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The threshold lies in the method: instructing jurors about *reasoning* beyond reasonable doubt

Federico Picinali[*]

Abstract

The last few decades have seen several scholars and courts striving to understand the meaning of the reasonable doubt standard and, in particular, to produce instructions that would enlighten jurors in this regard. The focus has been on defining the standard as a threshold indicating the quality and quantity of evidence sufficient for a finding of fact, or the degree of confidence that the fact finder should have before convicting. The results of these endeavours have not been satisfactory and nowadays it is still frequent that juries ask the court for clarification on the meaning of the standard. The paper argues that the reasonable doubt standard is better conceived and explained to the jury as requiring a particular method of reasoning, rather than merely a threshold. A direct explanation of the threshold is elusive and potentially encroaches on the fact finder's role. Reference to a method of reasoning, instead, promises to provide useful directions to the jury, which promote compliance with the threshold itself. The paper advances methodological directives inspired by works in philosophy of the mind and virtue epistemology. The paper then concludes with practical recommendations for devising a new instruction on the standard of proof.

Keywords: reasonable doubt; reasoning method; jury instructions; epistemic virtue; authority.

1.Introduction

The Crown Court Benchbook notwithstanding,[1] English jurors are often instructed that the beyond reasonable doubt standard (BRD) is the standard of proof for criminal trials. It is common for Crown Court judges to mention BRD immediately after imparting the

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[1] Section 4.3 advises judges to instruct jurors that they must be sure of the defendant's guilt in order to convict. See Judicial Studies Board (now Judicial College) *Crown Court Benchbook: Directing the Jury* (2010) at 16, available at http://www.judiciary.gov.uk/publications/crown-court-bench-book-directing-the-jury-2/ (last viewed 8 August 2014).

'being sure of guilt' instruction, suggested by the Benchbook.[2] Alternatively, judges may mention BRD at a later stage, in response to a request for clarification from the jury on the meaning of 'being sure'.[3] Archbold's support for BRD over 'being sure of guilt' is further indication that the standard is not going to disappear anytime soon from English courtrooms.[4]

There is, however, a conspicuous body of evidence showing that lay people struggle to come to grips with the meaning of BRD. It is not uncommon that jurors, after retiring in the jury room, send notes to the judge asking for clarification on this standard.[5] Also, a series of empirical studies conducted in the USA[6] has shown that in the absence of a definition of BRD mock jurors find it hard to apply the standard; that they match BRD with probability thresholds that are unacceptably low;[7] and that there is substantial variation in the probability thresholds selected by different mock jurors. The confusion and disagreement among mock jurors echoes the scholarly debate on the question as to what is the most accurate and effective definition of BRD – which is strictly connected to the debate on whether the trial judge should give a definition of the standard at all.[8] Not

[2] See M. Zander, "The Criminal Standard of Proof: How Sure is Sure?" (2000) 150 N. L. J. 1517. See also *R. v Stephens* [2002] EWCA Crim 1529; 2002 WL 1039755.

[3] Indeed, the Benchbook itself resorts to BRD to clarify the meaning of 'being sure'.

[4] See *Archbold: Criminal Pleading, Evidence and Practice* (2014), Ch. 4, s 447. Cf. P. Roberts & A. Zuckerman, *Criminal Evidence* (OUP, 2010) at 255.

[5] See *Stephens*, *supra* note 2; *R. v Majid* [2009] EWCA Crim 2563; 2009 WL 3122440; *R. v Folley* [2013] EWCA Crim 396; 2013 WL 617952.

[6] See R. J. Simon and L. Mahan, "Quantifying Burdens of Proof. A View from the Bench, the Jury, and the Classroom" (1971) 5 Law and Society Review 319 at 325–329; D. U. Strawn & R. W. Buchanan, "Jury Confusion: A Threat to Justice" (1976) 59 Judicature 478 at 481; N. L. Kerr, R. S. Atkin, G. Stasser, D. Meek, R. W. Holt, J. H. Davis, "Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors" (1976) 34 Journal of Personality and Social Psychology 282 at 291; E. Lillquist, 'Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability' (2002) 36 UC Davis Law Review 85 at 111-117.

[7] Cf. Zander, *supra* note 2.

[8] See H. A. Diamond, "Reasonable Doubt: to Define or not to Define" (1990) 90 Columbia Law Review 1716; Note, "Reasonable Doubt: an Argument Against Definition" (1995) 108 Harvard Law Review 1955; I. A. Horowitz, "Reasonable Doubt Instructions. Commonsense Justice and Standard of Proof" (1997) 3 Psychology, Public Policy, and Law 285; E. Stoffelmayr & S. S. Diamond, "The Conflict Between Precision and Flexibility in Explaining 'Beyond a Reasonable Doubt'" (2000) 6 Journal of Psychology, Public Policy, and Law 769; L. M. Solan, "Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt" (1999) 78 Texas Law Review 105; L. M. Solan, "Convicting the Innocent Beyond a Reasonable Doubt: Some Lessons About Jury Instructions from the Sheppard Case" (2001) 49 Cleveland

surprisingly, lack of consensus on the definition of BRD is also widespread amongst academics. Courts too have been unable to work out a shared understanding of the formula.[9]

In order to sidestep the definitional problem it has been suggested that trial judges instruct jurors on BRD but do not volunteer an explanation of the standard, unless the jury asks for it. In such a case only a concise definition should be given.[10] This halfway house is reminiscent of Jon Newman's disappointment when realising that "we are using a formulation that we believe will become less clear the more we explain it."[11] A more radical proposal is that advanced by the Benchbook: to replace BRD with a different – albeit allegedly equally stringent – standard of proof.[12] The paper contends that these are not the only available – nor the best – avenues. It is possible and advisable both to retain BRD and to provide jurors with an intelligible and useful instruction on its meaning. In order to do so, however, we must shift focus from the evidential threshold represented by the standard to the method of reasoning that it demands. Most of the definitional attempts conducted so far have conceptualised the standard as a threshold indicating the amount and the quality of evidence required for conviction, or the degree of confidence that the fact finder must have in the hypothesis of guilt before convicting. This narrow focus is the main reason for their failure to produce intelligible and practicable instructions. The standard, instead, may be understood as demanding *also* a certain method of reasoning from the fact finder; in particular, a method that aims at ensuring that the relevant evidential threshold is respected. As will be shown, this understanding

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State Law Review 465; P. Tillers & J. Gottfried, "Case Comment—*United States v. Copeland*, 369 F. Supp. 2d 275 (E.D.N.Y. 2005): A Collateral Attack on the Legal Maxim that Proof Beyond a Reasonable Doubt Is Unquantifiable?" (2006) 5 Law, Probability and Risk 135; J. Franklin, "Case Comment—*United States v. Copeland*, 369 F. Supp. 2d 275 (E.D.N.Y. 2005): Quantification of the 'Proof Beyond Reasonable Doubt' Standard" (2006) 5 Law, Probability and Risk 159; J. B. Weinstein & I. Dewsbury, "Comment on the Meaning of 'Proof Beyond a Reasonable Doubt'" (2006) 5 Law, Probability and Risk 167.

[9] See, in particular, L. Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (CUP, 2006) at 32-51 and Roberts & Zuckerman, *supra* note 4 at 253-254.

[10] See *Archbold*, *supra* note 4, s 447(f). The suggested concise definition is: "a reasonable doubt is the sort of doubt that might affect the mind of a person in dealing with matters of importance in his own affairs."

[11] Jon O. Newman, "Beyond 'Reasonable Doubt'" (1993) 68 New York University Law Review 979 at 984.

[12] See also *R. v Summers* [1952] 1 All E.R. 1059 CCA; 36 Cr. App. R 14.

creates new scope for an instruction that would make a valuable contribution to jurors' ability to perform their task.

2.Beyond reasonable doubt as an evidential threshold

In an oft-quoted *dictum* Lord Denning elaborated on the meaning of BRD in the following terms:

> [Proof of guilt] need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.[13]

This is just one of the many judicial attempts to define BRD, but it serves better than others to illustrate the difficulty of explaining to jurors what the standard requires. The obvious goal of the passage is to identify a threshold indicating the amount and quality of evidence that is necessary for conviction. In order to achieve this, Lord Denning employs a variety of expressions: 'need not reach certainty', 'high degree of probability', 'fanciful possibilities', 'so strong', 'remote possibility', 'not in the least probable'. All of these phrases are there to flesh out the notoriously hazy concept of 'reasonableness', which plays the crucial role of distinguishing between the doubts that are fatal to the prosecution case and those that are not. The result, however, is not satisfactory: no light is shed on the threshold represented by BRD. Instead, the expressions used by Denning are themselves in need of clarification – possibly more so than the concept of 'reasonableness', thus producing the disappointing regress hinted at by Newman.

Some may argue that failure to communicate precisely to jurors the threshold represented by BRD is not such a bad thing, provided that the fact finder understands

[13] *Miller v Minister of Pensions* [1947] 2 All E.R. 372 at 373-374; [1947] W.N. 241.

that such threshold is sufficiently high (i.e., higher than the 'preponderance of the evidence' but falling short of certainty). In a seminal paper Laurence Tribe pointed out the advantages of having an imprecise standard of proof.[14] A clear-cut threshold spells out explicitly that innocent people may be convicted, provided that the prosecution establishes a strong enough case against them. Tribe argues that the cost of making this information available to the jury, and the public in general, is too high to accept. I do not intend to take a position on this issue. However, we must acknowledge that while imprecision may have its value, when it becomes such that the fact finder herself considers it a hindrance to her job – as when jurors repeatedly ask for clarification on the standard – something has gone amiss.

The difficulty with instructing jurors on the threshold represented by BRD does not seem to lie in giving a definition of the key concept of 'reasonableness' – thus, a definition of the threshold itself. In a previous paper[15] I have attempted to clarify the semantics of the concept, i.e., the conditions for its application. Whether my proposal is convincing or not, I hope at least to have shown that clarifying what reasonableness means is not an intractable task. The real problem, however, is that while it is possible to identify in the abstract the conditions for the application of the concept, in the absence of a specific reference by the judge to the facts of the case, this abstract identification does not afford sufficient guidance to the fact finder. This is due to what I called the 'buck-passing' nature of reasonableness – a feature that, I believe, a successful definition of the term should try to unpack.[16] Let me explain this point briefly. Reasonableness is the property of certain statements or lines of reasoning, which refers to the presence of reasons in their support – these reasons being the condition for the accuracy of a claim to the effect that a statement or line of reasoning is 'reasonable'. Importantly, claiming that a statement is reasonable does not yet specify what the reasons in its support are:

[14] See L. H. Tribe, "Trial by Mathematics: Precision and Ritual in the Legal Process" (1971) 84 Harvard Law Review 1329, in particular, at 1372-1375.
[15] See F. Picinali, "Two Meanings of 'Reasonableness': Dispelling the 'Floating' Reasonable Doubt" (2013) 76 Modern Law Review 845.
[16] See *id*. at 857 ff.

identifying these reasons requires that we look at the facts backing the statement. The upshot is that a judge could easily define the concept of 'reasonable doubt' by saying, roughly, that it is an assertion supported by reasons.[17] In fact, some judicial definitions of BRD go along these lines.[18] However, in order to give more complete guidance to the jury, the judge would have to indicate – even if by way of a single example – what facts (or gaps) of the case at issue may or may not constitute relevant reasons to doubt guilt. E.g., whether the failure of one of several eyewitnesses to identify the defendant is a reason to doubt guilt; whether the unavailability of DNA evidence in a rape case constitutes such a reason. It goes without saying that this indication would encroach on the role of the fact finder and would create the risk of unduly influencing the verdict. True, the judge may tell the jury a fictional story, concoct some facts and then use them to clarify the notion of 'reasonable doubt'. However, because of the difference between the hypothetical and the real case, this technique may turn out to be utterly unhelpful. Also, to the extent that the hypothetical is crafted in such way that it is sufficiently similar to the case at issue, the problems of interference and of undue influence would again present themselves. So, it seems that either the judge may cling to the abstract definition and give no guidance or she may offer some relevant examples thus running the risk of giving too much guidance.

I believe that there is a more promising strategy to follow. This strategy requires that we conceive of the standard as demanding a particular method of reasoning from the fact finder, rather than merely setting an evidential threshold. Importantly, the method would be such that adherence to it would promote respect for the threshold itself. If we read this additional requirement into the standard, we can then concentrate on defining what the relevant method of reasoning is, so as to provide useful directions to jurors on how to discharge their duty. This task promises to be more manageable and more

[17] I concede that this definition is rough. However, as far as my understanding of 'reasonableness' goes, it is correct. To become more precise it would need to be enriched with further important details about the notions of 'reasonableness' and 'reason', as explained in *id*. Alas, the definition would still produce the problem discussed in this section.

[18] See Laudan, *supra* note 9 at 40-41 and *Archbold*, *supra* note 4, s 447(f).

respectful of the division of labour between the judge and the jury than the task of communicating the evidential threshold represented by BRD.

3.*Reasoning* beyond reasonable doubt

In his stern critique of the BRD instructions produced by the US case law, Larry Laudan notes: "[o]ne reason that the various characterizations of [BRD] we have surveyed seem so vacuous or unsatisfactory is that they studiously avoid talking about the structure of proof or about the kind of case the prosecution must present…[They fail to acknowledge] that persuasion is a process of *reasoning through evidence*. Judges gives [sic] jurors few hints as to how they should do that."[19] This passage goes straight to the point I am making. What is missing from the judicial definitions of BRD that have become familiar to scholars and practitioners is the reference to a method to engage with the evidence presented at trial.

The claim that it is possible to read such method into the criminal standard of proof is not a new one: Paul Roberts and Adrian Zuckerman have argued that "[f]rom the fact finder's perspective, the asymmetrical 'proof beyond reasonable doubt' standard may function, not so much as a subjective measure of confidence in a particular conclusion, but as a procedure for reasoning about evidence".[20] Roberts and Zuckerman contend that this reasoning procedure is the Holmesian[21] method of eliminative induction: given a certain fact in need of explanation, a series of explanatory hypotheses are formulated and progressively discarded so as to select one of them only, namely, the most robust.[22]

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[19] Laudan, *supra* note 9 at 52 (emphasis in the original).

[20] Roberts & Zuckerman, *supra* note 4 at 258. Cf. H. L. Ho, *A Philosophy of Evidence Law* (OUP, 2008), Ch. 4, arguing that a standard of proof, rather than representing a decisional threshold, requires that the fact finder adopt caution as a deliberative attitude. See also F. M. Iacoviello, "Lo Standard Probatorio dell'al di là di Ogni Ragionevole Dubbio e il Suo Controllo in Cassazione" (2006) Cassazione Penale 3869.

[21] The reference is to the celebrated fictional detective Sherlock Holmes.

[22] For a good treatment of this method of reasoning and of its possible forensic applications see C. Pizzi, *Diritto, Abduzione e Prova* (Giuffré, 2009). See also J. R. Josephson & M. C. Tanner, "Conceptual Analysis of Abduction" in J. R. Josephson & S. G. Josephson (eds), *Abductive Inference: Computation, Philosophy, Technology* (CUP, 1996).

While eliminative induction is certainly a valuable reasoning method and fact finders are likely to benefit from using it, the definition and explanation of this reasoning procedure seem to present similar problems to those discussed in the previous section. How is the jury to decide whether a certain hypothesis must be discarded? When should eliminative reasoning come to an end? If we do not provide the fact finder with an answer to these questions, the guidance that we offer is very limited. And yet, in order to answer these questions we must again address the problem of explaining to the jury the distinction between reasonable and unreasonable doubt: simply telling jurors that the hypothesis of the prosecutor should be discarded if a defensive hypothesis supported by reasons is available would not do; however, indicating what facts of the real case may or may not constitute or corroborate a reasonable defensive hypothesis would be doing too much. E.g., consider the case of a defendant on trial for rape, where the prosecution case rests entirely on DNA evidence and all the other evidence points towards innocence. In particular, the victim did not pick the defendant out at an identity parade.[23] In explaining what a reasonable defensive hypothesis is, it would be inappropriate for the judge to say that lack of identification would (or would not) be sufficient to render the hypothesis of innocence reasonable.

As suggested by Roberts and Zuckerman, interpreting BRD as requiring a reasoning method is a feasible and fruitful strategy. However, if the reasoning method read into the standard is such that its definition and, in particular, its communication demand that we elucidate the concluding phase of fact finding, the strategy is of little help. This is because until we have solved the problem of explaining to the jurors the threshold represented by BRD, we are unable to offer them valuable instructions. My claim is that it is possible to read into the standard certain methodological directives that, on the one hand, are specific and substantial enough to provide useful guidance to the fact finder and, on the other hand, are intelligible even if not accompanied by an elucidation of the concluding phase of fact finding. These directives prescribe the endorsement and the practice of a

[23] Cf. the facts in *Adams* [1996] 2 Cr. App. R. 467; *Adams* (No. 2) [1998] 1 Cr App R 377.

certain epistemic virtue, a cognitive faculty that someone engaging in an enterprise such as criminal fact finding should employ. Some virtue epistemologists claim that "an epistemic virtue should be the *kind* of trait whose most characteristic expression is the formation of a justified belief" and the achievement of knowledge.[24] In a similar vein I contend that the particular epistemic virtue that BRD prescribes is a cognitive faculty whose characteristic expression is promoting respect for the threshold embedded in BRD.

4.Exercising authority over our beliefs

In an interesting book on self-knowledge Richard Moran distinguishes between what he calls a 'theoretical' and a 'deliberative' stance towards our beliefs – more precisely, towards the question 'do I believe that *p*?'[25] The theoretical stance has a potentially pathological character in that it involves some kind of dissociation within the individual. In addressing the question 'do I believe that *p*?' the individual relates to herself in the same way in which she would relate to other people when addressing the question as to what they believe. She answers relying on evidence about herself (her thoughts and behaviour) as if she were observing herself from an external vantage point. She is totally disengaged from the object and the accuracy of her beliefs: she is merely concerned with the presence of the cognitive attitude, not with the presence of reasons that justify having it. If the attitude is present, the question is answered in the affirmative. Full stop.

Addressed from a deliberative stance, instead, the question 'do I believe that *p*?' acquires a very different meaning. Here, in deciding whether she believes that *p*, the individual deliberates on whether she *is to believe* or not. In other words, she *makes up her mind*, rather than merely describing its content. The evidence that the individual heeds when deliberating on her beliefs is not evidence about herself. It is evidence about the

[24] R. Audi, "Epistemic Virtue and Justified Belief" in A. Fairweather & L. Zagzebski (eds.), *Virtue Epistemology: Essays on Epistemic Virtue and Responsibility* (OUP, 2001) at 95 (emphasis in the original).
[25] See R. Moran, *Authority and Estrangement: An Essay on Self-Knowledge* (Princeton University Press, 2001) at 55-60. The same alternative applies to questions concerning our intentions. See also S. Hampshire & H. L. A. Hart, "Decision, Intention, and Certainty" (1958) 67 Mind 1 at 2, 10.

very object of the belief, that is, about *p*: the reasons that she takes as relevant to determine what she believes are just the same reasons that she would take as relevant to determine whether the object of her belief is true. In other words, the individual treats the question 'do I believe that *p*?' as equivalent to the question 'is *p* true?' [26] Therefore, she is concerned with forming a cognitive attitude that is accurate.

Through adopting the deliberative stance we *exercise authority over our beliefs*,[27] because we treat them as attitudes that we constitute via our reasoning, rather than predefined objects. Importantly, this authority is a sign of our freedom of mind and of our rationality.[28] We are free in that we take responsibility for the making of our cognitive attitudes.[29] We are rational because we form our cognitive attitudes so that they are responsive to the reasons that justify having them, that is, to the evidence concerning the objects of such attitudes. Exercising authority, therefore, is not engaging in unrestrained deliberation. It is, instead, engaging in deliberation that is subject to the demands of reason.[30] True, when exercising authority over our beliefs we take it upon ourselves to make up our mind as to what to believe. However, there is so much we can do in terms of *making up* our mind: we cannot decide to believe in what we want, because by their nature beliefs are a reflection of the evidence of which we are aware.[31] More precisely, they directly reflect the reasons that we read into such evidence. Therefore, our cognitive freedom may only reside in the consideration and assessment of the available evidence in order to discover its significance.[32] Beliefs directly follow from this interpretive task. This

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[26] Moran, *supra* note 25 at 62-63.

[27] See i*d*. at 124-134.

[28] See *id.* at 64, 84, 127, 151.

[29] Cf. S. Hampshire, *Freedom of the Individual* (Harper and Row, 1965) at 93-94, and 112.

[30] Cf. Moran, *supra* note 25 at 127, stating: "The stance from which a person speaks with any special authority about his belief is … the stance from which one declares the authority of reason over one's belief."

[31] This property of beliefs is often referred to as 'truth-directedness' and expressed with the metaphor according to which beliefs 'aim' at the truth of their object. See B. Williams, 'Deciding to Believe' in *Problems of the Self* (CUP, 1973) at 136, 137; D. J. Velleman, *The Possibility of Practical Reason* (Clarendon Press, 2000) at 251. Cf. P. Noordhof, 'Believe What You Want' (2001) 101 Proceedings of the Aristotelian Society 247 at 255–264.

[32] Gathering the evidence is best characterized as a possible expression of our freedom of action, rather than of our cognitive freedom.

is why I take this task to be the kernel of the idea of exercising authority over our beliefs. It is through – gathering and, in particular, through – interpreting the evidence that we can tease out the relevant reasons and exercise as much control as possible over our beliefs.

In light of the above explanation we can appreciate that authority comes in degrees. Normally we exercise authority over our beliefs. However, there are cases where we seem to abdicate part of our authority. We may not go as far as taking a theoretical stance towards our beliefs, but certainly we do not engage in a fully-fledged deliberation on what we are to believe, that is, we do not consider and assess carefully the available evidence concerning the object of our beliefs. We simply rely on beliefs that we already have, possibly after a cursory check of some of the reasons that justify having them. Often we take this avenue for the sake of expediency. Since we do not have the opportunity to deliberate every time on all the beliefs that we act upon, we treat some of our beliefs as settled. E.g., I call into the grocery store on my way home. I remember that this morning I did not see any flour in the cupboard. It is possible that my girlfriend bought some during the day, given that we had a plan of baking pizza for supper. It would be impractical for me to go home to find out – and even if I bought some unnecessary flour it would not be such a big deal. Thus, I act based on my morning belief that there is no flour in the cupboard and go on to buy some. At other times, our avoiding fully-fledged deliberation may show idleness. Even in the absence of time pressure we cannot bother considering evidence that may change our beliefs or our assumptions. E.g., I form a belief on a scholarly debate after reading a couple of articles while preparing for a class. I know that there is much more material written on the topic and I know that reading it may influence my belief. However, I am content with my belief for the time being. Moreover, we may avoid deliberation because of overconfidence. E.g. I have just moved to a new area of London and a few days ago I spent some time on Google Maps finding out the best bicycle route to get to my workplace. I believe that the route crosses Finsbury Park on the west side and then turns left onto Finsbury Park Road. Giving the route another quick check before the ride would

certainly help. But I am confident that I know my way. In fact, I get lost. On yet other occasions, we may evade deliberation because of a bias in favour of maintaining a particular belief and, therefore, a resistance against changing it.[33] E.g., I am a fervent supporter of a certain political party, which may bring me to ignore evidence of corruption of party members and simply to adhere to a previously formed belief in the integrity of the party.

Expediency, idleness, overconfidence, and bias[34] lead us to relinquish authority over our cognitive attitudes, to the extent that we may come to see them in a fashion that is similar to that in which the individual taking a theoretical stance sees them: as given objects that we ascertain – through finding them in our mind – rather than constitute. It is evident that every departure from a full exercise of authority involves the risk that our cognitive attitudes depart from the reality of their objects. This is because the equivalence between the question 'do I believe that *p*?' and the question 'is *p* true?' – which is typical of the deliberative stance – is partially lost. We gradually pay less attention to the existence of reasons that justify believing that something is the case. We put less care in our consideration and assessment of the available evidence, so that our – already limited – control on belief formation is diminished.

The upshot of this discussion is that exercising authority over our cognitive attitudes is an epistemic virtue:[35] those who care about the justification of their beliefs and seek knowledge must not evade deliberation on what they are to believe. Doing otherwise would be irrational, because it would make our beliefs less responsive to the reasons that justify having them. As was hinted above – consider the grocery store example –

[33] This last phenomenon is best known as 'confirmation bias'. Cf. L. Bortolotti, *Delusions and Other Irrational Beliefs* (OUP, 2010) at 140-143.

[34] I am advancing no claim that the list is exhaustive. In fact, the list of possible epistemic vices (and of the respective virtues) is much longer. However, I consider these to be the vices that are more likely to affect criminal fact finding. Therefore, I concentrate on them only.

[35] It should come as no surprise that a virtue epistemologist lists among the epistemic virtues abilities that counter the four – potentially disrupting – factors discussed above and that, therefore, can be understood as establishing one's authority over her cognitive attitudes. See W. J. Wood, *Epistemology: Becoming Intellectually Virtuous* (InterVarsity Press, 1998), in particular, Ch. 2 and 3. In light of this, one may argue that exercising authority is an overarching epistemic virtue, which includes other, more basic, virtues.

sometimes we may have countervailing reasons to relinquish (part of) our authority and simply to rely on pre-existing beliefs or assumptions.[36] However, when our task is precisely that of establishing whether a certain fact is true, reason favours the exercise of authority. If fact finding is our primary goal, we should guard against expediency, idleness, overconfidence or bias.

While certain factors may lower the degree of our authority, other factors may enhance it. After all, although I consider myself a reasonably skilled fact finder, I certainly lack the ability and determination of Sherlock Holmes in forming beliefs that reflect the available evidence. He generally displays a higher authority over his beliefs than I do over mine, in the sense that he exercises more care in the investigative process and, especially, in the process of interpreting the evidence. As a result, his beliefs represent the reality of their objects better than mine do.[37] What are, then, the factors that enhance the degree of authority? The list may be long. Here I want to focus only on two cognitive operations that concern the process of drawing inferences – i.e., the making of a judgment concerning the occurrence of a fact based on a judgment concerning the occurrence of another fact. It is well appreciated that inferential reasoning lies at the heart of fact finding.[38] Drawing inferences is the bread and butter of the fact finder: for instance, it is through an inference that the fact finder uses the demeanour of a witness to determine her reliability and uses a DNA match to determine whether the defendant was at the scene of the crime. In a previous article[39] I have attempted to define the structure of factual inferences and to isolate the fundamental operations that a reasoner should perform when determining whether fact *b* can be inferred from a given fact *a*. For present purposes I will concentrate on two of these operations only. Take a certain fact *a*. We

[36] However, while under certain circumstances it is possible to justify departures from authority that are due to expediency, it is harder to justify a departure produced, for instance, by bias.

[37] I admit that this is a strange comment to make on a fictional character!

[38] Cf. P. Roberts & C. Aitken, *The Logic of Forensic Proof: Inferential Reasoning in Criminal Evidence and Forensic Science*. *The Royal Statistical Society: Practitioner Guide No. 3*, at 12-15, available at http://www.rss.org.uk/uploadedfiles/userfiles/files/Forensic-Proof-contents.pdf (last accessed on 6 November 2014).

[39] F. Picinali, "Structuring Inferential Reasoning in Criminal Fact Finding: an Analogical Theory" (2012) 11 Law, Probability & Risk 197.

want to determine whether fact *b* can be inferred from *a*. We have information – be it a scientific law or a commonsense generalisation – stating a correlation between *a* and *b*. The accuracy of the inference will depend on the strength of the correlation – i.e., what is often referred to as the 'evidential strength' of *a* vis-á-vis *b* – and on the reliability of the information concerning such correlation, that is, on the reliability of the scientific law or commonsense generalisation. Thus, when we deliberate on whether (it is justified) to draw the inference, we must assess each of these variables. In our everyday reasoning we seldom pause to undertake these operations. When addressing the question (as to what we are to believe) concerning the occurrence of *b*, we may not take the trouble to assess carefully evidential strength and reliability. If we do it at all, we may do so swiftly,[40] just relying on some of the easily accessible reasons in favour or against believing in the occurrence of *b*. Often this is because we do not care much whether we get it right or not: we are under the pressure of more important issues. However, if our primary task is to find out whether *b* is the case, our authority over our beliefs should be exercised to a higher degree. This is done precisely through a thorough assessment of evidential strength and reliability. If we are taking our task seriously we should perform these two operations with care, irrespective of whether we are addressing the question on the occurrence of *b* for the first time or we are testing a belief on whether *b* occurred, that we have previously formed.

5.Reasonable doubt and the virtue of authority

There is a twofold link between BRD and the intellectual virtue consisting in exercising authority over our beliefs. That BRD requires the exercise of authority on the part of the fact finder is made evident by its clear reference to the reasons – for and – against the hypothesis of guilt. Contrary to what several instructions on BRD assume, the focus of the formula is not on defining the cognitive attitude that the fact finder must possess for

[40] And, possibly, only at the subconscious level.

a finding of guilt.[41] It is, instead, on requiring the presence of reasons to justify such a finding, where these reasons are provided by the pieces of evidence pertaining to the case. When the fact finder has to determine whether BRD is met, she should not limit herself to ascertaining – as if from a 'theoretical' stance – whether she has a particular cognitive attitude on the matter at issue.[42] The fact finder must, instead, heed the reasons for and against holding true the object of such attitudes, that is, for and against endorsing the attitude itself. In other words, she must take it upon herself to assess the available evidence so as to make the attitude responsive to it. Now, if BRD requires that the fact finder's beliefs are responsive to the reasons made available during the trial, it derives that the fact finder should pay particular attention not to fall prey to the factors that compromise such responsiveness: expediency – and more importantly – idleness, overconfidence, and bias.

Not only does BRD invite the fact finder to engage with the evidence; it also indicates what procedure should the fact finder follow in her interpretive endeavours. It does so through the concept of 'doubt'. This concept tallies with the procedure of hypothesis testing discussed by Roberts and Zuckerman.[43] To doubt a hypothesis is to question it and, more generally, to scrutinise and assess it. Famously, Descartes conceived of doubting not merely as an outward method used by the individual to test assertions proffered by someone else, but chiefly as an inward strategy directed at testing our own beliefs. In any case, doubting requires the adoption of an active, deliberative stance towards statements of fact. The previous discussion of authority provides important guidance for devising the test to which the hypothesis of guilt should be put. The

[41] Cf. Laudan, *supra* note 9 at 79-81. Consider also Laudan's reflections at 53-54 on the need for an evidence-centred, rather than an attitude-centred standard of proof.

[42] This should hold true irrespective of whether someone contends that verdicts should express the fact finder's attitude of belief in a statement of fact or that they should express the fact finder's attitude of acceptance of such a statement. It is my view that verdicts should express a particular belief of the fact finder. For more details see Picinali, *supra* note 15 at 868-869. Laurence Cohen argues, instead, that verdicts should express the (conative) attitude of acceptance. See L. J. Cohen, "Should a Jury Say What it Believes or What it Accepts?" (1991) 13 Cardozo Law Review 465. However, he recognizes that beliefs do play an "important role within the structure of courtroom thinking", given that "belief is the appropriate attitude towards the data", that is, the items of evidence on which the verdict is based (at 475).

[43] See *supra* section 3.

prosecution's case is made of a series of inferences, some of which are explicitly addressed, some of which are left implicit. In making up her mind as to whether any of these inferences is properly drawn – and, thus, whether the *factum probandum* is to be believed in light of the available evidence – the fact finder must test the evidential strength and the reliability of the inference.[44] She must focus on the correlation between the facts involved in the inference, as well as on the reliability of the information concerning such correlation. Thus, if an expert claims that there is a match between an ear-print found at the scene of the crime and the print of the defendant's ear,[45] the fact finder is not to infer that the defendant was at the scene of the crime before assessing carefully, on the one hand, the strength of the correlation between the presence of a match and the fact that the two prints come from the same source – in other words, how likely is it that the source is the defendant, given the match; on the other hand, the reliability of the information used and provided by the expert with regard to both the presence of the match and the correlation.

BRD demands a particular method of reasoning, whereby the fact finder is to exercise a high degree of authority over her beliefs. This means that the fact finder must heed the reasons that justify having a certain cognitive attitude concerning a relevant fact, rather than merely ascertain and report that she has said attitude – as she would likely do, were she to fall pray to one of the aforementioned epistemic vices. The strategy that BRD requires for the justification of one's attitude consists in testing the attitude through assessing the evidential strength and the reliability of the inferences that lead to it.

6.The virtuous fact finder

In their seminal work on the jury, Hastie, Penrod, and Pennington mention the widespread conception according to which the ideal juror is "a relatively passive record-

[44] For an interesting discussion on what inferences within the prosecution case should be proved BRD see D. Hamer, "The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof" (1997) 23 Monash University Law Review 43.

[45] Cf. *Dallagher* [2002] EWCA Crim 1903.

keeper … who encodes the events of the trial verbatim." [46] The view of the juror as a "tape recorder" [47] may be given two distinct interpretations. Neither of them is compatible with the proposed understanding of BRD as imposing a reasoning procedure inspired by the virtue of authority.

According to a strict interpretation, the ideal juror simply exposes herself to the evidence, lets the evidence 'impress' a cognitive attitude in her mind, ascertains what this attitude is through adopting a theoretical stance, and reports on it in the verdict. As argued above, this passive approach is not sufficient for reasoning BRD. BRD demands that the fact finder be alert and intellectually active; ready to engage with the reasons represented by the evidence, in particular, through testing the inferences put forward at trial by the prosecution. Undoubtedly, a strict reading of the tape-recorder metaphor is at odds with this intellectual dynamism.

Under a relaxed interpretation of the metaphor, the ideal juror merely records the evidence throughout the trial and abstains from deliberating on it until she retires into the jury room. Only at that point does she assess and test the available material, especially through an exchange with her fellow jurors. Some studies suggest that it is unrealistic to demand of jurors that they postpone any deliberation until the end of the trial.[48] I add to this consideration that such a demand would be inconsistent with the proposed understanding of BRD. It is true that in order to gain a complete picture of the case the fact finder must wait until all the evidence has been presented. Also, some items of evidence may be appreciated only in conjunction with items that are subsequently offered. However, memory decay and the particular need to test the reliability of the sources of evidence – witnesses above all – advise that jurors start engaging individually with every item of evidence at the time of its first appearance at trial. This preliminary reflection does not undermine the usual requirement that jurors defer judgment of the

[46] R. Hastie, S. D. Penrod & N. Pennington, *Inside the Jury* (Harvard University Press, 1983) at 18.
[47] *Ibidem*.
[48] See R. F. Forston, "Sense and Non-Sense: Jury Trial Communication" (1975) Brigham Young University Law Review 601 at 621; Hastie et al., *supra* note 46 at 18-19; Kerr et al., *supra* note 6 at 283. Cf. V. L. Smith, "Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making" (1991) 79 Journal of Applied Psychology 220 at 225-226.

overall case until all the evidence has been heard.[49] In fact, the prompt and private consideration of the reasons at play can only promote effective collective deliberation at the end of the trial.[50]

7.Instructing the fact finder on the virtue of reasoning BRD

Even if an abstract definition of the threshold represented by BRD were achievable – and I believe it is – it would be difficult to guide jurors in the application of this threshold without interfering with their task – indeed, without usurping their role. As an alternative, I have suggested that BRD be interpreted as requiring also a particular method of reasoning. Jurors should behave as virtuous fact finders, thus testing their beliefs on the evidence through practising a particular intellectual virtue. This is the exercise of authority over their cognitive attitudes: rather than trusting their beliefs supinely and being seduced by epistemic vices, jurors are to engage alertly and critically with the evidence throughout the trial, identifying the reasons for and against the hypothesis of guilt. The virtue of authority is further clarified in terms of the test to which the inferences forming the hypothesis of guilt should be put. Jurors should assess the correlation between the facts involved in the inference as well as the reliability of the information concerning such correlation. It is by means of this reasoning process that reasonableness can be accurately ascribed to doubts on the hypothesis of guilt: the reasons supporting defensive doubts will emerge through testing evidential strength and reliability. Adherence to the suggested method of reasoning should, therefore, promote compliance with the threshold represented by BRD.

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[49] See the *Crown Court Benchbook*, *supra* note 1 at 387.

[50] Cf. this sample direction – formulated by Lord Lane in *Watson* [1988] QB 690 – on the contribution that individual jurors are expected to make to the collective deliberation: "Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but also collectively. That is the strength of the jury system. Each of you takes into the jury-box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached."

At this point a critical reader may say: "Fair enough. You may have made a case for reading the virtue of authority into BRD. However, your discussion still leaves open the issue of determining 'how much virtue' the fact finder is to exercise, and of instructing her accordingly. What is the extent of consideration and assessment of the evidence that BRD requires? When should the fact finder be satisfied with her tests of evidential strength and reliability?" These are, again, problems of threshold determination, which seem to raise the very issue that my proposal intended to avoid: explaining to jurors the key concept of 'reasonable doubt'. At a closer look, however, this criticism is less significant than it seems. It is true that jurors would receive better guidance were we able to indicate the 'amount of virtue' that they need to exercise. However, instructing them on the virtue of authority represents an important step forward with respect to the traditional threshold-centered instructions on BRD – as well as a possible method-centered instruction along the lines of Roberts's and Zuckerman's conception of the standard. This is so for two related reasons. First, instructing jurors on the virtue of authority would give them useful directives on how to reason with the evidence, which they wouldn't otherwise receive. It would tell jurors with a reasonable degree of detail what attitudes to avoid and what operations to undertake when testing the prosecution case. Second, the absence of precise information concerning the extent of authority that jurors are expected to practise would not compromise their understanding of the directives and the beneficial role that the directives are expected to play. In fact, I suspect that most people would have an intuitive grasp of what it means to avoid the aforementioned epistemic vices and to assess the reliability and strength of an inference. If they are carefully directed to do so, their performance as fact finders is only likely to improve, whether or not they are told precisely what degree of epistemic effort is required of them.[51]

I appreciate that it may be complex and unnecessary to instruct jurors on the facets and the theoretical underpinnings of the virtue of authority. However, it is possible to

[51] Cf. R. Hursthouse, *On Virtue Ethics* (OUP, 1999), Ch. 1. I concede that in order to strengthen this claim it would be advisable to subject it to empirical testing. The claim is reasonable nonetheless.

devise a clear and helpful instruction that mentions the threshold required by BRD, but then concentrates on the main traits of the reasoning method that was discussed so far. This instruction should include the points that follow, formulating them in the language that is most accessible to lay people.[52]

1) The criminal standard of proof is BRD;

2) The evidential threshold imposed by BRD is substantially higher than the threshold governing fact finding in civil cases, but it falls short of certainty;[53]

3) In order to satisfy this stringent evidential threshold, BRD demands that jurors apply a particular method of reasoning, described in 5) and 6). Jurors should trust that adhering to this method will promote compliance with the threshold;

4) Jurors should follow this method both individually – when they are hearing the evidence – and collectively – when they are deliberating on the case as a whole at the end of the trial;

5) In general, jurors should exercise a high level of care and responsibility in fact finding; they should be alert and attentive to all the evidence presented at trial and their verdict should be responsive to such evidence; they should avoid hasty judgments on any relevant issue; they should be wary of the negative influence that biases and stereotypes may have on their deliberations; and they should be humble, that is, ready to change their minds when there are reasons to do so;

6) More specifically, jurors should test the many inferences that are part of the prosecution case.[54] A factual inference is the making of a judgment

[52] I have already attempted to formulate the points in easy and intelligible terms.

[53] Giving jurors a lower and a higher point of reference does help them situate the threshold – albeit imprecisely. This definitional device is often used in directions on BRD.

[54] It is important to consider that also ordinary testimonies require that jurors draw an inference concerning the trustworthiness of the witness, i.e., the inference from the fact that the witness said 'that *p*'

> concerning the occurrence of a fact based on a judgment concerning the occurrence of another fact. In order to test the inference, jurors must assess the strength of the correlation between the two facts and the reliability of the information expressing such correlation. 'Correlation' should be defined as the extent to which the occurrence of a fact is indicative of the occurrence of another fact. In light of the assessments of evidential strength and reliability, jurors should ask themselves whether there are reasons to doubt that the inference could be drawn. If there are, they should not draw the inference. It may be helpful to offer a straightforward example of this test, along the lines of the ear-print case discussed above.[55]

I trust that an instruction along these lines would constitute a decisive improvement on the current directions on the standard of proof. True, as with current directions and with a hypothetical direction on eliminative reasoning, the proposed instruction may still leave jurors to wonder about the meaning and application of the concept of 'reasonable doubt'. However – as argued above – it has the advantage of providing a more intelligible conceptual framework and a set of practicable directives that would substantially contribute to jurors' understanding and performance of their task and, as a result, to the quality of fact finding. Still, someone may contend that these directives are superfluous in that they are restatements of commonsensical recommendations of which jurors are already aware. I agree that the directives are commonsensical, if with this term we refer to the property of commanding assent from a reasonable person. However, I

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to the occurrence of *p*. The correlation between these facts is expressed by common-sense generalisations reflecting the characteristics of the witness or by empirical studies. The reliability of this information is to be assessed.

[55] A possible example not involving expert evidence is the following. Consider that it is part of the prosecution case that the defendant's intent to commit the crime should be inferred from the behaviour that she held in the days preceding the event. In deciding whether to draw the inference the fact finder should: (A) assess the extent to which this behaviour is indicative of the presence – at the relevant time – of the intention to commit the crime; and (B) ask herself whether she trusts the information concerning the relationship between these two facts (be it a common-sense generalisation and/or the words used by the prosecution when inviting the jury to draw the inference).

strongly doubt that every juror is already aware of them – especially of the test discussed in 6) – and of the positive epistemic role that they are expected to play. Also, I doubt that those who are already aware of these directives would always attempt to put them into practice even in the absence of an apposite invitation to do so.

For the proposed instruction to perform its beneficial function, however, it would have to be imparted within the introductory speech of the judge at the commencement of trial[56] and, possibly, repeated before the jury retires for deliberation. In fact, if jurors are to start applying the suggested reasoning procedure already when the evidence is first introduced, they must be informed on the nature of such procedure before the prosecution presents its case. Later repetition of the instruction would refresh its message in the jurors' mind before the crucial phase of collective deliberation. Aside from these considerations, the need for a pre-instruction on BRD is further supported by empirical studies showing that pre-instructions can be more effective than traditional directions.[57] This is especially the case when the instruction is repeated at the end of the trial.[58] Consider the words written long ago by a judge of the United States Court of Appeals. Not only do they advance a convincing argument for a pre-instruction on BRD; they also touch on the importance of putting jurors in the condition to reason carefully about the evidence – I would add: as BRD requires!

> [I]t makes no sense to have a juror listen to days of testimony only then to be told that he and his confreres are the sole judges of the facts, that the accused is presumed to be innocent, that the government must prove guilt beyond a reasonable doubt, etc. What

[56] Consider the words of the *Crown Court Benchbook*, *supra* note 1 at 1: "The more we focus upon jurors' needs in the management and conduct of trials, and in summing up, the better able the jury will be to perform their task accurately and confidently … The *first responsibility* of the trial judge, we propose, is to assist each member of the jury to understand and perform his or her duty to return a true verdict according to the evidence. That responsibility includes ensuring that jurors quickly become acclimatized to the courtroom and to the business of trial. *Much can be achieved by introductory, explanatory and reassuring words at the outset*" (emphasis added).

[57] See S. M. Kassin & L. S. Wrightsman, "On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts" (1979) 37 Journal of Personality and Social Psychology 1877; L. Heuer & S. D. Penrod, "Instructing Jurors: A Field Experiment with Written and Preliminary Instructions" (1989) 13 Law and Human Behavior 409.

[58] See Smith, *supra* note 48.

> manner of mind can go back over a stream of conflicting statements of alleged facts, recall the intonations, the demeanor, or even the existence of the witnesses, and retrospectively fit all these recollections into a pattern of evaluation and judgment given him for the first time after the events? The human mind cannot do so. It is not a magnetized tape from which recorded speech can be repeated at chosen speed and volume. The fact of the matter is that this order of procedure makes much of the trial of a lawsuit mere mumbo jumbo. It sounds all right to the professional technicians who are the judge and the lawyers. It reads all right to the professional technicians who are the court of appeals. But to the laymen sitting in the box, restricted to listening, the whole thing is a fog.[59]

8.A concluding remark

I have argued that we should construe BRD as requiring (also) a method of reasoning and that we should instruct jurors accordingly. I have made a suggestion as to what this method of reasoning should be, providing a theoretical as well as textual basis for my claim. No doubt some readers will have misgivings about the details of my argument. However, I trust that this paper has at least sensitised the audience to two claims. The general claim is that jurors need to be afforded more guidance on how to reason about the evidence. More work must be done in this direction and I believe that a new reflection on BRD is a promising starting point. The particular claim is that the Crown Court Benchbook's 'be sure of guilt' instruction is not a step forward in this direction. Jurors may understand the instruction as an invitation to take a theoretical stance, that is, merely to ascertain their cognitive attitude concerning guilt and to reflect this attitude in the verdict. The instruction in itself does not focus jurors' attention on the need for their attitude to be responsive to the available evidence, and it does not give jurors any guidance as to how to promote this responsiveness.

[59] E. B. Prettyman, "Jury Instructions: First or Last?" (1960) 46 American Bar Association Journal 1066, cited in Forston, *supra* note 48 at 621.