PROOF BEYOND ALL POSSIBLE DOUBT: IS THERE A NEED FOR A HIGHER BURDEN OF PROOF WHEN THE SENTENCE MAY BE DEATH?

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INTRODUCTION

On July 1, 2002, Judge Jed S. Rakoff of the Southern District of New York ruled that the Federal Death Penalty Act ("FDPA") is unconstitutional.[1] According to Judge Rakoff, imposition of the death penalty is a violation of the Due Process Clause in all cases. Because recent studies[2] demonstrate that innocent persons have been convicted in death cases in greater numbers than previously realized, the court concluded, innocent persons may be executed before their convictions have been vacated. Judge Rakoff did not assert that a capital punishment system is unconstitutional if the risk of error is remote.[3] Rather, at the core of his opinion lies a concern with the *number* of innocent defendants who may foreseeably be sentenced to death.[4] In his view, so long as executions of innocent individuals are

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1. United States v. Quinones, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49, 69 (2d Cir. 2002), *reh'g denied*, 317 F.3d 86 (2d Cir. 2003).

2. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973–1995 (2000) [hereinafter LIEBMAN ET. AL., BROKEN SYSTEM PART I]; JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002) [hereinafter LIEBMAN ET. AL., BROKEN SYSTEM PART II]. Justice Breyer also cited these studies in his concurring opinion in *Ring v. Arizona*, 122 S.Ct. 2428, 2446–47 (2002) (Breyer J., concurring).

3. Judge Rakoff recognized that, even in capital cases, the Supreme Court has acknowledged that "[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." Herrera v. Collins, 506 U.S. 390, 415 (1993).

4. Judge Rakoff's opinion is replete with references to numerosity. *See Quinones*, 205 F. Supp. 2d at 257, 259, 261, 265, 268 (asserting that "people are sentenced to death with *materially greater frequency* than was previously supposed"; suggesting that there is a distinction between assuming the existence of the death penalty and "countenancing the execution of *numerous* innocent people"; explaining that "DNA testing that established conclusively that *numerous* persons who had been convicted of capital crimes . . . were, beyond any doubt, innocent"; concluding that the result of our current system "can only be *the fully foreseeable execution of*

foreseeable and, indeed, likely, the entire system is "constitutionally intolerable."[5]

On December 10, 2002, the Court of Appeals for the Second Circuit reversed, stating that previous Supreme Court decisions, especially *Herrera v. Collins*,[6] were binding on the lower court. The Second Circuit held that Judge Rakoff was not free to deem *Herrera* to be inapposite in as much as the Court of Appeals was "not informed by the ground-breaking DNA testing and other exonerative evidence developed in the years since."[7] The Court of Appeals did not review the weight given to the post-*Herrera* studies upon which the district court relied, stating, "[i]n sum, if the well-settled law on this issue is to change, that is a change that only the Supreme Court or Congress is authorized to make."[8]

On January 16, 2003, the Second Circuit denied the defendant's petition for a panel rehearing[9] and subsequently declined to rehear the case en banc. Defense counsel has suggested that an appeal to the Supreme Court is likely, stating, "[n]obody likes to lose, but if you are going to lose this is the way."[10]

The last word on this issue, therefore, has yet to be heard.

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Through his opinion, Judge Rakoff has identified a serious due process infirmity in the current administration of the death penalty. While the case is still under judicial review, few predict that the Supreme Court will upset the Second Circuit's decision. Large-scale legislative change likewise appears distant at best.[11] In contrast to the

numerous innocent persons"; referring to the "unacceptably *high rate* at which innocent persons are convicted of capital crimes") (emphasis added).

5. *Id.* at 262 n.6; *see also* United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002) (finding FDPA unconstitutional because evidentiary rules of the penalty phase permit the introduction of material to the jury that would not be admissible at a proceeding governed by the Federal Rules of Evidence).

6. 506 U.S. 390 (1993).

7. United States v. Quinones, 313 F.3d 49, 69 (2d Cir. 2002) (quoting *Quinones*, 205 F. Supp. 2d at 263).

8. *Id.*

9. United States v. Quinones, 317 F.3d 86, 90–91 (2d Cir. 2003).

10. Mark Hamblett, *Circuit Upholds Federal Death Penalty*, N.Y.L.J., Dec. 11, 2002, at 1.

11. Although there have been a number of recent bills introduced in Congress that in various ways seek to address deficiencies in the current administration of the death penalty, their future does not appear promising. *See, e.g.*, Innocence Protection Act of 2001, S. 486, H.R. 912, 107th Cong. (2001) (introduced by Sen. Patrick Leahy and Rep. William Delahunt in their respective houses); Death Penalty Integrity Act of 2002, S. 2739, 107th Cong. (2001). Likewise, even in Illinois, where the governor declared a moratorium in January 2000 and established a commission to address deficiencies in the state's capital punishment system, the governor

views of virtually every other country in the Western world, the majority view in this country remains that there is a need for the death penalty.[12] If, then, the death penalty remains the law because the courts deem it constitutional and the legislature continues to believe it is a necessary tool for the punishment/deterrence of crime, what steps can be taken to reduce the risk that innocent capital defendants will face execution?

We argue that one way to address this question is to raise the requisite standard of proof for a death sentence. We propose that before the government may deprive a defendant of life, it must prove the defendant's guilt by a standard more rigorous than *beyond a reasonable doubt*. If a jury finds a defendant guilty beyond a reasonable doubt, it may not proceed to the penalty phase unless it also certifies that it has found the defendant guilty *beyond all possible doubt*. If the jury cannot certify to this effect, the judge assumes responsibility for sentencing but may not impose the death penalty.

In many respects, our proposal is not novel. Indeed, as Professor Margery Malkin Koosed pointed out, the Model Penal Code contemplated a similar modification decades ago.[13] Moreover, recently there have been a number of articles, prompted by a growing awareness of the frequency of errors in capital cases, maintaining that the beyond a reasonable doubt standard is not sufficient for a capital conviction.[14]

criticized the torpid rate of legislative change and ultimately granted clemency to 171 state death row prisoners on January 10, 2003. The governor explained that systemic failures in the legal system mandated his action. *See* Elizabeth Amon, *Death Row Clemency Attacked by Prosecutors*, NAT'L L.J., Jan. 21, 2003, at A1.

12. We express no opinion in this Essay regarding the correctness of this view. In 2000, Professor Liebman's study estimated that 66% of the public supports the death penalty, a statistic substantially lower than earlier estimates of 80% public support in 1994. *See* LIEBMAN ET AL., BROKEN SYSTEM PART I, *supra* note 2, at 1; James S. Liebman, et al., *Capital Attrition*: *Error Rates in Capital Cases 1973–1995*, 78 TEX. L. REV. 1839, 1839–40 (2000). Liebman also pointed out, however, that "[i]n the last several years, executions have risen steeply, reaching a fifty year high." *Id.* at 1839.

13. Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 111–24 (2001) (urging adoption of MODEL PENAL CODE § 20.6(f)).

14. *See, e.g.*, LIEBMAN ET AL., BROKEN SYSTEM PART II, *supra* note 2, at 397–99 (proposing that the death penalty should be limited to defendants "found beyond *any* doubt to have committed a capital crime"); Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 IND. L.J. 25, 27 (1996) (requiring the jury "to unanimously conclude that there is no lingering doubt before even proceeding to the death penalty phase"); Koosed, *supra* note 13 (proposing that the jury certify that it has found the defendant guilty beyond all doubt at the trial phase); Jon O. Newman, *Make Judges Certify Guilt in Capital Cases,* NEWSDAY, July 5, 2000, at A25 (advocating a similar certification proposal as ours); *see also* Robert D. Bartels, *Punishment and the Burden of Proof in Criminal Cases: A Modest Proposal*, 66 IOWA L. REV. 899, 914 (1981) (suggesting the jury should be given a range of possible penalties for the defendant resulting from conviction before it evaluates reasonable doubt); Erik

These articles, in various ways, assert that in capital cases the jury must determine the defendant's guilt by a higher standard of proof. We believe that the resurgence of interest in this area is not only laudable—it is necessary and feel the subject warrants additional attention.

In this Essay, we elaborate upon the meaning of the beyond all possible doubt standard, explain why and how it should be included in the jury's capital deliberation, and explore the possible effects of its integration. Although, for the sake of simplicity, we write this Essay in the context of the FDPA, we believe that this proposal has equal resonance in state capital prosecutions and sentencing statutes.

I. BACKGROUND: BURDEN OF PROOF AND THE REASONABLE DOUBT STANDARD

In the American judicial system, the requisite burden of proof in a particular adjudication correlates directly to the nature of the interest at stake. As Justice Harlan observed, "a standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."[15] Justice Harlan explained that while the phrases our legal system employs to describe various burdens "are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions."[16] Because the system is premised on the belief that different interests deserve different levels of protection, it relies on a number of tiers of proof to accommodate the diverse interests.

The American justice system uses four basic standards, listed in increasing degree of rigor: preponderance of the evidence;[17] clear and convincing evidence;[18] clear, unequivocal, and convincing evidence;[19]

Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002) (proposing a variable reasonable doubt standard that correlates the burden of proof to the severity of the penalty associated with an alleged crime). We discuss these proposals further in Part II.B *infra*.

15. *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring).

16. *Id*.

17. This is the applicable standard in civil cases. *See Winship*, 397 U.S. at 371–72 (Harlan, J., concurring); MCCORMICK ON EVIDENCE § 339 (John W. Strong ed., 5th ed. 1999) [hereinafter MCCORMICK].

18. One sees this standard in civil cases involving moral turpitude, *see, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 331–32 (1974) (libel), as well as in certain cases involving meaningful

and proof beyond a reasonable doubt.[20] Although judges do not typically instruct the jury on the quantitative value associated with each tier,[21] the legal community often attaches figures to these concepts. For example, Judge Weinstein, in *United States v. Fatico*,[22] estimated that preponderance of the evidence means some burden of proof over 50%. He suggested that the test for clear and convincing evidence should be 70% juror certainty; clear, unequivocal, and convincing evidence at least 80% juror certainty; and for proof beyond a reasonable doubt, 95% certainty.[23]

The premise behind these percentages is simple: the more important the interest, the more certainty required in the accuracy of the adjudication. "[T]he choice of the standard for a particular variety of adjudication does . . . reflect a very fundamental assessment of the comparative social costs of erroneous factual determinations."[24] In contrast to a civil case, where society may not be greatly concerned about which party bears the risk of erroneous factual determinations, in a criminal case, society generally believes that the government should bear the bulk of the burden of such errors. Indeed, many Americans, both attorneys and laymen, repeat the maxim that society would prefer to allow ten guilty persons go free rather than imprison one innocent. "In a criminal case," Justice Harlan instructed:

> [W]e do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . "Where one party has at stake an interest of transcendent value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party

individual nonpecuniary rights. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982) (child custody); Addington v. Texas, 441 U.S. 418 (1979) (commitment to a mental institution); *see also* MCCORMICK, *supra* note 17, § 340.

19. One sees this standard in deportation proceedings, denaturalization cases, and expatriation cases. *See, e.g.*, Woodby v. INS, 385 U.S. 276 (1966); Chaunt v. United States, 364 U.S. 350 (1960); Schneiderman v. United States, 320 U.S. 118 (1943); United States v. Fatico, 458 F. Supp. 388, 405 (E.D.N.Y. 1978) (discussing standard).

20. This is the applicable standard in criminal cases. *See, e.g.*, *Winship*, 397 U.S. at 364.

21. *See* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1192–99 (1979) (arguing that it is inappropriate to provide the jury with a quantitative assessment of proof beyond a reasonable doubt).

22. 458 F. Supp. 388, 403 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979).

23. *See id.* at 404–06. As we will discuss later, Judge Weinstein's estimate for proof beyond a reasonable doubt is significantly higher than estimates by prospective jurors given in empirical studies. Those studies suggest that jurors understand this concept to require between 51% and 92% certainty.

24. *Winship*, 397 U.S. at 370 (Harlan, J., concurring).

> the burden of persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt."[25]

Thus, the Supreme Court has held that the beyond a reasonable doubt standard is constitutionally mandated in criminal cases.[26] This standard is, thus, both functional and symbolic—it seeks to reduce the number of erroneous convictions in individual cases as well as to convey to society the gravity of the interest at stake.

Under the current federal capital punishment scheme, the jury applies the beyond a reasonable doubt standard a number of times. In both the guilt and penalty phases, the government must prove its case beyond a reasonable doubt.[27] At the penalty phase, this means that the government must prove the existence of a gateway factor[28] as well as any alleged statutory or nonstatutory aggravating factors[29] by

25. *Id.* at 372 (Harlan, J., concurring) (quoting Speiser v. Randall, 357 U.S. 513, 525–28 (1958) (Brennan, J.)).

26. *Id.* at 358. Although the Supreme Court characterized this decision as increasing the government's burden of proof, at least one historian has concluded that this standard, in fact, represented the converse—that is, a dilution in the burden of proof. *See* Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 513–15 (1975). Professor Morano has argued that prior to the inception of the beyond a reasonable doubt standard, the standard most often applied in criminal prosecutions was *beyond any doubt*, a concept akin to the one we advocate here. *Id.* at 511–12. For further discussion regarding the development and application of the reasonable doubt standard, see Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 981–90 (1993).

27. 18 U.S.C. §§ 3591(a)(2), 3593(c); *Winship*, 397 U.S. at 361–63. A model jury instruction for proof beyond a reasonable doubt reads:

> A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence. Proof beyond a reasonable doubt must be proof of such a convincing character that a reasonable person would rely and act upon it without hesitation in the most important matters of his or her own affairs. Yet proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS ¶ 9A.02 (2002). Several courts, most notably the Seventh Circuit and the Illinois state courts, have taken the position that no definition of the term "reasonable doubt" should be given to the jury. *See, e.g.*, United States v. Reynolds, 64 F.3d 292, 298 (7th Cir. 1995); United States v. Langer, 962 F.2d 592, 599–600 (7th Cir. 1992); United States v. Mitchell, 957 F.2d 465, 468 (7th Cir. 1992); United States v. Hall, 854 F.2d 1036, 1039 (7th Cir. 1988); People v. Malmenato, 150 N.E.2d 806 (Ill. 1958); People v. Robinson, 315 N.E.2d 95, 100 (Ill. App. Ct. 1974). If the jury has not been given a definition of reasonable doubt at the guilt phase of the case, the proposed instruction at the penalty phase contrasting the differences between "reasonable doubt" and "beyond all possible doubt" should be expanded.

28. Under the FDPA, these factors concern requisite intent. *See* 18 U.S.C. § 3591(a)(2)(A)–(D). For a more comprehensive discussion of the mechanics of the FDPA, see SAND ET AL., *supra* note 27, ¶ 9A.

29. 18 U.S.C. § 3593(c) provides, in part: "The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt."

this standard. (This standard is not applicable, however, should the jury reach the weighing process.)[30]

Although the Supreme Court has stated repeatedly and emphatically that death is different,[31] it has not required a unique tier of proof for capital cases. Rather, the Supreme Court and Congress appear to assume that the beyond a reasonable doubt standard is a necessary and sufficient standard for a capital case. The following section discusses why we believe that this understanding requires reconsideration.

II. ARGUMENT

Our argument is premised on the now familiar recitation of empirical data in two basic areas. First, we know that there is an astonishing error rate in capital convictions.[32] In 1991, the chair of the Senate Judiciary Committee commissioned Professor Liebman and a team of researchers to calculate the frequency of relief in federal capital habeas corpus cases.[33] The research team characterized the error in capital verdicts as having reached "*epidemic proportions*."[34] It determined, among other things, that between 1973 and 1995, "*the overall rate of prejudicial error in the American capital punishment system was 68%*."[35] In other words, it concluded, "courts found *serious, reversible error in nearly 7 of every 10 of the thousands of capital sentences that were fully reviewed during the period*."[36] Fur-

30. At the weighing stage, the jury must find that all of the statutory and nonstatutory aggravating factors sufficiently outweigh all the mitigating factors found to exist as to make a sentence of death appropriate. 18 U.S.C. § 3593(c). In the absence of any mitigating factor, the jury must find that the aggravating factors found to exist alone make a sentence of death appropriate. *Id.* Courts have held repeatedly that a court need not instruct the jury in a particular way as to how it should weigh the evidence. *See, e.g.*, Buchanan v. Angelone, 522 U.S. 269, 276 (1998); Tuilaepa v. California, 512 U.S. 967, 979–80 (1994); United States v. Chandler, 996 F.2d 1073, 1091–92 (11th Cir. 1993); United States v. Cooper, 91 F. Supp. 2d 90, 102 (D.D.C. 2000).

31. *See infra* note 44.

32. In *United States v. Church*, 217 F. Supp. 2d 700, 702 (W.D. Va. 2002), the court, in addressing the due process issue at play in *Quinones*, concluded that these studies only pertain to state cases. *See also* United State v. Denis, 246 F. Supp. 2d 1250, 1253 (S.D. Fla. 2002) (same). The frequency of errors may well be lower in the federal context, but we agree with Judge Rakoff that it is far too soon to draw any conclusions, and consequently believe we should likewise consider these studies in the federal context. *See* United States v. Quinones, 205 F. Supp. 2d 256, 266–67 (S.D.N.Y. 2002) (discussing why the state/federal distinction is not meaningful in the context of erroneous capital convictions).

33. LIEBMAN ET AL., BROKEN SYSTEM PART I, *supra* note 2, at 24.

34. *See id.* at 2.

35. *Id.*

36. *See id.* at i.

ther, the team found that while 82% of defendants "whose capital judgments were overturned by state post-conviction courts due to serious error were found to deserve a *sentence less than death* when the errors were cured on retrial," a significant percent "*were found to be innocent of the capital crime.*"[37] The researchers posited, "[t]he rising execution rate and a persistent error rate increase the likelihood of an increase in the incidence of wrongful executions."[38] (The writers estimated that at the time of publication in 2000, eighty-seven inmates had been released from death row as factually or legally innocent.)[39]

Second, we also recognize that reasonable doubt may represent less than 95% certainty in the minds of many jurors. Although judges ask jurors to be convinced that the defendant is guilty prior to convicting him, empirical data suggest that jurors may not apply as rigorous a standard as desired.[40] Professor Erik Lillquist, in evaluating numerous studies concerning empirical understandings of the reasonable doubt standard, determined, "the results of the surveys vary greatly: all the way from .92 certainty to .51."[41] Judge Newman, in his analysis of these studies, similarly concluded, "at the very least, the conclusion one draws from such studies is that the charge currently in use is ambiguous and open to widely disparate interpretation by jurors."[42] Further, there is reason to believe that this confidence of certainty may be even lower for capital juries. The Supreme Court has directed that the trial court should exclude any prospective juror who strongly opposes the death penalty, and therefore, the composition of a capital jury may be markedly different from a noncapital jury.[43]

37. *See id.* at ii.

38. Liebman et al., *supra* note 12, at 1859.

39. *Id.* at 1864 n.78.

40. The studies are numerous. *See, e.g.*, Reid Hastie, *Algebraic Models of Decision Process*, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION-MAKING 84 (Reid Hastie ed., 1993) (summarizing fifteen different empirical studies). We do not address any possible deficiencies in the beyond a reasonable doubt standard or the traditional accompanying instruction in the guilt determination of a criminal case in this Essay, although they may be numerous. *See, e.g.*, Victor v. Nebraska, 511 U.S. 1, 23-28 (1994) (Ginsburg, J., concurring) (exploring efficacy of reasonable doubt instructions).

41. Lillquist, *supra* note 14, at 112.

42. *See* Newman, *supra* note 26, at 985.

43. Under current Supreme Court precedent, the court must excuse for cause any prospective juror strongly opposed to capital punishment from sitting on the jury. *See, e.g.*, Morgan v. Illinois, 504 U.S. 719, 731–34 (1992); Lockhart v. McCree, 476 U.S. 162, 170 n.7 (1986); Wainwright v. Witt, 469 U.S. 412, 424 n.5 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968).

As discussed, the American justice system defines the burden of proof, or the acceptable rate of error, by reference to the nature and importance of the interest at stake in the adjudication. Plainly, life is the most fundamental interest ever imperiled by adjudication. We believe that the current risk of errant execution in the American capital punishment system is unacceptable and that society has a duty to try to reduce the frequency of such errors. Further, if raising the burden of requisite proof for imposition of the death penalty can, at least theoretically, reduce the number of erroneous jury verdicts, we believe this change should be made. In the oft-repeated words of the Supreme Court, death is different: as Chief Justice Burger instructed, "[i]n capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."[44]

We are not suggesting that the burden of proof should be altered in the *guilt* phase of a criminal trial; we direct our attention exclusively to its *penalty* phase. The premise is simple: because there is a fundamental difference between incarceration and execution by the state, there should be a concomitant distinction between the requisite standards of proof.[45] We, therefore, propose that the jury must

44. Ake v. Oklahoma, 470 U.S. 68, 87 (1985). The death-is-different theme pervades Supreme Court capital precedent. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 411 (1986) (plurality opinion) (Marshall, J.) ("In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. . . . This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different."); Gardner v. Florida:

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of society the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that a decision to impose a death sentence be, and appear to be, based on reason rather than caprice or emotion.

430 U.S. 349, 357–58 (1977); Woodson v. North Carolina:

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case

428 U.S. 280, 305 (1976).

45. While we advocate this change for functional reasons, the symbolic value should not be overlooked. *See* Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual and the Legal Process*, 84 HARV. L. REV. 1329, 1391–92 (1971):

> Far from being either barren or obsolete, much of what goes on in the trial of a lawsuit – particularly in a criminal case – is partly ceremonial or ritualistic in this deeply positive sense, and partly educational as well; procedure can serve a vital role as conventionalized communication among a trial's participants, and as something like a reminder to the community of the principles it holds important. The presumption of innocence, the rights to counsel and confrontation, the privilege against self-incrimination, and a variety of other trial rights, matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but also as affirmations of respect for

reevaluate the correctness of its guilt verdict before it may determine whether the death penalty should be imposed. Should the jury decline to find the defendant guilty beyond all possible doubt, the defendant will *not* go free. Rather, the judge will assume responsibility for imposition of a sentence other than death.[46] Should the jury find the defendant guilty beyond all possible doubt, the penalty phase will proceed unaltered.

A. What Does Absolute Certainty Mean?

The beyond all possible doubt standard asks the jury to be absolutely certain of its factual findings before it may proceed to the penalty phase; this means that the jury should consider any residual doubts—doubts that fall in the margin between reasonable doubt and absolute certainty. The notion that a gap exists between reasonable doubt and certainty is not controversial. Few, if any, would dispute that beyond a reasonable doubt does not represent certainty;[47] indeed, even the Supreme Court has recognized the distinction between proof beyond a reasonable doubt and proof beyond all doubt. In *Franklin v. Lynaugh*,[48] Justice O'Connor, in concurrence, defined "residual doubt" as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'"[49] A number of studies concerning capital juries likewise confirm that "lingering doubt" may be salient in jury deliberations.[50]

> the accused as a human being – affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are.

(footnotes omitted).

46. Should the jury not find the defendant guilty beyond all possible doubt, the judge will follow the same procedures as if the jury could not reach a verdict in its penalty phase deliberations and will impose a permissible sentence under the relevant statute. Convictions for most crimes under the FDPA carry a minimum mandatory life sentence. *See, e.g.*, 18 U.S.C. §§ 1111, 1114, 1116, 1201 (2001); *see also* Jones v. United States, 527 U.S. 373, 388 n.8, 414–15 (1999) (discussing principle in context of 18 U.S.C. § 1201). *But see* 18 U.S.C. § 924(j)(l); 21 U.S.C. § 848(e) (allowing for lesser penalties).

47. See *supra* note 27 for a model instruction on reasonable doubt.

48. 487 U.S. 164 (1988).

49. *Id.* at 188; *see also* Lockhart v. McCree, 476 U.S. 162, 181 (1986) ("The defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase.").

50. These studies address the use of "residual" or "lingering" doubt as a mitigating factor. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998); William S. Geimer & Jonathon Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 28 (1988); *see also* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision-Making*, 83 CORNELL L. REV. 1476, 1533–36 (1998) (concluding that "[b]y far, the strongest mitigating factor was 'lingering

Beyond all possible doubt is a subjective rather than an objective standard. This Essay does not stray from the collective legal and philosophical wisdom that it is impossible to determine the offense underlying the crime to an objective absolute certainty. "In no criminal case will the jury be able to determine 'the facts' to a certainty. Even in the most extreme case, there will be some possibility that all the witnesses are mistaken, that the defendant has confessed falsely, that photographs are doctored or otherwise misleading, and so forth."[51] We are neither suggesting that a trial can produce a flawless factual record nor that our proposal will *eliminate* erroneous death sentences. Our goal is more modest: we seek to reduce the error rate.

B. How Should the Heightened Standard of Proof Be Integrated Into the Capital Trial Scheme?

A number of legal theorists have addressed the need to bridge the margin between reasonable doubt and absolute certainty in capital cases. We see two basic types of proposals. On one side, we see proposals such as those of Professor Koosed, Professor Bradley, Judge Newman, and our own, that seek to modify the standard of proof only *after* the jury has found the defendant guilty beyond a reasonable doubt.[52] The goal of these proposals is to prohibit the imposition of a death sentence on convicted defendants unless the jury is absolutely certain of its verdict. On the other side, we find proposals that advocate changing the necessary standard of proof for the guilt verdict.[53] These proposals aim to limit the number of capital

doubt'"). For a lengthier discussion of these studies, see Koosed, *supra* note 13, at 54–61. Koosed concludes that "the primacy of lingering doubt in life-sentencing decisions is universal." *Id*. at 60.

51. Bartels, *supra* note 14, at 914; *see also In re* Winship, 397 U.S. 358, 370 (1970) (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. The intensity of disbelief – the degree to which a fact-finder is convinced that a given act actually occurred – can, of course, vary."); United States v. Hall, 854 F.2d 1036, 1044 (7th Cir. 1988) (Posner, J., concurring) ("[C]omplete certainty – the certainty of such propositions as that cats do not grow on trees and that I have never set foot on Mars – is never attainable with respect to the question whether a criminal defendant is guilty of the crime for which he is being tried. . . .").

52. *See* Bradley, *supra* note 14, at 27; Koosed, *supra* note 13; Newman, *supra* note 14, at A25.

53. *See, e.g.*, Bartels, *supra* note 14, (variable reasonable doubt theory); Lillquist, *supra* note 14, at 95 n.21 (According to Lillquist, the jury should apply a variable standard of reasonable doubt according to the severity of the crime charged; a criminal traffic violation, therefore, would carry a lower standard for beyond a reasonable doubt than that associated with

trials brought ex ante rather than to eliminate the imposition of death sentences ex post. Such proposals, thus, increase the burden on the government in order to suppress its desire to pursue capital punishment.

The stakes under these latter proposals are high for the government. If the government determines that a defendant is guilty of crimes serious enough to deserve a death sentence, then it must also consider the possibility that its efforts to remove the individual from society will be less successful under a more rigorous standard. The apparent goal of such a proposal is to reduce sharply the number of capital cases brought by the government. In and of itself, such an outcome may be attractive. (The Liebman study demonstrates that the states, at the very least, bring questionable capital cases with alarming frequency.) Nevertheless, we feel this proposal represents too extreme a frustration of the desire to have a functioning capital punishment system,[54] potentially rendering a capital prosecution a prohibitive choice for the government.

We freely acknowledge that changing the burden of proof at the guilt phase allows for a degree of consistency unlikely under our proposal. A change in the burden of proof at the guilt phase could prevent that uncomfortable—but essential and very human—tension felt by a jury when it is convinced that there is sufficient proof to imprison a defendant for life, but not enough proof to eliminate its doubts (however small) and allow it, therefore, to consider the death penalty.[55] Nevertheless, we believe our proposal to be the more prudent course given the current capital sentencing procedures.

Our proposal seeks to navigate between the twin needs to incarcerate those individuals found by juries to be culpable of serious crimes and to protect many others from wrongful execution. While our proposal is in some ways quite similar to those of Koosed, Bradley, and Newman, it does differ from their proposals in a number of respects.

a capital offense.); *see also* LIEBMAN ET AL., BROKEN SYSTEM PART II, *supra* note 2, at 397–99. (While it is not entirely clear if the Liebman study advocates a different standard of proof as to guilt or a different standard as to the penalty, the study suggests the former.)

54. *See supra* note 2. Again, we express no opinion in this Essay regarding the correctness of this view.

55. We discuss this tension further *infra* Part III.

For example, Koosed asserts that the jury should consider the degree of its confidence in a guilt verdict initially in the trial phase[56] because studies show jurors often consider the death penalty prematurely during the guilt phase determination. Under such circumstances, Koosed observes, a jury may agree to convict a defendant in order to ward off the death penalty.[57] To reduce this risk, Koosed proposes presenting the concept of proof beyond all doubt to the jury during the guilt phase, but without explanation. She recommends that the court give the jury three choices at the conclusion of the guilt phase: not guilty, guilty beyond a reasonable doubt, and guilty beyond all doubt.[58] She correctly suggests that the court need not explain the implications or import of this question to the jury, but adds, curiously, that the inclusion of this question, in and of itself, will inform jurors that they should not "chastise[]" one another for considering doubts as "irrelevant or unworthy or contrary to morality."[59] We are not convinced that the addition of this standard without comment will have the intended effect. While we recognize that our proposal may also confuse the jury's understanding of the beyond a reasonable doubt standard, we believe, nevertheless, that this risk intensifies if the reasonable doubt and beyond any possible doubt standards are juxtaposed at the *guilt* phase.

Koosed also proposes that each juror should evaluate the question of proof beyond all doubt alone; therefore, the jury need not reach a unanimous decision.[60] Koosed believes that this proposal will ensure that each juror has time for quiet reflection. While such introspection is, to be sure, desirable, openness among jurors has long been a hallmark of jury deliberation, and we do not believe deviation from this practice is warranted in this instance.

Professor Bradley's proposal is likewise similar to ours: Bradley suggests that the court should not instruct the jury about the heightened standard of proof until after the guilt verdict. He, however,

56. Koosed, *supra* note 13, at 122–24. If necessary, Koosed suggests the jury should make this determination again at the outset of the penalty phase. Asking the same jury to consider an identical question twice does not appear to us to be the ideal solution. If the jury makes inconsistent findings to an identical question, what then? Which determination should the court credit?

57. Bowers et al., *supra* note 50, at 1496 (concluding that "some who may be reluctant to agree to a capital verdict may agree to enter a guilty verdict in exchange for the agreement of other jurors not to impose the death penalty").

58. Koosed, *supra* note 13, at 125.

59. *Id.* at 124.

60. *Id*. at 125.

limits the number of cases where instruction on a heightened standard of proof is permissible. According to Bradley, courts should instruct on a heightened standard *only* when the defendant can offer defenses that could negate his "identity as the murderer."[61] Thus, Bradley suggests an instruction on this standard is necessary when the defendant can identify an alibi or claim mistaken identity. Conversely, Bradley submits where the defenses involve issues not directly bearing on culpability, such as "aggravating factors, including prior convictions, at the penalty stage," instruction on the heightened standard of proof is not appropriate.[62] We do not feel that this additional layer of complexity is necessary.

The significant difference between our proposal and that of Judge Newman is the appropriate arbiter. Judge Newman wrote his brief piece prior to the Supreme Court's decision in *Apprendi v. New Jersey*.[63] In *Apprendi*, the Court held that the jury, rather than the judge, must decide if the government has proven beyond a reasonable doubt any fact that increases the penalty for a crime beyond a set statutory maximum, other than a fact of a prior conviction. Like Koosed, we conclude that under *Apprendi*, the jury, rather than the judge, must make this determination.[64]

Thus, we propose that the jury should be instructed accordingly. At the outset of the penalty phase, the court should give the jury the following charge and special verdict form:

> Because the death penalty presents a different form of punishment than a [long or] life sentence in prison, our system provides a further protection to ensure that this penalty is not imposed on a defendant unless you are *absolutely certain* of his/her guilt. Therefore, before we hear the submissions of the parties for the penalty phase, you must advise us of the strength of your belief that the defendant is, in fact, guilty as you have found.
>
> At the guilt phase, you[65] found that the defendant is guilty of [specify offense] beyond a reasonable doubt. In so finding, you unani-

61. Bradley, *supra* note 14, at 27.

62. *Id.*

63. 530 U.S. 466 (2000).

64. The FDPA and a number of states permit the judge rather than the jury to determine guilt. *See, e.g.*, 18 U.S.C. 3593(e) (2002) (contemplating that the court may determine whether the defendant shall receive a death sentence); COLO. REV. STAT. § 18-1.3-1302(1)(a) (2003) (same); FLA. STAT. ANN. ch. 921.142(2) (2003) (same). In these instances, the judge should engage in the beyond all possible doubt inquiry.

65. This language assumes that the composition of the jury at the penalty phase is identical to that of the jury at the guilt phase. If for any reason there are jurors at the penalty phase who did not participate in the guilt deliberation (e.g., if alternate jurors who were excused during deliberations as to guilt are substituted for jurors who become unavailable for the penalty

> mously concluded that the proof was such that a reasonable person would rely and act upon it without hesitation in the most important matters of his or her own affairs. We now ask whether you also find that defendant's guilt as to this count has been proven beyond all possible doubt. By proof beyond all possible doubt, we mean proof to an absolute certainty. It means that you do not harbor any lingering or residual doubts whatsoever as to the defendant's guilt.
>
> Proof beyond all possible doubt is, therefore, a more rigorous and higher standard than proof beyond a reasonable doubt. As I instructed you,[66] to find proof beyond a reasonable doubt, you must believe that the evidence presented by the government is of such a character that a reasonable person would rely and act upon it without hesitation in the most important matters of his or her own affairs. Yet, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. By contrast, proof beyond all possible doubt is proof of such a convincing nature that you have no doubt whatsoever as to the defendant's guilt.
>
> Please indicate your findings on the form below:[67]
>
> We unanimously find that defendant's guilt as to Count ____ has been proven beyond all possible doubt.
>
> We unanimously find that defendant's guilt as to Count ____ has been proven beyond a reasonable doubt but not beyond all possible doubt.
>
> If you do not find that the defendant's guilt has been proven beyond all possible doubt, [your deliberations are over and I will impose a sentence of life in prison] or [then you will consider whether the defendant should receive a life sentence or some lesser authorized sentence].

As this instruction explains, if the jury believes that the defendant has been proven guilty beyond all possible doubt, the penalty phase will continue unaltered. If the jury, however, fails to find guilt beyond all possible doubt, it cannot consider the death penalty. In cases where the latter occurs and only two sentences are available to the defendant—either death or life in prison—the jury's task is complete. The judge will impose a life sentence. As no other options

phase), other language, advising that the issue of guilt beyond a reasonable doubt has been conclusively determined by the jury that deliberated as to guilt, may be appropriate.

66. For those jurisdictions in which the jury is not instructed on the definition of reasonable doubt, *see supra* note 27.

67. This proposal further assumes that counsel will not sum up to the jury on the question whether the evidence does or does not support a finding of guilt beyond all possible doubt. The decision whether or not to provide counsel with an opportunity to sum up on this question is a matter best left to the discretion of the trial judge in light of the circumstances of the case. The court should consider such factors as length and complexity of the trial, length of jury deliberations as to guilt, etc. If counsel is allowed to sum up on this question, summation should occur after the court gives the foregoing instruction and before it distributes the form.

remain, there is no sense to continue the penalty phase proceedings. In contrast, in cases under the FDPA where there are three sentencing options—death, life in prison, or a lesser sentence—the penalty phase will continue, but with narrower possibilities. While the jury will no longer consider the death penalty, it will deliberate as to which sentence—life or a lesser sentence—should be imposed.[68]

If the jury cannot reach a unanimous decision with respect to the certainty of the defendant's guilt, what happens then? Our proposal requires unanimity as to the higher burden of proof. Conceivably, one could sanction a system pursuant to which a death sentence could be imposed if the jury was unanimous as to guilt beyond a reasonable doubt and agreed by a majority or two-thirds vote that the higher burden of proof had also been met. We think that such a system would add complexity to the process and undermine its underlying purposes.[69]

Likewise, what are the implications for appellate review? We submit that appellate courts should give little weight to a jury's response to the beyond all possible doubt inquiry for purposes of a harmless error review under *Chapman v. California*.[70] Therefore, our proposal should not be used as a "get-out-of-jail free" pass if the evidence supports a guilt finding beyond a reasonable doubt.

III. DEFICIENCIES AND DRAWBACKS

If the Supreme Court and Congress continue to tolerate some level of error in our capital system, we are aware of several problems with our proposal. One problem is gauging its success. How do we determine if it results in a reduction in the number of erroneous death sentences? How do we even engage in this inquiry without putting an intolerable number of innocent defendants in peril? As Professor Liebman's team discovered, it takes years to ferret out errors.

68. Under the FDPA, a jury recommendation of a lesser sentence is not dispositive. Although the judge may not impose a death sentence, the judge retains discretion to sentence the defendant to life in prison. *See* 18 U.S.C. § 3594 (2001).

69. Such a position is consistent with FDPA precedent. In *Jones v. United States*, 527 U.S. 373 (1999), the Supreme Court held that where the jury is deadlocked as to the appropriate sentence in the penalty phase, the jury is not deemed "hung"; rather, the judge assumes responsibility for sentencing.

70. 368 U.S. 18 (1967). In *Chapman*, the Supreme Court held that for a constitutional error at trial to be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

The other problems are related to the mechanics of implementation. First, it is unclear how this proposal would affect jury dynamics. At worst, jurors could trade off a guilty verdict in anticipation of averting the death penalty at the next determination. The court's silence as to the different standards until the penalty phase could mitigate this possibility in part, a practice we recommend in our proposed charge. At some point, if applied regularly, however, the beyond all possible doubt standard would become part of the legal vernacular and would be known by more sophisticated jurors. While this problem is inherent in any bifurcated capital scheme and, arguably, not unique to our proposal, we are aware of the risk of certain adverse consequences. Nevertheless, we believe that the benefits outweigh this speculative risk.

Related to this problem is the concern that our proposal will have the unintended effect of diluting or muddling the jury's understanding of proof beyond a reasonable doubt at the guilt phase of the capital trial and, indeed, in criminal trials in general. Former Illinois Governor Ryan's Commission on Capital Punishment expressed considerable anxiety about allowing the jury to entertain the concept of "lingering doubt" in any capacity during the capital case. The Commission concluded that while it was "sensitive to the notion that the most severe penalty available should not be meted out in cases where there is some bona fide doubt remaining about whether the defendant committed the underlying crime" that lingering doubt, even when submitted to the jury as only a mitigating factor, would be "completely contradictory" to principles established at the guilt phase of the trial.[71]

While acknowledging our proposal's identifiable potential weaknesses, we remain convinced by its sagacity and less concerned about the possible dilution to the beyond a reasonable doubt standard that it could theoretically engender. After all, few legal scholars and practitioners would assert that the beyond a reasonable doubt standard dilutes the clear and convincing evidence standard. Rather, they recognize alike that the standards simply represent efforts to address

71. *See* www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html. Instead, the Commission recommended, inter alia, that the court should: (1) make clear to the jury that it is never required to impose the death penalty; (2) indicate whether it concurs with the jury's determination concerning the appropriateness of the death penalty and override any jury decision in favor of death that it deems unfair; and (3) preclude imposition of the death penalty on defendants whose convictions are based solely on the testimony of in-custody informants, accomplices, or single eyewitnesses. *Id.* at 151–63.

different issues and different social utilities. As the Supreme Court has stated on numerous occasions, death penalty cases are different, and, therefore, we believe that a concomitant different level of proof is appropriate.

Others may attack the internal logic of our proposal. It could be argued, as the majority did in *Herrera v. Collins*, that it is "a rather strange jurisprudence, in these circumstances, which held that under our Constitution [a person] cannot be executed, but that he could spend the rest of his life in prison."[72] Under circumstances of incarceration, however, an inmate still has recourse to the appellate system and remains capable, should new evidence arise, of seeking judicial review, whereas plainly this door is closed after imposition of the death penalty.

Finally, it could be argued that a jury that finds a defendant guilty beyond a reasonable doubt could be reluctant to acknowledge any uncertainties underlying its finding. Judges often instruct jurors not to speak among themselves prior to their deliberations because of the conventional wisdom that once someone utters a viewpoint, he is more inclined to be wedded to it. Similarly, it may be argued that once a jury finds a defendant guilty beyond a reasonable doubt, it will be loath to undermine that verdict by acknowledging that it had not first eliminated all possible doubt. Whether juries would reach discordant findings at these stages remains to be seen.

CONCLUSION

We believe that our proposal can reduce the risk that innocent persons will be sentenced to death. Questions persist: How great a risk will remain? Will it be at a level that our jurisprudence can countenance? These are open questions.

At the very least, we must continue to ask them.

72. Herrera v. Collins, 506 U.S. 390, 405 (1993).