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Convicting the Innocent beyond a Reasonable Doubt: Some Lessons about Jury Instructions from the Sheppard Case

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CONVICTING THE INNOCENT BEYOND A REASONABLE DOUBT: SOME LESSONS ABOUT JURY INSTRUCTIONS FROM THE *SHEPPARD* CASE

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I. INTRODUCTION

We can never know for certain who bludgeoned Marilyn Sheppard to death early in the morning of July 4, 1954. We weren't there. But in his recent book, *The Wrong Man*, journalist James Neff argues convincingly that the most likely killer was Richard Eberling, a sociopath who killed other women after stealing from them over the course of a long criminal career.[2] Eberling was convicted for one of these killings, but Neff makes a strong case that there were other victims as well, including Marilyn Sheppard. At the time of Mrs. Sheppard's death, Eberling had worked for the Sheppards as a window cleaner. The evidence against him includes some DNA evidence, which was probative but not entirely conclusive, a reported confession, opportunity, conduct consistent with other crimes he was known to have committed and with Dr. Sheppard's story of what happened the night his wife was murdered, and a series of Eberling's statements tying him to the crime scene, made both before and during his incarceration for killing another woman. Some of these statements were made to Neff, who had been interviewing Eberling in prison, where Eberling died in 1998.

Let us assume that Neff is right. If so, the most important question is what went wrong with the system of justice that led to Dr. Sheppard's conviction for his wife's murder in 1954. The question is serious enough if only because of the tragedy that

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[1]Professor of Law, Brooklyn Law School. I am grateful to George Carr, Patricia Falk and Adam Thurschwell for their generous help with difficult issues of Ohio law and for their sharing legal materials.

[2]JAMES NEFF, THE WRONG MAN: THE FINAL VERDICT ON THE DR. SAM SHEPPARD MURDER CASE (2001).

the legal process wreaked on Dr. Sheppard and his family. But it becomes all the more serious if the answer includes dysfunction in the legal system that has not been corrected in the half century since the first *Sheppard* trial. Moreover, F. Lee Bailey's successful efforts in the 1960's to free Dr. Sheppard on a writ of *habeas corpus*, and the subsequent retrial resulting in a verdict of not guilty were not the last legal proceedings. In 1999, Dr. Sheppard's son, Sam Reese Sheppard, brought a civil action based on wrongful conviction to clear his father's name affirmatively. He lost, the jury finding that he had not met the requisite burden of proving his father's innocence.

Indeed, it is difficult to prove one's innocence, and the legal system purports not to require defendants in criminal cases to do so. Defendants are supposed to have no burden of proof, and the government's burden is supposed to be an exacting one: proof beyond a reasonable doubt. I will argue that the system does not always function according to this design, and certainly did not do so in the first *Sheppard* trial. Rather, it functioned more like the civil trial, in which the Sheppards, as plaintiffs, had the obligation to prove their case. The shift in the burden of proof happened for a number of reasons. Some are still very much a part of the system today, and are not specific to any peculiarities in the *Sheppard* case itself.

The conviction of the innocent has become a frequent topic of discussion in recent years, largely because post-conviction DNA analysis has made the phenomenon impossible to deny with any credibility. Barry Scheck, Peter Neufeld and Jim Dwyer[3] devote most of their book, *Actual Innocence*, to describing the investigative work and legal struggles that led to the exoneration through DNA evidence of a number of people wrongly convicted of crimes they did not commit. As recent events have shown, DNA analysis, had it been available in 1954, would have at least cast enough additional doubt on Dr. Sam Sheppard's guilt to make it less likely that he would ever have been brought to trial.[4]

But *Actual Innocence* raises another question – a question that DNA evidence cannot answer: What happens at a trial that leads a jury to vote unanimously that an innocent person is guilty beyond a reasonable doubt of committing a crime that he did not commit? In an appendix, Scheck *et al.* list a number of recurring factors, including, in order of prevalence, mistaken eyewitness identification, incorrect serology inclusion, police misconduct, prosecutorial misconduct, defective or fraudulent science, bad lawyering and false testimony.[5]

Many of these factors, along with others, were present in both the first and third *Sheppard* trials. Most horrifying was the willingness of government lawyers and witnesses to engage in misconduct. For example, the key prosecution witness in the 1954 trial was the county coroner, Dr. Samuel Gerber. Dr. Sheppard claimed that the killer had struck him and knocked him unconscious twice – once in the bedroom where his wife had been killed, and again outside, on the shore of Lake Erie, where Dr. Sheppard had followed the killer out the back of the lake-front home. When he returned to the house, he called his neighbor, the mayor of Bay Village, the

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[3]BARRY SCHECK, ET AL., ACTUAL INNOCENCE (2000).

[4]For discussion of this evidence, *see* NEFF, *supra* note 2, at 329-32.

[5]SCHECK, *supra* note 3, at 263. For further discussion of some of the problems with expert identification techniques, *see* Michael J. Saks, *Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science*, 49 HASTINGS L. J. 1069 (1998).

Cleveland suburb in which they lived. Dr. Gerber testified persuasively that Dr. Sheppard's story was incredible because of the considerable time that elapsed between the time of death, established by the coroner's office, and the time that Dr. Sheppard called the mayor. What Dr. Gerber did not say at trial is that his own office had established the time of death as much earlier, in a report that did not see the light of day for some half century.[6] The time of death in the report actually *supported* Dr. Sheppard's version of the events.

This omission was one of many false and misleading statements made by government officials. The most famous was Dr. Gerber's claim that Mrs. Sheppard was likely killed with some kind of surgical instrument.[7] At the first trial, he was never asked why he could not produce an instrument that matched the impressions on the body and the bed sheets. In reality, the government had searched far and wide for such an instrument, but couldn't find one, a fact that government lawyers and witnesses kept to themselves. All of this came out, rather sensationally, at the second trial, in which Bailey obtained the acquittal.[8] By the time of the third trial, just a few years ago, government lawyers abandoned the surgical instrument theory, opting instead for the theory that Dr. Sheppard had killed his wife with a lamp, a position that had been abandoned in 1954 as inconsistent with credible evidence.[9]

Prosecutorial misconduct was not the only problem with the *Sheppard* trials. Juror exposure to wild theories in the press was not controlled at the first trial.[10] In fact, the identity of the jurors was a matter of public information, making it more difficult for anyone to acquit given the public outrage against Dr. Sheppard that the local press had stirred up. This became the basis for Bailey's successful *habeas corpus* petition.[11] According to Neff, strategic errors by defense counsel may also have played a role both in Dr. Sheppard's conviction and in the recent civil case. Moreover, it appears that the jury did not understand the DNA evidence that was brought to light in the civil trial.

In this article, I will discuss another factor that I believe pervades the criminal justice system: jury instructions that shift the burden from the government to the defendant. Of course, I cannot prove with certainty that these jury instructions were

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[6]NEFF, *supra* note 2, at 18.

[7]*See, e.g.,* PAUL HOLMES, THE SHEPPARD MURDER CASE 112-13 (1961); NEFF, *supra* note 2, at 142.

[8]For description, *see* NEFF, *supra* note 2, at 261.

[9]*Id.* at 370.

[10]I experienced this first-hand on my way to the symposium for which this article was prepared. In a taxi from the airport to my hotel in Cleveland, I mentioned to the driver that I was going to be speaking about the *Sheppard* case. He told me he believed that Dr. Sheppard killed his wife because, being sterile, Dr. Sheppard could not have been the father of the child she was carrying. The driver told me that he had heard this from his parents, but didn't know where they got this information. In fact, this was one of the rumors that was being circulated during the first trial, based on a theory that the government pursued, but had to abandon. It had no basis in fact, it turns out. Dr. Sheppard's second wife became pregnant many years later in a pregnancy that resulted in a miscarriage, and there was no controversy over who the father was.

[11]Sheppard v. Maxwell, 384 U.S. 333 (1966).

responsible for a particular conviction in a particular case. The only way to do that would be to re-try a large number of cases in precisely the same way as the original trial, except for using a corrected instruction, and then to observe a significantly lower rate of conviction. Nonetheless, it is noteworthy that the jury in the first *Sheppard* trial took five days and eighteen written ballots to reach a decision. The vote on the first ballot was 7 - 5 in favor of conviction.[12] In these circumstances, it is not unreasonable to ask whether adjustments in the way the jury was told to do its job might have affected the outcome.

Moreover, there now exists a great deal of empirical research that sheds some light on the effects that the language of jury instructions are likely to have on decision makers. That research is very robust and, to the best of my knowledge, uncontroverted. It shows that some language routinely used in jury instructions is hard to understand, and that the way in which instructions are worded, particularly instructions that define the burden of proof, affects the likelihood of conviction, especially in close cases.

Part II of this article establishes three criteria for good criminal jury instructions. They are fidelity to the law, comprehensibility, and consistency with the presumption of innocence. It then discusses the presumption of innocence, burden of proof and circumstantial evidence instructions used at the time of the first *Sheppard* trial in light of those criteria. None of them passes muster. While jury instructions in Ohio and elsewhere have made some progress since then, the system can still be improved in ways that are quite obvious. Part III discusses some of the empirical research on burden of proof instructions, and relates it to both the jury instructions on which Dr. Sheppard was convicted, and contemporary instructions. Part IV is a brief conclusion calling for the criminal justice system to take seriously the need to revise jury instructions to convey the messages they are supposed to convey in language that people can understand. It has been almost fifty years since Dr. Sheppard was convicted. The system has made some progress in that time, but not nearly enough.

II. JURY INSTRUCTIONS IN THE *SHEPPARD* TRIAL

A. Three Criteria for a Good Jury Instruction

In order to assess the quality of a jury instruction, it is first necessary to decide what makes a good jury instruction good. Let us say that at a minimum any good criminal jury instruction must meet the following three criteria: First, it must accurately convey the law to the jury. Second, it must do so comprehensibly. Third, it must not contain subliminal messages that undermine the presumption of innocence.

Writing jury instructions that are legally accurate seems straightforward enough, especially when the law is contained in a statute. In fact, the instructions in the *Sheppard* trial were largely descriptions of the elements of first degree murder, second degree murder and manslaughter.[13] They summarize the statutes, and explain the terms, as do most jury instructions based on statutes. But fidelity to the law is not always easy to achieve, and sometimes comes with some cost. First, it is

[12]NEFF, *supra* note 2, at 165.

[13]State v. Sheppard, Transcript, pp. 6996-7003 (on file with author) [hereinafter Transcript]. My gratitude to George Carr for providing the transcript of the jury instructions.

sometimes possible to be loyal to the language of a complicated statute only by making the instruction as incomprehensible as the statute. This obviously makes the trial process a matter of gambling with someone else's freedom, since the jurors will not know what they are supposed to consider when they deliberate. When a statute is complex, the easiest way to be accurate in describing its requirements is to read it verbatim to the jury. But the statute was not written to be easy for people on jury duty to understand. It was written to reflect the precise, and sometimes minute compromises that the legislature reached in enacting the law. The result is a choice between guaranteeing fidelity to the statute's language on the one hand, and making the statute understandable, on the other. Matters become even worse when the statute is not only complicated, but is also poorly written.

There has been a great deal of discussion of the tension between accuracy and comprehensibility in recent literature, focusing largely on death penalty instructions. Many death penalty statutes require jurors to take into account both aggravating and mitigating circumstances. However, studies show that jurors usually do not know what those terms mean, and instructions on how to weigh them are routinely misunderstood.[14] Even in this context, courts are often perfectly content to accept instructions that track the language of the statute. As the Eight Circuit held, "[t]he best way to comply with [the Federal Death Penalty Act] is to actually use the language of the statute in the jury."[15] This perspective is by no means unusual among appellate courts.[16] Statutory language can offer a safe harbor for trial courts concerned about being reversed even when it is not comprehensible.

Although many courts accept "accuracy" over comprehensibility, some do set higher standards. Notably, the Supreme Court of New Jersey has made the following statement:

> This Court has made abundantly clear that correct jury instructions are at the heart of the proper execution of the jury function in a criminal trial: "'[a]ppropriate and proper charges to a jury are essential for a fair trial.'" A court's obligation properly to instruct and to guide a jury includes the duty to clarify statutory language that prescribes the elements of a crime when clarification is essential to ensure that the jury will fully understand and actually find those elements in determining the defendant's guilt.
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> For the purpose of instructing and guiding juries, courts regularly explain and define statutory language consistent with legislative intent. Courts commonly clarify statutory language to give more precise meaning

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[14]Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?,* 1995 UTAH L. REV. 1 (1995); Peter Maijes Tiermsa, *Reforming the Language of Jury Instructions,*, 22 HOFSTRA L. REV. 37 (1993); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 230-31 (1996).

[15]United States v. Paul, 217 F.3d 989, 997 (8th Cir. 2000).

[16]*See* Harjo v. Gibson, 216 F.3d 1087 (10th Cir. 2000) ("Instructing the jury according to the statutory language of the aggravator, as the trial court did, meets constitutional standards."); Farrington v. Senowski, 214 F.3d 237,244 (2d Cir. 2000) ("These instructions on larceny mirror the statutory language, *see* N.Y. Penal Law § 155.05, and were therefore not 'clearly constitutionally deficient.'").

> to statutory terms to effect the legislative intent and to make sure that juries carry out that intent in determining criminal culpability.[17]

This approach, in my opinion, is far more likely to lead to fair jury deliberation than the mechanical adherence to statutory language without regard to how likely jurors are to understand it. Yet the New Jersey approach is the more unusual one, at least as reflected in appellate court decisions. The result is that trial judges who know that the linguistically faithful instruction will be nothing more than gibberish to the jury are likely to accept it nonetheless, seeing reversal down the road if they attempt to exercise creativity for the sake of comprehensibility.[18]

A second issue concerning the accuracy of a jury instruction involves instructions that describe such things as burden of proof, causation, and various legal presumptions. For these concepts, the relevant underlying law is about the instructions themselves. We cannot measure their accuracy against a statute defining a crime. Instead, we must measure these instructions against what it is that the instruction is supposed to accomplish, and for that we need to agree in advance on a theory. Unless there is consensus about the underlying purpose of the instruction, there will be no consensus about what information the instruction is supposed to convey. The wide range of instructions on both causation and burden of proof should itself suggest that more than two hundred years into this country's history, we still have not reached consensus on what those theories should be. As we will see, burden of proof instructions, especially instructions defining proof beyond a reasonable doubt, tend to suffer from lacking a clear sense of exactly what message they are attempting to convey. The reasonable doubt instruction in the 1954 and 1966 *Sheppard* trials was a classic example of this phenomenon. Since then, the Ohio legislature has revised the instruction, but it is still not adequately focused on what the government must prove.[19]

As for the second criterion, comprehensibility, I mean writing or speaking in English that is clear enough for jurors to understand. Both the vocabulary and the syntax should make an instruction as easy as possible to comprehend, even if the concepts being conveyed are complex. There is a great deal of literature on the issue of comprehensible jury instructions.[20] As we will see, the presumption of innocence instruction used in the *Sheppard* trials is a model for how not to write an instruction. The reasonable doubt instruction failed this test as well. Also poorly written was the instruction on circumstantial evidence. At the time, Ohio had a rule that when a case was based solely on circumstantial evidence, the jury could only convict if there was

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[17]State v. Alexander, 136 N.J. 563, 571-72 (1994).

[18]*See* Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOKLYN L. REV. 1081 (2001).

[19]*See infra* Part IIB for discussion.

[20]For an early study *see* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions,* 79 COLUM. L. REV. 1306 (1979). *See also*, Amiram Elwork, Bruce D. Sales, & James J. Alfini, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982). *See* Tiersma, *supra* note 18 for additional references.

no reasonable theory of the evidence consistent with the defendant's innocence.[21] The instruction that the first *Sheppard* jury heard on this issue was self-contradictory.

Finally, jury instructions should not contain messages that will tend to undermine the presumption of innocence. The most egregious example of this tactic that I have seen is described in a 1947 New York case, in which the Court of Appeals reversed a conviction based on the following definition of reasonable doubt in a jury instruction:

> It is not a doubt based upon sympathy or a whim or prejudice or bias or a caprice, or a sentimentality, or upon a reluctance of a weak-kneed, timid, jellyfish of a juror who is seeking to avoid the performance of a disagreeable duty, namely, to convict another human being of the commission of a serious crime.[22]

Of course, no court would use such language today, making the quotation appear entertaining. But courts continue to find ways of conveying the message that jurors should not be afraid of convicting if they think that the defendant is guilty. In so doing, they continue to undermine the presumption of innocence.

The circumstantial evidence instructions used in the 1954 trial were strongly oriented toward focusing the jury on the circumstantial evidence that favored the government and away from the circumstantial evidence that favored Dr. Sheppard. As such, they undermined the presumption of innocence. The reasonable doubt instruction also failed in this regard, as do many such instructions even today.[23]

Taken together, the failure of the instructions to meet minimal criteria account for part of what was unfair about the *Sheppard* trial. With the presumption of innocence explained in incomprehensible terms, reasonable doubt instructions conveying confused messages in unclear language that was largely at odds with the presumption of innocence, and examples of circumstantial evidence that favored the prosecution, the battle for the defendant was all uphill once the case reached the jury.

Did the instructions affect the outcome of the case? We can never know. But we do know from Neff's recent interviews with surviving jurors that some jurors believed Dr. Sheppard was guilty because he was the only one there; others thought he was guilty because he was motivated by aspects of his adventurous sex life that were disclosed not at trial, but in the press; and others focused on the gap in time between the time of death and the time that Dr. Sheppard called the mayor – to which the coroner testified in contradiction to his own department's report, which was conveniently suppressed.[24] In these circumstances, no one can say that a jury focused on its burden and on the presumption of innocence would have acquitted. But a hung jury requires only a single vote for acquittal.

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[21]That rule has since been abandoned. *See* Ohio v. Jenks, 574 N.E.2d 492, 503 (1991), discussed *infra* note 52.

[22]People v. Feldman, 296 N.Y. 127, 140 (1947).

[23]*See* Part III for discussion of how many standard reasonable doubt instructions tend to shift the burden of proof from the government to the defendant.

[24]NEFF, *supra* note 2, at 166-67.

Let us now examine various jury instructions used in the *Sheppard* trial to determine how well they meet the criteria of accuracy, comprehensibility and conformity with the presumption of innocence.

B. The Presumption of Innocence

No principle of criminal law is more deeply embedded in our system than the presumption of innocence. The entire burden of proof in a criminal case rests on the shoulders of the government. It is statutorily mandated in Ohio, but is a matter of constitutional right in any event. The current Ohio statute states in clear and plain language:

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution.[25]

The statutory instruction in place at the time of the *Sheppard* trial was considerably more difficult to understand.[26] It read in relevant part:

> A defendant in a criminal action is presumed to be innocent until he is proved guilty of the crime charged, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he shall be acquitted. This presumption of innocence places upon the state the burden of proving him guilty beyond reasonable doubt.[27]

In addition to these words, the trial judge added the following in the first *Sheppard* trial:

> By presumption of innocence is meant that cloak which the law throws over every citizen in our society, giving him, in a sense, a favorable position in society as distinguished from an unfavorable one, the place of an honest man as distinguished from a dishonest man, and an innocent man as distinguished from a law violator, and keeps that cloak over him unless and until proof is furnished that such citizen is not entitled to the protection of that cloak and, in a case of a charge of crime, to be guilty of it by evidence showing it beyond a reasonable doubt, as that term is understood under our law.[28]

No doubt, what the instruction meant to say was just what the current statute does say. But I find the instruction impossible to understand on its own terms, and I cannot imagine that Ohio jurors found it any easier. One problem is the insertion of the phrase, "and in case of a reasonable doubt, whether his guilt is satisfactorily

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[25]OHIO REV. CODE ANN. § 2901.05(A) (West 2001). The statute further shifts the burden of proving an affirmative defense to the accused, by a preponderance of the evidence.

[26]The instruction, which is statutory, was so poorly written, that I thought the draft paper that I was using for my presentation at the conference must have contained typographical errors, so I did not make this point there. When I returned home, I quickly discovered that the error was not mine.

[27]OHIO REV. CODE ANN. § 2945.05.

[28]Transcript, *supra* note 13, at 6995.

shown, he shall be acquitted." From context, I can guess that the statute was well-intentioned, and was trying to say that even if proof of guilt seems satisfactory, a jury must acquit if it is left with reasonable doubt. But I can only guess because the words of the statute themselves make almost no sense to me. As for the additional language read by Judge Blythen, it consists of a single 110 word sentence with a host of messages. For example, the instruction distinguishes between the "honest" and the "dishonest" man with respect to who maintains the "cloak" of innocence. Does that mean that the presumption of innocence automatically disappears if a defendant tells a lie? That is certainly one reasonable interpretation of the instruction, and it is inconsistent with the requirement of proof beyond a reasonable doubt.

The contrast between the old and new instructions illustrates two important points. First, it is not impossible to take most incomprehensible instructions and to make them clear. The Ohio legislature did an excellent job with the presumption of innocence instruction now in effect. Second, the jury system is fragile. For years, Ohioans on jury duty received no understandable instruction concerning the presumption of innocence. We do not know what presumptions they really had when they entered the jury room to deliberate. The presumption of innocence instruction used in the *Sheppard* trial, then, fails all three tests: It does not accurately describe the law, since it is so convoluted we cannot tell what it means. By the same token it is incomprehensible and it undermines the presumption of innocence by suggesting that dishonesty on the stand shifts the burden of proof to the defendant.

C. Proof Beyond a Reasonable Doubt

The burden of proof in a criminal case is supposed to be a heavy one for the government to meet. The Supreme Court of the United States has expressed this sentiment many times, and has never strayed from it.[29] For example, in 1979, the Court held: "[B]y impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself."[30] In fact, a unanimous Supreme Court held in 1993 that a constitutionally deficient instruction on the meaning of reasonable doubt cannot be subjected to harmless error analysis.[31] The expression "proof beyond a reasonable doubt" is means for accomplishing an end – the requirement that a person should not be convicted unless the government proves its case to "near certitude."

For a reasonable doubt instruction to meet our first two criteria, it must be both comprehensible and written in language that is reasonably likely to accomplish its intended goal of informing the jury that it should convict only if it is nearly certain of the defendant's guilt. Incomprehensible statements, such as Ohio's earlier presumption of innocence instruction, cannot possibly convey to a jury how it should deliberate.

In addition, language that purports to place the burden on the government, but which then cleverly suggests that the burden rests with the defendant, should not be

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[29]I discuss this history in some detail in Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About reasonable Doubt*, 78 TEX. L. REV.105, 109-12 (1999).

[30]Jackson v. Virginia, 443 U.S. 307, 315 (1979).

[31]Sullivan v. Louisiana, 508 U.S. 275 (1993).

acceptable. Similarly, instructions that focus first on the difficulty of proving guilt beyond a reasonable doubt, but then go on at great length about how most doubts are unreasonable, may undermine the very values that they purport to promote.

Let us compare three sets of reasonable doubt instructions to see how well they achieve the criteria I have just enumerated. The first is the instruction statutorily in place in 1954 in Ohio. The second is Ohio's current reasonable doubt instruction and the third is an instruction I believe sets the standard for burden of proof instructions. It is New Jersey's revision of an instruction promulgated by the Federal Judicial Center, which is superior to the others in meeting the three criteria.[32]

The instruction used in the *Sheppard* trial began with the judge saying that the presumption of innocence requires "in the case of a charge of a crime, to be guilty of it by evidence showing it beyond a reasonable doubt as that term is understood under our law."[33] It then explains that the legislature has defined "reasonable doubt," and conveys the statutory definition to the jury. When Dr. Sheppard was tried in 1954, Ohio defined "reasonable doubt" in its legislatively-drafted jury instruction as follows:

> It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.[34]

This instruction, as short as it is, is riddled with problems. First, it is not the case that the law requires "evidence showing" a crime beyond a reasonable doubt. It requires that the elements of a crime be proven beyond a reasonable doubt. Very strong evidence "showing" the crime may be neutralized by even stronger conflicting evidence. Thus the instruction is unfaithful to the law, failing the first criterion of a good jury instruction. The instruction also uses expressions that are unfamiliar in everyday speech ("moral evidence"), it focuses on which doubts are illegitimate ones, and defines "reasonable doubt" with a series of negatives that is very confusing and difficult to process.

If in response to this instruction one asked, "what must the government do to prove its case," it would be very hard to answer. The response would have to be something like: "The government must prove its case by evidence beyond leaving you in the condition that you cannot say you feel an abiding conviction to a moral certainty of the truth of the charge." Yet the instruction never even does that much. It leaves it to the jurors to compute the relationship between the burden placed on the government and the definition of "reasonable doubt." In Part III of this article, I will discuss empirical studies suggesting that instructions that focus on what makes a doubt reasonable instead of what burden the government must meet serves to shift the burden of proof from the government to the defendant, and thus to undermine the presumption of innocence.

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[32]FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS NO. 21 at 28 (1987 ed.).

[33]Transcript, *supra* note 13, at 6995.

[34]OHIO REV. CODE ANN. § 2945.05.

The current statutory Ohio instruction, enacted by the Legislature in 1974, reads:

> "Reasonable doubt" is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.[35]

Standard jury instructions stray from this language a bit, but capture its essence.[36]

While the newer instruction is an improvement, problems remain. The biggest problem with the current instruction is that it has failed to fix the major problem with the old one: its focus is on which doubts are reasonable, instead of on what the government's burden should be. Again, it warns jurors against "possible doubt," deals in negatives, and uses expressions with which jurors are unlikely to be familiar. For example, it continues to use the expression "moral evidence," which comes from Enlightenment philosophy, and means, essentially, indirect evidence, as contrasted with "demonstrative evidence," which is perceived directly through the senses.[37] The expression, "moral certainty," present in the earlier Ohio instruction, means something like, "as certain as you can be given that you have to rely on moral evidence." Justice O'Connor has characterized the standard as meaning, "the highest degree of certitude based on such evidence."[38] The question is whether the expression "moral evidence" expresses this concept clearly to the jury.

Let us compare these two instructions with a third: The Supreme Court of New Jersey's slight revision of an instruction written in the 1980s by the Federal Judicial Center. That instruction reads as follows:

> The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is necessary to prove only that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
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> A reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of the defendant, after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself or from a lack of evidence. It is a doubt that a reasonable person hearing the same evidence would harbor.

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[35]OHIO REV. CODE ANN. § 2901.05(D) (West 2001).

[36]Basically, the standard instruction replaces "the jury" with "you," which serves to make the instructions easier to understand. OHIO JURY INSTRUCTIONS § 403.50 at 36 (2000).

[37]*See* Victor v. Nebraska, 511 U.S. 1, 11 (1994), for discussion of some of this history. For more detail, *see* Solan, *supra* note 29, and references cited therein.

[38]511 U.S. at 11.

> Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt. In this world, we know very few things with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you are not firmly convinced of defendant's guilt, you must give defendant the benefit of the doubt and find him not guilty.[39]

The key to this instruction is its associating the expression "firmly convinced" with "proof beyond a reasonable doubt." It focuses the jury on the government's burden, and not on what might be deficient about the defendant's case. Before exploring why this instruction is so much superior to the others, however, let us turn to the instruction on circumstantial evidence in the *Sheppard* trial, which suffered from some of the same problems, among others.

D. Circumstantial Evidence: The Judge and the Cherry Tree

The instruction in the 1954 *Sheppard* trial on the nature of circumstantial evidence is also problematic. It was a ground for appeal, rejected by the Ohio appellate courts,[40] but focused upon heavily in Justice Taft's dissenting opinion in the Supreme Court of Ohio's affirmance of Dr. Sheppard's conviction.[41] It began with a description of the difference between direct and circumstantial evidence. It then told the jury to do the following:

> It is necessary that you keep in mind, and you are so instructed, that where circumstantial evidence is adduced it, together with all other evidence, must convince you on the issue involved beyond a reasonable doubt and that where circumstantial evidence alone is relied upon in the proof of any element essential to a finding of guilt such evidence, together with any and all other evidence in the case, *and with all the facts and circumstances of the case as found by you must be such as to convince you beyond a reasonable doubt and be consistent only with the theory of guilt and inconsistent with any theory of innocence. If evidence is equally consistent with the theory of innocence as it is with the theory of guilt it is to be resolved in favor of the theory of innocence*.[42]

On one reading, the last two sentences are inconsistent. The first tells the jurors that circumstantial evidence must "be consistent only with the theory of guilt and inconsistent with any theory of innocence." The second says that the burden of proof should act as a tie-breaker. If the evidence favors the two parties equally, then the jury should acquit. Note that the last sentence really describes proof by a preponderance of the evidence, and is remote from any legitimate concept of proof beyond a reasonable doubt.

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[39]State v. Medina, 685 A.2d 1242, 1251-52 (N.J. 1996).

[40]Ohio v. Sheppard, 135 N.E.2d 340 (Ohio 1956); Ohio v. Sheppard, 128 N.E.2d 504 (Ohio App. 1955).

[41]*Sheppard*, 135 N.E.2d at 351 (Taft, J., dissenting).

[42]*Id.* at 346 (emphasis added).

It is also possible to argue that these sentences should not be read separately, but should be taken as a whole, and that together they convey the message that circumstantial evidence must be especially strong for a conviction to be based on it. The first sentence conveys the rule, and the second emphasizes that ties go to the defendant. That might be true—but it might not be. There is absolutely no reason to believe that jurors will focus on the first of two inconsistent statements. In fact, there is reason to believe the opposite. Note that the first statement entails the second, making it logically nothing more than surplusage. If, indeed, it is the case that *all* uncertainties in circumstantial evidence are to be resolved in favor of the defendant, then it also must be true that uncertainties when the evidence is equally consistent with guilt and innocence are to be resolved in favor of the defendant. The juror hearing these sentences, then, will ask herself why the judge bothered to utter the second sentence.

In everyday life, we answer such questions to ourselves by applying what the philosopher H. Paul Grice called principles of conversational implicature.[43] When listening, we make assumptions about what the speaker is trying to communicate, and when speaking we make assumptions about how the listener is likely to understand what we are saying. Given that language permits a vast range of inferences, successful communication requires that the speaker and listener both be on more or less the same wavelength with respect to these goals. According to Grice, the dominant inference that people use is a cooperative principle: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged."[44] Grice describes certain maxims that follow from this principle. Among them are the maxim of quantity ("make your contribution as informative as is required (for the current purposes of the exchange")), and the maxim of relevance ("be relevant.").[45]

Returning to the *Sheppard* case, consider the reasoning that a juror is likely engage in after hearing the potentially conflicting instructions. The maxim of quantity suggests to the juror that the second part of the instruction – the part that imposes only a preponderance of the evidence standard – is not mere surplusage. Taking the two statements together, the juror might sensibly conclude that close cases should be resolved in favor of acquittal, but that once the case was pretty strong, it was fair enough to draw inferences in favor of the state. This is a far cry from any acceptable notion of proof beyond a reasonable doubt.

The most dramatic part of the instruction came when the judge illustrated the difference between direct and circumstantial evidence, a common practice among courts.[46] Significantly, in affirming Dr. Sheppard's conviction, the majority opinion

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[43]Paul H. Grice, *Logic and Conversation*, *in* SYNTAX AND SEMANTICS, VOL. 3: SPEECH ACTS 41 (P. Cole & J. Morgan eds., 1975).

[44]*Id.* at 45.

[45]*Id.* at 45-46.

[46]The following was the practice at that time:

> In defining circumstantial evidence, it is proper to use illustrations drawn from common experience or based upon familiar events of every-day life. Illustrations which are apt and clear, and not of such a character as to cause the jury to lose sight of the real issue, are often helpful in making clear a legal proposition otherwise difficult

of the Supreme Court of Ohio did not mention this part of the circumstantial evidence instruction – the part that is routinely mentioned in the popular literature on the *Sheppard* case. For that, we need to read the dissent. The trial judge illustrated the difference between direct and circumstantial evidence with the following example:

> Illustrating now what would be direct evidence, let us assume that I had on a certain day a very fine cherry tree in my yard. The family happens to be away on that day and when I return about five o'clock in the evening I find my cherry tree chopped down. I proceed to investigate and first make inquiry of my next door neighbor Mr. Smith. I ask him if he saw any stranger doing anything in my yard on that day. He replies: 'Yes, I saw George Washington chop it down with an ax.' That would constitute direct evidence because Mr. Smith is relying on his own sense of sight and states what he himself saw with his own eyes. For that reason he is able to give direct evidence that George Washington chopped down that cherry tree.
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> Let us now consider a case of circumstantial evidence in the same connection. Assume that on inquiry of Mr. Smith, my neighbor, he, in answer to my question, says that he did not see anyone chopping down my tree. I then ask him: 'Did you see anyone about my place today.' He replies: 'Yes, I saw George Washington walk along your driveway from the yard to the street with an ax on his shoulder.' Here is evidence of a fact which does not directly prove who chopped down my cherry tree but which permits a natural and fair inference that George Washington was in my yard with an ax combined with the fact that my tree was chopped down would constitute very definitely a piece of circumstantial evidence to be weighed in the consideration of a charge against George involving the act of chopping down that tree.[47]

Justice Taft's dissenting opinion recognized the problem with the instruction and described it well:

> This portion of the court's charge was most unfortunate in the instant case and quite probably had a tendency to mislead the jury. The state was contending that defendant's guilt should be inferred largely from the circumstance of his presence in the house at the time of the killing. The jury was told in effect that George Washington could be found guilty of chopping down the tree because he was seen nearby with an ax in his possession; and the jury would thus be influenced by this example to conclude that, since defendant was nearby at the time of the killing and "could have" committed the crime even though the nature of the murder weapon was never identified by any evidence, then defendant, like George

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> of comprehension, and tend to overcome a layman's conception that conviction upon circumstantial evidence is wrong.

LEHR FESS, 3 OHIO INSTRUCTIONS TO JURIES § 8.15 (1953).

[47]*Sheppard*, 135 N.E.2d at 351-52 (Taft, J. dissenting).

> Washington, did what was consistent with the circumstance of his presence. This is especially likely to have improperly influenced the jury, since everyone has been taught that George Washington did do what was consistent with the circumstance of his presence, that is, chopped down the cherry tree. [48]

The dissenting opinion demonstrates an intuitive sense that jurors reason in terms of the mental models they form. The cherry tree story was designed to raise a comparison between Dr. Sheppard – who seemed to be guilty because he was present but would not admit it – and George Washington – who seemed guilty because he was present, but was willing in advance to accept punishment because he could not tell a lie. If George Washington would have been honest enough to accept his punishment, how could the jurors let Sam Sheppard off in such similar circumstances?

To see how bad the instruction was, consider this alternative. An important piece of circumstantial evidence on which the defense relied was the absence of splattered blood on Dr. Sheppeard's pants. Suppose the judge had given this example:

> Suppose I am trying to find out whether my young child, George, has eaten the last cookie from the cookie jar. I know that he always ends up with chocolate all over his face, hands and clothing after eating cookies. He especially gets chocolate on his pants from wiping his hands on them. When I look at George, there is no chocolate on his pants, however. I can infer from the absence of chocolate on his pants that he is not the one who ate the cookie.

Of course, the prosecutor would have objected to any such instruction, and with good reason. But the instruction actually given to the jury was no less heavy-handed. In suggesting that jurors draw inferences of guilt from equivocal facts, it violated both the criterion of fidelity to the law and the criterion of consistency with the presumption of innocence.

These problems are not trivial. By all accounts,[49] the case against Sheppard was entirely circumstantial. He was in the house when his wife was killed. He claimed to have been assaulted by someone who tore off his (*i.e.,* Dr. Sheppard's) shirt in a struggle at the beach behind the house. Where is that person? What happened to the shirt? Did Dr. Sheppard remove it because it contained his wife's blood? Much of the defense was circumstantial as well. If Sheppard killed his wife, why was there no blood splattered on his pants? What motive did he have? And so on. How the jury regarded the circumstantial evidence was of critical importance.

Note that the court could have used a neutral illustration. In many states, courts talk about rain. Below is a typical example:

> Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be

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[48] *Id.* at 351.

[49] There are indeed many, but all agree that the case against Dr. Sheppard was circumstantial. *See* Jack Harrison Pollack, DR SAM: AN AMERICAN TRAGEDY (1972); HOLMES, *supra* note 7; NEFF, *supra* note 2.

> circumstantial evidence from which you could conclude that it was raining.[50]

Of course, the problem with this kind of instruction is that it has doomed itself to irrelevance for the sake of neutrality.[51]

The question of how to present the notion of circumstantial evidence to a jury is very much a matter of disagreement within the judicial system today. Some states, including Ohio, have eliminated any legal consequences of the distinction between direct and circumstantial evidence. In 1991, the Supreme Court of Ohio held in *Ohio v. Jenks*:

> In every criminal case, the jury is asked to weigh all of the admissible evidence, both circumstantial and direct, to determine if the defendant is guilty beyond a reasonable doubt. Hence, there is but one standard of proof in a criminal case, and that is proof of guilt beyond a reasonable doubt. This tenet of the criminal law remains true, whether the evidence against a defendant is circumstantial or direct. We therefore hold that where the state relies on circumstantial evidence to prove an element of the offense, and where the jury is properly instructed on the standards for reasonable doubt, an additional instruction on circumstantial evidence is not required. Once the jury is properly instructed as to the heavy burden the state bears under the "guilt beyond a reasonable doubt" standard, the jury is then free to choose between competing constructions of the evidence.[52]

On the other hand, some courts still instruct on circumstantial evidence, and it is not unusual to find courts weighing the risk of undermining the presumption of innocence against the futility of providing examples that are so far removed from the facts of the case to make the instructions useless. For example, the Second Circuit has reversed a conviction based in part on a circumstantial evidence instruction that contained an example presuming the defendant's guilt.[53] To the best of my knowledge, empirical studies have not addressed this important issue.

III. SHIFTING THE BURDEN OF PROOF

In this section, I will discuss burden of proof instructions in light of several important advances in our knowledge of language and cognitive psychology over the past quarter century. Instructions such as the one used in the *Sheppard* trial are especially likely to shift the burden of proof when the government bases its case on circumstantial evidence and the defendant cannot come up with a convincing alternative scenario.

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[50]Johns Hopkins Univ. v. Cellpro 894 F. Supp. 619, 830 (D.Del. 1995).

[51]Courts have noted this shortcoming. *See* United States v. Gleason, 616 F.2d 2 (2d Cir. 1979).

[52]574 N.E.2d 492, 503 (Ohio 1991).

[53]United States v. Dove, 916 F.2d 41,46 (2d Cir. 1990).

A. Proof vs. Reasonable Doubt

First, let us look closely at the expression, "proof beyond a reasonable doubt." The phrase has two parts: proof, and reasonable doubt. The problem is that it fails to say how much proof the government must submit in the first place before reasonable doubt even becomes relevant. The very expression invites jurors to determine first that the government has put on a case, and then to determine whether the defense has been able to "raise" reasonable doubts.[54] But the defendant is not supposed to be required to raise anything. That is the essence of the presumption of innocence. The result of focusing the jury on the notion of reasonable doubt is that once the government puts on a case, even a weak one, it appears to be up to the defendant to rebut it.

Psychologists over the past two decades have suggested that people think of events in terms of mental models that they form and revise as new facts come to light.[55] Jury theorists, such as Reid Hastie and his colleagues, have similarly proposed that jurors evaluate a case in light of competing stories that they weigh against each other.[56] Standard reasonable doubt instructions play into this psychology by encouraging jurors to lose focus on the strength of the government's case, and instead to compare one story against the other.

Moreover, experienced trial lawyers know that it is easier to win a case by presenting the jury with an alternative theory of the facts than by merely attacking the strength of the prosecution's case. Certainly F. Lee Bailey knew it in the retrial of the *Sheppard* case. He made sure that he presented evidence consistent with an intruder having been in the house. An expert testified that some of the blood on the wall was that of the intruder. It worked. Jurors from the second trial that James Neff interviewed remembered being impressed by this evidence.[57] The value of presenting alternative theories is that it gives jurors alternative mental models into which to construct the story of the case.

Earlier I suggested that the New Jersey modification of the Federal Judicial Center's reasonable doubt instruction goes a long way toward curing the ills of most standard instructions.[58] What makes the New Jersey instruction better than the others is that it does not define "reasonable doubt." Instead, it defines "proof beyond a reasonable doubt," focusing the jury on the government's burden, not on a phantom obligation of the defendant to raise doubts. It says that such proof must leave jurors "firmly convinced" of the defendant's guilt. Moreover, the expression "firmly convinced," seems to capture well the notion that the government must put on a strong case. We are convinced when the evidence in favor of a proposition is strong, and the alternatives are weak.

Both the old and new Ohio instructions, in contrast, begin with definitions of doubt. The older instruction actually begins by saying what should not count as a

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[54]For detailed discussion of these points, see Solan, *supra* note 29.

[55]*See* PHILIP N. JOHNSON-LAIRD, MENTAL MODELS (1983).

[56]*See* REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 15-36 (1983).

[57]NEFF, *supra* note 2, at 281.

[58]*See supra* note 39 and accompanying text.

doubt, which adds additional interpretive difficulties to which I will return. The current Ohio instruction uses "firmly convinced" as do the New Jersey and Federal Judicial Center instructions. However, the Ohio version uses it as a partial definition of doubt, rather than as an explanation of how strong the government's proof must be. Moreover, because of this, the drafters were forced to use "firmly convinced" in the negative, adding to the instruction's complexity. To understand the logic of the instruction, a juror must substitute the definition of reasonable doubt into the expression, "proof beyond a reasonable doubt," more or less as follows:

> The government must prove its case beyond the point at which, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge.

Compare that to the New Jersey version:

> Proof beyond a reasonable doubt is proof, for example, that leaves you firmly convinced of the defendant's guilt.

The expression "beyond" contains an implied negative. Thus, it is necessary to sort through double negatives to understand the Ohio version. A number of researchers have shown how rewriting jury instructions to eliminate just this sort of confusion, can enhance comprehensibility enormously.[59]

In fairness, the new Ohio instruction, after defining reasonable doubt negatively in terms of not firmly convincing the jury, does attempt to address the strength of the government's case. But it does so with an expression, often used in burden of proof instructions, that necessarily conveys mixed signals:

> "Proof beyond a reasonable doubt" is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

This instruction accomplishes its goal only if ordinary people must reach a state of "near certitude" before they make important decisions in their own lives. In my own life, I set no such standard. I do what I can to make whatever decisions I think are best, given the information that I have. Often enough, I feel that I'm muddling along, lucky to be doing as well as I am. I would not be surprised if most people feel just that way with respect to important personal decisions that they must make.

A considerable empirical literature suggests that this burden-shifting perspective captures the way jurors approach their task. While I will not summarize it in detail here,[60] I will describe two of the more dramatic studies briefly. First, Irwin Horowitz, a psychologist, and Laird Kirkpatrick, an evidence scholar, have conducted an important study in which they presented potential jurors in Oregon with tapes of mini-trials.[61] Half of the subjects watched a "strong case" for the prosecution, in which 85% of the evidence was judged in advance to favor conviction. The other half watched a "weak case," in which the evidence was

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[59] *See supra* note 20.

[60] *See* Solan, *supra* note 29, for detailed discussion of most of this literature.

[61] Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 LAW AND HUMAN BEHAVIOR 655 (1996).

equally divided between the two sides. After watching the trial and answering some preliminary questions, subjects were divided into six-person juries. Each jury heard one of the following five definitions of reasonable doubt: (1) moral certainty; (2) does not cause you to waver and vacillate; (3) real doubt; (4) reasonable doubt undefined; and (5) firmly convinced, the Federal Judicial Center's instruction. The results are telling. Only the "firmly convinced" instruction achieved acquittals when the case was weak, and convictions when the case was strong. All of the other instructions resulted in at least a 50% conviction rate for the weak case, and a high conviction rate when the case was strong.

Horowitz and Kirkpatrick's study is consistent with the point I am making here. I certainly do not argue that the best burden of proof instruction is the one that will always lead jurors to acquit. Rather, the best instruction is the one that will generally lead the jury to convict when the government's case is strong, and not otherwise. I hope to have provided an underlying explanation for these experimental results.

The second study was conducted in Wyoming by Bradley Saxton, and involved interviews with actual jurors who had just completed a criminal case.[62] Jurors were asked whether they agreed or disagreed with certain characterizations of the trial process. One question was the following:

> According to the instructions the judge gave you, is the following statement true or false: In a criminal trial, the state is responsible for producing evidence for the jury that tends to show that the defendant may have committed the crime – once the state has made this showing, it is the defendant's responsibility to produce witnesses or other evidence to persuade the jury that the defendant did not commit the crime.[63]

Jurors could respond with, "I'm very sure that this statement is true," "I'm pretty sure that this statement is true," "I don't know," "I'm pretty sure that this statement is false," or "I'm very sure that this statement is false." Thirty-one percent of the jurors were either very sure or pretty sure that the quoted statement is true. That is, almost one-third of the jurors who actually sat on a criminal case left believing that the burden of proof shifted to the defendant once the government had adduced evidence of guilt.

Wyoming's reasonable doubt instruction does not define the term. Thus, the results of this study suggest that the expression "proof beyond a reasonable doubt" and the way people model their thinking in general, contributed to this result. No doubt other instructions can either enhance or diminish the extent to which jurors believe that the burden shifts to the defendant. The analysis I have presented, combined with the results of Horowitz and Kirkpatrick, suggest that keeping the jury focused on the fact that the government has the burden of presenting proof that leaves the juror firmly convinced of the defendant's guilt is an effective way of reducing the extent to which jurors shift the burden of proof.

As for shifting burdens, Dr. Sheppard's conviction provides a tragic example of this dynamic. But it happens in less celebrated cases as well. In the everyday practice of criminal law, it is most likely to occur when, say, a person with a criminal

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[62]Bradley Saxton, *How Well do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33LAND & WATER L. REV. 59 (1998).

[63]*Id.* at 141 question 21.

record is arrested for holding up a store. The defendant was, indeed, nearby, but didn't commit the crime. He has a lawyer, but the lawyer is too burdened to investigate the case aggressively, and the defendant can not, as a practical matter, testify, because his prior convictions that will come out only if he is a witness.[64] The result is that he will be unable to raise reasonable doubt, and therefore is likely to lose the case despite the proof not being very strong.

B. Some Troubling Definitions of Doubt

A second set of problems with many reasonable doubt instructions, including Ohio's, concerns the substance of the definitions of "doubt." While I have focused thus far on ways in which standard reasonable doubt instructions tend to shift the burden of proof away from the government in criminal cases, the concept has another effect, which is sometimes of help to defendants, especially defendants of means who are well-represented by counsel. Defense lawyers can accept the challenge of raising reasonable doubt by concocting scenarios consistent with the evidence that are logically possible, but far-fetched. They can then argue to the jury that their client is innocent because they have been able to establish reasonable doubt. Many people see the O.J. Simpson case as an example of this tactic.

Of course, this approach to defending criminal defendants is no secret to prosecutors, judges, legislators or state commissions who write and revise pattern jury instructions. The result has been a backlash. Many instructions spend a great deal of time explaining to jurors what should *not* count as a reasonable doubt, and making sure that jurors do not take the concept of reasonable doubt too far. The reaction is entirely understandable. But its cost is that it adds to the burden that a defendant must meet when the government has a fairly weak case based on circumstantial evidence, and the defendant does not have any good alternative explanations of what happened because he wasn't there and didn't commit the crime.

Let us look at what we really do when we doubt, and then compare this understanding to what jury instructions say about it. Doubting is an imaginative process. When someone says, "I doubt that the Yankees will win yet another World Series this year," what is that person saying? He is saying that he can imagine a possible world in which the Yankees do win, but that he does not believe that the real world next October will coincide with the world that he has imagined now. Philosophers of language use the notion of "possible world" to describe the semantics of statements about the future, about counterfactuals, and about states of mind, among other things.[65]

With this in mind, let us look once again at the older Ohio instruction, which was in place during the *Sheppard* trial in 1954. It begins its definition of reasonable doubt:

> It is not a mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt.

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[64] *See* F. R. EVID. 609 (permitting impeachment of a witness's credibility by evidence of conviction of a crime).

[65] For a good description of this perspective, consistent with the psychology of mental models, *see* JOHNSON-LAIRD, *supra* note 55, at 56-63.

Although the drafter may not have intended to bias the instruction so heavily in favor of the government, this instruction tells jurors not to pay attention to *any* doubts. For all doubts are only possible doubts, based on imagination. That is precisely how we doubt.

The statutory definition then ended on a positive note:

> It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

This must mean that the government has proven its case beyond a reasonable doubt when the evidence does not leave the minds of the jurors in the condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. Putting aside whether the average juror understands what all the words mean, it is almost inconceivable that he can parse his way through this sentence and get the logical relations right. Moreover, the approved instructions then in force went way beyond the statutory language to list a host of things that are not doubt and others that are.[66]

While the Ohio reasonable doubt instruction in force since 1974 is a major improvement, some of its language is the same as the early version. The instruction now says:

> It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt.

This is practically identical to the language that I earlier criticized. In contrast, the Federal Judicial Center instruction, as modified by the Supreme Court of New Jersey, contains very little such language even though it conveys the notion that nothing is certain in this world.

IV. CONCLUSION

The questions that I have tried to raise in this paper focus on what we have learned in the almost fifty years since Dr. Sheppard's conviction. When it comes to the study of psychology and language, the answer seems to be that we've learned a great deal. But only some of that learning has made its way into the law. Ohio's current presumption of innocence instruction is now a clear and accurate reflection of the law. Its reasonable doubt instructions are better than those under which Dr. Sheppard was convicted, but still leave room for improvement, given what we now know about how people construe language and what the effects of using different instructions really are. Significantly, Ohio's reasonable doubt instruction is by no means unusual. A number of states and federal circuits can and should improve their instructions to catch up with what we know about how jurors understand instructions.

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[66] FESS, *supra* note 46, at § 86.13 (listing, among other things: "It is not a mere capricious or speculative doubt; it is not a doubt voluntarily excited in the mind, in order to avoid the rendition of a disagreeable verdict").

Finally, while changes in the substantive law have taken care of the horrible instructions on circumstantial evidence in Dr. Sheppard's first trial, the legal system is still uncertain about how to discuss this concept. If no examples are given, the concepts seem rather abstract. If a neutral example is given, it may not seem relevant. But if a relevant example is given, then it may tend to undermine the presumption of innocence.

I have presented three rather simple criteria for evaluating criminal jury instructions: fidelity to the law; comprehensibility; and consistency with the presumption of innocence. We have seen some improvement in the half century since Dr. Sheppard's conviction. But anyone reading through the standard jury instructions of most jurisdictions will have to conclude quickly that many instructions fail to meet one or more of the criteria for good instructions. It should not take fifty more years for jury commissions, legislatures and appellate courts to focus their attention on completing the task.