SEARCHING FOR TRUTH IN THE CRIMINAL JUSTICE SYSTEM

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December 12, 2013. Word count: 15,271 with footnotes

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 that 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 deliberately places some barriers and obstacles in the search for truth. To what extent are they justified? This paper looks at these questions.

The paper is divided into five sections. The first looks at one specific bar to prosecution, double jeopardy, which prevents a court from holding a hearing. The second section looks at some rules of evidence that for policy reasons prevent the parties from introducing relevant evidence. The next looks at the history of the well-known standard of proof in the Anglo-American system of criminal justice – proof beyond a reasonable doubt. The fourth is a discussion of some specific reasonable doubt issues. The final section looks at legal fact finding and its influence on other disciplines.

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¹ Tehan v. US (1966) 382 US 406 at 416. 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 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.’
Probability runs through the whole of the criminal justice system – from arrest to parole. In arrest, the standard for a police officer is ‘reasonable grounds’ to believe that the person arrested ‘has committed or is about to commit an indictable offence’. 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.’ A judge holding a preliminary hearing requires ‘sufficient evidence’ for a committal for trial, which has been interpreted as ‘admissible evidence which could, if it were believed, result in a conviction.’ 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. The jury’s verdict uses the standard of ‘proof beyond a reasonable doubt.’ And so on throughout the criminal process. In this paper 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 (that is, 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.

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2 Criminal Code, section 495 (1) (a).
3 Criminal Code, section 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 103.
4 Criminal Code, s. 548(1).
7 Appeals involve other tests. See, for example, the test used by the Supreme Court of Canada in R. v. Trochym [2007] 1 SCR 239 at para 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 section 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.’

It is a fundamental rule. The second sentences of my book, Double Jeopardy, states: ‘No other procedural doctrine is more fundamental or all-pervasive.’ There are a number of sections of the Canadian Criminal Code relating to the rule 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.’ 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. 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.

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10 Friedland, Double Jeopardy at 3.
11 Criminal Code, sections 607-610.
12 Friedland, Double Jeopardy at vii and 16.
13 Ibid at 5 et seq.
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 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. We will come back to ‘benefit of clergy’ later in this paper. It is interesting to note 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 double jeopardy issue has recently arisen in England. A 2003 English statute now permits a retrial of an *acquitted* accused in certain circumstances. It came about because of the Billy Dunlop case. Dunlop had been acquitted of murder in 1989. 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.

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14 Friedland, *Double Jeopardy* at 326 et seq. English law took it to great lengths. The English court of appeal could not even order a new trial when a *conviction* was quashed. Now it can. US and Canada have always allowed a new trial in such cases. The US 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 203, part 10.
16 Friedland, *My Life in Crime* at 85 et seq.
17 The acquittal arose because 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 the accused.
18 Ibid at 86.
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 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 such as an alleged confession, a possible new eyewitness, or planted or fabricated real evidence. 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 that could be stretched to cover this type

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19 Ibid.
20 See New Zealand’s Criminal Procedure Act 2011; Scotland’s Double Jeopardy (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 Guardian, December 13, 2010), and the 2009 conviction of Mario Celaire for murder committed in 2001 (Guardian July 3, 2009).
23 Friedland, My Life in Crime at 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 at 86.
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 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

And 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 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 ‘Joe shot me’, courts have allowed this hearsay evidence to be introduced by the Crown under what is called the ‘dying

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26 Friedland, My Life in Crime at 87.
28 Friedland, Double Jeopardy at 422 et seq.
30 Timothy Hennis v. Frank Hemlick, January 17, 2012. At the time of writing he remains on death row.
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 where the evidence is both necessary and reliable. 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. 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.** 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.’ 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.' 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…’ 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.
Privilege. Another obvious example of a rule that excludes 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. There are a number of exceptions, such as when the otherwise privileged evidence could raise a reasonable doubt of the accused’s guilt. Evidence rules do not have to be symmetrical.

There is also a marital privilege designed to protect communications made during a marriage. A number of jurisdictions have eliminated this privilege, but it is still applicable in Canada. Should it? Another privilege protects cabinet documents. 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.

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 excluded such evidence. The Supreme Court of Canada held in the 1970 Wray case 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 confessions because they are often 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 section 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.’ The judge therefore now has a discretion under section 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 section 24 (2). In 2009, the Supreme Court of Canada in 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 discover the evidence would harm the administration of justice and so should be excluded under this test.52 An innocent and trivial breach

51 Ibid. at para 79.
52 Ibid. at para 128.
by the police, however, would be admissible. Such a rule acts as a deterrent against abusive tactics by the police.

Privilege against self-incrimination. In the Anglo-American system of criminal justice the accused cannot be called as a witness by the prosecutor. 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.’ 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 normally 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.’ 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. In Canada, somewhat surprisingly, the section 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 judge alone. What inferences a trial judge, a jury, and an appeal court can

53 Langbein, The Origins of Adversary Criminal Trial, at 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 340 et seq.; Langbein, The Origins of Adversary Criminal Trial at 279 et seq.
55 See generally, Paciocco and Stuesser at 311 et seq.
56 R. v. Prokofiew [2012] 2 SCR 639, 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.’
draw from the failure of an accused to testify is still being worked out by Canadian courts.  

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? More accused persons would then testify at the trial, which might improve the search for truth in the criminal process.

The Purpose of the Criminal Process

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.’ 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 the criminal process 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 ‘pot’ are two examples. The justice system could not function effectively if charges were brought in all these cases. And the costs 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. Too many persons would be caught up in the criminal justice system. Some

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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.’


62 (Oxford, 2010) at 423; see also 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 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 322.
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, 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. Restraint on 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 other cases – perhaps 90 percent of all criminal cases – the accused pleads guilty. In most of these cases there is prior discussion or negotiation or ‘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, therefore, will plead guilty in a number of these cases, particularly if they are being held in custody pending trial. But guilty pleas permit the criminal justice system to operate effectively. Having too large number of trials would, like bringing too many charges, cause the justice system to collapse. So the efficient disposal of criminal charges should 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 great 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

64 Friedland, My Life in Crime at 360-61.
a single person is making over $12,500 a year\(^{65}\) – 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 affects truth-finding in the criminal justice system. Persons who cannot afford counsel should have greater assistance, whether through duty counsel, paralegal representation, or other ways. Full representation is not likely to be provided in all criminal cases, even if more government money is 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 restraint in prosecuting offences and having criminal trials, the purpose of the criminal process is to bring about accurate determinations through fair procedures.’

**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

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\(^{65}\) Legal Aid Ontario website. Duty counsel will give advice for persons earning over this amount, but not
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.”

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

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66 Glanville Williams, Proof of Guilt, at 154-5.
67 Langbein, The Origins of Adversary Criminal Trial, at 262, note 40.
68 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 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 one innocent man suffer,’ also telling them that this is ‘often repeated to juries.’ E-mail from Phillips, dated March 2, 2013.
69 See Larry Laudan, Truth, Error, and Criminal Law: An Essay in Legal Epistemology (Cambridge, 2006) at 63. Laudan, understandably, does not like that 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 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 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 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.
Let us look at the origins of the jury. Trial by jury took over from trial by ordeal in England after Pope Innocent III banned death by the ordeal in 1215. The jurors were from the locality where the crime was allegedly committed, 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 John Langbein shows, ‘an opposite dynamic was at work, not promoting the accused’s silence but pressuring him to speak.’ 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. Pressure was put on the jurors to agree by withholding food, drink, fire or candle during their deliberations.

Lawyers were slowly permitted to appear in criminal cases. 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.’ 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.

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72 Langbein, _The Origins of Adversary Criminal Trial_ at 61 and chapter 5.
73 Winsor (1866) 10 Cox C.C. 276 (Q.B.) and 327 (Exch. Ch.).
74 Devlin, _Trial by Jury_ at 50; Williams, _Proof of Guilt_ at 12.
The number of defence counsel increased significantly in the 1780s. As historian John Beattie has shown, the numbers increased at the Old Bailey from under 7% in 1778 to over 20% in 1785. Lawyers were not given full rights in felony cases in England or Upper Canada until permitted by legislation in 1836. 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.’ 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. 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. The English judges simply became umpires in the process.

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.

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77 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 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 481-82.

78 Langbein, The Origins of Adversary Criminal Trial at 93, Beattie, ‘Scales of Justice’; Beattie, Crime and the Courts at 352 et seq.

79 As cited in Duff et al., The Trial on Trial: Volume 3, Towards a Normative Theory of the Criminal Trial at 44.


81 Williams, Proof of Guilt at 24 et seq.

Proof beyond a reasonable doubt became widely used in the 1780s, although it was sometimes used before that.\textsuperscript{83} 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.\textsuperscript{84} 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.\textsuperscript{85} 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.\textsuperscript{86} Benefit of clergy was abolished by statute in 1828.\textsuperscript{87}

Transportation was the main punishment through most of the 18\textsuperscript{th} century.\textsuperscript{88} Most persons convicted of a capital offence had their sentences commuted and were transported, usually for 14 years. In other cases, transportation was normally for 7 years. Perhaps two-thirds of all convicted felons in England were transported.

\textsuperscript{83} There were a number of Irish cases where it had been used. Shapiro, 'Changing Language, Unchanging Standard' at 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, \textit{The Origins of Reasonable Doubt} at 193; Anthony Morano, ‘A Reexamination of the Development of the Reasonable Doubt Rule’ (1975) Boston University Law Review 507 at 516 et seq.

\textsuperscript{84} Langbein, \textit{The Origins of Adversary Criminal Trial} at 58.

\textsuperscript{85} Beattie, \textit{Crime and the Courts} at 490 et seq. and at 560.

\textsuperscript{86} Green, \textit{Verdict According to Conscience} at 275-6, fn 29; Beattie, \textit{Crime and the Courts} at 560.

\textsuperscript{87} Offences against the Person Act 1828.

\textsuperscript{88} Beattie, \textit{Crime and the Courts} at 470 et seq.
to America. About 50,000 convicts were transported to the American colonies before 1775.

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. 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. Some have estimated that one out of three prisoners on the hulks died from the intolerable conditions. Existing prisons were not much better. Prison reformer John Howard published the first edition of his important work, *The State of the Prisons in England*, in 1777. More prisons were eventually constructed by individual counties, starting in 1785.

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89 Gallanis, ‘Old Bailey Counsel’ at 169, citing A.R. Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies, 1718-1775* (Oxford, 1987) at 1. Compare Green, *Verdict According to Conscience*, who said at 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.


91 Christopher, *A Merciless Place* at 61.


93 Evans, *The Fabrication of Virtue* at 120. Fisher, ‘The Birth of the Prison’ at 1267-68; Gallanis, ‘Old Bailey Counsel’ at 170; Beattie, *Crime and the Courts* at 593 says one in three died; see also Beattie, *Crime and the Courts* at 573; Christopher, *A Merciless Place* at 67 also concludes that one in three of the prisoners on the hulks died.

94 Gallanis, ‘Old Bailey Counsel’ at 172.


96 Gallanis, ‘Old Bailey Counsel’ at 171; Fisher, ‘The Birth of the Prison’ at 1237; Evans, *The Fabrication of Virtue* at 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* at 120 and 131.
Also, hangings increased because of the crime wave that came after the soldiers involved in the American Revolution returned to England.\textsuperscript{97} There were four times as many hangings in London in 1785 as there were in 1780.\textsuperscript{98} John 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.\textsuperscript{99} And in Sussex County there were 34 executions in the 1780s compared to only 2 in the previous decade.\textsuperscript{100}

Transportation to Australia did not commence until 1787.\textsuperscript{101} But transportation to West Africa started in 1781. The story about transportation to West Africa was not known to legal historians until Emma Christopher published her book in 2010, appropriately entitled \textit{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 deportations.\textsuperscript{102} They did not know the extent and therefore the significance of the story.


\textsuperscript{98} Emma Christopher, \textit{A Merciless Place} at 27.

\textsuperscript{99} Beattie, \textit{Crime and the Courts} at 532-3 and 584.

\textsuperscript{100} Ibid at 588.

\textsuperscript{101} Beattie, \textit{Crime and the Courts} at 599 et seq.

\textsuperscript{102} See Beattie, \textit{Crime and the Courts} at 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, \textit{Crime and the Courts}, fn 138 on 594 and see 599 (‘The evidence about Africa was discouraging.’) I did not spot any significant reference to Africa in any of the books by Shapiro that I examined. Nor in Langbein, \textit{The Origins of Adversary Criminal Trial}; nor in Fisher, ‘The Birth of the Prison’; nor Gallanis, ‘Old Bailey Counsel’. Whitman, \textit{The Origins of Reasonable Doubt} does not mention the West African deportations, simply stating at 163: ‘After a hiatus from 1775 to 1787, it was resumed, with offenders now transported to Australia.’ Green has a footnote on page 281 of \textit{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, \textit{A Merciless Place}, which I otherwise might not have come across. I subsequently found the following enlightening sentence in Evans, \textit{The Fabrication of Virtue} at 119: ‘A few hundred unfortunatees 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.
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. Well over half of the Europeans who went there died from disease within a few years.

Perhaps two hundred persons, mainly convicts and army deserters, were transported – as soldiers – from England to West Africa in July of 1781. 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. This was given wide publicity. 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. His unsuccessful defence 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. 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. 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

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103 Christopher, A Merciless Place at 86 and 101.
104 Ibid at 86, stating that 200 out of 300 soldiers died in one area in West Africa in a short period of time; and at 101: ‘Up to seventy-five per cent of Europeans were consigned to the earth within twelve months of stepping ashore.’
105 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 at 20 (‘a few hundred British convicts’ in total), 124 (‘200 convict-soldiers’).
106 Ibid at 122 and 133.
107 Ibid at 122 and 382, footnote 38.
108 Ibid at 253-4.
109 OBSP T17830910.
110 Christopher, A Merciless Place, chapter 10.
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. 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. The first use of the beyond reasonable doubt formulation at the Old Bailey may have been in April 1783. 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 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.’ 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.’ As

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111 Ibid at 306. See also F. P. Lock, Edmund Burke, Volume II: 1784-1797 (Oxford, 2006) at 24-25, discussing Burke’s response to plans to transport a shipload of convicts to Gambia in West Africa in March 1785.
112 Langbein, The Origins of Adversary Criminal Trial at 263. Erskine was one of the defence lawyers in the Gordon Riots case.
115 Whitman, The Origins of Reasonable Doubt at 192.
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.\footnote{Morano, ‘A Reexamination of the Development of the Reasonable Doubt Rule’.
}

Let us turn to some specific reasonable doubt issues.

**Some Reasonable Doubt Issues.**

The beyond reasonable doubt rule is, of course, part of the common law\footnote{Woolmington v. DPP [1935] A.C. 462 (H.L.) and Manchuk v. The King [1938] SCR 341.} and can be found in some eighteenth-century Canadian cases.\footnote{Trial of David Maclane (1797) 26 Howell’s State Trials 721 at 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 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’.
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Requiring a high standard of proof is important because of the clear danger of wrongful convictions. There have been a large number of well-documented wrongful convictions in Canada, as there have been in other common law jurisdictions. One thinks of the well-known trio of Canadian cases: *Marshall, Milgaard, and Morin.*\footnote{Lifchus at paragraph 13.} 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 mischief because her book on the trial stirred up controversy.\footnote{Friedland, *My Life in Crime* at 340.
}

Today, wrongful convictions are accepted by the judiciary as a real possibility. In a 2001 Supreme Court of Canada extradition decision, *Burns and Rafay,*\footnote{United States v. Burns and Rafay [2001] 1 SCR 283; see also R. v. Oickle [2000] 2 SCR 3 at paras 34 et seq.
} 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.’\footnote{Burns and Rafay at paragraph 1.
}
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. Sections 4 and 5 of the model charge read as follows:

‘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. 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. 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”,

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124 Canadian Judicial Council website, Model Jury Instructions, sections 9(4) and (5), revised June 2012..
125 Lifchus, at paras 25 and 37.
even though the Crown has failed to prove its case beyond a reasonable doubt.\textsuperscript{126} 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.\textsuperscript{127} 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.\textsuperscript{128}

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 prisoner’s guilt.”’\textsuperscript{129} The widely used English text, \textit{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.’\textsuperscript{130}

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

In earlier days, the so-called Rule in Hodge’s case\textsuperscript{131} 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

\begin{itemize}
\item \textsuperscript{126} Ibid at para 25.
\item \textsuperscript{127} Victor v. Nebraska (1994) 511 US 1. The Supreme Court held in In re Winship (1970) 397 US 358 that the beyond reasonable doubt standard applies to the states (and to state young offender proceedings).
\item \textsuperscript{128} Cage v. Louisiana (1990) 498 US 39.
\item \textsuperscript{129} R. v. Hepworth and Fearnley [1955] 2 QB 600, per Lord Goddard. See generally, Williams, \textit{Proof of Guilt} at 159 et seq.
\item \textsuperscript{130} \textit{Cross and Tapper on Evidence} 12\textsuperscript{th} edition (Oxford, 2010) at 163.
\item \textsuperscript{131} Hodge’s Case (1838) 2 Lewin 227, 168 E.R. 1136.
\end{itemize}
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. 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. Today, identification evidence is suspect and requires a special charge to the jury.

The Supreme Court of Canada held in a 1978 case that such a charge on circumstantial evidence need no longer be given. 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 rational inference that can be drawn from the circumstantial evidence is that the accused is guilty.’ It is now required in the Canadian Judicial Council’s model jury instructions.

If the accused enters the witness box, a special charge is required. The Model Jury Instructions state:

‘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

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133 Shapiro, Beyond Reasonable Doubt at 200 et seq.; Shapiro, A Culture of Fact at 21-22.
135 Cooper [1978] 1 SCR 860.
136 R. v. Griffin [2009] 2 SCR 42 at paragraphs 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.
137 Canadian Judicial Council, Model Jury Instructions, section 10.2.
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.’ 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.’ Note the words ‘you are satisfied.’ The US Supreme Court requires ‘a subjective state of certitude of the facts in issue.’

A growing body of literature, such as Daniel Kahneman’s recent best-selling book, *Thinking, Fast and Slow*, explores decision-making under conditions of uncertainty. In many situations decision-makers use heuristics or rules of thumb. 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.’ 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

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139 Ibid section 9.2 [4].
141 In Re Winship (1970) 397 US 358 at 364, per Brennan J. for the court. See also Harlan J. concurring, at 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 happened. Instead, all the factfinder can acquire is a belief of what probably happened.’
142 (Farrar, Straus and Giroux, 2011).
144 Canadian Judicial Council, Model Jury Instructions, section 9.2 [4].
decision-making process under the instruction that a reasonable doubt ‘is based on reason and common sense.’

**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. The only specific type of evidence it applies to is proof that a confession was made voluntarily. This is understandable because a confession will 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. D.P.P.* changed that. *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.’ 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 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

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145 Ibid. This section of the paper cannot deal adequately with this important and interesting area of research. A recent example of empirical work on decision-making is Andreas Glöckner 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 the 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’s work in the 1920s (published posthumously in 1931), which was the forerunner of game theory. Ramsey died in 1930 at the age of 26.

146 Morin [1988] 2 SCR 345 at para 19 et seq.
149 *Foster’s Crown Law*, as quoted in Woolmington.
used reasonable diligence.\textsuperscript{151} 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.\textsuperscript{152} 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,’\textsuperscript{153} 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 probabilities test.’\textsuperscript{154} 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.\textsuperscript{155}

**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.\textsuperscript{156} 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

\textsuperscript{151} See, e.g., R. v. City of Sault Ste. Marie (1978) 40 CCC (2d) 353.
\textsuperscript{152} See F.H. McDougall [2008] 3 SCR 41.
\textsuperscript{153} Ibid at para 49.
\textsuperscript{154} Ibid at para 46.
\textsuperscript{155} 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 328-9.
\textsuperscript{156} The only reference to twelve jurors in the Criminal Code is in section 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.
unanimous verdicts – 10 out of 12 for convictions. 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, but would not permit a 5 out of 6 verdict. Majority verdicts are not permitted in the U.S. federal system. Should Canada introduce majority verdicts? 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. The 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. It is hard to say what the Supreme Court of Canada would say if federal legislation was introduced permitting majority verdicts. 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. 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. 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*, 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,

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159 Burch v. Louisiana (1979) 441 US 130.
161 See Practice Direction (Majority Verdicts) [1967] 3 All ER 137; Juries Act 1974, section 17.
162 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.
163 See R. v. Gill (2003) 2003 BCAC 208. 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.
164 Williams, *Proof of Guilt* at 282.
returning to a simple majority in 1836. The number was later raised to 8 out of 12. 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.

**Other Related Issues.** The well-known Canadian case involving former premier Colin Thatcher raises another issue. Does a jury have to be unanimous on how a crime was committed, such as the murder in the *Thatcher* case? Could some jurors find that Thatcher personally committed the act and some find 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. 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.

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 *Morgentaler* case 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.’ 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

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167 See also Lorraine Daston, *Classical Probability in the Enlightenment* (Princeton, 1988), chapter 6, ‘Moralizing Mathematics’ at 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.’
169 R. v. Pickton [2010] 2 SCR 198. See also R. v. Reyat 2012 BCCA 311, 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.
171 Ibid at 76.
they need not enforce it. Such practice, if commonly adopted, would undermine and place at risk the whole jury system.\(^{172}\)

I have stressed the role of the jury in this paper. The jury is important in the development of the criminal law. The law is often built on challenged charges to juries. In fact, there are 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 in Ontario.\(^{173}\) There are said to be only about 500 jury trials in criminal cases in Ontario each year.\(^{174}\)

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.\(^{175}\) This is particularly the case close to election time. Is it possible that increasing the number of so-called ‘law and order’ judges in Canada may in the future tend to influence defence counsel to avoid trial by judge alone. One wants a neutral trier of fact.\(^{176}\)

\(^{172}\) Ibid at 40, Per Curiam headnote.


\(^{174}\) Friedland, My Life in Crime at 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 paragraph 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 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 likely 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 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 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.

\(^{175}\) 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 the United States in a jurisdiction where the trial judge handles bail and other matters 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.

\(^{176}\) See Friedland, My Life in Crime at 399-400.
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. 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. A fair trial requires a fair selection process whether it is for trial by a jury or trial by a judge.

So finding truth in a criminal case, as in any other matter, is in part determined by the relevant evidence that is available, the limitations on the use of that evidence, the standard of proof applied, and the existence of an unbiased fact-finder.

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. A major figure in science at the beginning of the 17th century was, of course, Francis Bacon, who is

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179 See Barbara Shapiro, A Culture of Fact: England, 1550-1720 at 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 3, I talk 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.’ Steps were taken to discourage such actions. It has taken longer for science to catch up. Most scientific journals now require disclosure of a scientist’s financial relationship with any company whose product is being studied.

probably better known 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*, 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. 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. It is surprising how many lawyers were interested in science and played a role through the Royal Society in the development of scientific ideas. 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.’ ‘Legal modes of establishing appropriate belief,’ Shapiro writes, ‘played a larger role in the development of truth-establishing practices than has hitherto been recognized.’

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. 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.’

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182 Shapiro, *A Culture of Fact*, at 137.
183 Ibid. at 33.
184 Ibid at 37.
185 Ibid at 8. See also Lorraine Daston, *Classical Probability in the Enlightenment* at 6: ‘more than any other single factor, legal doctrines molded the conceptual and practical orientation of the classical theory of probability...’ and at 14: ‘legal theories of evidence supplied probabilists with a model for ordered and even roughly quantified degrees of subjective probability.’
These habits of thought in turn influenced the adoption of proof 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.’186

186 Shapiro, Beyond Reasonable Doubt at 32.