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# Not Guilty and Innocent - The Problem Children of Reasonable Doubt

Vincent T. Bugliosi

# NOT GUILTY AND INNOCENT—THE PROBLEM CHILDREN OF REASONABLE DOUBT

*Vincent T. Bugliosi**

## I. INTRODUCTION

The terms *not guilty* and *innocent* have an interesting, almost symbiotic, relationship to each other in American criminal jurisprudence. A defendant is legally presumed to be *innocent*, but he pleads *not guilty* to the charges brought by the prosecution. A defendant usually presents evidence to show, and he argues, that he is *innocent*. And courts regularly instruct the jury that they are to determine the guilt or innocence of the defendant. In the end, however, he is found to be guilty or *not guilty*. If the verdict is *not guilty*, newspapers normally say he was found to be *innocent*.

The legal distinction between *not guilty* and *innocent* is more than a semantic parlor game. The principal function of the trier of fact in a criminal case, to wit, to determine if the prosecution has met its burden of proving guilt beyond a reasonable doubt, cannot be properly carried out without a grasp of the subtle but critical distinction between the two terms.

This article presents an analysis of the background and purpose of trial by jury, presumption of innocence, and burden of proof as bases from which the substantive distinction between *not guilty* and *innocent* emanates. With more particularity, the article focuses upon the widespread misuse of the word *innocence* in lieu of *not guilty*, and the by-product of this misuse—the erroneous statement by courts, practicing attorneys and drafters of jury instructions that the function of the jury is to determine the "guilt or innocence" of the accused. The article illustrates some of the obvious as well as more circuitous means by which these errors and their resulting confusion are transmitted to the jury, principally by way of jury instructions.

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* Member of California Bar. B.B.A., University of Miami, 1956; L.L.B., U.C.L.A., 1964. The author served as a Los Angeles County Deputy District Attorney from 1964-1972, and is the co-author of two non-fiction crime books, HELTER SKELTER and TILL DEATH US DO PART. Article reprinted, with permission, from 4 CRIM. J.J. 349 (1981).

## II. BACKGROUND

The United States Constitution guarantees the right to trial by jury in a criminal prosecution in article III, section 2, clause 3,[1] and the sixth amendment.[2]

The concept of trial by jury came to America with the English colonists who insisted on the jury method of trial. The founding fathers who wrote our Constitution had learned from history. They strived for safeguards against the use of unfounded criminal charges brought merely to eliminate the political enemies of those in power. As one safeguard, the Framers of the Constitution attempted to establish an independent judiciary. By guaranteeing those accused of crime the right to be tried by a jury of their peers, they added yet another layer of protection from arbitrary or politically motivated prosecutions. In 1789, Thomas Jefferson wrote to Thomas Paine, "I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."[3] The United States Supreme Court has repeatedly stressed the importance of jury trial: "[W]e believe that trial by jury in criminal cases is fundamental to the American scheme of justice . . . ."[4]

Along with the right to a jury trial, the presumption of innocence and the prosecution's burden of proving the defendant guilty beyond a reasonable doubt have been conjunctive bedrocks of the Anglo-American system of law. The United States Supreme Court has stated that the right to a fair trial is a fundamental right secured by the fourteenth amendment to the United States Constitution.[5] The presumption of innocence and burden of proof are designed to help insure that those accused of crime are af-

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1. U.S. CONST. art. III, § 2, ch. 3. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ." *Id.*

2. U.S. CONST. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. *Id.*

3. Letter from Thomas Jefferson to Thomas Paine (1789). *See also* Singer v. United States, 380 U.S. 24, 31 (1965). "The [jury trial] clause was clearly intended to protect the accused from oppression by the government . . . ." *Id.*

4. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

5. Estelle v. Williams, 425 U.S. 501, 503 (1976).

forded this right.

In emphasizing the importance of the presumption of innocence, the United States Supreme Court has stated that "[t]he presumption, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[6] The presumption serves as an admonishment to the jury to reach their verdict solely on the evidence adduced at trial, and not on the basis of suspicions, appearances, and personal opinions that may arise from the fact of the defendant's arrest, indictment, custody, or matters not introduced as proof at trial.[7]

The Supreme Court has also held that the concomitant commandment prohibiting a criminal conviction of any person except upon proof of guilt beyond a reasonable doubt is guaranteed by the Due Process Clause of the fourteenth amendment to the United States Constitution.[8] Applicable to all the states, this burden of proof has been enunciated by every state legislature in the land. The requirement of proof beyond a reasonable doubt in a criminal case is premised on the seminal value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.[9]

The operative interrelationship between the presumption of innocence and the burden of proving guilt beyond a reasonable doubt is simply this: the presumption of innocence permits the accused to remain inactive and secure, *unless and until the prosecution overcomes the presumption by producing evidence which effectively meets their legal burden of proof.*[10] The presumption of innocence attends the accused throughout the trial, and applies to every fact that must be established in order to prove his guilt beyond a reasonable doubt.[11]

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6. *Id.*
7. Bell v. Wolfish, 441 U.S. 520, 533 (1979).
8. *In re* Winship, 397 U.S. 358, 364 (1970).
9. *Id.* at 372.
10. Taylor v. Kentucky, 436 U.S. 478, 483 n. 12 (1978).
11. Kirby v. United States, 174 U.S. 47, 55 (1899). Though from a public policy standpoint, the effect of the presumption of innocence is clearly a salutary one, it could be argued that the same effect could be obtained without the presumption, and by only retaining its corollaries, eliminate the legal infirmity and fiction surrounding the presumption of innocence. Legal presumptions are based on the rationale of probability. Under certain situations, experience has shown that when fact "A" is present, the presence of fact "B" is so probable that fact "B" should be presumed to exist unless and until an adverse party disproves it, e.g., a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail.

When, however, we apply this underlying basis for a legal presumption to the presumption of innocence, the presumption, it would seem, should fall. Statistics and convic-

## III. DEFINING TERMS

Whenever the terms *guilty, not guilty*, and *innocent* are used in a criminal trial, it is essential that their specific meanings be defined to, and understood by, the jury. It is also essential that the usage of these terms by the court and counsel during a trial be consistent with the definitions stated. Any incorrect or contradictory language may result in the jury being misled and confused as to its role in the trial.

In common usage, the word *guilty* is a specific *factual* description of a reality. It describes a person who committed the act or crime.[12] Whether the prosecution can prove that he actually did it is a separate question to be determined at trial. A second meaning of the word *guilty* refers to the subjective conclusion of the jury in the form of a verdict in a criminal trial.[13] This conclu-

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tion rates show it is ridiculous to presume that when the average defendant is arrested, charged with a crime, and brought to trial, he is usually innocent. But obviously, the converse presumption that a defendant is presumed to be guilty would be far worse and, indeed, intolerable. Our system, for readily apparent reasons, is infinitely superior to those in nations, mostly totalitarian, which presume an arrested person is guilty and place the burden on the accused to prove his innocence.

The solution would seem to be to simply eliminate the presumption of innocence instruction to the jury, keeping those two necessary corollaries of the presumption which do have enormous merit: First, the fact that the defendant has been arrested for and charged with a crime is no evidence of his guilt and should not be used against him; and secondly and more importantly, under our system of justice the prosecution has the burden of proving guilt. The defendant has no burden to prove his innocence.

It is one thing to say that the defendant does not have to prove his innocence, and that in the absence of affirmative proof of guilt he is entitled to a not guilty verdict. To go a step further, however, and say that he is legally presumed to be innocent when he has just been brought to court in handcuffs seems to be hollow rhetoric. One day a defendant is going to stand up in court and tell the judge, "Your Honor, if I am legally presumed to be innocent, why have I been arrested for this crime, why has a criminal complaint been filed against me, and why am I now here in court being tried?"

As any seasoned criminal trial lawyer will attest, for the most part juries see through the transparent fiction of the presumption of innocence. Whether they verbalize it or not, as reasonable human beings they know that if the defendant seated at the counsel table in front of them were truly, in the eyes of the law, legally presumed to be innocent, they would not have been impaneled to hear and adjudicate the charges brought against him by the law. It is entirely within the rubric of reason that the articulation of the presumption of innocence by the judge to the jury may, on balance, rebound to the detriment of the accused. If the jury knows the presumption of innocence is a legal fiction, yet the judge intones the dynamics of the presumption to them in a very sober manner, and with the straightest of countenances, could it be that he thereby loses a speck of credibility in their eyes? And when he subsequently instructs them on those matters which *are* legally sound and designed by the law to be protective of and beneficial to the defendant (e.g., doctrine of reasonable doubt), they may not take his words as seriously as they should?

12. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 585 (1980) defines guilty as "[h]aving committed a crime . . . ."

13. BLACK'S LAW DICTIONARY 637 (5th ed. 1979) defines a "guilty verdict" as "[f]ormal pronouncement by jury that they adjudge the defendant guilty of the offense charged."

sion comes into existence only at the end of the trial, and only if the prosecution has convinced the jury of the *factual guilt* of the defendant beyond a reasonable doubt.

In common usage, the word *innocent*, as with the word *guilty*, is a specific factual description of a reality. It describes a person who did not commit the act or crime.[14] A person who is *innocent* is defined, in both common and legal usage, as one who is "free from guilt."[15] Whether or not he is convicted or acquitted is a separate question to be determined at trial. As in factual guilt, factual innocence exists regardless of the subjective conclusion of the jury. Unlike the word *guilty*, the word *innocent* has no court verdict counterpart in American criminal law. "Innocent" is not one of the possible verdicts that a jury may return. A defendant who is not proven guilty beyond a reasonable doubt is found to be "Not Guilty."

In ordinary lay usage, the term *not guilty* is often considered to be synonymous with *innocent*.[16] In American criminal jurisprudence, however, they are not synonymous. "Not Guilty" is a legal finding by the jury that the prosecution has not met its burden of proof. A "Not Guilty" verdict can result from either of two states of mind on the part of the jury: that they believe the defendant is factually innocent and did not commit the crime; or, although they do not necessarily believe he is innocent, and even "tend" to believe he did commit the crime, the prosecution's case was not sufficiently strong to convince them of his guilt beyond a reasonable doubt.

Within this second state of mind (reasonable doubt) resulting in a "Not Guilty" verdict lies the distinction between the terms *not guilty* and *innocent*. It is generally accepted that the doctrine of reasonable doubt is, as Sir Winston Churchill once described Soviet Russia, "a riddle wrapped in a mystery inside an enigma." Legal scholars and authorities say it simply cannot be satisfactorily defined and to attempt to do so only confuses further.[17] How-

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14. In Ebberts v. State Board of Control, 84 Cal. App. 3d 329, 335, 148 Cal. Rptr. 543, 546 (1978), the court stated "[w]e interpret the phrase 'not committed at all' in [CAL. PENAL CODE §§ ] 4900 and 4903 to mean that the claimant can show the board that he was 'innocent' in the sense that *he did not do the acts which characterize the crime*. This is the only sensible meaning we believe we can give to the use of the term 'innocent'. . . ." (emphasis added).

15. WEBSTER'S NEW COLLEGIATE DICTIONARY 595 (7th ed. 1976), BLACK'S LAW DICTIONARY 708 (5th ed. 1979), and BALLANTINE'S LAW DICTIONARY 629 (3rd ed. 1969) define "innocent" as freedom from guilt.

16. WEBSTER'S NEW WORLD THESAURUS 316 (1971).

17. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 341, at 798-800 (2d ed. 1972);

ever, there is one all-important principle that is implicit in the term — namely, that a jury does not have to believe in a defendant's innocence in order to return a verdict of not guilty. Even their belief in his guilt, if only a moderately held one, should not result in a guilty verdict. To convict, their belief in his guilt must be beyond a reasonable doubt.

Why is such a notion implicit? Since no thorough examination by any student of the doctrine of reasonable doubt could conclude that a jury has to believe in a defendant's innocence as a prerequisite to their returning a verdict of not guilty, it is perhaps not imperative to attempt to articulate why such a conclusion is implicit in the term. Nonetheless, and without having read or even heard of any prior writing on the subject, I make this effort: if the judge were to merely instruct the jury that to convict the defendant they had to be "convinced of the defendant's guilt," the issue for the jury to resolve would seem to be guilt as *opposed to what*? The inference is innocence, i.e., the opposite side of guilt is innocence. So the question would be that of *guilt* or *innocence*. But the judge does not give this truncated instruction. To the words "convinced of the defendant's guilt" he appends the words "beyond a reasonable doubt." It would seem we have now jettisoned the previously inferential "innocence," at least to the extent that it no longer is a *sine qua non* in the legal equation necessary for a verdict of not guilty. Now the issue seems to be guilt *as opposed to what*? Guilt beyond a reasonable doubt. The new comparison seems to be between believing in guilt on one hand, and believing in guilt beyond a reasonable doubt on the other. In other words, when the judge tells the jury that to convict, they have to be convinced *not only* of guilt, but guilt beyond a reasonable doubt, he clearly is telling them that *a mere belief in guilt is not enough to convict*. And if a mere belief in guilt is not enough to convict, and has to result in a not guilty verdict, *a fortiori, a belief in innocence is not necessary* in order to result in a not guilty verdict.[18]

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ILLINOIS JUDICIAL CONFERENCE COMMITTEE ON PATTERN INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL, § 2.05 (1968): "We have so frequently discussed the futility of attempting to define reasonable doubt that we might expect the practice to be discontinued."; J. WIGMORE, WIGMORE ON EVIDENCE § 2497, at 317 (3d ed. 1940): "[t]his elusive and undefinable state of mind."; Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 63 (1933): "It is coming to be recognized that all attempts to define reasonable doubt by paraphrase or circumlocution tend to obfuscate rather than clarify the concept." Many courts, in abject surrender, e.g., the United States Seventh Circuit, do not even attempt to define reasonable doubt in any way whatsoever to the jury.

18. As if the concept of reasonable doubt did not have enough indigenous semantic

Since a "Not Guilty" verdict can be predicated on that "gray zone" of uncertainty somewhere between a belief in innocence and the required proof of guilt, it would be incorrect to state that a conclusion of "Not Guilty" means that the jury believes the defendant is innocent. Although a verdict of "Not Guilty" certainly may be based upon a belief in the defendant's innocence, it just as certainly may be based on a hesitation in belief of guilt which amounts to a reasonable doubt in the minds of the jury.

Inasmuch as the terms *not guilty* and *innocent* have for the most part been used interchangeably throughout the years by lay people as well as by the legal profession,[19] instead of the correct term "Guilty or Not Guilty" being used exclusively, the far more common, but incorrect term "Guilt or Innocence" has insidiously crept into the American language and consciousness. Although the precise date and locus of its misconceived birth are not known, it has led a very robust life, shows no sign of aging and, as we shall see, has been invested with the imprimatur of the highest court in the land.

While a defendant's guilt or innocence obviously is the most important *moral* issue at every criminal trial, and could not possibly be more *legally* relevant (since if a jury believes a defendant is innocent they must find him "Not Guilty"), the defendant's guilt or innocence is *not* the issue for the jury to determine. It is whether or not the prosecution has met its legal burden of proving guilt beyond a reasonable doubt. If the jury answers in the negative, they must conclude that the defendant is "Not Guilty," even in those situations where they tend to believe he did commit the

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problems, I might add that the word "beyond" in the term "beyond a reasonable doubt" is an unnecessary element of a concept already mired in metaphysical confusion. During my years as a prosecutor, I noted how defense counsel, in discussing the term "beyond a reasonable doubt," emphasized the word "beyond" as if the prosecution had to go beyond the horizon and to the ends of the earth to prove guilt. Because of the confusing, misleading context in which it was used, I developed a line of thought to explain to the jury the word "beyond." I pointed out to the jury that in "beyond a reasonable doubt," "beyond" is a needless appendage which is not even used in its principal sense of "further," i.e., "more than." (If it were, the prosecution would have to prove there is *more than* a reasonable doubt of a defendant's guilt, when obviously, they have to prove just the opposite—that there is *less than* a reasonable doubt.) Instead, "beyond" is used in the sense of "to the exclusion of," i.e., the prosecutor has the burden of proving the defendant's guilt to the exclusion of all reasonable doubt. Excising the word "beyond" from the term "beyond a reasonable doubt," I would proceed to tell the jury the much more simple: "If you do not have a reasonable doubt of guilt, convict. If you do have a reasonable doubt, acquit." I then went on to define reasonable doubt as a sound, sensible, logical doubt reasonably based upon the evidence in the case.

19. *See infra* nn. 22-37 and accompanying text.

crime.[20] To summarize: if the issue for the jury to determine at a criminal trial were the defendant's guilt or innocence, this would mean that after an evaluation of the testimony and evidence, it would have to decide whether or not the defendant committed the crime, i.e., did he do it or did he not do it? But that is not its function. Its duty is to determine whether or not the prosecution has met its legal burden of proving the defendant's guilt beyond a reasonable doubt. If the jury does not understand this critical distinction, it cannot properly fulfill its function as the trier of fact.

Though the distinction between the terms *not guilty* and *innocent* is a crucial one, and integral to a jury's ability to properly perform its task, it is nothing short of incredible that with legal treatises having been written on virtually every point of law imaginable, apparently none has ever been written on the subject in America. At least, this writer has never come across such an article or treatise and none is listed in the *Index to Legal Periodicals*, or the *Criminal Justice Periodical Index*.[21]

The purpose of this article is not to pass judgment on what the function of the trier of fact in a criminal case should be. It is certain that arguments could be advanced for the proposition that perhaps the determination of guilt or innocence should be the function of the jury. The point is that under existing law it is not. Yet, the number of times and the number of situations in which this incorrect statement is communicated to the jury by judge and counsel is astonishing and unsettling.

## IV. CASE DISCUSSION

The misstatement that it is the role of the jury in a criminal trial to determine the guilt or innocence of the defendant has been

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20. In Scottish criminal procedure, where conviction or acquittal is decided by the majority vote of a jury of fifteen, the jury is not restricted to a verdict of "Guilty" or "Not Guilty." There is a third possibility designed to cover the situation where there is a suspicion of guilt but not sufficient to remove all reasonable doubt. The third possible verdict is "Not Proven." (Scottish wags refer to the verdict as one of "Not Guilty, but don't do it again.") The principal criticism of the Scottish verdict system has been the lingering stigma that attaches to one whose trial only culminated in a "Not Proven" verdict. A. GIBB, N. WALKER, INTRODUCTION TO THE LAW OF SCOTLAND 683 (5th ed. 1952); T. SMITH, BRITISH JUSTICE: THE SCOTTISH CONTRIBUTION 125, 126 (1961).

21. At the risk of sounding presumptuous, the first specific writing on the subject that this writer is aware of is in this writer's own book, HELTER SKELTER (Norton ed. at 383, 1974; Bantam ed. at 520, 1975). A more expanded discussion appears in my second book, TILL DEATH US DO PART (Norton ed. at 363-65, 1978; Bantam ed. at 378-81, 1979) and in my *Tactics and Techniques in Handling Each Phase of a Criminal Trial*, 2 TRIAL DIPLOMACY JOURNAL at 34-35 (1979).

given currency even in the decisions of the United States Supreme Court.

In the 1964 case of *Jackson v. Denno*,[22] the United States Supreme Court stated the task of the jury as one of "*adjudicating guilt or innocence.*"[23] It was not merely an isolated misstatement by the Court. The Court incorrectly referred to the determination of "guilt or innocence" as being the jury's function no less than seven times in the *Jackson* opinion.[24]

The Supreme Court again specifically dealt with juries in the 1970 case of *Williams v. Florida*.[25] The Court was tracing the development of jury trials when it emphasized the importance of "the concept of relying on a body of one's peers to *determine guilt or innocence* as a safeguard against arbitrary law enforcement."[26]

In 1972, the United States Supreme Court decided *Apodaca v. Oregon*,[27] dealing with the community makeup of jury panels. The Court stated that various segments of a community have "the right to participate in the overall legal processes by which criminal *guilt or innocence are determined.*"[28]

The Court was ironically concerned with the implications that words may carry, and the detrimental effect that misstatements may have on the jury, in the 1978 case of *Taylor v. Kentucky*.[29] In the very sentence wherein the Court expressed concern over the danger that one of the statements made at trial by the prosecution was misconstrued by the jury, the Court misstated the task of the jury to be one of "*determining petitioner's guilt or innocence.*"[30]

The cases referred to above are but a few examples of the United States Supreme Court, in case after case, continuing to loosely and erroneously define the principal function of the jury in a criminal trial. Needless to say, far less insightful state, county, and municipal courts throughout the land make this same mistake.

There are hundreds of state appellate court cases that abound

22. 378 U.S. 368 (1964).
23. *Id.* at 387 (emphasis added).
24. *Id.* at 374, 379, 387, 394 (three times), 395.
25. 399 U.S. 78 (1970).
26. *Id.* at 87 (emphasis added).
27. 406 U.S. 404 (1972).
28. *Id.* at 413 (emphasis added).
29. 436 U.S. 478 (1978).
30. *Id.* at 487 (emphasis added).

with the misstatement. In *People v. Collins*,[31] the California Supreme Court, one of the nation's premier courts, said that "the testimony as to mathematical probability infected the case with fatal error and distorted the jury's traditional role of *determining guilt or innocence* . . . ."[32] In the New York case of *People v. Jenkins*,[33] the court stated:

> In the trial minutes it appears that the court was asked . . . to charge 'that the jury could find either defendant Minor or defendant Jenkins *guilty* or *innocent* of each count, and that they need not find both either *guilty* or *innocent*.' On both occasions, the court refused to charge as requested. This was error, for the jury did have the right to treat each defendant separately and to weigh the evidence concerning each defendant in order to *determine the guilt or innocence* of each.[34]

Can it be that notwithstanding the fact that courts, legal experts and lawyers[35] insist on erroneously articulating the function of a jury as being the determination of guilt or innocence, they nonetheless clearly realize the jury's sole function is to determine whether or not the prosecution has proven guilt beyond a reasonable doubt and that this is not synonymous with "determining guilt or innocence"? This seems highly unlikely. Were they to truly know the critical distinction between the two terms, they would necessarily be aware that they are perpetuating the confusion by verbalizing, in their legal opinions and writings, the notion that it is the jury's function to determine the guilt or innocence of the accused. This is obviously not to suggest that a grasp of the distinction is beyond the cerebral profundity of the violators. What is suggested by this erroneous use of the term "guilt or innocence" is the fact that they may never have addressed their minds to the subject. The apparent total absence of any legal writings on the subject is one reason, undoubtedly, for this inattention to the matter. Despite this inattention, I maintain that most jurists and legal authorities do have a fuzzy, unarticulated, visceral

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31. 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968).

32. *Id.* at 320, 438 P.2d at 33, 66 Cal. Rptr. at 497 (emphasis added).

33. 47 A.D.2d 735 (N.Y. App. Div. 1975).

34. *Id.* at 736 (emphasis added). Not only the courts, but legal experts as well, misapprehend or misstate the function of the trier of fact in a criminal trial. For example, see R. PERKINS, PERKINS ON CRIMINAL LAW (2d ed. 1969): "Criminal Procedure is the formal machinery which has been established to enforce the substantive criminal law. Its broad outlines include (1) accusation of crime, (2) *determination of guilt or innocence* and (3) disposition of those convicted." *Id.* at 1 (emphasis added).

35. *See infra* sections VI and VII.

grasp of the distinction. The grasp is just not sufficiently pinioned and conceptualized in their minds to cause them to speak or write correctly on the subject. In other words, they "know" the distinction, but they "really don't know."

On the other hand, I believe that with a goodly number of our legal brethren, the depth of their intellectual detachment from the subject is such that when they proclaim it is the role of the jury to determine the guilt or innocence of the accused, they may mean precisely what they are saying, i.e., they may truly believe the jury's ultimate legal function is to determine whether or not the defendant committed the crime for which he is on trial. For instance, in the 1981 case of *Bullington v. Missouri*,[36] no less a legal scholar than United States Supreme Court Justice Powell declared:

> Underlying the question of *guilt or innocence* is an *objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged.* From the time an accused is first suspected to the time the decision on *guilt or innocence* is made, our criminal justice system is designed to enable the trier of fact to discover *that truth* according to law.[37]

## V. JURIES

When juries are initially exposed to the criminal justice system, they are immediately overwhelmed by the nomenclature. The attorneys and court communicate in a language that is a mixture of English and Latin, oftentimes with strained interpretations thereof. They speak in technical terms of law, and debate *ad nauseam* over the meanings of a single word, each advocating a different reading. The sum total of a juror's exposure to criminal courtroom terminology and procedure may consist of what has been gleaned from newspapers, magazines and television. Any im-

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36. 451 U.S. 430 (1981).

37. *Id.* at 450 (emphasis added). In F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS (1927), the author writes:

> At the trial, the killing of Parmenter and Berardelli was undisputed. The *only issue* was the identity of the murderers. *Were Sacco and Vanzetti two of the assailants* of Parmenter and Berardelli, or *were they not*? *This was the beginning and the end of the inquiry at the trial*; this is the beginning and the end of any judgment now on the *guilt or innocence* of these men. Every other issue, no matter how worded, is relevant only as it helps to answer *that central question.*

pressions they possess when they first venture into the courtroom may likely be based upon misinformation. The most salient examples of such misinformation are the use of the word *innocent* as being synonymous with *not guilty*, and the belief that they are to determine the guilt or innocence of the defendant.

These misconceptions are reinforced wherever they turn. It is common practice for the media to report a defendant's plea of "Not Guilty" as a plea of "Innocence." Likewise, as referred to earlier, the press rather consistently reports that a defendant has been found "Innocent" when a jury returns a verdict of "Not Guilty." The term "guilt or innocence" is used in books and plays. Television shows and movies talk about "guilt or innocence." When a jury is deliberating, the press reports that they are deliberating the "guilt or innocence" of the accused.[38] With this constant inundation, lay people naturally believe that the whole purpose of a criminal trial is to ascertain whether or not the defendant committed the crime. Even in the absence of such a deluge, those unlettered in the law would almost automatically make this assumption. After all, though the prosecutor and defense attorney get caught up in the adversary proceeding—with its attendant, unblushing effort to maximize advantages, minimize disadvantages, and propound or circumvent those technical rules of law and procedure which they perceive to be favorable or unfavorable to their cause—jurors have a much more pristine view of justice. To them, justice is finding out the truth and then giving a person his due. And the question—"did the defendant commit the crime or not"—is much more compatible with their concept of justice than what they view as the game-like—"did the prosecution prove it beyond a reasonable doubt or not."

Whatever the reason or genesis for the belief, by and large the notion that a jury determines the guilt or innocence of a defendant accompanies the new juror into the courtroom. Not only is the juror rarely, if ever, disabused of this misconception by the court, but as we shall soon see, the notion is usually fortified and repeated by the very court whose duty it is to rectify the misconception.

The court, and attorneys practicing before it, take the time to correctly define and explain technical terms, phrases and issues

38. For example, *see* NEWSWEEK, March 2, 1981 at 38: "For twelve weeks Jean Harris has stood trial for the murder of Dr. Herman Tarnower, and at the weekend the jury was still deliberating her *guilt or innocence*." (emphasis added).

for the benefit of the jury so that they will be able to properly evaluate the evidence and make an informed and intelligent decision with respect thereto. It is ironic that the ultimate issue for the jury to decide is almost invariably left unclarified at best, and at worst, the misconception the jurors have of their role is further underlined in their minds.

## VI. Jury Instructions

Incorrect and confusing jury instructions on the principal function of the jury run throughout the criminal courts of the nation. In fact, one could not be accused of engaging in hyperbole to assert that literally hundreds of thousands of defendants throughout the years have been tried, and are continuing to be tried, by juries who have been misinstructed on the most fundamental issue at a criminal trial—the burden of proof in a criminal trial.

This article's examination of inaccurate and confusing jury instructions will focus primarily on pattern jury instructions for several basic reasons. First, pattern instructions are written and compiled by experienced legal authorities, generally current or past judges. As members of the bench, they are held to possess the erudition and skill to state and interpret the law correctly. Second, pattern jury instructions are in widespread use by courts and attorneys in virtually every jurisdiction. They are continually held to be representative, if not definitive, of the instructions to be given. Third, pattern instructions are normally not challenged as to content on appeal. More often than not, challenges revolving around a pattern instruction are on the basis of the instruction having been given or not given, without debate over whether it was correctly written in the first place.

The very fact that pattern jury instructions are used so extensively throughout the land makes the errors and confusions exposed by this article's analysis all the more egregious.

### *A. Federal Courts*

One of the most widely used sources of pattern jury instructions for federal criminal trials is *Federal Jury Practice and Instructions*.[39] Compiled by Judge Edward J. Devitt[40] and Professor

39. 1 E. Devitt, C. Blackmar, Federal Jury Practice and Instructions (3d ed. 1977) (hereinafter cited in text as *Devitt and Blackmar*).

40. Honorable Edward J. Devitt, Chief Judge, United States District Court for the District of Minnesota.

Charles B. Blackmar,[41] the pattern instructions are premised on those which have met with appellate approval in actual cases, and from suggested instructions furnished by over forty federal judges.[42]

Devitt and Blackmar have devoted an entire chapter to the purpose and practical "Do's and Dont's" of jury instructions. In emphasizing the qualities of a proper instruction, Devitt and Blackmar assert that an instruction should be clear, concise and accurate.[43] A good instruction, they note, is not vague, contradictory, nor unclear.[44]

Yet even with the impeccable credentials of Devitt and Blackmar, the respected nature of their sources, and their specific concern for the importance of consistent, accurate and clear instructions, their instructions on the role of a jury in a criminal trial are hopelessly contradictory, inaccurate and hence, unclear. Examples of flat-out incorrect and in some cases inconsistent instructions in *Devitt and Blackmar* follow.

In § 11.06 of *Devitt and Blackmar*, an instruction given by courts throughout the land, the judge properly instructs the jury that to convict the defendant, they must conclude that his guilt has been proven beyond a reasonable doubt.[45] But unbelievably, in the very same instruction, and as if he were merely stating the same thing in a different way, he tells the jurors: "You are here to determine *the guilt or innocence of the accused* . . . ."[46] To twelve people chosen from the community and unschooled in the law, inasmuch as the word *innocent*, in common usage, means totally free of culpability (i.e., an innocent party is one who did not commit the crime), the subject instruction can only be translated by the jury to mean: "You are here to determine whether or not the defendant committed the crime."

The offending instruction, § 11.06, is compounded by other instructions liberally sprinkled throughout *Devitt and Blackmar* which seem to affirm to the jury what they have always believed—that the purpose of the trial is to determine whether or

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41. Charles B. Blackmar, Professor of Law, St. Louis University, St. Louis, Missouri.

42. 1 DEVITT AND BLACKMAR, *supra* note 39, at II, III.

43. *Id.* § 8.01 at 241.

44. *Id.* § 8.01, at 245 (citing Thomas, *Improvement in Charges to Juries*, 1 F.R.D. 141 (1940)).

45. *Id.* § 11.06.

46. *Id.* (emphasis added). This added instruction is not only inconsistent with the previous instruction, but, as we have seen, has no place under existing law.

not the defendant committed the crime. "Determining Guilt or Innocence" is used in the instructions on flight and concealment,[47] suppression or fabrication of evidence,[48] false statements,[49] and in seven other instructions.[50] In instruction § 18.02, the jury is told that "[t]he punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way, in arriving at an impartial verdict as to *the guilt or innocence of the accused.*"[51]

There is another type of instruction in *Devitt and Blackmar* which, although technically correct, is fraught with potential confusion for the jury and, if not preceded by an instruction defining the distinction between *innocent* and *not guilty*, may end up misleading them on their role just as much as the aforementioned incorrect instructions. Instruction § 11.14 of *Devitt and Blackmar*, the general instruction on burden of proof and reasonable doubt, provides, *inter alia*, "So if the jury, after careful and impartial consideration of all of the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit."[52] Instruction § 11.14 then concludes that "[i]f the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence."[53] This instruction is technically correct because as opposed to incorrect instructions such as § 11.06, discussed earlier, which tell the jury that it is its *function* to determine the guilt or innocence of the accused, instruction § 11.14 only points out to the jury that it may be confronted with a situation where the evidence in the case reasonably permits a conclusion that the defendant did not commit the crime (innocence) just as much as it permits the conclusion that he did (guilt), and if that occurs, they are to adopt the conclusion of innocence. Very obviously, the jury invariably wants to know whether or not the defendant is innocent. And as stated earlier, if they form the belief he is innocent, they have no choice but to return a verdict of "Not Guilty." However, to avoid confusing and

47. *Id.* § 15.08.
48. *Id.* § 15.09.
49. *Id.* § 15.12.
50. *Id.* §§ 18.06, 18.12, 27.02, 35.22, 41.12, 44.10, 58.15.
51. *Id.* § 18.02 (emphasis added).
52. *Id.* § 11.14.
53. *Id.* In most states, identical or similar language is customarily contained within the instructions on circumstantial evidence, not reasonable doubt.

misleading the jury, § 11.14 should only be given *after* the jury has already been instructed on the distinction between *not guilty* and *innocent*.[54] Without this previous elucidation, the jury is very apt to construe § 11.14 *not just* to mean that where the evidence indicating the defendant did not commit the crime (innocence) is just as strong as the evidence indicating that he did (guilt), they are to conclude that he is innocent, but that whether or not he committed the crime is the ultimate issue for them to decide, which it is not. In other words, as instructions like § 11.14 provide, the quest by the jury to ascertain whether or not the accused is innocent is clearly a proper and inevitable one, but it should never be made in the context of "guilt or innocence" being the issue for them to resolve.

The infirmity inherent in *Devitt and Blackmar* instruction § 11.14 can be stated in another way. The last sentence of § 11.14 specifies two conclusions: one of innocence and one of guilt.[55] But as we have seen, there is another conclusion that a jury may reach. This third conclusion is that "gray zone" where the jury does not necessarily believe that the defendant is innocent, yet are not convinced beyond a reasonable doubt of his guilt. Where the jury comes into court believing that its function is to determine the "guilt or innocence" of the accused, and the court reinforces this incorrect notion through other jury instructions (e.g., § 11.06), the flames of confusion are only fanned further by instructions such as § 11.14. If the jury is not specifically told that reasonable doubt encompasses the subject "gray zone," the possibility is increased that they will return a verdict of guilty in situations where they only "tend" to believe the defendant committed the crime. Since § 11.14 does not speak to the gray zone at all, the jury is left on its own to discern its existence and then to interpret its effect.

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54. *Id.* In the DEVITT AND BLACKMAR pattern jury instructions, there exists no instruction which defines the difference between the terms *not guilty* and *innocent*. In fact, the DEVITT AND BLACKMAR criminal jury instructions seem to take pains to tell the jury that their lay belief that the terms *not guilty* and *innocent* are synonymous is correct. How else could a juror reasonably construe the judge's words in § 18.06, the instruction on lesser included offenses, when he instructs the jury:

> [I]f your unanimous verdict is that the accused is '*Not Guilty*' of the crime charged in the indictment, you will have your foreperson fill in, date and sign that verdict; and then proceed to determine the *guilt* or *innocence* of the accused with respect to the lesser offense of _____, which is necessarily included in the crime of _____ charged in the indictment. (emphasis added).

55. 1 DEVITT AND BLACKMAR, *supra* note 39, at § 11.14.

The above examples represent instances where Devitt and Blackmar have ignored their own prescriptions for proper jury instructions. By misstating the role of the jury as that of determining guilt or innocence, they have created inaccurate and inconsistent instructions. With the failure to define and differentiate between *innocent* and *not guilty*, they have drafted confusing instructions which require mastery of abstract concepts for which they provide no guidelines. Devitt and Blackmar have forgotten their own words which they urged attorneys and judges to remember when formulating instructions: "[T]he task is to shed light and not add to the darkness."[56] Judge Devitt and Professor Blackmar have almost assuredly turned the lights out for many jurors with the confusing and incorrect instructions referred to hereinbefore.

### *B. State Courts*

This article's discussion of incorrect and confusing jury instructions commenced with a discussion of *Devitt and Blackmar* simply because of the uniform reliance upon it by so many federal courts throughout the nation. An examination of pattern jury instructions in the individual state courts in the land, however, though not uniform, reveals the same generic type of incorrect and/or confusing instructions in the overwhelming majority of the states. Some states have both types of instructions; others just one or the other. Very few are "innocent" as to both instructions. What follows is a representative sampling of the two types of misleading instructions in the various states.[57]

*Florida*, instruction § 2.14 (incorrect):

> Just as the determination of the guilt or innocence of the accused rests solely and absolutely with you, so also does the determination of the extent of punishment . . . rest solely with the Court. When you have determined the guilt or innocence of the accused, you have completely fulfilled your solemn obligation under your oaths.[58]

*Illinois*, instruction § 3.02 (confusing):

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56. *Id.* § 8.02, at 243.

57. Those instructions which tell the jury that their role is to *determine* or *decide* the guilt or innocence of the accused are categorized as "incorrect." Those that simply point out to the jury that some types of evidence indicate or bear upon the defendant's guilt, some upon his innocence, are denominated "confusing."

58. THE SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, FLORIDA STANDARD JURY INSTRUCTIONS FOR CRIMINAL CASES (1970).

> Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant . . . .[59]

*Kansas*, instruction § 51.10 (incorrect):

> Your only concern in this case is determining the guilt or innocence of the defendant . . . .[60]

*Oregon*, instruction § 203.01 (confusing):

> If you find that the defendant has previously been convicted of a crime, you may consider this for its bearing on the believability of his testimony; and it must not be considered by you as any evidence bearing upon his guilt or innocence of the crime charged here.[61]

*California*, instruction § 2.52 (incorrect):

> The flight of a person immediately after the commission of a crime . . . is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence . . . .[62]

*Texas*, instruction § 0.05 (incorrect):

> The defendant is presumed to be innocent until [his] guilt is established by legal evidence beyond a reasonable doubt; and, in case you have a reasonable doubt of the defendant's guilt, you will acquit the defendant and say by your verdict 'not guilty.' Your verdict must be in writing and signed by your foreman. Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this cause . . . .[63]

*Mississippi*, instruction § 166 (incorrect):

> [I]t is the sworn duty of each and every juror . . . to vote . . . for

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59. THE ILLINOIS JUDICIAL CONFERENCE COMMITTEE ON PATTERN JURY INSTRUCTIONS IN CRIMINAL CASES, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL (1968).

60. THE COMMITTEE ON PATTERN JURY INSTRUCTIONS, KANSAS DISTRICT JUDGES ASSOCIATION, PATTERN INSTRUCTIONS FOR KANSAS (1971).

61. THE OREGON STATE BAR COMMITTEE ON UNIFORM JURY INSTRUCTIONS, OREGON JURY INSTRUCTIONS FOR CRIMINAL CASES (1979).

62. THE COMMITTEE ON STANDARD JURY INSTRUCTIONS, CRIMINAL, OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (4th ed. 1979).

63. THE COMMITTEE ON CRIMINAL PATTERN JURY CHARGES OF THE STATE BAR OF TEXAS, TEXAS CRIMINAL PATTERN JURY CHARGES (1975).

> an acquittal of the defendant, until and unless the mind of such juror is convinced beyond all reasonable doubt . . . from the evidence or want of evidence . . . of the guilt of the defendant, . . . a juror cannot under his oath as a juror compromise his honest conviction from the evidence or from the want of evidence, as to the guilt or innocence of the defendant . . . .[64]

*Ohio*, instruction § 405.01 (confusing):

> If the circumstances create inferences that are equally consistent with either innocence or guilt, such inferences must be resolved in favor of the defendant's innocence.[65]

*Tennessee*, instruction § 37.07 (incorrect):

> Evidence of an admission has been introduced in this case . . . . If you find that the statement is true, you are the sole judge of the weight that should be given it. You should consider it along with all other evidence in the case in determining the defendant's guilt or innocence.[66]

*District of Columbia*, instruction § 32 (incorrect):

> Each defendant is entitled to have his guilt or innocence as to each of the crimes charged determined from his own conduct . . . as if he were being tried alone. The guilt or innocence of any one defendant . . . should not control or influence your verdicts respecting the other defendants. You may find any one or more of the defendants guilty or not guilty . . . .[67]

As in the case of *Devitt and Blackmar* instruction § 11.06 discussed earlier,[68] several states, *in the very same instruction*, tell the jury that they have to determine whether the accused's guilt has been established beyond a reasonable doubt as well as determine his guilt or innocence.[69] A great many more states tell the jury the same thing, but are considerate enough to confuse the jury by giving the guilt or innocence instruction separate from the reasonable doubt instruction. Irrespective of the way in which the

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64. J. ALEXANDER, MISSISSIPPI JURY INSTRUCTIONS § 166 (1953).

65. THE JURY INSTRUCTIONS COMMITTEE OF THE OHIO JUDICIAL CONFERENCE, OHIO JURY INSTRUCTIONS—CRIMINAL (1981).

66. THE COMMITTEE ON PATTERN JURY INSTRUCTIONS (CRIMINAL) OF THE TENNESSEE JUDICIAL CONFERENCE, TENNESSEE PATTERN JURY INSTRUCTIONS—CRIMINAL (1978).

67. THE JUNIOR BAR SECTION, THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (1966).

68. *See supra* notes 45-51 and accompanying text.

69. *See, e.g.*, Texas Instruction 0.05, *supra* note 63 and accompanying text.

misinformation is imparted to the jury, however, the helpless jurors can only come to one of two conclusions, both of which are incorrect. They can either conclude that determining guilt or innocence is synonymous with determining whether guilt has been proven beyond a reasonable doubt, or they can infer that the two issues are separate, and it is incumbent upon them to make both determinations.[70]

Even when trial judges depart from the pattern instructions and frame their own charge to the jury, the non-legal concept of guilt or innocence has so impregnated our conventional notion of criminal justice that it nonetheless almost invariably surfaces. A typical non-pattern charge to the jury was made by Bronx County New York Judge Ivan Warner in the case of *People of the State of New York v. James Richardson*:[71]

> If you are satisfied to a moral certainty that this defendant . . . is guilty of any one of the crimes charged here, you may safely say that you have been convinced beyond a reasonable doubt. If your mind is wavering, or if you are uncertain . . . you have not been convinced beyond a reasonable doubt . . . .
>
> You have no right to . . . discuss . . . or speculate about punishment in any way . . . . Your working function is to determine . . . the guilt or innocence of the defendant.[72]

As can be seen, the state pattern jury instructions dutifully join the ranks of their federal counterparts in charging the jury in a criminal trial with incorrect and confusing instructions on this most fundamental of issues—the burden of proof in a criminal trial.

Are the drafters of these pattern jury instructions, when they inform juries that the issue for them to decide is the guilt or innocence of the accused, merely sloppy or do they actually believe that the defendant's guilt or innocence is the issue to be resolved by the jury? Of course, whether their use of words is ascribable to

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70. N.Y. CRIM. PROC. LAW § 300.10 (2) (McKinney 1982) seems to strongly suggest this type of legal schizophrenia when it provides:

> In its charge, the court must state the fundamental legal principles applicable to criminal cases in general. Such principles include, but are not limited to, the presumption of the defendant's innocence, the requirement that *guilt be proved beyond a reasonable doubt, and* that the jury may not, *in determining the issue of guilt or innocence*, consider or speculate concerning matters relating to sentence or punishment.

71. People of the State of New York v. James Richardson, from S. PHILLIPS, NO HEROES, NO VILLAINS 214 (Random House, 1977).

72. *Id.*

sloppiness or to ignorance of this area of the law is immaterial, since either way the jury is misinstructed. It is this writer's view that, as stated earlier, no one who truly understands the legal concepts involved would ever use the term "determining guilt or innocence" to describe the issue for the jury to resolve. Moreover, there is somewhat more concrete evidence that the source of the problem, at least in some instances, is not mere sloppiness. A case in point indicating that the drafters may believe the defendant's guilt or innocence is "at issue" in a criminal trial is California Jury Instructions, Criminal (CALJIC) § 2.25,[73] which provides:

> When a witness refuses to testify as to any matter, basing his refusal on the constitutional privilege against self-incrimination, you are not to draw from that fact any inference as to the credibility of the witness or as to the guilt or innocence of the defendant.[74]

In the "Comment" following CALJIC § 2.25, the Committee on Standard Jury Instructions (the drafters of CALJIC) state:

> [California] Evidence Code § 913 provides that if a privilege is exercised not to testify, no presumption shall arise because of such exercise, and no inference may be drawn therefrom as to the credibility of the witness 'or as to any matter *at issue*,' which would include *defendant's guilt or innocence* . . . .[75]

## VII. THE TRIAL PRACTITIONER

As with the courts, it is this writer's experience that the great bulk of prosecutors and defense attorneys essentially use the two terms "determining guilt or innocence" and "proving guilt beyond a reasonable doubt" interchangeably. For instance, courtrooms echo with the sound of defense lawyers arguing to juries in their summations that the prosecution has not met its legal burden of proving guilt beyond a reasonable doubt, and in the next breath telling the jury, "Now, in determining the guilt or innocence of my client, take into consideration . . . ."[76] In fact, the textbook

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73. THE COMMITTEE ON STANDARD JURY INSTRUCTIONS OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, *supra* note 62, at § 2.25.

74. *Id.*

75. *Id.* (emphasis added).

76. Two typical examples of this are found in J. STEIN, CLOSING ARGUMENT, THE ART AND THE LAW (1969). While giving examples of good closing arguments, Stein excerpts the following from one of his summations: "You are the ones who take an oath to determine *guilt or innocence*." *Id.* § 452 at 169 (emphasis added). Stein also excerpts the

put out by the Association of Trial Lawyers of America, National College of Advocacy, states that "[t]he determination of guilt or innocence is the sole province of the jury, and if none, the judge. Prosecutor against defense counsel, plaintiff versus defendant—with the determination of guilt or innocence left to an independent arbiter—is the essence of our system."[77]

It should be noted that if the jury misconceives its role, this inures to the benefit of the prosecution, since it is much easier for the prosecutor to prove guilt (when the alternative for the jury is innocence), than it is for him to have to prove not just guilt, but guilt beyond a reasonable doubt. It is the defense that suffers from the jury's misconception of its role.

If the thought which is uppermost in the jury's mind when they retire to deliberate is "did he do it or did he not do it," as opposed to "did the prosecution meet its burden of proof or did it not meet its burden of proof," even if the evidence against the defendant is only moderately strong (as opposed to the requisite very strong) the jury will probably be psychologically attuned to a conviction. But a defense attorney has a serious dilemma when he argues to the jury that the prosecution has not met its legal burden of proving guilt beyond a reasonable doubt. The baggage of such an argument can be the implication that he has conceded his client is not innocent. In other words, if his client had absolutely nothing to do with the crime, and is completely innocent, how is it appropriate to argue that *his guilt* has not been proven beyond a reasonable doubt? Though there is no *legal* implication of guilt in a reasonable doubt argument, as a practical matter it tends to go in that direction, though by analogy, not as conspicously as a plea of "Not Guilty by Reason of Insanity." While there is likewise no legal concession of guilt in the insanity plea, that is the precise effect of such a plea. Again, if a defendant had absolutely nothing to do with the commission of the crime, a plea of "Not Guilty by Reason of Insanity" is completely inappropriate. The plea in effect tells the jury, "I'm guilty, but give me a break because I'm crazy."

The way in which a defense counsel should argue the crucial

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following from the closing argument of Attorney V. J. McAlpin: "The prosecution has failed to prove that Barbara Jean Templeton is guilty beyond a reasonable doubt. The judge will instruct you that you can find either or both of the defendants *guilty or innocent*." *Id.* § 453 at 176 (emphasis added).

77. ASSOCIATION OF TRIAL LAWYERS OF AMERICA, PSYCHOLOGY AND PERSUASION IN ADVOCACY 310 (2d ed. 1978).

distinction between *not guilty* and *innocent* to a jury without thereby implying to the jury that he has conceded his client is not innocent is, in this writer's opinion, very often the single most important issue for counsel to deal with in his summation, but inasmuch as this issue concerns trial tactics and techniques it is outside the margins of this article.

Suffice it to say, however, that it is obviously advisable, and in fact nearly always essential, for defense counsel to argue his client's innocence, but never in the context of guilt or innocence being the issue for the jury to decide. The approach almost necessarily has to be broken down into two levels. At the first level, counsel can argue that the evidence proves, or at least points to, his client's innocence, i.e., he did not commit the crime. Defense counsel can then go on to the second level and argue that the prosecution's case against his client was so weak that even if one or more of the jurors nonetheless believes that he did commit the crime, they certainly should not believe in his guilt beyond a reasonable doubt. And therefore, under the law, they *still* are duty-bound to return a verdict of not guilty.

## VIII. CONCLUSION

The hallowed injunction that no defendant in a criminal trial may be convicted unless his guilt has been proven beyond a reasonable doubt has been organic to the American system of justice since its inception. Our courts, legislatures, and constitutions have made this clear. Inasmuch as the jury's ability to determine whether the prosecution has met its burden of proof necessarily is dependent upon its having a working knowledge of the legal concepts involved in such a determination, the accuracy of the judge's instructions to the jury is paramount.

This article has explored the two types of instructions which can mislead the jury: the incorrect ones ("guilt or innocence"), and the technically correct type which are villainous only if they are not preceded by an instruction explaining the distinction between not guilty and innocent. Since there appears to be no jurisdiction which gives this explanatory instruction, the second type of instruction can end up misleading the jury as much as the incorrect ones. But even in those few states whose pattern jury instructions do not contain either of these two types of instructions,[78] and

78. *See e.g.*, THE MINNESOTA DISTRICT JUDGES ASSOCIATION COMMITTEE ON CRIMI-

only give the correct instruction that to convict, guilt must be proven beyond a reasonable doubt, the jury is still most likely misled as to its proper role. This is so because telling the jury that the ultimate issue for them to determine is whether or not the prosecution has met its legal burden of proving guilt beyond a reasonable doubt is *not* telling them that the ultimate issue is *not* the defendant's guilt or innocence.[79] A rough parallel is the complaint frequently lodged against those doctors who tell their patients what to do, but neglect to tell them what not to do.

Although, as we have seen, it is implicit in the beyond a reasonable doubt instruction that the issue in a criminal trial is not the defendant's guilt or innocence, it is pure folly to expect the jury, on its own, to pick up that subtlety and make the translation mentally. This is particularly true when as lay people, the jurors have always naturally believed that the issue in a criminal trial is, referring to the defendant, "did he do it, or did he not do it?" Justice Learned Hand spoke of mental gymnastics beyond the ability of jurors.[80] Surely, if the United States Supreme Court and courts throughout the land are confused in this area of the criminal law, or simply careless in their application of the relevant concepts, how can we expect lay persons to comprehend the precious distinctions inherent in terms such as *reasonable doubt, not guilty*, and *innocent*? If we, the members of the legal profession, do not educate them, and with all the simplicity and clarity of expression we can muster, who will?

In light of the previous discussion in this article, it is recommended that variations of the following instruction be incorporated into the pattern jury instructions at the state and federal level:

> Though you are naturally and properly concerned with the question of whether the defendant in this case is guilty or innocent of the crime for which he is presently standing trial, the issue for

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NAL JURY INSTRUCTION GUIDES, MINNESOTA JURY INSTRUCTION GUIDES—CRIMINAL (1977).

79. Interesting reading on the subject of confused jurors, even after jury instructions, may be found in Strawn and Buchana, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 481 (1976), in which a Florida study concluded that an even 50% of the 116 Florida jurors involved in the study thought it was up to the defendant to prove his innocence, *after* receiving the required Florida pattern jury instructions on presumption of innocence and burden of proof. *See also* O'Mara and Eckartsberg, *Proposed Standard Jury Instructions—Evaluation of Usage and Understanding*, PENNSYLVANIA BAR ASSOCIATION QUARTERLY 542 (October, 1977).

80. Nash v. United States, 54 F.2d 1006, 1007 (3d Cir. 1932).

> you, the jury, to determine is not the defendant's guilt or innocence. In other words, it is not to determine whether or not he committed the crime charged in the [complaint, indictment, information, etc.]. The issue for you to determine is whether or not the prosecution has met its legal burden of proving guilt beyond a reasonable doubt ('to the exclusion of all reasonable doubt' would be a preferable articulation). These two issues are not the same.
>
> Stated another way: to say one is guilty is to say he committed the crime; to say one is innocent is to say he did not commit the crime. In American criminal jurisprudence, however, the legal term 'Not Guilty' is not totally synonymous with innocence. 'Not Guilty' is a legal finding by the jury that the prosecution has not met its burden of proof. A 'Not Guilty' verdict based on the insufficiency of the evidence can result from one of two states of mind on your part: first, that you believe the defendant is innocent and did not commit the crime; or, although you do not necessarily believe he is innocent, and may even tend to believe he did commit the crime, the prosecution's case was not sufficiently strong to convince you of his guilt beyond a reasonable doubt. What flows from what I have just said is that you do not have to believe the defendant is innocent in order to return a verdict of 'Not Guilty.'

For those who would be horrified by such an instruction because of its admittedly pro-defense implications, I would make these observations. The recommended instruction would obviously not be the sole charge to the jury on the issue of reasonable doubt. Standard instructions which point out that the prosecution does not have the burden of proving guilt beyond *all* doubt, only a *reasonable* doubt, and a reasonable doubt is not a mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt, would have a counterpoising influence upon the jury.[81] But most importantly, the recommended instruction is a clear and accurate statement of the law as it presently exists. This article takes no stance on whether the existing state of the law is a desirable one. It is written from the puristic standpoint and perspective of the ivory tower. Perhaps the issue for the jury to determine

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81. Many will fear that these latter instructions will not be sufficient to offset the recommended pro-defense instruction, with the deleterious result being that more "factually guilty" defendants than ever before will walk out the courtroom door. If, for this reason, the aforementioned proposed instruction is not given, at an absolute minimum the jury should only receive the reasonable doubt instructions, and all references to "guilt or innocence" as being the issue for the jury to decide should be deleted. Though there remains a problem with this solution (*see supra* notes 78-79 and accompanying text), at least the jury will only be receiving legally correct instructions. As previously stated, a few states are presently doing this. NEW YORK STATE COMMITTEE ON CRIMINAL JURY INSTRUCTIONS, CRIMINAL JURY INSTRUCTIONS—NEW YORK seems to be going in this direction also.

should be the defendant's guilt or innocence.[82] Or perhaps we should supplant our present two verdict (Guilty or Not-Guilty) system with the three verdict (Guilty, Not-Guilty, and Not-Proven) system of Scotland. But two things are incontestable. As members of the legal profession, we cannot engage in the breezy practice of distorting what the law is simply because we do not like or understand it. And if we do not correct the misconceptions and errors which have been the subject of this article, we are just as responsible as we would be if we had begotten them. We are, I am told, the caretakers and the masters of the law. There is no one else.[83]

82. Almost by definition, however, this would necessitate lowering the burden of proof from beyond a reasonable doubt to something lesser, such as the preponderance of the evidence used in civil cases. This is so because, as stated earlier, it is implicit in the very language of the doctrine of reasonable doubt that a jury does not have to believe in a defendant's innocence as a condition precedent to their returning a verdict of not guilty.

83. An old Turkish proverb says that whoever tells the truth is chased out of nine villages. If this article attracts all the attention of a new fly in the forest, so be it. But if it does not, and the formidable status quo reflexively responds in a disquieting way to the article's ramifications, it will be interesting to see where the lines of battle will be drawn, what sides the various elements and forces in our legal community will take in the fray, and the nobility and highness of purpose with which the confrontation will be waged.