit of the doubt.

(B) A prison snitch testifies that the defendant confessed to murder. In fact the defendant made no such confession, but the snitch, motivated by a desire to get his sentenced reduced (which was promised by the prosecutor) falsely testified to the confession.<sup>18</sup> The defendant is convicted. If the jury applies reasonable doubt seriously, and understands the snitch's motivation for testifying, the jury may be more likely to acquit.

(C) A witness positively identifies the defendant as her rapist. The defendant is convicted, but later exonerated by DNA evidence.<sup>19</sup> Again, the faulty identification is the primary culprit, but secondarily, perhaps the failure to take reasonable doubt seriously also contributed.

To be sure, there are cases where juries in fact do take reasonable doubt seriously, and perhaps even more where they believe they are taking it seriously. Indeed, on occasions, they may take it too seriously.<sup>20</sup> But why wouldn't a jury take reasonable doubt seriously? Obviously, as suggested at the beginning of the article, it is concerned with turning a probably guilty criminal free. Additionally, I am not sure that a typical juror really thinks

16. See sources cited *supra* note 8.

17. These are basically the facts of the Martin Tankleff case. Tankleff was finally released after spending twenty years in prison for a crime that he did not commit. Bruce Lambert, *Perseverance, and Chance, Led to Reversal in '88 Murders*, N.Y. TIMES, July 6, 2008, L1, at 1.

18. Similar facts led to the wrongful conviction of Kerry Max Cook. See *Cook v. State*, 940 S.W.2d 623, 626 (Tex. Crim. App. 1996); KERRY MAX COOK, CHASING JUSTICE 82–88 (2007).

19. Jennifer Thompson, a rape victim, positively identified Ronald Cotton as her rapist. After serving eleven years in prison, Mr. Cotton was exonerated due to DNA evidence. Ms. Thompson wrote a column regarding her mistaken identification. Jennifer Thompson, *When You Can't Believe Your Own Eyes*, PLAIN DEALER (Cleveland), June 20, 2000, Editorials & Forum, at 9B.

20. The O.J. Simpson acquittal might provide one example.

about the possibility of convicting an innocent person.

Eighty-six years ago, Judge Learned Hand expressed a sentiment, which has proven to be woefully wrong, but which some jurors may share today:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.<sup>21</sup>

Because some jurors still may believe that, and because the importance of reasonable doubt can easily be lost, I believe that it is important both to define reasonable doubt, and to explain the importance of following the instructions given.

### III. DEFINING REASONABLE DOUBT

To be fair, any definition of reasonable doubt has to capture the full scope of the concept, while at the same time ensuring that juries do not acquit if their doubt is unreasonable. So how do we do this? I took my first crack at it back in 1968 when, as draftsman for the North Carolina Superior Court Judges' Jury Instructions Committee, I drafted the following instruction:

A reasonable doubt is not a vain imaginary or fanciful doubt. It is a sane rational doubt based on reason and common sense arising out the evidence or lack of evidence as the case may be. It means that in order to convict the defendant you must be fully satisfied and entirely convinced of his/her guilt. If you are so satisfied, you should return a verdict of guilty. Otherwise, not.<sup>22</sup>

I would have preferred defining reasonable doubt as "a possibility of innocence based on reason and common sense, arising from the evidence or lack of evidence as the case may be." It seemed to me that getting the jury to think in terms of a possibility of innocence is clearer than instructing it to think in terms of doubt as to guilt, and more clearly explains what the jury should be looking for. Candidly, some of the trial judges did not like "reasonable possibility of innocence" language because they feared that

21. *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

22. NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES, COMMITTEE ON PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES (1970); *see also* ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 212 (5th ed. 2009).

jurors would focus more on the word “possibility” and less on the word “reasonable,” thereby giving the defendant the benefit of an unreasonable doubt.

To combat that, I would begin my ideal definition as follows:

A reasonable doubt is a possibility of innocence based on reason and common sense arising from the evidence or lack of evidence as the case may be. It is not a vain, imaginary, or fanciful doubt, nor is it an unreasonable possibility. Rather, it is a possibility that leaves you less than fully satisfied or entirely convinced of the defendant’s guilt. If you are so satisfied, it is your duty to return a verdict of guilty, but if not, you must give the defendant the benefit of the reasonable doubt, and return a verdict of not guilty.

Although I once thought that this was a complete enough instruction, I now believe that more is necessary. Specifically, I am not sure that the proposed instruction adequately distinguishes between proof beyond a reasonable doubt and proof by clear and convincing evidence. To do that, I propose adding to the above instruction the following:

In applying reasonable doubt, it would be helpful to think of the following seven ways in which you might view the evidence. (1) You could be convinced beyond a reasonable doubt that the defendant is innocent, (2) You could be fairly sure that the defendant is innocent, (3) you could think it more likely than not that the defendant is innocent, (4) you could think it is as likely that the defendant is guilty as it is that the defendant is innocent, (5) you could think it more likely than not that the defendant is guilty, (6) you could be fairly sure that the defendant is guilty, or (7) you could be convinced beyond a reasonable doubt that the defendant is guilty. If after hearing all of the evidence and arguments, you find it falls in any of the first six categories, that is, even if you are fairly sure that the defendant is guilty, you would still have a reasonable doubt, and it would be your duty to give the defendant the benefit of that doubt, and return a verdict of not guilty. On the other hand, if after hearing all of the evidence and arguments, you are in the seventh category and believe the defendant to be guilty beyond a reasonable doubt, it would be your duty to return a verdict of guilty.<sup>23</sup>

One could argue that this instruction is more favorable to the defendant than he is entitled. Whether that is true depends on whether there really is a difference between the sixth and seventh categories. I believe that there is, and that the difference captures the essence of reasonable doubt. So, in our original hypothetical, the jury in Charles’s case (75% sure of guilt) would be in category six. Under this instruction, the jury knows that it has to be in category seven, or else it must acquit. Given that I began

23. This is not an original idea with me. I heard it presented at a conference of criminal defense attorneys. Regrettably, I cannot recall the name of the attorney who presented this idea. If I did, I would obviously give him appropriate credit.

with the hypothesis that we do want the jury to acquit Charles if it is only 75% sure of his guilt, and the further hypothesis that many juries given the usual reasonable doubt instruction (or no instruction) would be likely to convict under those circumstances, the proposed instruction sends the jury a powerful message that it needs to take reasonable doubt seriously.

#### IV. REASONABLE DOUBT AND THE CONSTITUTION

There is no doubt that the instruction proposed in the preceding section would pass constitutional muster. Unfortunately, it is equally clear that an instruction considerably less favorable to the defendant would also pass muster. The only decision in recent years to invalidate a reasonable doubt instruction was *Cage v. Louisiana*, where the instruction clearly indicated that the defendant could be convicted despite a reasonable doubt:

[A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice or 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. What is required is not an absolute or mathematical certainty, but a moral certainty.<sup>24</sup>

When we deconstruct this instruction, it is obvious what troubled the Court. The word “substantial,” which is used twice, is insolubly ambiguous. If it means “of substance” as opposed to ephemeral, it is undoubtedly correct. But, if it means “significant” or “great” it is not correct. Given that the instruction also spoke of “grave uncertainty” it is clearly in error. In our hypothetical problem, a juror who is 75% sure of Charles’s guilt would not be “gravely uncertain.” Indeed, if she were only 40% sure of Charles’s guilt (that is, she thought that he was probably innocent), I doubt that she would think of herself as “gravely uncertain.” Thus, it is not surprising that the Court invalidated this instruction.

The Court also seemed troubled by the use of the archaic phrase “moral certainty.”<sup>25</sup> To my untutored twentieth–twenty-first century mind, the phrase “moral certainty” seems to imply something close to absolutely certainty. That is, if I had a vain imaginary or fanciful doubt, I may be convinced beyond a reasonable doubt, but I do not think that I would feel satisfied to a moral certainty.<sup>26</sup>

24. *Cage v. Louisiana*, 498 U.S. 39, 40 (1990) (emphasis omitted).

25. *See id.* at 41.

26. It is for that reason that I proposed eliminating the “moral certainty” language from the North Carolina Pattern Jury Instructions.

Of course, the Louisiana jury in *Cage* was told that “moral certainty” meant something less than mathematical certainty, but was not told what it did mean.<sup>27</sup> Hence, the possibility that the jury thought that it meant something less than reasonable doubt is supposed to mean was significant.

In the other significant reasonable doubt case, *Victor v. Nebraska*,<sup>28</sup> the Court upheld two different reasonable doubt instructions, in one of the cases correctly, and in the other, incorrectly. In the first of the two cases, *Sandoval v. California*, the instruction read as follows:

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.<sup>29</sup>

The Court, though troubled by the term “moral evidence” (which in the nineteenth century apparently meant all evidence except demonstrative evidence) concluded correctly that the overall instruction was constitutionally proper.<sup>30</sup> Despite *Sandoval*’s protestations, he was not, and should not have been, entitled to the benefit of possible or imaginary doubt.<sup>31</sup> And, indeed, if the jury has an “abiding conviction to a moral certainty of his guilt” then they are convinced beyond a reasonable doubt.

I also agree with the Court in disapproving of the instruction because of the lack of contemporary vitality for terms like “moral evidence” and “moral certainty.” Additionally, I am troubled because the instruction is confusing. Were I a juror, I would want to know how I could have an abiding conviction to a moral certainty if I had any doubt, even a possible or imaginary one. But since that ambiguity if anything is favorable to the defendant, it should not be a basis for reversing his conviction.

The *Victor* case fell somewhere in between. The instruction was neither as obviously permissible as the *Sandoval* instruction nor as obviously impermissible as the *Cage* instruction. The instruction read as follows:

‘Reasonable doubt’ is 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. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all of the evidence, to have an

27. See *Cage*, 498 U.S. at 40.

28. 511 U.S. 1 (1994).

29. *Id.* at 7 (emphasis omitted).

30. See *id.* at 10–13, 17.

31. See *id.* at 17.

abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute 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. You may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.<sup>32</sup>

By a seven-to-two vote the Court upheld this instruction.<sup>33</sup> The dissenting Justices (Blackmun and Souter), were bothered by the phrase “substantial doubt” for the same reason it troubled the Court in *Cage*.<sup>34</sup> While I agree with the Court that the overall instructions were not as incorrect as those in *Cage*, that is surely damning with faint praise.

Justice Ginsburg, who concurred in part, did so only on the ground that it was no business of the Court to revise instructions for the state judiciary.<sup>35</sup> She was especially bothered by the phrase “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.”<sup>36</sup> Relying on a statement in a report to the Judicial Conference of the United States, she emphasized that things like “choosing a spouse, job, a place to live and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases.”<sup>37</sup>

I could hardly agree more with Justice Ginsburg’s conclusions. Indeed, perhaps in the life’s most important decision, one’s relationship to a deity, I have certainly known of active church members who are not convinced beyond a reasonable doubt that their church represents the one true faith.

Perhaps part of the reason for the Court’s affirmation of the *Victor* instruction was its apparent belief in the correctness of the jury’s determination. For example, in *Victor*, Justice O’Connor, writing for the Court, explained the case as follows: “On December 26, 1987, petitioner Victor

32. *Id.* at 18 (emphasis omitted).

33. *See id.* at 22–23.

34. *See id.* at 30–38 (Blackmun, J., dissenting).

35. *Id.* at 27 (Ginsburg, J., concurring).

36. *Id.* at 24.

37. *Id.* (quoting FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS No. 21 cmt. at 18–19 (1987)).

went to the Omaha home of an 82-year-old woman for whom he occasionally did gardening work. Once inside, he beat her with a pipe and cut her throat with a knife, killing her. Victor was convicted of first degree murder.”<sup>38</sup>

On a moment’s reflection, it should be apparent that O’Connor is begging the very question to be decided. The jury needed to determine whether the evidence established *beyond a reasonable doubt* that Victor did the things alleged by the Government. When one starts the opinion with the statement that he did them, she might not be quite so persnickety about whether the Government met the proper burden of proof.

The opinion should have started out by saying “the Government alleges that Victor beat her with a pipe and cut her with a knife, killing her. The question for us is whether given the manner in which the jury was instructed, can we be confident that the jury found Victor guilty beyond a reasonable doubt?” With a mindset that a heinous act had been charged and that we need to be satisfied that the jury understood its fact-finding obligations properly, it is at least plausible that the Court would have reached a different result.

#### CONCLUSION

It is clear that although due process requires proof beyond a reasonable doubt, only the plainest error on that score will rise to the level of constitutional scrutiny. It is, however, equally clear that states are free to define reasonable doubt in such a way that jurors will not be confused with the lesser standard of clear and convincing evidence. Because there is good reason to believe that juries may not always give the defendant the benefit of a reasonable doubt, and because failure to give defendants the benefit of a reasonable doubt may well have contributed to some wrongful convictions, state trial judges ought to do everything in their power to ensure that defendants are given the benefit of a reasonable doubt.

If judges regularly gave instructions such as that proposed in section III of this article, I believe that fewer innocent people would be convicted. Of course, one of the costs would be that more factually guilty people would likely be acquitted. But, if the Court meant what it said in *Winship*, and if Blackstone was right, it is a cost we should be willing to pay.

38. *Id.* at 17.