

Searching for Truth in the Criminal Justice System

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The Supreme Court of the United States noted in a 1966 case that “The basic purpose of a trial is the determination of truth.”¹ Is this statement correct? If it is — and I believe it is — how close do we come to finding the truth? There is, of course, no such thing as absolute truth in human affairs or, indeed, even in science. So truth is always a matter of probability. Moreover, the criminal justice system for various policy reasons places some barriers and obstacles in the search for truth. To what extent are they justified? This article looks at these questions.

The article is divided into a number of sections. The first looks at one specific bar to prosecution, double jeopardy, which prevents a court from holding a hearing. The second looks at some rules of evidence that prevent the parties from introducing relevant evidence. The next looks in some detail at the history of the well-known standard of proof in the Anglo-American system of criminal justice — proof beyond a reasonable doubt. Further sections examine some specific reasonable doubt issues in Canada, followed by an historical section on legal fact finding and its influence on other disciplines. Finally, an attempt is made in the conclusion to set out a statement of the purpose of the criminal process.

Probability runs through the whole of the criminal justice system — from arrest to parole. In arrest, the standard for a police officer is

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1. *Tehan v. U.S.*, 382 U.S. 406 (1966). That does not mean that all the participants are searching for the truth. Alan Dershowitz makes this point in his book *Reasonable Doubts* (1996), at p. 166: “When defense attorneys represent guilty clients — as most do, most of the time — their responsibility is to try, by all fair and ethical means, to prevent the truth about their client’s guilt from emerging.”

“reasonable grounds” to believe that the person arrested “has committed or is about to commit an indictable offence.”² An accused can be kept in custody without bail before trial if, amongst other grounds, there is “any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice.”³ A judge holding a preliminary hearing requires “sufficient evidence”⁴ for a committal for trial, which has been interpreted as “admissible evidence which could, if it were believed, result in a conviction.”⁵ A positive defence, such as self defence or provocation, does not have to be left to the jury by the trial judge unless it meets what is called the “air of reality” test.⁶ The jury’s verdict uses the standard of “proof beyond a reasonable doubt.” And so on throughout the criminal process.⁷ In this article I am going to concentrate on the trial itself.

Bars to Prosecution

For my doctoral thesis — started over 50 years ago — I planned on looking at a range of issues that prevent a court from adjudicating on a matter. These include diplomatic immunity; time limitations; territorial jurisdiction (how far the criminal law extends outside a country); and double jeopardy. All of these necessarily prevent the court from getting at the truth. I started my doctoral research with double jeopardy and because of the complexity of that issue, never went on to study the other topics.⁸

2. *Criminal Code*, s. 495(1)(a).

3. *Criminal Code*, s. 515(10)(b). For the legislative background to this provision, see Martin Friedland, *My Life in Crime and other Academic Adventures* (University of Toronto Press, 2007), at p. 103.

4. *Criminal Code*, s. 548(1).

5. *R. v. Arcuri*, [2001] 2 S.C.R. 828, 157 C.C.C. (3d) 21, 44 C.R. (5th) 213 (S.C.C.), per McLachlin C.J. for the court, at para. 21.

6. *R. v. Cinous*, [2002] 2 S.C.R. 3, 162 C.C.C. (3d) 129, 49 C.R. (5th) 209 (S.C.C.).

7. Appeals involve other tests. See, for example, the test used by the Supreme Court of Canada in *R. v. Trochym*, [2007] 1 S.C.R. 239, 216 C.C.C. (3d) 225, 43 C.R. (6th) 217 (S.C.C.), at paras. 81-3, where on an appeal from a conviction the court found that inadmissible evidence was introduced at trial and then examined whether it should order a new trial. An appeal court can dismiss an appeal under s. 686 of the *Criminal Code* if there is “no substantial wrong or miscarriage of justice.” The court held that to do so the admissible evidence had to be “so overwhelming that a conviction is inevitable, or would invariably result.” “This standard,” the court stated, “should not be equated with the ordinary standard in a criminal trial of proof beyond a reasonable doubt.” It is, the court added, a “higher standard appropriate to appellate review.”

Put simply, the rule against double jeopardy prevents an accused from being tried again for the same offence. It obviously prevents the tribunal from getting at the truth. There are good policy reasons for the rule. As Justice Hugo Black stated for the Supreme Court of the United States in a 1957 case:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty.⁹

It is a fundamental rule. The second sentences of my book, *Double Jeopardy*, states: “No other procedural doctrine is more fundamental or all-pervasive.”¹⁰ There are a number of sections of the Canadian *Criminal Code* relating to the rule¹¹ and it is now in the *Canadian Charter of Rights and Freedoms*. Section 11(h) of the *Charter* states that “Any person charged with an offence has the right . . . if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.”

There is a long history of the rule. In 355 BC, Demosthenes wrote that “the laws forbid the same man to be tried twice on the same issue.”¹² In England, the controversy in 1176 between Henry II and Thomas à Becket, the Archbishop of Canterbury, was the crucial event in the development of the rule.¹³ Henry wanted to punish clerics who had already been convicted by the ecclesiastical courts. Thomas à Becket — picture Peter O’Toole in the movie — said that the King’s justices did not have jurisdiction to do so and, moreover, the clerics had already been tried and punished.

The church cited early Christian doctrines, such as St. Jerome’s commentary in 391 AD on the prophet Nahum: “For God judges not twice for the same offence.” The passage in Nahum 1:9 states that God would not punish the wicked city of Nineveh a second time. I am not convinced, however, that it was for “due process” reasons that Nineveh would not be punished again, but rather because of the

8. Friedland, *My Life in Crime*, chapters 3 and 5. Martin Friedland, *Double Jeopardy* (Oxford, 1969).

9. *Green v. U.S.*, 355 U.S. 184 (1957), at pp. 187-8.

10. Friedland, *Double Jeopardy*, *supra*, footnote 8, at p. 3.

11. *Criminal Code*, ss. 607-610.

12. Friedland, *Double Jeopardy*, *supra*, footnote 8, at vii and p. 16.

13. *Ibid.*, at 5 et seq.

harshness of the initial punishment, as the various translations of the passage suggest. The King James translation, for example, reads: "But with an overrunning flood he will make an utter end of the place thereof ... affliction shall not rise up the second time." We all know the result. Becket was murdered in the cathedral. As a result, Henry II — Richard Burton — backed off. Double jeopardy slowly became part of the English criminal law.¹⁴ We will come back to "benefit of clergy" later in this paper. It should be added that in spite the importance of double jeopardy in the dispute, neither T.S. Eliot in *Murder in the Cathedral* nor Jean Anouilh in *Becket* mentions the double jeopardy point. Nor do the words appear in the 1964 movie *Becket*; nevertheless, it won an Academy Award for its screenplay. Perhaps the phrase is on the cutting room floor.

An interesting and important double jeopardy issue has recently arisen in England. A 2003 English statute¹⁵ now permits a retrial of an *acquitted* accused in certain circumstances.¹⁶ It came about because of the Billy Dunlop case. Dunlop had been acquitted of murder in 1989.¹⁷ He later confessed his guilt to a prison officer when he was confined for another offence and was convicted of perjury for his evidence at the murder trial. Dunlop could not be charged again with murder because of double jeopardy. The victim's mother lobbied to have the law changed. It was changed — and the law was made retroactive. Dunlop was tried again and convicted of murder.¹⁸

The English legislation is limited to a list of serious offences, requires "new and compelling evidence" and can only be ordered by the Court of Appeal which has to determine that it is "in the interests of justice."¹⁹ Similar legislation can now be found in Australia, New Zealand, and other jurisdictions.²⁰ There have only been a handful of

14. Friedland, *Double Jeopardy*, *supra*, footnote 8, at 326 et seq. English law took the concept to great lengths. After the introduction of appeals in criminal cases in 1907, the English court of appeal could not order a new trial when a *conviction* was quashed. Now it can. U.S. and Canada have always allowed a new trial in such cases. The U.S. has not allowed an appeal from an acquittal, but Canada has since 1930 on "a question of law alone." *Criminal Code* 676(1)(a).

15. *Criminal Justice Act 2003*, part 10.

16. Friedland, *My Life in Crime*, *supra*, footnote 8, at p. 85 et seq.

17. The acquittal arose after the Crown offered no evidence as a result of two hung juries, the practice in England, although not necessarily so in Canada: BBC News, October 6, 2006. Such an acquittal is in theory the same as an acquittal on the merits, but may well have influenced the passage of the legislation and the decision to retry Dunlop.

18. *Ibid.*, at p. 86.

19. *Ibid.*

20. See New Zealand's *Criminal Procedure Act 2011*; Scotland's *Double Jeopardy*

successful retrials in England in the decade since the law was enacted — in particular, Billy Dunlop and the killers of Stephen Lawrence, a Black youth, whose death led to a public inquiry, which had suggested the possibility of a retrial in certain cases.²¹

Should Canada adopt the English rule? I do not think it is right to do so, even though it is understandable why the law was enacted. The law in Canada already allows a conviction for perjury if the accused lies under oath at his or her trial.²² Moreover, since 1930 the Crown in Canada can appeal an acquittal if an error of law, but not of fact, occurred at the first trial.²³ But the English legislation deals with facts, not law. The English legislation will, however, have the undesirable effect of creating continuing anxiety for all persons acquitted of serious offences. They will always be vulnerable to a future application for a retrial based on new evidence. The new evidence may, in fact, be problematic, such as an alleged confession, a possible new but unreliable eyewitness, or planted or fabricated real evidence. Even DNA evidence can be planted. Persons acquitted in England will, as stated by Justice Hugo Black . . . have to “live in a continuing state of anxiety and insecurity.”

Canada should not follow England’s lead. Indeed, it is doubtful that the Canadian *Charter* would permit legislation similar to that in England.²⁴ The word “finally” in the Canadian *Charter* permits an appeal from an acquittal in certain cases,²⁵ but I doubt if it could be stretched to cover this type of case. I do, however, recommend that it would be desirable for Canada to adopt the 1996 English legislation to deal with “tainted” acquittals, such as the notorious British

(*Scotland*) Act 2011; and the latest Australian state to enact legislation, *Victoria’s Criminal Procedure Amendment (Double Jeopardy and Other Matters)* Act 2011.

21. See Joshua Rozenberg, “Change in double jeopardy law led to . . . retrial,” *The Guardian* 3 January 2012. The accused were convicted of murder and sentenced to imprisonment, sentences that were upheld on appeal: BBC News, 10 May 2013. Other retrials that resulted in convictions include the conviction in 2010 of Mark Weston for murder in 1995 (see the *Guardian*, December 13, 2010), and the 2009 conviction of Mario Celair for murder committed in 2001 (the *Guardian* July 3, 2009).
22. *R. v. Gushue*, [1980] 1 S.C.R. 798, 50 C.C.C. (2d) 417, 16 C.R. (3d) 39 (S.C.C.).
23. Friedland, *My Life in Crime*, *supra*, footnote 8, at p. 85, where I argue that Canada should follow the Australian law and not order new trials in such cases unless “the error committed by the prosecutor or the judge could be said with some degree of certainty to be the reason for the verdict.”
24. Friedland, *My Life in Crime*, *supra*, footnote 8, at p. 86.
25. *R. v. Century 21 Ramos Realty Inc.* (1987), 32 C.C.C. (3d) 353, 56 C.R. (3d) 150, 37 D.L.R. (4th) 649 (S.C.C.).

Columbia case of Peter Gill, in which Gill had a sexual affair with one of the jurors during the trial and was acquitted of murder.²⁶

I am reasonably certain that the American courts would not permit a second trial in such a case — if the second prosecution was by the same jurisdiction. The double jeopardy rule in the United States does not even permit an appeal from an acquittal on a matter of law.²⁷ Unfortunately, however, the United States Supreme Court permits state prosecutions after a federal prosecution and vice versa on what is called the “two sovereignty” rule.²⁸ There is a U.S. military case going through the courts now where the accused is being tried for murder by a military tribunal after a jury in a state prosecution acquitted him. He has now been sentenced to death²⁹ and the United States Supreme Court has refused leave to appeal.³⁰

Rules of Evidence

Some of the rules of evidence also hinder the search for the truth. Again, they were developed for policy reasons. The question is whether they are desirable. I will deal briefly with some of them.

Hearsay. The rule against hearsay evidence was designed to get at the best evidence available — that is, the persons who made the hearsay statement, who would then be subject to cross-examination and under oath or affirmation and subject to a later perjury charge. There were and are, however, many specific exceptions. If a person, for example, had been shot and was dying and tells the police who show up at the scene that “George shot me,” courts have allowed this hearsay evidence to be introduced by the Crown under what is called the “dying declaration” exception.³¹ The courts have recently been expanding the use of hearsay. In a 1990 case, the Supreme Court of Canada decided that courts could admit hearsay evidence in cases

26. Friedland, *My Life in Crime*, *supra*, footnote 8, at p. 87.

27. See *Rodrigues v. Hawaii* 469 U.S. 1078 (1984), at p. 1079: the accused cannot be retried even though “the acquittal was based upon an egregiously erroneous foundation.” Some articles in U.S. legal journals have argued in favour of the new English rule: see, e.g., Kyden Creekpau, “What’s Wrong With A Little More Double Jeopardy?” (2007), 44 *American Criminal Law Review* 1179.

28. Friedland, *Double Jeopardy*, *supra*, footnote 8, at p. 422 et seq.

29. See Nicholas Schmidle, “Three Trials for Murder,” *The New Yorker*, November 14, 2011 and “An Execution Draws Closer,” *The New Yorker* digital, February 3, 2012.

30. *Timothy Hennis v. Frank Hemlick*, January 17, 2012. At the time of writing he remains on death row.

31. David Paciocco and Lee Stuesser, *The Law of Evidence*, 6th edition, (Irwin, 2011), at pp. 164-166.

where the evidence is both necessary and reliable.³² This is good, but it would be far better — as I have argued elsewhere — if the reform of the rules of evidence were done with the assistance of the judiciary through the legislative process, as is done for the federal rules of evidence in the United States.³³ This would make the rules more certain and more accessible to lawyers and the public and make the trial process less confrontational, more efficient, and less costly.

Character Evidence.³⁴ Character evidence is normally relevant but unfair because it tends to lower the standard of proof. As Justice Ian Binnie stated in a 2002 Supreme Court decision: “the Crown is not entitled to ease its burden by stigmatizing the accused as a bad person.”³⁵ If admitted, jurors might say: “we don’t care if he’s guilty or innocent, he deserves to be behind bars.” Previous convictions? If the accused does not testify, previous convictions cannot be introduced into evidence unless the evidence fits into what is called “similar fact evidence.”³⁶ It is different if the accused testifies. Section 12 of the *Canada Evidence Act* states that “a witness may be questioned as to whether the witness has been convicted of any offence . . .”³⁸ The accused entering the witness box is a witness and so the introduction of such evidence was automatic until the Supreme Court’s *Corbett* decision in 1988, which now rightly gives the trial judge discretion as to whether the evidence should be introduced.³⁸

Privilege.³⁹ Another obvious example of a rule that excludes

32. *R. v. Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92, 79 C.R. (3d) 1 (S.C.C.), per McLachlin J. See to the same effect, *R. v. Starr*, [2000] 2 S.C.R. 144, 147 C.C.C. (3d) 449, 36 C.R. (5th) 1 (S.C.C.), per Iacobucci J., and *R. v. Khelawon*, [2006] 2 S.C.R. 787, 215 C.C.C. (3d) 161, 42 C.R. (6th) 1 (S.C.C.), per Charron J.

33. Friedland, “Developing the Law of Evidence: a Proposal,” (2011), 16 Canadian Criminal Law Review 37.

34. Paciocco and Stuesser, chapter 3. Protection against the use of bad character evidence made its appearance with the growing use of defence counsel, as will be discussed below. See John Langbein, *The Origins of Adversary Criminal Trial* (Oxford, 2003), at p. 190 et seq.

35. *R. v. Handy*, [2002] 2 S.C.R. 908, 164 C.C.C. (3d) 481, 1 C.R. (6th) 203 (S.C.C.), at para. 72.

36. Paciocco and Stuesser, *supra*, footnote 34, at pp. 79-81. England now allows previous convictions to be introduced in certain cases (if they establish a defendant’s “propensity to commit offences of the kind with which he is charged” or are “of the same description” or “of the same category”) whether or not the accused testifies: see the *Criminal Justice Act 2003*, ss. 101 and 103.

38. See Paciocco and Stuesser, *supra*, footnote 34, at pp. 447-451.

38. *R. v. Corbett*, [1988] 1 S.C.R. 670, 41 C.C.C. (3d) 385, 64 C.R. (3d) 1 (S.C.C.).

39. Paciocco and Stuesser, *supra*, footnote 37, chapter 7.

relevant evidence is solicitor-client privilege. If the rule did not exist, persons would be reluctant to discuss issues with their lawyers. A recent decision held that even the government tax collectors cannot overcome the solicitor-client privilege.⁴⁰ There are a number of exceptions, such as when the otherwise privileged evidence could raise a reasonable doubt of the accused's guilt.⁴¹ Evidence rules do not have to be symmetrical.

There is also a marital privilege⁴² designed to protect communications made during a marriage. A number of jurisdictions have eliminated this privilege,⁴³ but it is still applicable in Canada. Should it? Another privilege protects cabinet documents.⁴⁴ In other cases — such as priest and penitent, journalist and source, psychiatrist and patient there is no blanket protection. Courts decide these issues on a case-by-case basis.⁴⁵

Illegally Obtained Real Evidence. Prior to the *Charter*, the courts admitted illegally obtained *real* evidence, even though it was obtained as a result of an excluded confession by the accused. U.S. courts exclude such evidence.⁴⁶ The Supreme Court of Canada held in the 1970 *R. v. Wray* case,⁴⁷ for example, that Wray's confession — he was charged with murder — was improperly obtained, but held that the rifle that the police were able to find as a result of the confession was admissible. The confession had been excluded under the common law rule that excluded involuntary confessions⁴⁸ because they are often

40. *British Columbia (Auditor General) v. British Columbia (Ministry of Attorney General)*, [2013] 4 W.W.R. 599, 40 B.C.L.R. (5th) 390, 2013 CarswellBC 180 (B.C. S.C.).

41. *R. v. Brown*, [2002] 2 S.C.R. 185, 162 C.C.C. (3d) 257, 50 C.R. (5th) 1 (S.C.C.); *R. v. McClure*, [2001] 1 S.C.R. 445, 151 C.C.C. (3d) 321, 40 C.R. (5th) 1 (S.C.C.).

42. Paciocco and Stuesser, *supra*, footnote 31, at pp. 245-247. See *R. v. Couture*, [2007] 2 S.C.R. 517, (*sub nom.* *R. v. C. (D.R.)*) 220 C.C.C. (3d) 289, 47 C.R. (6th) 1 (S.C.C.).

43. The privilege was abolished in England in 1984: *Police and Criminal Evidence Act 1984* (U.K.), c. 60, s. 80(9).

44. Paciocco and Stuesser, *supra*, footnote 31, at pp. 278-9.

45. *R. v. Fosty*, (*sub nom.* *R. v. Gruenke*) [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289, 8 C.R. (4th) 368 (S.C.C.); *R. v. National Post*, [2010] 1 S.C.R. 477, (*sub nom.* *National Post v. Canada*) 254 C.C.C. (3d) 469, 74 C.R. (6th) 1 (S.C.C.).

46. See *Weeks v. United States*, 58 L.Ed. 652, 35 S.Ct. 341, 232 U.S. 383 (1914); *Mapp v. Ohio*, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 367 U.S. 643 (U.S. Ohio S.C., 1961).

47. *R. v. Wray*, [1971] S.C.R. 272, [1970] 4 C.C.C. 1, 11 C.R.N.S. 235 (S.C.C.).

48. *R. v. Ibrahim*, [1914] A.C. 599, [1914-15] All E.R. Rep. 874, 24 Cox C.C. 174 (Hong Kong P.C.). For the history of the rule, see Langbein, *The Origins of Adversary Criminal Trial*, at p. 218 et seq. Langbein states at p. 218, from his examination of the Old Bailey Sessions Papers, that the rule was "formulated

unreliable. But the part of Wray's statement that was confirmed by the finding of the gun — the Supreme Court held — was admissible.

The 1982 *Charter of Rights and Freedoms* changed the law. The confession rule has been held to come under s. 7 of the *Charter* as well as under the common law.⁴⁹ Section 7 of the *Charter* gives everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." A judge therefore now has a discretion under s. 24(2) as to whether the real evidence is admissible. Section 24(2) of the *Charter* states that where "a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." So today, in a case like *Wray*, the confession would still likely be excluded and the accused would try to show — on a balance of probability — that to admit the evidence of the gun would bring the administration of justice into disrepute.

There have been a large number of Supreme Court of Canada cases dealing with s. 24(2). In 2009, the Supreme Court of Canada in *R. v. Grant* took "a fresh look" at the subject.⁵⁰ The majority decision, delivered by Chief Justice Beverley McLachlin and Justice Louise Charron, set out a new framework. In deciding whether to exclude or admit evidence, they look at three factors: the seriousness of the Charter-infringing conduct of the police; its impact on the accused; and thirdly, on what the long-term effect would be of the exclusion or admission of this illegally obtained evidence. This third line of inquiry, the court stated, "asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion." "Society," they state, "generally expects that a criminal allegation will be adjudicated on its merits,"⁵¹ but there are cases where admission of the evidence would harm the administration of justice. So, for example, the long-term effect of allowing in real evidence in cases where the police have *deliberately* or *flagrantly* used improper methods in questioning the accused to

in the early 1740s and settled by the 1760s." It was, he concludes, at p. 233, based on the potential unreliability of involuntary confessions. The *Wray* case, *ibid.*, takes the same approach.

49. *R. v. Oickle*, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129 (S.C.C.); *R. v. Singh*, [2007] 3 S.C.R. 405, 225 C.C.C. (3d) 103, 51 C.R. (6th) 199 (S.C.C.).

50. *R. v. Grant*, [2009] 2 S.C.R. 353, 245 C.C.C. (3d) 1, 66 C.R. (6th) 1 (S.C.C.), at para. 3.

51. *Ibid.*, at para. 79.

discover the evidence would harm the administration of justice and so should be excluded under this test.⁵² An innocent and trivial breach by the police, however, would be admissible. Such a rule acts as a deterrent against abusive tactics by the police.

Privilege Against Self-incrimination.⁵³ In the Anglo-American system of criminal justice the accused cannot be called as a witness by the prosecutor.⁵⁴ The one person who normally knows the most about the case is therefore not a compellable witness. How far should we go in protecting the accused from self-incrimination?

In Canada, neither the judge nor the prosecutor may comment on the accused's failure to testify. Section 4(6) of the *Canada Evidence Act* specifically states that the "failure of the person charged . . . to testify shall not be made the subject of comment by the judge or by counsel for the prosecution."⁵⁵ Counsel for the accused is not, however, prohibited from trying to explain why the accused did not enter the witness box. The judge cannot tell the jury that they *should* draw an adverse inference and there is not normally⁵⁶ an obligation on the judge to tell the jury that they should *not* draw such an inference. English law, however, now permits a court or judge to "draw such inferences as appear proper from the failure of the accused to give evidence."⁵⁷ In contrast, the United States Supreme Court has held that a trial judge is obliged to tell the jury they *cannot* draw a negative inference from the accused's silence, if so requested by the accused.⁵⁸ In Canada, somewhat surprisingly, the section

52. *Ibid.*, at para. 128.

53. Langbein, *The Origins of Adversary Criminal Trial*, at p. 277 et seq. traces the origins of the rule to the increased use of counsel in the 1780s. See also R.H. Helmholz et al, *The Privilege against Self-Incrimination* (Chicago, 1997).

54. Section 11(c) of the *Charter* provides that a person charged with an offence has the right "not to be compelled to be a witness in proceedings against that person in respect of the offence." At common law the accused was incompetent to testify, even on his or her own behalf. The right to testify was not given to the accused in Canada until 1892 and in England until 1898. It is clear, however, that the judge could and did question the accused in the seventeenth and for most of the eighteenth centuries, although not under oath. See John Beattie, *Crime and the Courts in England 1660-1800* (Princeton, 1986), at p. 340 et seq.; Langbein, *The Origins of Adversary Criminal Trial*, at p. 279 et seq.

55. See generally, Paciocco and Stuesser, *supra*, footnote 31, at p. 311 et seq.

56. *R. v. Prokofiew*, [2012] 2 S.C.R. 639, 290 C.C.C. (3d) 280, 96 C.R. (6th) 57 (S.C.C.), now incorporated in the Canadian Judicial Council's Model Jury instructions, section 9.7, which applies "where there are multiple accused and counsel for one of the accused has improperly invited the jury to infer the guilt of another accused from his or her failure to testify."

57. *Criminal Justice and Public Order Act 1994*, s. 35(3).

58. *Carter v. Kentucky*, 101 S.Ct. 1112, 450 U.S. 288 (U.S. Ky. S.C., 1981).

preventing comment on the accused's failure to testify has been interpreted as not applying to the judge or counsel when the trial is by a judge alone.⁵⁹ What inferences a trial judge, a jury, and an appeal court can draw from the failure of an accused to testify is still being worked out by Canadian courts.⁶⁰

I think we pay too much deference to the self-incrimination rule. Would it not be better, for example, to allow the judge to comment on the accused's failure to take the stand and at the same time prevent the prosecutor from introducing evidence of the accused's previous convictions?⁶¹ More accused persons would then testify at the trial, which might improve the search for truth in the criminal process.

Standard of Proof in Criminal Cases

The standard of proof is crucial to the question of finding truth in the criminal justice system. What is the meaning of proof beyond a reasonable doubt and how did it develop as the accepted standard of proof in criminal cases?

I normally asked my criminal law class to fill in the blank in the following statement. I ask the reader to try it. "It is better for [. . .] guilty persons to escape punishment rather than one innocent person be convicted."

Obviously, the higher the standard of proof required, the more guilty persons will escape punishment. How has the number been treated in the past? Many years ago, my thesis supervisor, Glanville Williams wrote:

The Romans had the maxim that it is better for a guilty person to go unpunished than for an innocent one to be condemned; and Fortescue turned it into the sentiment that twenty guilty men should escape death through mercy rather than one just man be unjustly condemned. The next recorded instance of this is in the mouth of Sir Edward Seymour, who . . . said . . . "rather ten guilty persons should escape, than one innocent should suffer." Hale took the ratio as five to one; Blackstone reverted to ten to one, and in that form it became established.⁶²

Legal Historian John Langbein, however, points out an English case in 1793 — after Blackstone's time — in which the judge told the jury that "it is better that a hundred guilty men should escape, than

59. *R. v. Binder* (1948), 92 C.C.C. 20, 6 C.R. 83, [1948] O.R. 607 (Ont. C.A.).

60. See Hamish Stewart, *Halsbury's Laws of Canada, Evidence*, section HEV-15: "It is not clear whether the trier of fact may draw an adverse inference from the accused's failure to testify."

61. See Friedland, *My Life in Crime*, *supra*, footnote 8, at pp. 285-6.

62. Glanville Williams, *Proof of Guilt* (Stevens & Sons, 1963), at pp. 154-5.

one innocent man should suffer unlawfully.”⁶³ And Canadian legal historian Jim Phillips found a Nova Scotia case from 1791 where the prosecutor used the ratio 99 to 1.⁶⁴ The twelfth century mediaeval Jewish scholar Moses Maimonides put the ratio as high as 1,000 to 1.⁶⁵

Let us look at the origins of the jury.⁶⁶ Trial by jury took over from trial by ordeal in England after Pope Innocent III banned death by the ordeal in 1215.⁶⁷ The jurors were from the locality where the crime

63. Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 34, at p. 262, note 40.

64. Boutelier case: see Jim Phillips, “The Criminal Trial in Nova Scotia 1749-1815” in G.B. Baker and J. Phillips, *Essays in the History of Canadian Law in Honour of R.C.B. Risk*, vol.VIII (U of T Press, 1999) 469, at p. 492. Similarly, Jim Phillips informed me of an 1830 New Brunswick charge to the jury in which the judge told the jury that “it is better that ninety-nine guilty men should escape than once innocent man suffer,” also telling them that this is “often repeated to juries.” E-mail from Phillips, dated March 2, 2013.

65. See Larry Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (Cambridge, 2006), at p. 63. Laudan, understandably, does not like the Maimonides ratio, stating at 144: “Under such a regime, there would be precious few convictions of the guilty and virtually no deterrence of crime.” He does not, as far as I can see, choose a desirable ratio in the book, but in a later paper, “Is it finally time to put ‘Proof Beyond a Reasonable Doubt’ Out to Pasture?” in Andrei Marmor, ed. *The Routledge Companion to Philosophy of Law* (Routledge, 2012) 317, at p. 322 he states: “Whatever society finally fixes on as an acceptable value of the Blackstone ratio, it seems to me much more likely that it will be closer to 2:1 . . . than to Blackstone’s own proposal of 10:1.” This may also reflect Laudan’s personal preference, although this is not specifically stated. This might explain why he finds the present proof beyond a reasonable doubt standard “obscure, incoherent, and muddled.” *Truth, Error, and Criminal Law*, at p. 30. The higher the standard, the larger the distribution of errors in favour of the accused. He apparently wants to keep it low. It also might explain why he wants to do away with many of the rules of evidence that strongly favour the accused and, instead, build them into the overall standard of proof: see chapter 5 of *Truth, Error, and Criminal Law* and “Is it finally time”, at p. 323, which states that there is a strong case for adopting “rules of evidence and procedure that aimed not at distributing error (since that problem would already be accommodated in the standard of proof) but at minimizing error by admitting relevant evidence and excluding irrelevant evidence.” It would, I think, not be easy to accommodate the rules of evidence in the standard of proof and yet keep it at the low end. Nevertheless, Laudan’s book is a serious, although provocative, examination of the criminal justice system from a non-lawyer philosopher of science.

66. See generally, Patrick Devlin, *Trial by Jury* (London, 1956); Glanville Williams, *Proof of Guilt*, *supra*, footnote 62; Barbara Shapiro, *Beyond Reasonable Doubt and Probable Cause* (U of California Press, 1991) chapter 1.

67. Thomas Green, *Verdict According to Conscience: Perspectives on the English*

was allegedly committed, often with knowledge of the facts. Some may have witnessed the event. Over the centuries, jurors became more independent. Judges would routinely question the accused. Lawyers did not appear in criminal trials until the 17th and 18th centuries. There were apparently few self-incrimination concerns in those years. As Langbein shows, “an opposite dynamic was at work, not promoting the accused’s silence but pressuring him to speak.”⁶⁸ The jury, who had to be unanimous, were not permitted to disagree. Indeed, the right of a trial judge to discharge a jury for failure to agree was not finally settled until 1866.⁶⁹ Pressure was put on the jurors to agree by withholding food, drink, fire or candle during their deliberations.⁷⁰

Lawyers were slowly permitted to appear in criminal cases.⁷¹ They participated in treason trials as well as in misdemeanor cases in the 1600s, but not in felony cases until the 18th century. Sergeant Hawkins in his *Pleas of the Crown*, written in the 1600s, argued that lawyers would prevent the jury from finding the truth, stating that “the very speech, gesture and countenance, and manner of defense of those who are guilty, when they speak for themselves, may often help to disclose the truth, which probably would not be so well discovered from the artificial defense of others speaking for them.”⁷² Some judges did, however, permit lawyers in felony cases, but limited them to arguing points of law and cross-examining prosecution witnesses. Counsel was not, however, permitted to address the jury. The accused could and was questioned, but not under oath.

The number of defence counsel increased significantly in the 1780s. As historian John Beattie has shown, the numbers increased at the

Criminal Trial Jury 1200-1800 (Chicago, 1985), at p. 3; Beattie, *Crime and the Courts*; Langbein, *The Origins of Adversary Criminal Trial*; James Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale, 2008), at p. 128 et seq.; A. Duff et al, *The Trial on Trial: Volume 3, Towards a Normative Theory of the Criminal Trial*, at p. 41 et seq.

68. Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 8, at p. 61 and chapter 5.

69. *Winsor v. R.* (1866), 7 B. & S. 490, 10 Cox C.C. 327, 12 Jur. (N.S.) 561 (Eng. Ex. Ch.).

70. Devlin, *Trial by Jury*, *supra*, footnote 66, at p. 50; Williams, *Proof of Guilt*, *supra*, footnote 62, at p. 12.

71. Beattie, *Crime and the Courts*, *supra*, footnote 54, at p. 352 et seq.; Beattie, “Scales of Justice: Defense Counsel and English Criminal Trial in the Eighteenth and Nineteenth Centuries” (1991), 9 *Law and History Review* 221; Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 54, at p. 93 et seq.

72. Hawkins, *Pleas of the Crown*, as quoted by Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 54, at pp. 35-36.

Old Bailey from under 7% in 1778 to over 20% in 1785.⁷³ Lawyers were not given *full* rights in felony cases in England or Upper Canada until permitted by legislation in 1836.⁷⁴ The Criminal Law Commissioners had stated in their 1836 report: "It will hardly, we think, be disputed that the permitting the advocate to speak for the client tends, generally, to the discovery of truth and the consequent advancement of justice."⁷⁵ Lawyers, it was argued, would assist in arriving at the truth, not in preventing the jury from finding it.

The jury trial in England can be contrasted with what had happened on the Continent after 1215.⁷⁶ In order to get a conviction on the Continent, the prosecution required two witnesses or a confession. It was hard to get two witnesses in most cases, so the accused was tortured in order to get a confession. Whatever the problems with the English system, it was certainly better than that used on the Continent. In the age of enlightenment, France and Germany adopted the English jury system, although judges on the Continent continued to be far more active than the English judiciary in the development of the case. English judges simply became umpires in the process.⁷⁷

The standard of proof in England was high in the 17th and 18th centuries. Intellectual historian Barbara Shapiro shows that the jury were told that they had to have a "satisfied conscience," or a "satisfied understanding," or "moral certainty." All these expressions were considered interchangeable and were often used together.⁷⁸

73. Beattie, "Scales of Justice" has comparable but somewhat different figures. The Old Bailey records are now online and Beattie has now produced a full yearly record which he will likely publish and which he generously made available to me. The new table shows the change from 6.7% with counsel in 1778 to 21.2% in 1785, with 19% in 1782. See also T.P. Gallanis, "The Mystery of Old Bailey Counsel" (2006), 65 Cambridge L. J. 159, at p. 161. Jim Phillips has shown a similar pattern in early Nova Scotia. Defence counsel were present in almost a quarter of the trials between 1778 and 1790 as a matter of judicial discretion and were permitted by statute in 1840: Phillips, "The Criminal Trial in Nova Scotia 1749-1815" in *Essays in the History of Canadian Law*, volume VIII, 469, at pp. 481-82.

74. Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 54, at p. 93; Beattie, "Scales of Justice", *supra*, footnote 74; Beattie, *Crime and the Courts*, *supra*, footnote 54, at p. 352 et seq.

75. As cited in Duff et al., *The Trial on Trial: Volume 3, Towards a Normative Theory of the Criminal Trial*, *supra*, footnote 67, at p. 44.

76. John Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* (Chicago, new edition 2006).

77. Williams, *Proof of Guilt*, *supra*, footnote 62, at p. 24 et seq.

78. Barbara Shapiro, "Changing Language, Unchanging Standard: From 'Satisfied Conscience' to 'Moral Certainty' and 'Beyond Reasonable Doubt'" (2009) 17 Cardozo J. Int'l and Comp. L. 261, at pp. 264 and 267;

Proof beyond a reasonable doubt became widely used in the 1780s, although it was sometimes used before then.⁷⁹ Why were the 1780s a crucial period in the development of the beyond a reasonable doubt standard of proof as well as the key period in the development of other aspects of the current system of justice? One probable reason for the introduction of proof beyond reasonable doubt was the increased use of defence counsel who would likely have suggested to the judge that the beyond reasonable doubt standard should be used. But why was there an increase in defence counsel?

In order to answer that question, one has to understand the system of punishment in that period. The “Bloody Code” with its extensive use of capital sentences, is well known to the reader, but less well known are the techniques for ameliorating the harshness of the criminal law. One was “pious perjury,” in which the jury, for example, lowered the amount stolen so that the consequence of a conviction was lessened.⁸⁰ Another was benefit of clergy, which grew out of the double jeopardy events I described earlier. At first, benefit of clergy applied to the clergy, then to persons who could read, and finally to all first-time offenders for lesser felonies.⁸¹ The importance of benefit of clergy was reduced when it was eliminated for certain serious offences and especially when the *Transportation Act of 1718* allowed transportation of persons who established benefit of clergy.⁸² Benefit of clergy was abolished by statute in 1828.⁸³

Transportation was the main punishment through most of the 18th century.⁸⁴ Most persons convicted of a capital offence had their sentences commuted and were transported, usually for 14 years. In

see also Barbara Shapiro, *A Culture of Fact: England, 1550-1720* (Cornell, 2011), at pp. 22-23; Shapiro, *Beyond Reasonable Doubt*, at pp. 40-41.

79. There were a number of Irish cases where it had been used. Shapiro, “Changing Language, Unchanging Standard”, *ibid.*, at p. 276. In a famous American case in 1770 involving the trial of British soldiers in the Boston Massacre, both the prosecutor (Thomas Paine) and the defence counsel (John Adams) used the concept of beyond reasonable doubt. Note that Adams said “it is better, five guilty persons should escape unpunished, than one innocent person should die.” See Whitman, *The Origins of Reasonable Doubt I*, *supra*, footnote 67, at p. 193; Anthony Morano, “A Reexamination of the Development of the Reasonable Doubt Rule” (1975), 55 *Boston University Law Review* 507, at p. 516 et seq.
80. Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 54, at p. 58.
81. Beattie, *Crime and the Courts*, *supra*, footnote 54, at p. 490 et seq. and at p. 560.
82. Green, *Verdict According to Conscience*, *supra*, footnote 67, at pp. 275-6, footnote 29; Beattie, *Crime and the Courts*, *supra*, footnote 54, at p. 560.
83. *Offences against the Person Act 1828*.
84. Beattie, *Crime and the Courts*, *supra*, footnote 54, at p. 470 et seq.

other cases, transportation was normally for 7 years. Perhaps two-thirds of all convicted felons in England were transported to America.⁸⁵ About 50,000 convicts were transported to the American colonies before 1775.⁸⁶

Then came the American Revolution, which started in 1775 and was not officially over until the Treaty of Paris in 1783. From the start of the war, the Americans would not accept transported prisoners. The last transport to America sailed in October 1775.⁸⁷ What happened to those who would formerly have been transported? Many were induced to join the British army before or after their conviction. This practice stopped as the war wound down.

Others were imprisoned. Britain did not, however, have the capacity to imprison those awaiting transportation or sentenced to imprisonment. Legislation was therefore passed in 1776 to use convicts to dredge the Thames and other British waterways. They would engage in hard labour during the day and would be held at night in one of the hulks of abandoned ships on the Thames.⁸⁸ Some have estimated that one out of three prisoners on the hulks died from the intolerable conditions.⁸⁹ Existing prisons were not much better.⁹⁰ Prison reformer John Howard published the first edition of his important work, *The State of the Prisons in England*, in 1777.⁹¹ More prisons were eventually constructed by individual counties, starting in 1785.⁹²

85. Gallanis, "Old Bailey Counsel", *supra*, footnote 73, at p. 169, citing A.R. Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718-1775* (Oxford, 1987), at p. 1. Compare Green, *Verdict According to Conscience*, *supra*, footnote 67, who said at p. 279 that at mid-century 40% of all felons convicted of capital property offences, but 85% of those convicted of a non-capital property offences were transported to America.

86. Emma Christopher, *A Merciless Place: The lost story of Britain's convict disaster in Africa and how it led to the settlement of Australia* (Allen and Unwin, 2010; Oxford, 2011), at p. 31.

87. Christopher, *A Merciless Place*, *ibid.*, at p. 61.

88. Robin Evans, *The Fabrication of Virtue: English Prison Architecture, 1750-1840* (Cambridge, 1982), at p. 119; George Fisher, "The Birth of the Prison Retold" (1995), 104 *Yale Law Journal* 1235, at pp. 1267-68.

89. Evans, *The Fabrication of Virtue*, *ibid.*, at p. 120. Fisher, "The Birth of the Prison", *ibid.*, at pp. 1267-68; Gallanis, "Old Bailey Counsel", *supra*, footnote 73, at p. 170; Beattie, *Crime and the Courts*, *supra*, footnote 54, at p. 593 says one in three died; see also Beattie, *Crime and the Courts*, *supra*, footnote 54, at p. 573; Christopher, *A Merciless Place*, *supra*, footnote 86, at p. 67, also concludes that one in three of the prisoners on the hulks died.

90. Gallanis, "Old Bailey Counsel", *supra*, footnote 73, at p. 172.

91. See Fisher, "The Birth of the Prison", *supra*, footnote 88, at pp. 1236-7.

92. Gallanis, "Old Bailey Counsel", *supra*, footnote 73, at p. 171; Fisher, "The

Also, hangings increased because of the crime wave that came after the soldiers involved in the American Revolution returned to England.⁹³ There were four times as many hangings in London in 1785 as there were in 1780.⁹⁴ Beattie has figures that show that in Surrey County there were 64 hangings between 1783 and 1787, more than double the hangings in the previous 5 years.⁹⁵ And in Sussex County there were 34 executions in the 1780s compared to only 2 in the previous decade.⁹⁶

Transportation to Australia did not commence until 1787.⁹⁷ But transportation to West Africa started in 1781. The story about transportation to West Africa was, it appears, not known to legal historians until Emma Christopher published her book in 2010, appropriately entitled *A Merciless Place: the lost story of Britain's convict disaster in Africa and how it led to the settlement of Australia*. Her interest in the slave trade led her to investigate transportation to West Africa. Earlier writers had only very brief references to the West African transportations.⁹⁸ They did not know the extent and therefore appreciate the significance of the story.

Birth of the Prison", *supra*, footnote 88, at p. 1237; Evans, *The Fabrication of Virtue*, *supra*, footnote 88, at p. 135. For the preceding five years it was thought that the central government would construct and pay for penitentiaries, but with the *Transportation Act of 1784*, permitting transportation throughout the world, the proposed *Penitentiary Act of 1779* was dropped: Evans, *The Fabrication of Virtue*, *supra*, footnote 88, at pp. 120 and 131.

93. Beattie, *Scales of Justice*, *supra*, footnote 71, at p. 260, footnote 23; Beattie, *Crime and the Courts*, *supra*, footnote 54, at pp. 532-3 and at p. 584 et seq.; Christopher, *A Merciless Place*, *supra*, footnote 86, at p. 10; Whitman, *The Origins of Reasonable Doubt*, *supra*, footnote 67, at p. 200; Fisher, "The Birth of the Prison", *supra*, footnote 88, at p. 1273 (in 1783, 130,000 British soldiers returned home); see also Douglas Hay, "The Laws of God and the Laws of Man: Lord George Gordon and the Death Penalty" in John Rule and Robert Malcolmson, eds, *Protest and Survival: Essays for E.P. Thompson* (London, 1993), at pp. 60-111. The Gordon Riots of June 1780 is an important part of this story: see Christopher, *A Merciless Place*, *supra*, footnote 86, at pp. 73-74.

94. Christopher, *A Merciless Place*, *supra*, footnote 76, at p. 27.

95. Beattie, *Crime and the Courts*, *supra*, footnote 54, at pp. 532-3 and 584.

96. *Ibid.*, at p. 588.

97. *Ibid.*, at p. 599 et seq.

98. See Beattie, *Crime and the Courts*, *supra*, footnote 54, at p. 594 who notes that 8 men in Surrey were sentenced to periods of 3 to 15 years' banishment in Africa in the early months of 1783. He does not say whether they were, in fact, transported there. See also Beattie, *Crime and the Courts*, *supra*, footnote 54, on p. 594 and see p. 599 ("The evidence about Africa was discouraging.") Transportation to Africa is not discussed in Beattie's *Policy and Punishment in London, 1660-1750* (Oxford, 2001). I did not spot any

The British needed troops in West Africa to fight other European powers. It also needed troops to protect its forts, which were needed for the slave trade, and to capture other forts, particularly Dutch and French forts. It was difficult to get people to volunteer to go to West Africa.⁹⁹ Well over half of the Europeans who went there died from disease within a few years.¹⁰⁰

Perhaps two hundred persons, mainly convicts and army deserters, were transported — as soldiers — from England to West Africa in July of 1781.¹⁰¹ They did not know where they were going until it was too late. Indeed, even the ship's captain did not know the destination until shortly before departure. They probably thought they were going to the West Indies. When the convicts discovered that their destination was to be West Africa, they unsuccessfully tried to scuttle the ship.¹⁰² This was given wide publicity.¹⁰³ A year later one of the convicts managed to find his way back to England and was charged with returning from transportation and in October 1782 was sentenced to death at the Old Bailey.¹⁰⁴ His unsuccessful defence

significant reference to Africa in any of the books by Shapiro that I examined. Nor in Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 54; nor in Fisher, "The Birth of the Prison", *supra*, footnote 88; nor Gallanis, "Old Bailey Counsel", *supra*, footnote 73. Whitman, *The Origins of Reasonable Doubt* does not mention the West African deportations, simply stating at p. 163: "After a hiatus from 1775 to 1787, it was resumed, with offenders now transported to Australia." Green has a footnote on p. 281 of *Verdict According to Conscience*, referring to a 1786 case in which the government official noted on the file that perhaps the defendants "should be transported to some place with a more favorable climate than their present destination of Africa." It was this reference in Green that caused me to Google "transportation Africa" and the search came up with Christopher's 2010 book, *A Merciless Place*, which I otherwise might not have come across. I subsequently found the following enlightening sentence in Evans, *The Fabrication of Virtue*, *supra*, footnote 88, at p. 119: "A few hundred unfortunates were delivered to Gambia, on the West African coast, where they mostly perished." Evans was writing about the construction of penitentiaries and so did not expand on this sentence.

99. Christopher, *A Merciless Place*, *supra*, footnote 86, at pp. 86 and 101.

100. *Ibid.*, at p. 86, stating that 200 out of 300 soldiers died in one area in West Africa in a short period of time; and at p. 101: "Up to seventy-five per cent of Europeans were consigned to the earth within twelve months of stepping ashore."

101. Christopher does not give a specific number, but it seems that about half were convicts, some were under sentence of death, some awaiting transportation, and some wishing to escape the conditions on the hulks or the prisons: see Christopher, *A Merciless Place*, *supra*, footnote 86, at p. 20 ("a few hundred British convicts" in total), 124 ("200 convict-soldiers").

102. *Ibid.*, at pp. 122 and 133.

103. *Ibid.*, at pp. 122 and 382, footnote 38.

was that the military governor had no food and the transported soldiers were starving and so he and some other convicts were freed and left to fend for themselves.¹⁰⁵ The fate of those sent to West Africa would likely have been known to most of those awaiting trial and to many members of the general public.

Another shipload of 40 convicts left on a slave ship from England to West Africa the following month, November 1782.¹⁰⁶ They went as civilians, not as soldiers. London newspapers continued to describe the transport and the terrible conditions in West Africa. In 1785, the papers also reported plans to send hundreds, even thousands, of convicts to West Africa. Parliamentarian Edmund Burke spoke against it in the House of Commons, alleging that 100,000 convicts were awaiting transportation to Africa. A Parliamentary Committee was set up to investigate the issue.¹⁰⁷ The result of that committee was to send convicts to Australia.

So it is not surprising that, with the threat of hanging or imprisonment on the hulks or transportation to West Africa, the use of lawyers in criminal cases increased in this brief but crucial number of years starting about 1780. Transportation was no longer the prospect of a new life in the New World, but a slow death in intolerable conditions.

The years 1782-83 are possibly the crucial years in the development of the proof beyond reasonable doubt rule because of the increased use of counsel in those years and the growing knowledge of the use of transportation to a likely death in West Africa. In the previous year, 1781, Lord Mansfield, one of England's greatest judges, apparently charged a jury in the important Lord Gordon treason trial without mentioning proof beyond a reasonable doubt.¹⁰⁸ The first use of the beyond reasonable doubt formulation at the Old Bailey may have been in April 1783.¹⁰⁹ Defence lawyers would likely have suggested to judges that the beyond reasonable doubt standard should be used.

Prosecutors also probably wanted the beyond reasonable doubt

104. *Ibid.*, at pp. 253-4.

105. OBSP T17830910.

106. Christopher, *A Merciless Place*, *supra*, footnote 86, chapter 10.

107. *Ibid.*, at p. 306. See also F.P. Lock, *Edmund Burke, Volume II: 1784-1797* (Oxford, 2006), at pp. 24-25, discussing Burke's response to plans to transport a shipload of convicts to Gambia in West Africa in March 1785.

108. Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 54, at p. 263. Erskine was one of the defence lawyers in the Gordon Riots case.

109. Barbara Shapiro, "Changing Language, Unchanging Standard," (2009), 17 *Cardozo J. of Int'l and Comp. Law*, 261 at p. 275, footnote 66, citing Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 54, at pp. 263-64.

standard. Some jurors, it was thought, often imposed on themselves an almost impossibly high standard. Some believed that “any doubt” was enough to acquit. Some judges in fact told the jury that they should acquit if there was “any degree of doubt.”¹¹⁰ Philosopher William Paley wrote in 1785 about jurors not willing to convict an accused “whilst there exists the minutest possibility of his innocence . . . from a general dread lest the charge of innocent blood should lie at their doors.”¹¹¹ As Anthony Morano argued in a 1975 article, the reasonable doubt rule reduced the standard of proof from any doubt to a lower standard — a reasonable doubt.¹¹²

The Canadian Experience

The beyond reasonable doubt rule is, of course, part of the common law¹¹³ and can be found in some eighteenth-century Canadian cases.¹¹⁴

Wrongful Convictions. Requiring a high standard of proof is, of course, important because of the clear danger of wrongful convictions. There have been a large number of well-documented wrongful convictions in Canada,¹¹⁵ as there have been in other common law jurisdictions. One thinks of the well-known trio of Canadian cases: *Marshall*, *Milgaard*, and *Morin*.¹¹⁶ In earlier days it was thought to be wrong to suggest that there could be wrongful convictions. In the 1959 *Truscott* case, for example, the judge who conducted the trial later urged both the federal and Ontario governments to prosecute author Isabel LeBourdais for public

110. See cases cited by Whitman, *The Origins of Reasonable Doubt*, *supra*, footnote 67, at pp. 195-6; Langbein, *The Origins of Adversary Criminal Trial*, *supra*, footnote 54, at pp. 263-64; Morano, “A Reexamination of the Development of the Reasonable Doubt Rule”, *supra*, footnote 79, at p. 512.

111. Whitman, *The Origins of Reasonable Doubt*, *supra*, footnote 67, at p. 192.

112. Morano, “A Reexamination of the Development of the Reasonable Doubt Rule”, *supra*, footnote 79.

113. *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, [1935] All E.R. Rep. 1, 25 Cr. App. R. 72 (U.K. H.L.) and *R. v. Manchuk*, [1938] S.C.R. 341, 70 C.C.C. 161, [1938] 3 D.L.R. 693 (S.C.C.).

114. *Trial of David MacLaine* (1797), 26 Howell’s State Trials 721, at p. 811. Such a charge was not uniformly given, however: see Jim Phillips, “The Criminal Trial in Nova Scotia 1749-1815” in *Essays in the History of Canadian Law in Honour of R.C.B. Risk*, Volume VIII, (Toronto, 1999) 469, at pp. 492-4 who discusses an 1813 case (John and Amy Pomp at 494) where the ‘proof beyond a reasonable doubt’ charge was not given and a 1791 case (Boutelier at 493) where the judge talked about “the smallest doubt.”

115. See Kent Roach, “Wrongful Convictions in Canada” (2012), 80 University of Cincinnati Law Review 1465.

116. *Lifchus*, *infra*, footnote 122, at para. 13.

mischievous because her book on the trial stirred up controversy.¹¹⁷ Today, wrongful convictions are accepted by the judiciary as a real possibility. In a 2001 Supreme Court of Canada extradition decision, *United States v. Burns*,¹¹⁸ for example, the court unanimously refused to extradite the accused to the United States to face the death penalty, stating: “In recent years, aided by the advances in the forensic sciences, including DNA testing, the courts and governments in this country and elsewhere have come to acknowledge a number of instances of wrongful convictions for murder despite all of the careful safeguards put in place for the protection of the innocent.”¹¹⁹ In a recent review of wrongful convictions in Canada, Kent Roach observes:¹²⁰

The seven public inquiries held in the last 20 years have examined the causes of wrongful convictions. They include police error, including tunnel vision; inaccurate eyewitness identifications sometimes facilitated by improper identification techniques and feedback; false confessions sometimes facilitated by improper police interrogations; the use of unreliable witnesses, especially jailhouse informers; lack of full disclosure by the prosecutor; inadequate defence assistance; and faulty forensic evidence.

In addition, there are guilty pleas by innocent persons. Roach concludes that “recognized wrongful convictions are only the tip of the iceberg.”¹²¹

Charging the Jury. What does a trial judge in Canada say to the jury? The Canadian Judicial Council now has a model jury charge that comes from a series of Supreme Court cases.¹²² Sections 4 and 5 of the model charge read as follows:¹²³

Now what does the expression “beyond a reasonable doubt” mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings.

117. Friedland, *My Life in Crime*, *supra*, footnote 8, at p. 340.

118. [2001] 1 S.C.R. 283, 151 C.C.C. (3d) 97, 39 C.R. (5th) 205 (S.C.C.); see also *R. v. Oickle*, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129 (S.C.C.), at paras. 34 et seq.

119. *United States v. Burns*, *ibid.*, at para. 1.

120. Roach, “Wrongful Convictions”, *supra*, footnote 115, at p. 1524.

121. *Ibid.*, at p. 1525.

122. *R. v. Lifchus*, [1997] 3 S.C.R. 320, 118 C.C.C. (3d) 1, 9 C.R. (5th) 1 (S.C.C.); *R. v. Bisson*, [1998] 1 S.C.R. 306, 121 C.C.C. (3d) 449, 14 C.R. (5th) 1 (S.C.C.); *R. v. Starr*, [2000] 2 S.C.R. 144, 147 C.C.C. (3d) 449, 36 C.R. (5th) 1 (S.C.C.).

123. Canadian Judicial Council website, Model Jury Instructions, s. 9(4) and (5), revised June 2012.

Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

It is virtually impossible to prove anything to an absolute certainty, and the Crown is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. You must not find [name of accused] guilty unless you are sure s/he is guilty. Even if you believe that [name of accused] is probably guilty or likely guilty, that is not sufficient. In those circumstances, you must give the benefit of the doubt to [name of accused] and find him/her not guilty because the Crown has failed to satisfy you of his/her guilt beyond a reasonable doubt.

The charge seems fair, although if I were the accused I would rather the trial judge said “falls close to absolute certainty” rather than stating what is obviously true that “a reasonable doubt falls much closer to absolute certainty than to probable guilt.” What does “much closer” mean? Does the sentence — meant to raise the standard of proof — in fact tend to lower it?

The phrase “moral certainty” used to be standard in jury charges in Canada, but the Supreme Court of Canada said in a 1997 case that it should no longer be used.¹²⁴ Beyond reasonable doubt is enough. There is a danger that some of today’s jurors would not understand “moral certainty” as equivalent to beyond reasonable doubt. They might think that they are entitled to convict if they feel “certain”, even though the Crown has failed to prove its case beyond a reasonable doubt.¹²⁵ No particular formula is required by the U.S. Supreme Court as long as the jury understands that proof beyond a reasonable doubt is necessary.¹²⁶ In one case they quashed a conviction because the trial judge told the jury that a reasonable doubt had to be a “grave” or “substantial” doubt, which unduly favoured the prosecution.¹²⁷

In the 1950s, the English Court of Criminal Appeal tried to clarify the meaning of reasonable doubt by stating: “One would be on safe ground if one said in a criminal case to a jury: ‘you must be satisfied beyond reasonable doubt’, and one could also say, ‘you the jury, must be completely satisfied,’ or better still, ‘you must feel sure of the

124. *Lifchus*, *supra*, footnote 122, at paras. 25 and 37.

125. *Ibid.*, at para. 25.

126. *Victor v. Nebraska*, 127 L.Ed.2d 583, 511 U.S. 1 (U.S. Neb. S.C., 1994). The Supreme Court held in *Winship, Re*, 25 L.Ed.2d 368, 90 S.Ct. 1068, 397 U.S. 358 (1970) that the beyond reasonable doubt standard applies to the states (and to young offender proceedings).

127. *Cage v. Louisiana*, 498 U.S. 39 (1990).

prisoner's guilt."¹²⁸ The widely used English text, *Cross and Tapper on Evidence*, states in the latest edition:

The Court of Appeal has recommended that judges stop trying to define that which it is impossible to define, and "to keep the direction on this important matter short and clear". The current direction recommended by the Judicial Studies Board refers only to the jury's being sure, and if any reference has been made during the trial to "beyond reasonable doubt" for a direction informing the jury that that is the same thing. It is unwise to go further, for example in attempting to distinguish being sure from being certain.¹²⁹

If I were an accused, I think I would prefer having the Canadian Judicial Council direction set out earlier.

Circumstantial Evidence. In earlier days, the so-called Rule in Hodge's case¹³⁰ was always given in Canada whenever the prosecution's case was based wholly or mainly on circumstantial evidence. The rule required, in the words of a 1938 Supreme Court of Canada case, that the judge tell the jury that they "must be satisfied not only that the circumstances are consistent with the conclusion that the criminal act was committed by the accused, but also that the facts are such as to be inconsistent with any other rational conclusion than that the accused is the guilty person."¹³¹ The required charge was given in addition to a beyond reasonable doubt charge. In the 18th and 19th centuries, circumstantial evidence was suspect. Direct evidence, such as identification evidence, was preferable.¹³² Today, identification evidence is suspect and requires a special charge to the jury.¹³³

The Supreme Court of Canada held in a 1978 case that such a charge on circumstantial evidence need no longer be given.¹³⁴ But the rule has made a comeback. In a 2009 Supreme Court case, the court stated that although no "special instruction" on circumstantial evidence need be given, "the essential component of an instruction on circumstantial evidence is to instill in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only

128. *R. v. Hepworth & Fearnley*, [1955] 2 Q.B. 600 (Eng. Q.B.), per Lord Goddard.

See generally, Williams, *Proof of Guilt*, *supra*, footnote 62, at p. 159 et seq.

129. *Cross and Tapper on Evidence*, 12th ed. (Oxford, 2010), at p. 163.

130. *R. v. Hodge* (1838), (*sub nom.* Hodge's Case) 168 E.R. 1136, 2 Lewin 227, 1 Stark. 849 (Eng. C.C.R.).

131. *R. v. Comba*, [1938] S.C.R. 396, 70 C.C.C. 205, [1938] 3 D.L.R. 719 (S.C.C.).

132. Shapiro, *Beyond Reasonable Doubt*, *supra*, footnote 66, at p. 200 et seq.; Shapiro, *A Culture of Fact*, *supra*, footnote 78, at pp. 21-22.

133. *R. v. Hibbert*, [2002] 2 S.C.R. 445, 163 C.C.C. (3d) 129, 50 C.R. (5th) 209 (S.C.C.).

134. *R. v. Cooper*, [1978] 1 S.C.R. 860, 34 C.C.C. (2d) 18, 37 C.R.N.S. 1 (S.C.C.).

rational inference that can be drawn from the circumstantial evidence is that the accused is guilty.”¹³⁵ It is now required in the Canadian Judicial Council’s model jury instructions.¹³⁶

When the Accused Gives Evidence. If the accused enters the witness box, a special charge is required. The Model Jury Instructions state:¹³⁷

Even if the testimony of [name of accused] does not raise a reasonable doubt about his/her guilt, (or, about an essential element of the offence charged (or, an offence)), if after considering all the evidence you are not satisfied beyond a reasonable doubt of his/her guilt, you must acquit.

When the accused testifies and denies the accusations of the complainant, a special charge to the jury is given in Canada, instructing the jury that even if the accused’s evidence does not raise a reasonable doubt, the jury must acquit if after considering all the evidence they are not satisfied beyond a reasonable doubt of the accused’s guilt.

Subjective Probability. Does the trier of fact, whether judge or juror, apply a subjective or objective test? The model jury charge appears to be objective, telling the jury that a reasonable doubt is one “that arises logically from the evidence or from an absence of evidence.”¹³⁸ But reasonable doubt is also subjective in that it looks at each individual juror’s belief. The model jury charge states: “The presumption of innocence applies at the beginning and continues throughout the trial, unless you are satisfied, after considering the whole of the evidence, that the Crown has displaced the presumption of innocence by proof of guilt beyond a reasonable doubt.”¹³⁹ Note the words “you are satisfied.” The US Supreme Court requires “a subjective state of certitude of the facts in issue.”¹⁴⁰

A growing body of literature, such as Daniel Kahneman’s recent

135. *R. v. Griffin*, [2009] 2 S.C.R. 42, 244 C.C.C. (3d) 289, 67 C.R. (6th) 1 (S.C.C.), at paras. 33, 34, and 79. See also Benjamin Berger, “The Rule in Hodge’s Case: Rumours of its Death are Greatly Exaggerated” (2005), 84 Canadian Bar Review 47. I am grateful to Professor Berger for steering me right on this issue and on a number of other aspects of the topic.

136. Canadian Judicial Council, Model Jury Instructions, section 10.2.

137. *Ibid.*, section 9.6 [4], based upon *R. v. W. (D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397, 3 C.R. (4th) 302 (S.C.C.) and *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521, 93 C.C.C. (3d) 1, 34 C.R. (4th) 1 (S.C.C.).

138. *Ibid.*, section 9.2 [4].

139. *Ibid.*, section 9.2 [8]. See also *R. v. Griffin*, [2009] 2 S.C.R. 42, 244 C.C.C. (3d) 289, 67 C.R. (6th) 1 (S.C.C.).

140. In *Winship, Re*, 25 L.Ed.2d 368, 90 S.Ct. 1068, 397 U.S. 358 (1970), at p. 364, *per* Brennan J. for the court. See also Harlan J. concurring, at p. 370: “In a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what

best-selling book, *Thinking, Fast and Slow*, explores decision-making under conditions of uncertainty.¹⁴¹ In many situations decision-makers use heuristics or so-called rules of thumb.¹⁴² But these are sometimes inaccurate. How does the law control the use of improper heuristics by jurors? One way is to allow challenges by the accused and the prosecutor to the selection of jurors in order to try to weed out jurors with clear biases and prejudices. The elimination of talk of “moral certainty” in charges to the jury also tends to help keep the jury focused on the evidence, rather than their own feelings. Further, the jury are also told, as we have seen, that a reasonable doubt “is not based on sympathy for or prejudice against anyone involved in the proceedings.”¹⁴³ That is all that is said. The law cannot — and indeed, should not try to — eliminate the juror’s life experiences which can legitimately enter the decision-making process under the instruction that a reasonable doubt “is based on reason and common sense.”¹⁴⁴

Application of the Beyond Reasonable Doubt Standard. The beyond reasonable doubt standard applies to all elements of the offence, although not to specific items of evidence.¹⁴⁵ The only specific type of evidence it applies to is proof that a confession was made voluntarily.¹⁴⁶ This is understandable because a confession will

happened. Instead, all the factfinder can acquire is a belief of what *probably* happened.”

141. (Farrar, Straus and Giroux, 2011).

142. See the 1974 article in *Science* by Amos Tversky and Daniel Kahneman, “Judgment Under Uncertainty: Heuristics and Biases” set out in Kahneman’s book as Appendix A, at p. 419 et seq.

143. Canadian Judicial Council, Model Jury Instructions, section 9.2 [4].

144. *Ibid.* This section of the article cannot deal adequately with this important and interesting area of research. A recent example of empirical work on decision-making is Andreas Glickner and Christoph Engel, “Can We Trust Intuitive Jurors? Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning” (2013), 10 *Journal of Empirical Legal Studies* 230, who show (at pages 230-31) that: “There is mounting evidence that most people do not mathematically integrate evidence. Their behavior is better explained by sense making and constructing coherent stories from the evidence. People are storytellers, not meter readers, Jurors attempt to create complete narratives from the pieces of evidence they hear.” However, when they “actively construct coherent mental representations of the situation, they thereby unconsciously modify their perception of the evidence.” I am grateful to philosopher Cheryl Misak, who put me on to the issue of subjective probability in discussing her current research on Cambridge philosopher and mathematician Frank Ramsey, whose work in the 1920s (published posthumously in 1931) was the forerunner of game theory. Ramsey died in 1930 at the age of 26.

145. *R. v. Morin*, [1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193, 66 C.R. (3d) 1 (S.C.C.), at para .19 et seq.

146. *R. v. Oickle*, [2000] 2 S.C.R. 3, 147 C.C.C. (3d) 321, 36 C.R. (5th) 129

usually be decisive, if admitted and believed. Until 1935, the reasonable doubt rule did *not* apply to intent, at least in the case of murder. The House of Lords in *Woolmington v. Director of Public Prosecutions* changed that.¹⁴⁷ *Foster's Crown Law*, published in 1762, and which was followed between then and 1935, stated: "In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner unless they arise out of the evidence produced against him."¹⁴⁸ So the rule that beyond reasonable doubt applies to all elements of the offence is not as old a rule as one would have thought.

Does the reasonable doubt rule apply to all offences? Apparently yes. No distinction is made between federal and provincial offences or between summary and indictable offences. A traffic offence? A parking offence? Nothing is stated in the federal *Contraventions Act*¹⁴⁹ about the standard of proof for minor federal offences and so presumably it is proof beyond a reasonable doubt. For many regulatory offences, the onus of proof is placed on the accused to show he or she used reasonable diligence.¹⁵⁰ Even though the standard of proof on the accused in such cases is the balance of probabilities, the onus on the prosecutor to prove the act would still be proof beyond a reasonable doubt.

The reasonable doubt standard is not applied, however, to civil cases, even when criminal conduct is alleged, or to disciplinary offences by professional associations and regulatory agencies, where the balance of probability test is used.¹⁵¹ Justice Marshall Rothstein stated for the Supreme Court in a 2008 case that in such cases "there is only one standard of proof and that is proof on a balance of probabilities,"¹⁵² which means that it is "more likely than not that an alleged event occurred." The evidence, he states, "must always be sufficiently clear, convincing and cogent to satisfy the balance of

(S.C.C.); *R. v. Egger*, [1993] 2 S.C.R. 451, 82 C.C.C. (3d) 193, 21 C.R. (4th) 186 (S.C.C.), at p. 474 (re essential ingredients of the offence).

147. *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, [1935] All E.R. Rep. 1, 25 Cr. App. R. 72 (U.K. H.L.).

148. *Foster's Crown Law*, as quoted in *Woolmington*.

149. Stat. Can. 1972, chapter 47.

150. See, e.g., *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30 (S.C.C.).

151. See *C. (R.) v. McDougall*, (sub nom. *F.H. v. McDougall*) [2008] 3 S.C.R. 41, 61 C.R. (6th) 1, (sub nom. *H. (F.) v. McDougall*) 297 D.L.R. (4th) 193 (S.C.C.).

152. *Ibid.*, at para. 49.

probabilities test.”¹⁵³ Is this really the same as “more likely than not?” A trier of fact would likely think it is somewhat higher.

It is possible that the Supreme Court might in the future say that a lower standard—not proof beyond a reasonable doubt—is all that is required for minor regulatory offences where there is a small fine and no possibility of jail, equating it with a civil case. But maybe not, because the reasonable doubt standard would seem to be able to accommodate lesser offences in that a trier of fact would likely take into account the nature of the offence in deciding whether a doubt was reasonable. It appears to be an elastic rule.¹⁵⁴

Unanimity. Should unanimity be required? Unanimity of the jury is not mentioned in the *Criminal Code*. It is assumed that unanimity is required, just as it is assumed that 12 jurors are needed for a jury in criminal cases.¹⁵⁵ My students always wonder why unanimity is necessary for acquittals? Perhaps an acquittal should require only a majority of the jurors. England now permits less than unanimous verdicts—10 out of 12 for convictions.¹⁵⁶ The same is true in many states in the United States. The United States Supreme Court has permitted legislation providing for 9 out of 12 jurors for convictions in state courts,¹⁵⁷ but would not permit a 5 out of 6 verdict.¹⁵⁸ Majority verdicts are not, however, permitted in the U.S. federal system.

Should Canada introduce majority verdicts?¹⁵⁹ The problem is that it in effect lowers the standard of proof. Requiring 10 out of 12 is obviously easier to achieve than 12 out of 12. One real danger is that the jury may take a vote early in their deliberations and end their discussions. England has tried to prevent this by *not* telling the jury about their right to have a less than unanimous verdict until they have deliberated for at least two hours without success.¹⁶⁰ It is hard to say

153. *Ibid.*, at para. 46.

154. Some scholars, such as Larry Laudan, criticize the beyond reasonable doubt rule because it applies to minor offences, without acknowledging that the word “reasonable” seems to permit flexibility. See Laudan, *Truth, Error, and Criminal Law* and “Is it Finally Time”, at pp. 328-9.

155. The only reference to twelve jurors in the *Criminal Code* is in s. 631(2.2) and (5) where it mentions adding two additional jurors to the twelve jurors. There is also nothing about the number of jurors in the Ontario *Jurors Act*.

156. *Criminal Justice Act*, 1967.

157. *Johnson v. Louisiana*, 406 U.S. 356 (1972); *stc > Apodaca v. Oregon (State)*, 406 U.S. 404 (1972).

158. *Burch v. Louisiana*, 441 U.S. 130 (1979).

159. The Law Reform Commission of Canada said “no” in its 1980 Working Paper, *The Jury in Criminal Trials*, and its 1982 Report, *The Jury*.

160. See *Practice Direction (Majority Verdicts)*, [1967] 3 All E.R. 137; *Juries Act*, 1974, s. 17.

what the Supreme Court of Canada would say if federal legislation was introduced permitting majority verdicts.¹⁶¹ My guess is that the court would say that 9 or 10 out of 12 was impermissible, but that 11 out of 12 was acceptable because the latter would prevent a hung jury by a single unreasonable holdout who may have an undisclosed reason, such as taking a bribe or having a romantic relationship with the accused.¹⁶² It is extremely unlikely that 2 jurors out of 12 would be so involved.

Many systems that use the jury permit less than unanimity. Scotland permits verdicts by a majority of its fifteen-person jury.¹⁶³ The French introduced the jury in the constitution of 1791 after the French Revolution. Initially it was 10 out of 12. (One would have thought that a country that used the decimal system would have used 10 jurors.) The number of votes required and the procedures for voting in France, as philosopher Ian Hacking shows in his book, *The Taming of Chance*,¹⁶⁴ changed from year to year. The French Code of 1808 changed to a simple majority of the 12 jurors. This was again changed to 8 out of 12 in 1831, returning to a simple majority in 1836. The number was later raised to 8 out of 12.¹⁶⁵ The number of jurors has recently been reduced and is now 6 out of 9 or 4 out of 6, depending on the tribunal. Hacking uses the French jury system to illustrate how the great French mathematicians (Condorcet, Laplace, Poisson) developed theories of probability through discussions of the jury system.¹⁶⁶

The well-known Canadian case involving former premier Colin Thatcher¹⁶⁷ raises another issue. Does a jury have to be unanimous

161. Provincial legislation would no doubt be held to be inapplicable because the concept of unanimity is implicit in the federal criminal code, which would be held to be paramount.

162. See *R. v. Gill* (2003), 297 W.A.C. 290, 180 B.C.A.C. 290, 2003 CarswellBC 918 (B.C. C.A.). As mentioned in the text, above, in the discussion of double jeopardy, Gill had had a sexual affair with one of the jurors during the trial. He was acquitted of murder, but was later convicted of obstruction of justice.

163. Williams, *Proof of Guilt*, *supra*, footnote 62, at p. 282.

164. Ian Hacking, *The Taming of Chance* (Cambridge, 1990) chapter 11.

165. See Nancy Marder, "An Introduction to Comparative Jury Systems" (2011), 86 Chicago-Kent Law Review 453, at pp. 461-2.

166. See also Lorraine Daston, *Classical Probability in the Enlightenment* (Princeton, 1988), chapter 6, "Moralizing Mathematics", at pp. 342-3 that the probability of judgments, devised by Condorcet on the eve of the French Revolution "addressed the problem of the optimal design of a tribunal in order to minimize the probability of a wrong decision by manipulating three variables: the number of judges; the minimum majority required, and the probability that the individual judges would decide correctly."

167. *R. v. Thatcher*, [1987] 1 S.C.R. 652, 32 C.C.C. (3d) 481, 57 C.R. (3d) 97 (S.C.C.).

on *how* a crime was committed, such as the murder in the *R. v. Thatcher* case? Could some jurors find that Thatcher personally committed the act and others that a person hired by Thatcher did it? Such a verdict would be permissible, the Supreme Court held. We also saw this in the *Pickton* case.¹⁶⁸ It did not matter if Pickton killed the many women or actively participated in their deaths. Members of the jury could decide beyond a reasonable doubt on either ground.

Jury Nullification. To what extent may a jury disregard the law, often referred to as “jury nullification.” The Supreme Court of Canada held in the well-known *R. v. Morgentaler* case¹⁶⁹ in 1988 — where the court struck down the abortion sections of the *Criminal Code* — that defence counsel should not have urged the jury to disregard the law. Counsel for Dr. Morgentaler had stated to the jury: “The judge will tell you what the law is...But I submit to you that it is up to you and you alone to apply the law to this evidence and you have a right to say it shouldn’t be applied.”¹⁷⁰ Chief Justice Brian Dickson stated for the Court: “In a trial before judge and jury, the judge’s role is to state the law and the jury’s role is to apply that law to the facts of the case . . . It was quite simply wrong to say to the jury that if they did not like the law they need not enforce it. Such practice, if commonly adopted, would undermine and place at risk the whole jury system.”¹⁷¹ Nevertheless, a jury may, on their own, disregard the law. In *R. v. Krieger*,¹⁷² the trial judge had told the jury that they *must* convict. The Supreme Court of Canada unanimously held that this deprived the accused of the right to trial by jury. Justice Arthur Fish stated for the court:¹⁷³ “under the system of justice we have inherited from England juries are not entitled *as a matter of right* to refuse to apply the law — but they do have the *power* to do so when their consciences permit of no other course.”

Use of the Jury in Canada. I have stressed the role of the jury in this paper. The jury has been and continues to be important in the

168. *R. v. Pickton*, [2010] 2 S.C.R. 198, 257 C.C.C. (3d) 296, 77 C.R. (6th) 12 (S.C.C.). See also *R. v. Reyat* (2012), 288 C.C.C. (3d) 487, 95 C.R. (6th) 359, 551 W.A.C. 311 (S.C.C.), a perjury prosecution arising from the Air India case, involving the question whether the jury had to be unanimous on specific allegations of perjury. Leave to appeal to the Supreme Court of Canada was extended on January 24, 2013.

169. *R. v. Morgentaler*, (*sub nom.* *R. v. Morgentaler* (No. 2)) [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1 (S.C.C.).

170. *Ibid.*, at p. 76.

171. *Ibid.*, at p. 40, *per Curiam* headnote.

172. *R. v. Krieger*, [2006] 2 S.C.R. 501, 213 C.C.C. (3d) 303, 41 C.R. (6th) 201 (S.C.C.).

173. *Ibid.*, at para. 27.

development of the criminal law. The law is often built on challenged charges to juries. There are, however, surprisingly few jury cases in Canada. The Law Reform Commission of Canada found that there were only about 1,400 jury cases across Canada in a 12-month period in 1976-77, with only 326 cases in Ontario.¹⁷⁴ There are said to be only about 500 jury trials in criminal cases in Ontario each year.¹⁷⁵

Does the fact that Canada has so few jury cases tell us something about Canadian judges? One thing it does suggest is that accused persons and their counsel in Canada think that they can have a fair trial if tried by a judge *without* a jury. In many American states where judges are elected — often on a law and order platform — accused persons want trial by jury rather than trial by a judge, which in most cases they are entitled to choose.¹⁷⁶ This is particularly so close to election time. Is it possible that the apparent increase in the number of so-called “law and order” judges in Canada could in the future

174. Law Reform Commission of Canada, Working Paper 27, *The Jury in Criminal Trials* (Ottawa, 1980), at p. 22.

175. Friedland, *My Life in Crime*, *supra*, footnote 3, at p. 380. Anthony Doob, who also has access to current data, has confirmed the figure of 500: e-mail from Doob, March 11, 2013. Frank Iacobucci also uses a similar figure in his recent report, *First Nations Representation on Ontario Juries* (Toronto, 2013) at para. 97. Blake Brown does not give current figures in *A Trying Question: The Jury in Nineteenth-Century Canada* (Toronto, 2009) except to say at page 223, citing Neil Vidmar, ed., *World Jury Systems* (Oxford, 2000), at p. 219, that “one estimate is that in Ontario in the 1990s at least ninety percent of criminal cases were tried by a judge alone.” This seems to suggest that there are many more jury cases in Ontario than there likely are. The number is probably under 1 percent because of the very large number of criminal code offences tried by provincial court judges — several hundred thousand convictions in Canada each year. Of course, many of these convictions are guilty pleas and withdrawals without a trial. The statistics that Vidmar used state that there were just over 1,000 criminal jury cases in Ontario in 1990-91, but this does not tell us whether persons who initially selected trial by jury later re-elected trial by a judge or pled guilty. See Law Reform Commission of Ontario, *Consultation Paper on the Use of Jury Trials in Civil Cases* (1994), at p. 6. Current published statistics in Ontario do not even say how frequently juries are selected, let alone how many persons are actually tried by a jury: see Ministry of the Attorney General Court Services Division, Annual Report 2011-2012.

176. See Martin Friedland and Kent Roach, “Borderline Justice: Choosing Juries in the Two Niagaras” (1997), 31 *Israel Law Review* 120. Of course there are many other considerations influencing whether a judge or jury is chosen. An accused in jurisdictions in the United States where the trial judge handles bail and other matters might fear that the judge might not be as open-minded as a jury in their deliberations. Also, in Canada, counsel may advise the accused that if convicted a Superior Court judge may be inclined to give a higher sentence on the same facts than a provincial court judge.

influence more defence counsel to avoid trial by judge alone. One wants a neutral trier of fact.¹⁷⁷

A Neutral Jury. And, of course, one wants a neutral jury. It may be that the use of juries started to decline in Canada because in earlier decades the prosecution had greater power than the defence to shape who would be on the jury. In 1992, the Supreme Court of Canada, using the *Charter*, struck down a section of the *Criminal Code* giving the Crown the right to have up to 48 potential jurors stand aside without alleging cause, whereas the accused could only challenge 12 jurors without cause.¹⁷⁸ We recently discovered that the Crown in Ontario has had greater access to background information on jurors than the accused. Again, the Supreme Court in recent judgments has tried to maintain equality by holding that the Crown must share any such information with the defence.¹⁷⁹ A fair trial requires a fair selection process whether it is for trial by a jury or trial by a judge.¹⁸⁰

Fact-finding in the Law and Other Disciplines

The law has been historically important in the development of concepts of fact-finding and truth in other disciplines. At the same time, other disciplines have influenced the development of the law.

The historical interaction between law and science is particularly interesting. Many lawyers were interested in science in the 17th century.¹⁸¹ A major figure in science at the beginning of the 17th century was, of course, Francis Bacon, who is probably better known

177. See Friedland, *My Life in Crime*, *supra*, footnote 3, at pp. 399-400.

178. *R. v. Bain*, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 10 C.R. (4th) 257 (S.C.C.). Frank Iacobucci's recent report, *First Nations Representation on Ontario Juries* (Toronto, 2013) shows the lack of representativeness on jury rolls of members of First Nation communities.

179. *R. v. Yumnu*, [2012] 3 S.C.R. 777, 290 C.C.C. (3d) 323, 98 C.R. (6th) 44 (S.C.C.); *R. v. Emms*, [2012] 3 S.C.R. 810, 292 C.C.C. (3d) 533, 98 C.R. (6th) 95 (S.C.C.); *R. v. Davey*, [2012] 3 S.C.R. 828, 293 C.C.C. (3d) 265, 98 C.R. (6th) 69 (S.C.C.). See also *R. v. Spiers* (2012), 293 C.C.C. (3d) 17, 98 C.R. (6th) 114, 113 O.R. (3d) 1 (Ont. C.A.). See generally, Brent Kettles, "Impartiality, Representativeness and Jury Selection in Canada" (2013), 59 *Criminal Law Quarterly* 462.

180. See Barbara Shapiro, *A Culture of Fact: England, 1550-1720*, at p. 26, discussing "the norm of impartiality" in science and law: "Efforts to ensure impartiality have always been at the heart of the legal enterprise." In my study for the Canadian Judicial Council, *A Place Apart: Judicial Independence and Accountability in Canada* (1995), at p. 3, I write about the importance of judges not accepting favours from litigants and note that "Sir Francis Bacon had been removed as Lord Chancellor for accepting gifts."

181. See my essay, "A Century of Criminal Justice" in the book with the same title (Carswell, 1984), at p. 235, where I rely on Shapiro's article, "Law and

as a scientist than as a lawyer, although he was the Lord Chancellor of England, the highest member of the judiciary. As historian Lorraine Daston states in *Classical Probability in the Enlightenment*,¹⁸² Bacon “established a set of guidelines, borrowed directly from the legal rules of evidence concerning testimony . . . for weighing the credibility of [scientific] reports.” We associate scientific empiricism with Bacon and refer to it as Baconian empiricism.

The law had the jury system, which was at the time a unique way of attempting to determine the truth. The law therefore influenced fact-finding in other systems. It is surprising how many lawyers were interested in science and played a role through the Royal Society in the development of scientific ideas. As historian Barbara Shapiro has shown, some of the early meetings of the Royal Society, founded in 1660, were held in lawyers’ chambers, the Middle Temple, and a number of the early presidents of the Society were lawyers. Shapiro writes that “the language and practice of the Royal Society . . . exhibited features derived from the legal arena — emphasis on witnesses, preference for multiple witnesses, the rejection of hearsay, criteria for evaluating witnesses, and a concern for the degree of certainty to be attributed to witnessed matters of fact.”¹⁸³ “Legal modes of establishing appropriate belief,” Shapiro writes, “played a larger role in the development of truth-establishing practices than has hitherto been recognized.”¹⁸⁴

It is, therefore, not at all surprising that legal fact-finding methods influenced fact-finding in science and other areas, such as history, map-making, religion, and philosophy. Many of the early historians — Thomas More, Francis Bacon, Edward Coke, John Selden, the Earl of Clarendon, and Frederick Maitland — were lawyers.¹⁸⁵ Shapiro shows that the “concept of ”fact“ took shape . . . in the legal arena and was then carried into other intellectual endeavors until it became part and parcel of the generally held habits of thought of late-seventeenth and early-eighteenth-century English culture.”¹⁸⁶

These habits of thought in turn influenced the adoption of proof

Science in Seventeenth-Century England” (1969), 21 Stanford Law Review 727.

182. Lorraine Daston, *Classical Probability in the Enlightenment*, *supra*, footnote 166, at p. 307.

183. Shapiro, *A Culture of Fact*, *supra*, footnote 66, at p. 137.

184. *Ibid.*, at p. 33.

185. *Ibid.*, at p. 37.

186. *Ibid.*, at p. 8. See also Lorraine Daston, *Classical Probability in the Enlightenment*, *supra*, footnote 166, at p. 6: “more than any other single factor, legal doctrines molded the conceptual and practical orientation of the classical theory of probability . . .” and at p. 14: “legal theories of evidence

beyond a reasonable doubt. “By the end of the eighteenth century,” Shapiro states, “the concepts of moral certainty and proof beyond reasonable doubt were widespread in the moral and philosophical literature. Their introduction into legal writing in the jury charges, which emerge late in the century, should thus not be surprising.”¹⁸⁷

Conclusion

The finding of truth in a criminal case, as in science or any other matter, depends on a large number of factors. This paper has shown that in part it is determined by bars to prosecution, the relevant evidence that is available, the limitations on the use of that evidence, the standard of proof applied, the quality of legal representation for both the prosecution and the defence, and the existence of an unbiased fact-finder.

For various, mostly sound, policy reasons, the courts are not able to get at all the truth. This is inevitable in a system which looks at other values apart from truth. As the English writers Andrew Ashworth and Mike Redmayne state in their 2010 text, *The Criminal Process*, “The purpose of the criminal process is to bring about accurate determinations through fair procedures.”¹⁸⁸ This is as good a description of the purpose of the criminal process as I have found. It can cover the pre-trial, trial, sentencing, incarceration, and parole stages of the criminal process.

The description does not, however, provide a complete picture of

supplied probabilists with a model for ordered and even roughly quantified degrees of subjective probability.”

187. Shapiro, *Beyond Reasonable Doubt*, *supra*, footnote 66, at p. 32.

188. (Oxford, 2010), at p. 423; see also p. 23: the objects of the criminal trial are “accurately to determine whether or not a person has committed a particular criminal offence and to do so fairly.” See also A. Duff, L. Farmer, S. Marshall, and V. Tadros, *The Trial on Trial: Volume 3, Towards a Normative Theory of the Criminal Trial* (Hart, 2007), where the authors state at p. 13 their overall purpose: “to build a normative theory of the criminal trial, based on an account of its central communicative purpose as a process through which citizens are called to answer charges of public wrongdoing and to account for their wrongful conduct.” See also Ian Dennis, *The Law of Evidence* (3rd ed., 2007), who argues for the concept of legitimacy. The issue is discussed in Ashworth and Redmayne at p. 322. Some legal systems use the concept of ‘human dignity’ as an organizing principle (See Aharon Barak, *The Judge in a Democracy* (Princeton, 2006), at p. 85 et seq. I have not done so because of the vagueness of the concept. It should be noted that the Supreme Court of Canada abandoned the concept for equality cases in *R. v. Kapp*, [2008] 2 S.C.R. 483, 232 C.C.C. (3d) 349, 58 C.R. (6th) 1 (S.C.C.), after adopting it in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1, 43 C.C.E.L. (2d) 49 (S.C.C.).

the criminal process, at least in Canada. The decision not to prosecute is part of the criminal process. Relatively few criminal acts are reported to or known by the police. Even when they are known, charges are often not brought by the police or prosecutors. Shoplifting and possession of cannabis are two examples. The justice system could not function effectively if charges were brought in all cases. And the costs to administer the system would be prohibitive. The process would break down, citizens would lose faith in the administration of justice, and in some cases might take justice into their own hands. And, as in the United States today, too many persons would be caught up in the criminal justice system.¹⁸⁹

Some measure of restraint is therefore necessary. A striking example of restraint in bringing charges can be found in the Canadian tax system. Most persons are surprised to learn that relatively few persons — in the hundreds rather than the thousands — are charged with tax evasion in Canada each year. Yet, millions of persons are involved in the tax system. Prosecutions are reserved for clear-cut cases which can serve as morality plays for other members of the public, cases where other taxpayers will not sympathize with the wrong-doers, and thus the “dramatization of the moral notions of the community,” to use Thurman Arnold’s phrase,¹⁹⁰ will be more starkly presented. Civil penalties and techniques for making it difficult to avoid taxes are used instead. The tax people obviously think that they can collect more taxes this way than by using the criminal process.¹⁹¹ Moderation in the use of the criminal process has to be built into the description of the purpose of the criminal law.

Moreover, many of the criminal code charges brought in Canada are disposed of by diversion without a trial or a plea. In the vast majority of cases where there is a plea — perhaps 90 percent of all criminal cases — the accused pleads guilty. In most of these cases there is prior discussion or negotiation or, as it is often called, “bargaining” between the prosecutor and the defence. Even if there is no formal discussion, it is usually understood by the accused that a plea of guilty will likely result in a lesser penalty than a sentence imposed after a trial and a finding of guilt. Innocent persons,

189. Friedland, *My Life in Crime*, *supra*, footnote 3, at p. 297, where it is shown that in 2007 the “U.S incarceration rate has risen from roughly 100 persons per 100,000 in 1963 to over 650 per 100,000 today, by far the highest rate in the world. In contrast, the Canadian incarceration rate, which had been the same as the American rate was in 1963 — around 100 per 100,000 — is still almost exactly that rate today.”

190. Thurman W. Arnold, “Law Enforcement — An Attempt at Social Dissection” (1932), 42 *Yale Law Journal* 1, at p. 8.

191. Friedland, *My Life in Crime*, *supra*, footnote 3, at pp. 360-61.

therefore, will plead guilty in a number of these cases, particularly if they are being held in custody pending trial. Guilty pleas permit the criminal justice system to operate effectively. Having too many trials, just as bringing too many charges, would cause the justice system to collapse. So the efficient disposal of criminal charges should also be part of the definition of the purpose of the criminal law.

Cost considerations also play a role the criminal process. One particularly troubling aspect of the criminal process is the lack of effective legal representation for a large number of persons charged with criminal offences in Canada and other countries. At the present time, for example, legal aid in Ontario does not provide defence counsel for persons who are not likely to be sentenced to imprisonment if convicted — that is, most first offenders and probably a majority of persons charged. And even if there is a chance of imprisonment, representation is denied if a single person is making over \$12,500 a year¹⁹² — well under the minimum wage for a forty hour week. Having counsel, improves ones chances of being found not guilty or of having the charges withdrawn or otherwise diverted out of the system. Self-representation probably negatively affects truth-finding in the criminal justice system. Persons who cannot afford counsel should have greater assistance, whether through duty counsel, staff lawyers, paralegal representation, or other ways. Full representation is not likely to be provided in all criminal cases, even if more government money were devoted to legal aid. Cost restraint will prevent this when there are competing demands from other parts of society, such as health care, education, and infrastructure. If this is inevitable, then the addition of “within reasonable cost restraints” should also be included in the definition of the purpose of the criminal process.

So here is a possible revised statement about the purpose of the criminal process: “Within reasonable cost restraints and with a measure of moderation in prosecuting offences and having criminal trials, the purpose of the criminal process is to bring about accurate determinations through fair procedures.”

192. Legal Aid Ontario website. Duty counsel will give advice for persons earning over this amount.