

Proof Beyond a Reasonable Doubt: A Balanced Retributive Account

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* This Article is a more thorough exploration of ideas that I have previously explored. See Mattias Kumm & Alec D. Walen, *Human Dignity and Proportionality: Deontic Pluralism in Balancing*, in *PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING* 67 (Grant Huscroft et al. eds., 2014). Special thanks to Erin Islo, Khushboo Shah and Adam Klein for their research help on this project, and Paul Baier, Charles Barzun, Nick Beckstead, Corey Brettschneider, Tim Campbell, Kim Ferzan, Georgi Gardiner, Stuart Green, Adil Haque, Debbie Hellman, Douglas Husak, Leora Katz, Adam Kolber, Hallie Liberto, Mattias Kumm, Larry Laudan, Seth Lazar, John Leubsdorf, Maggie Little, Dan Markel, Jeff McMahan, Olivier Moreteau, Alain Pé-Curto, Walter Perron, David Plunkett, Emily Podhorcer, Ralf Poscher, Re'em Segev, Holly Smith, Rolf Stürner, Larry Temkin, Silja Vöneky, Thomas Weigend, and Yuan Yuan. Thanks also to the audiences at the University of Virginia School of Law, LSU Paul M. Hebert Law Center, the University of Amsterdam School of Law, the Max Planck Institute for Criminal Justice, the KoRSE Program at Freiburg University, and the ICON-S Conference 2014 for their helpful discussions and comments on earlier versions of this Article.

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INTRODUCTION

The standard of proof (“SOP”) for criminal convictions in the United States—and in many other jurisdictions¹—is proof beyond a reasonable doubt (the “BARD” standard). The Supreme Court held that this standard was a constitutional requirement in 1970 in *In re Winship*.² The standard, which is customarily thought to require the fact finder to be at least 90%

1. See *infra* notes 29–34.

2. 397 U.S. 358, 364 (1970). *Winship* was not a unanimous opinion, but all of the Justices agreed on the substantive conclusion. Justices Burger and Stewart dissented on the ground that “[t]he original concept of the juvenile court system was to provide a benevolent and less formal means than criminal courts could provide for dealing with the special and often sensitive problems of youthful offenders.” *Id.* at 376 (Burger, J., dissenting). They avoid requiring the BARD standard, then, by distinguishing convictions in juvenile courts from “criminal” convictions. Justice Black also dissented, but his reasons were grounded in concerns about judicial restraint. *Id.* at 385–86 (Black, J., dissenting). Substantively, he agreed that “a strong, persuasive argument can be made for a standard of proof beyond a reasonable doubt in criminal cases—and the majority has made that argument well.” *Id.* at 385.

certain of the defendant's guilt to convict,³ is now part of American legal folklore. But neither the BARD standard's proper interpretation nor its theoretical justification are settled and clear.⁴ This Article aims to address both of these deficits.

To address these deficits, it will be helpful to have a clear sense of what an SOP does. Understood most generally, an SOP provides an agent with a practical standard for determining that an action is sufficiently likely to be objectively justified for her to permissibly and blamelessly perform it.⁵ This concept applies not only to judicial actions, such as convicting a criminal defendant, but to any action that an agent might perform, and that might, depending on facts that are not known to her, be objectively justifiable. That is, it applies not only to convictions but also to acts such as self-defense. It also implies both that an agent can act permissibly and blamelessly even if she does what is objectively unjustifiable, and that she can act impermissibly and in a way that warrants blame even if she does what is objectively justifiable. The focus in this Article, however, will be determining when criminal convictions are impermissible because the likelihood of punishing an innocent person is too high.

To be clear, punishing an innocent person wrongs that person. Nonetheless, if the state's fact finder has found him guilty using the morally correct SOP, then the state acts permissibly and blamelessly. It acts permissibly and blamelessly, despite the unfortunate result, because its agents took all the care that they were required to take.⁶ Thus, the challenge for a theory of the SOP for a criminal conviction is to determine: (1) how stringent the SOP must be before a fact finder meeting the standard acts

3. See, e.g., Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 306 (2006).

4. One dispute that this Article does not pursue further concerns the standard for mixed questions of law and fact. See *United States v. Gaudin*, 515 U.S. 506, 522–23 (1995) (finding that courts must use the BARD standard to answer mixed questions of law and fact); but see Youngjae Lee, *Reasonable Doubt and Moral Elements*, 105 J. CRIM. L. & CRIMINOLOGY (forthcoming 2015) (where the law involves making vague moral judgments, such as that a person's actions were "cruel," the state should not have to meet the BARD standard).

5. See T.M. SCANLON, *MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME* 49–52 (2008) (treating permissibility as an action guiding term). Permissibility and blame can come apart; it can be permissible to do the right thing for the wrong reason and thereby merit blame. But such worries are outside the scope of this Article.

6. If the state discovers later that the person was actually innocent, the state should recognize that it owes compensation for the wrong done. But this compensation is analogous to a kind of strict liability debt for faultless wrongdoing, and one should not interpret the state's owing compensation as implying that the state was at fault for the wrong done.

permissibly, even if she mistakenly convicts the innocent, and (2) whether the BARD standard satisfies that level.

Given that the BARD standard is well-settled law, it may seem unnecessary to investigate it. But it takes just a little digging in history to show that it is not so obvious how to set the right SOP for a criminal conviction. Many people associate the BARD standard with Blackstone's ratio, according to which "it is better that ten guilty persons escape, than that one innocent suffer."⁷ But the ten-to-one ratio is just one of a range of positions that has been taken by notable thinkers and politicians. On a much more cautious note, Moses Maimonides wrote: "[I]t is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death."⁸ Voltaire, who saw the options as more evenly balanced, declared "that it is better to risk saving a guilty man than to condemn an innocent."⁹ And Otto von Bismark is reported to have said that "it is better that ten innocent men suffer than that one guilty man escape."¹⁰ These remarks suggest an SOP range going from essentially 100% certainty to something closer to a 10% possibility.¹¹ Assuming, contrary to some case law,¹² that some sort of quantitative measure should guide jury considerations, one must determine which measure is best.

7. 4 WILLIAM BLACKSTONE, *ARTICLEARIES* *358. This and the next three citations can all be found in Alexander Volojh, *N Guilty Men*, 146 U. PA. L. REV. 173, 178, 193, 195 (1997)

8. 2 MOSES MAIMONIDES, *THE COMMANDMENTS* 270 (Charles B. Chavel trans., Soncino Press Ltd. 1967) (1166).

9. 1 VOLTAIRE, *ZADIG OU LA DESTINÉE* 28 (Librairie Marcel Didier 1962) (1747).

10. John W. Wade, *Uniform Comparative Fault Act*, 14 FORUM 379, 385 (1979).

11. The connection between the ratio and the SOP is only suggestive. *See, e.g.*, Michael L. DeKay, *The Difference Between Blackstone-Like Error Ratios and Probabilistic Standards of Proof*, 21 LAW & SOC. INQUIRY 95, 95 (1996) (demonstrating that the SOP has implications for the ratio of false convictions to false acquittals only if one also knows how accurately juries can distinguish the guilty from the innocent and the proportion of defendants at trial who are guilty); *see also* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 72, 76 (2008) (showing that it might be impossible to get the Blackstone ratio in a situation with a seemingly low error rate of 5%; there might not be enough guilty to acquit).

12. *See, e.g.*, *McCullough v. State*, 657 P.2d 1157, 1159 (Nev. 1983) ("The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify."). *But see* Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 773 n.62 (2012) (pointing out that consistency requires a tribunal to pick a probability below which it acquits and above which it convicts). For further discussion of whether the SOP can be quantified, *see infra* Part III.B.2.

Two types of theorists have risen to this challenge. One group, whom this Article refers to as “maximalists,” invoke a range of non-consequentialist arguments to argue in favor of using the BARD standard. The maximalists interpret the BARD standard in an extreme way so that, contrary to current practice, the standard is as protective of the innocent as possible without ruling out all convictions.¹³ This Article argues, however, that the maximalist arguments are either conclusory or morally unsound.¹⁴

Other theorists, who take a fundamentally consequentialist approach, constitute the second group.¹⁵ Many recent sophisticated consequentialist arguments hold that the criminal law should, at least in certain kinds of cases, either use or consider using an SOP that is lower than the very high level of confidence customarily associated with the BARD standard.¹⁶ The consequentialists who take this position argue that only a lower standard would properly protect *all* the interests involved, including the interest almost all share in being protected from the criminal acts of those who, if falsely acquitted, would likely commit a greater number of violent crimes than if convicted and incapacitated.¹⁷ Strikingly, these consequentialist arguments also lead, in at least some cases, to an SOP so low—well below

13. See, e.g., 3 ANTONY DUFF ET AL., *THE TRIAL ON TRIAL: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL* 89 (2007); ALEX STEIN, *FOUNDATIONS OF EVIDENCE LAW* 172–83 (2005); Rinat Kitai, *Protecting the Guilty*, 6 BUFF. CRIM. L. REV. 1163, 1164 (2003); Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971). Note, Kitai seems to have changed her name to Kitai-Sangero, but, for consistency, this Article will reference the name under which she published the 2003 paper.

14. See *infra* Part II.

15. See, e.g., Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065 (2015); Kaplow, *supra* note 12; Larry Laudan, *The Rules of Trial, Political Morality, and the Costs of Error: Or, is Proof Beyond a Reasonable Doubt Doing More Harm than Good?*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 195 (Leslie Green & Brian Leiter eds., 2011); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85 (2002).

16. This connection between consequentialism, or utilitarianism, and a lower SOP for criminal law seems to have been first noticed by Saul Smilansky, and he saw this as a reason not to be a utilitarian. See Saul Smilansky, *Utilitarianism and the ‘Punishment’ of the Innocent: The General Problem*, 50 ANALYSIS 256 (1990). Laudan and Epps, however, embrace the prospect of using a lower SOP. Laudan, *supra* note 15, at 207; Epps, *supra* note 15, at 1151. Kaplow does not endorse the conclusion that the BARD standard is too high, but he is generally skeptical of the reasons given in support of fixed standards that pay no attention to the welfare implications of using a particular standard in a particular context.

17. This is Laudan’s primary point. See Laudan, *supra* note 15; see also Kaplow, *supra* note 12, at 762 n.42, 803–04 n.112; Epps, *supra* note 15, at 1069 n.12.

50%—that it becomes clear that consequentialism cannot really provide an SOP for *punishment*. Though consequentialism can accord some significance to the distinction between guilt and innocence, that significance is sometimes drowned out by a concern with incapacitation and deterrence. In such cases, consequentialism uses punishment as nothing more than a fig leaf for these other goals. Therefore, consequentialism can only accidentally, and thus unreliably, ground an SOP for punishment.¹⁸

The inability of consequentialism to provide an SOP for *punishment*, combined with the failure of the maximalist arguments, sets the challenge that this Article addresses: articulate a non-consequentialist account of the right SOP for criminal convictions that captures the moral significance of punishment as an act that presupposes guilt, and provide a practical measure of the SOP that fits this account.

This Article argues that courts should retain the BARD standard, more or less as it is customarily understood, as the proper SOP for most criminal cases. It does not argue that courts should require that the fact finder be at least 90% certain of the defendant's guilt to convict.¹⁹ That is too rigid and precise. The argument's conclusion is more accommodating: Courts should retain the requirement that the SOP for a criminal conviction is a high, though not maximally high, standard.

This Article also argues that the justification for the BARD standard, as a high but not maximally high standard, is found neither in general deontological principles nor in consequentialist balances.²⁰ That is to say, its justification is not to be found in principles governing right action quite generally—such as the distinction between doing and allowing—that are independent of maximizing good consequences, nor is it to be found in the principle that the right action maximizes good consequences. It is to be found in the retributive justification for punishment itself. This is not the first retributive defense of the BARD standard; Jeffrey Reiman offered

18. Consequentialists might argue that they simply work with a different understanding of punishment. *See infra* Part III.D.

19. This Article argues that exceptions may exist when penalties are either disproportionate or very small. *See infra* Part IV.D; *cf.* Lillquist, *supra* note 15, at 85 (arguing for a much broader variability in the SOP for criminal trials).

20. This is an example of a broader point, namely that only the right sort of reasons can justify a given action or reaction. Stephen Darwall calls this point "Strawson's Point." STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* 15 (2006). It can also be understood in terms of what Joseph Raz calls exclusionary reasons, which exclude reasons "by kind and not by weight." JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 22 (1979).

such a defense in 1990.²¹ But his argument mistakenly assumed, among other things, that the duty to punish had to be owed to particular people. This Article corrects his mistakes and thereby succeeds where his argument fails.²²

In a nutshell, the positive argument proceeds as follows: In a retributive framework, the justification for punishment includes the thought that people who have committed serious wrongs—crimes in the context of state punishment—deserve punishment and that others have a right not to be punished. A retributivist may recognize that desert is not the only reason to punish; the good that punishment accomplishes by deterring and incapacitating potential criminals provides, on any reasonable account of retributivism, an important and sometimes necessary reason to punish.²³ But on a retributivist view, these instrumental reasons to punish are relevant to punishment only once it has been determined that the person to be punished deserves punishment. Desert functions like a switch in the normative equivalent of a transistor; until the transistor is switched on, the potentially greater normative force of the instrumental reasons cannot justify punishment.²⁴ The transistor metaphor may be novel, but the idea that desert functions as both a necessary condition for punishing and a positive reason to punish, lies at the very heart of retributivism.²⁵ Moreover—and this is the novel positive contribution of this Article—this transistor-like function is true not only for the act of punishing, but also for setting the SOP for determining whether someone deserves punishment.

If the state must establish that the defendant deserves punishment before citing instrumental reasons to justify punishment, then the only value of punishment that can be taken into account in establishing the SOP is the value of doing justice by giving someone the punishment he deserves.

21. See Jeffrey Reiman & Ernest van den Haag, *On the Common Saying that It is Better that Ten Guilty Persons Escape than that One Innocent Suffer: Pro and Con*, 7 SOC. PHIL. & POL'Y 226, 230–34 (1990).

22. The differences between Reiman's retributive accounts and those this Article proposes are explained in more depth later in the article. See *infra* Part IV.B.

23. See, e.g., Michael T. Cahill, *Punishment Pluralism*, in RETIBUTIVISM: ESSAYS ON THEORY AND POLICY 25, 29–30 (Mark D. White ed., 2011); Douglas Husak, *Holistic Retributivism*, 88 CAL. L. REV. 991, 995 (2000); MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 154 (1997).

24. Whether they can justify preventive detention is another matter. See Alec Walen, *A Unified Theory of Detention, with Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871 (2011) (discussing the moral preconditions for preventive detention).

25. See Alec Walen, *Retributive Justice*, STAN. ENCYCLOPEDIA PHIL. (June 18, 2014), <http://plato.stanford.edu/archives/sum2014/entries/justice-retributive/>.

The right SOP for punishment should therefore reflect the balance of the abstract positive value of punishing the guilty, and thereby accomplishing justice, against the concrete harm of mistakenly punishing and blamelessly wronging the innocent. This balance tips heavily, but not absolutely, in favor of protecting the innocent. The result is an SOP in the ballpark of the BARD standard as customarily understood.

Part I of this Article offers legal, historical, and sociological background on the use of the BARD standard. Part II examines and rejects a range of non-retributive, deontological, and generally maximalist accounts of the BARD standard. Part III examines consequentialist accounts of the SOP for criminal trials, showing that these accounts quite plausibly imply that the state should use a lower standard than the BARD standard, in some cases calling for a standard so low that it becomes clear that the connection to punishment is a mere fig leaf. Finally, Part IV, drawing a lesson from the faults of consequentialism, defends the retributive account of the BARD standard.

I. BACKGROUND ON THE BARD STANDARD—GROUNDWORK

To set the stage for the normative argument, one must understand the legal and social context in which this argument operates. This Part begins with a discussion of the BARD standard's legal background, both in the United States and elsewhere, and describes the dominant judicial interpretation of the BARD standard as well as the inadequate rationale judges have given for using this standard. This Part then discusses the standard's history, arguing that it did not always serve the function that courts now believe the standard serves. The BARD standard was not always meant to convey a substantive standard of proof, implying that a conviction can be acceptable only if the probability that the defendant is innocent falls below a certain threshold.²⁶ Rather, the problem that it was originally introduced to address was that jurors were too reluctant to convict because they were overly worried that if they convicted the innocent they could face eternal damnation themselves. Accordingly, the BARD standard was introduced to encourage the faint of heart to convict by telling them not to worry if they had no *reasonable* doubts about the defendant's guilt.²⁷ When the problem shifted and courts sought to protect innocent defendants, courts made an effort to read the BARD standard as a substantive SOP that would require a high degree of proof.²⁸ But the courts never clarified what was at stake in setting the

26. *See infra* Part I.B.

27. *Id.*

28. *See infra* Part I.A–B.

proper SOP for a criminal conviction, and that has led to the current confused state of BARD jurisprudence. Finally, this Part argues that the way the standard is used in practice is quite inconsistent with the dominant judicial rhetoric. Because one can resolve this tension between rhetoric and practice in any number of ways, it is crucial to appeal to a plausible normative framework to guide any attempted resolution of this tension.

A. The Legal Background of the BARD Standard

As Charles McCormick, the canonical writer on evidence, explained, “demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, but its crystallization into the formula ‘beyond a reasonable doubt’ seems to have occurred as late as 1798.”²⁹ Despite this demand’s relatively late “crystallization” into the BARD standard, it is now currently widespread. The English-speaking world fully embraces the BARD standard,³⁰ and is joined by a growing swath of Western Europe, including Germany, Sweden, and most recently, Italy.³¹ In

29. CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 321, at 681–82 (1954) (footnote omitted) (cited by Justice Brennan in *In re Winship*, 397 U.S. 358, 361 (1970)).

30. See Thomas V. Mulrine, *Reasonable Doubt: How in the World is It Defined?*, 12 AM. U. J. INT’L L. & POL’Y 195 (1997) (Australia, Canada, and the United Kingdom); Warren Young, Neil Cameron & Yvette Tinsley, *Juries in Criminal Trials, Part Two*, (N.Z. Law Comm’n, Preliminary Paper No. 37, 1999) (New Zealand); Criminal Procedure Act 51 of 1977 § 105A(2)(a)(i) (S. Afr.) (South Africa). The English Crown Court Bench Book directs judges to instruct the jury: “The prosecution proves its case if the jury . . . are sure that the defendant is guilty.” But it follows that with a note: “Being sure is the same as entertaining no reasonable doubt.” JUDICIAL STUDIES BD., CROWN COURT BENCH BOOK: DIRECTING THE JURY 16 (2010), available at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Training/benchbook_criminal_2010.pdf [<http://perma.cc/D8E2-ALVE>].

31. See Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT’L & COMP. L. REV. 317, 343–44 (1995); Fråga om utvisning på grund av brott. Tillika spörsmål om beviskravoch bevisvärdering i brottmål [NJA] [Supreme Court] 1980-12-23 § 725 (Swed.) (“utom rimligt tvivel” means “beyond reasonable doubt”); see also CHRISTOPHER WONG, OVERVIEW OF SWEDISH CRIMINAL PROCEDURE 3 n.18 (2012), available at http://works.bepress.com/christoffer_wong/15 [<http://perma.cc/SAKM-3FJJ>]; Federico Picinali, *Is “Proof Beyond a Reasonable Doubt” a Self-Evident Concept? Considering the U.S. and the Italian Legal Cultures Towards the Understanding of the Standard of Persuasion in Criminal Cases*, 9 GLOBAL JURIST, art. 5 (2009) (noting that Italy adopted the BARD standard in 2006). The French use a standard that seems outwardly different. French fact finders must be “inwardly convinced”—they must feel a *conviction intime*—of the defendant’s guilt. CODE PÉNAL [C. PÉN] art.

addition, much of the rest of the democratic world, including Israel,³² India,³³ and the Rome Statute of the International Criminal Court,³⁴ has also adopted the BARD standard. Something about the standard rings true in most liberal democracies.

The BARD standard seems to reflect a basic commitment to justice, and as such, judges naturally express the standard in an idealistic, maximalist manner. One can see this maximalist expression in Justice Brennan's opinion in *In re Winship*.³⁵ Writing for the majority, Justice Brennan wrote: "[T]he reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."³⁶ He reinforced that maximalist interpretation at the end of his argument by writing that: "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty."³⁷

In truth, Brennan was exaggerating. The BARD standard does not require a state of certainty. If the Court wanted to require certainty, *Winship* should have required courts to base convictions on proof beyond any *rational* doubt, no matter how unlikely to reflect reality. Further, if ensuring that guilt is established with the utmost certainty were really important, *Winship* should have introduced numerous changes to the structure of trials. For example, the Court could have required trial courts to exclude inculpatory testimony from accomplices who have struck plea bargains.³⁸ But the Court did not require these types of changes. Indeed, in *Addington v. Texas*,³⁹ the Court indicated its awareness that some scholars had argued

353 (Fr.). Thomas Weigend, in personal conversation, has assured me that this is functionally the same as the German standard. See also Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243, 246 (2002) ("In actual practice, . . . the civil-law and common-law standards for criminal cases are likely equivalent."). Others, however, argue that the standard is not the same as the BARD standard. See, e.g., Michele Taruffo, *Rethinking the Standards of Proof*, 51 AM. J. COMP. L. 659, 667 (2003) (asserting that "*intime conviction* . . . stresses the value of the subjective 'intimate' persuasion of the single judge, relying mainly upon her individual and even emotional beliefs. It does not mean by itself, however, that such beliefs must be based upon a particularly high standard of proof . . .").

32. CA 9796/03 Haviv Shem-Tov v. Israel [2005] (Isr.).

33. Mancini v. Dir. of Pub. Prosecutions, [1942] A.C. 1 (H.L.) 1–13 (appeal taken from Eng.).

34. Rome Statute of the International Criminal Court, art. 66(3), July 1, 2002.

35. *In re Winship*, 397 U.S. 358, 363–64 (1970).

36. *Id.* at 364 (internal quotation marks omitted).

37. *Id.*

38. See Laudan, *supra* note 15, at 216.

39. 441 U.S. 418 (1979).

that the BARD standard was not the highest possible SOP.⁴⁰ The Court's considered position, then, is not that the BARD standard is the highest standard the law could use; it is rather that the BARD standard is high, but not so high as to make it too difficult to achieve the practical task of convicting and punishing criminals.

Recognizing that the BARD standard is not actually maximally high raises the question: How far short of a maximally high standard should the SOP for criminal convictions be? Before addressing that question, however, it will be helpful to have a fuller picture of the Court's reasoning in support of adopting an SOP that aims to be as high as practically possible, without making it unduly difficult to obtain a conviction. As already noted, one reason that Justice Brennan gave is that it is important that individuals "have confidence that [their] government cannot adjudge [them] guilty of a criminal offense without convincing a proper fact finder of [their] guilt with utmost certainty."⁴¹ Brennan's five other reasons appealed to: (1) the BARD standard's historical pedigree;⁴² (2) the constitutional argument that the BARD standard is implicit in the presumption of innocence⁴³ and due process of law;⁴⁴ (3) the idea that a lower standard would put the defendant "at a severe disadvantage . . . amounting to a lack of fundamental fairness;"⁴⁵ (4) the moral importance of a defendant's "good name and freedom;"⁴⁶ and (5) the concern that "the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."⁴⁷ Additionally, Justice Harlan, in his concurrence, appealed to what seems to have been the most commonly given reason for adopting the BARD standard: "that it is far worse to convict an innocent man than to let a guilty man go free."⁴⁸

None of these reasons is adequate if one hopes to justify a standard that in any way reflects the maximalist rhetoric that Justice Brennan used.⁴⁹ Taking Justice Harlan's reason first: His consequentialist argument

40. *Id.* at 423 n.2 ("[R]easonable doubt represented a less strict standard than previous common-law rules." (citing Antony Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507 (1975))).

41. *In re Winship*, 397 U.S. at 364.

42. *Id.* at 361–63.

43. *Id.* at 363.

44. *Id.* at 364.

45. *Id.* at 363 (quoting *In re Samuel W.*, 247 N.E.2d 253, 259 (N.Y. 1969)).

46. *Id.* at 364.

47. *Id.*

48. *Id.* at 372 (Harlan, J., concurring).

49. There are other reasons, which will not be discussed here, why one should not take Brennan's maximalist rhetoric seriously. Among these is that the Court's focus on proving all the elements of each crime beyond a reasonable doubt allows and incentivizes states to avoid the BARD standard by making what would have

was based on an incomplete exercise in balancing costs and benefits.⁵⁰ A more complete balance, taking into account all of the relevant facts and the empirical data, quite plausibly would call for a lower SOP.⁵¹ As for Justice Brennan's arguments: The importance of the people's confidence that a court will not falsely adjudge them guilty is just another consequentialist consideration, as is the moral importance of a defendant's "good name and freedom."⁵² Courts must balance these considerations against the good consequences that might result from lowering the SOP and making it easier for the state to convict and punish the guilty.⁵³ The moral force of the law turns on the sociological claim that courts would dilute this moral force by using a lower standard. Ultimately the relevance of diluting the moral force of the law is also consequentialist. Further, the manner in which the standard is actually used⁵⁴ belies the claim that the standard must approach anything resembling its maximalist representation. The fairness argument, which asserts that the defendant is at a disadvantage, is too crude, as the argument does not address cases in which the defendant has better resources than the prosecution.⁵⁵ Further, the historical argument is dubious.⁵⁶ The constitutional

been elements into defenses. *See* *Paterson v. New York*, 432 U.S. 197 (1977) (holding that New York could put the burden on the defendant to show that he suffered extreme emotional disturbance, despite the fact that he would be guilty of murder only if he did not suffer it); *see also* Barbara Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 *YALE L.J.* 1299 (1977).

50. He clearly cast that as a consequentialist point, spelling it out in terms of "the social disutility of convicting an innocent man" and "the disutility of acquitting someone who is guilty." 397 U.S. at 372 (Harlan, J., concurring).

51. *See infra* Part III.

52. *See* 397 U.S. at 363–64.

53. One might be tempted to object that some of these concerns, such as the moral importance of a defendant's good name, have intrinsic value and thus are not consequentialist concerns. But that betrays an overly narrow conception of consequentialism. Consequentialism can and must allow that certain things have intrinsic value. The argument is consequentialist if what one should do is governed by maximizing that value. *See infra* Part III.A.

54. *See infra* notes 99–106 and accompanying text.

55. *See* Kaplow, *supra* note 12, at 850 n.204 (noting that in white collar contexts "the government is often significantly outspent by private parties"). Kaplow adds that the real worry is not that the defendant will always be at a disadvantage, but that the government has the ability to focus its vast resources, which the government may be tempted to do in cases involving political opponents. *See id.* Whether the SOP should generally be high to protect against this possibility in a small number of cases is dubious. More narrowly tailored alternatives should at least be considered if that is the primary reason for the BARD standard.

56. *See infra* Part I.B.

appeal to the presumption of innocence is consistent with a very low SOP,⁵⁷ and the appeal to due process of law is question begging if the other arguments do not work. Thus, a better normative argument is required if the use of a high—but not maximally high—SOP in criminal cases is to be justified.

B. The Lessons of History and Epistemological Nonsense

Surprisingly, given the prevalence of the BARD standard in democratic systems and its rhetorical connection with seeking to raise the SOP as high as practically possible, the BARD standard's roots illustrate a very different concern. Rather than seeking to raise the SOP in criminal cases as high as possible, this Section will argue that courts originally sought to encourage jurors to convict more often. Appreciating how the BARD instruction changed into the BARD standard can help explain why the legal doctrine connected to the BARD standard is in disarray—so much so that many courts believe that the best option is to not even attempt to explain the standard⁵⁸—and can help inform efforts to fix the doctrine.

James Whitman convincingly argues that the original reason for formulating the BARD instruction was to address the concern that jurors in the eighteenth century had with judging.⁵⁹ Jurors in that earlier, more Christian age were reluctant to convict anyone because they believed that “any sinful misstep committed by a judge [or juror] in the course of judging built him a mansion in Hell.”⁶⁰ Undoubtedly, this fear was particularly acute because, as Daniel Epps explains, “[i]n eighteenth-century England and earlier, numerous crimes, including many we would

57. See *infra* Part III.C.

58. The Fourth and Seventh Circuits do not allow courts to give the jury any explanation of reasonable doubt. See, e.g., *United States v. Blackburn*, 992 F.2d 666, 668 (7th Cir. 1993) (“We have reiterated time and again our admonition that district courts should not attempt to define reasonable doubt.”); *United States v. Adkins*, 937 F.2d 947, 950 (4th Cir. 1991) (“This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof.”). Meanwhile, the D.C. Circuit advises against defining it. See, e.g., *United States v. Taylor*, 997 F.2d 1551, 1558 (D.C. Cir. 1993). One can only defend the decision not to instruct jurors on the BARD standard if jurors can make adequate sense of the standard on their own, which is a dubious proposition. See *infra* Part I.C.

59. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008). He opposes his view to, among others, that of Barbara Shapiro. See BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE”: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991). Forerunners of Whitman’s position include Morano, *supra* note 40.

60. WHITMAN, *supra* note 59, at 3 (internal quotation marks omitted).

consider minor today[,] . . . were punishable *exclusively* by death.”⁶¹ Jurors, therefore, “experienced ‘a general dread lest the charge of innocent blood should lie at their doors.’”⁶² The judiciary respected this fear enough that one could commonly find jury instructions in the late eighteenth century—when courts first began using the BARD instruction—encouraging jurors to acquit the defendant if they experienced any doubt: “[I]f any doubt at all hangs upon your minds, if you feel the least suspicions . . . acquit him.”⁶³ Obviously, such jury instructions made obtaining convictions more difficult than if jurors had been encouraged to pursue justice boldly, with little concern for themselves. Thus, some courts, to counter this tendency of jurors to choose the “safer way,”⁶⁴ introduced the BARD instruction to help reassure timid jurors that they could vote to convict as long as they could assure themselves that none of their doubts were “reasonable.”⁶⁵

To be clear, encouraging jurors to be more willing to convict should not be confused with setting a lower SOP for a conviction. The original point of the BARD instruction seems not to have concerned the substantive SOP for conviction, but instead was literal encouragement.⁶⁶ The instruction was designed to combat the irrational timidity of jurors based on the mere abstract possibility of error.⁶⁷ The motivation behind the instruction was to address the concerns of people like William Paley and Jeremy Taylor.⁶⁸ Paley, a prominent moral philosopher in England in the 1780s, complained of the harm done by timid juries who refused to convict even when the evidence “furnishes that degree of credibility, . . . which experience has shown that they may decide and act upon with sufficient safety,” and who “reject such proof, from an insinuation of uncertainty that belongs in all human affairs, and from a general dread lest the charge of innocent blood should lie at their doors.”⁶⁹ And Taylor, whom Whitman describes as “the leading English moral theologian of the late seventeenth and eighteenth centuries,” compared the actions of a timid juror with:

[A] Woman handling of a Frog or a Chicken, which all their friends tell them can do them no hurt, and they are convinced in

61. Epps, *supra* note 15, at 1081.

62. WHITMAN, *supra* note 59, at 4 (quoting WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 391–92 (1785)).

63. *Id.* at 196 (citation omitted).

64. *Id.* at 4. To be clear, the safer way was meant to be safer for their souls.

65. *Id.* at 206.

66. *Id.*

67. *Id.* at 197.

68. *Id.*

69. *Id.* at 192 (quoting PALEY, *supra* note 62, at 391–92).

reason that they cannot, they believe it and know it, and yet when they take the little creature into their hands they shriek [sic], and sometimes hold fast and find their fears confuted, and sometimes they let go and find their reason useless.⁷⁰

The BARD instruction, understood in that context, is merely meant to encourage jurors not to indulge irrational fears. It is not meant to provide substantive guidance for determining what kind of doubt would be “reasonable.”

If the previous claim is correct, it raises the question: Where did the substantive standard come from? The answer is that it would have been grounded in weighing what was at stake. Courts surely did not mean for the BARD instruction to imply that jurors had no legitimate concern that their souls were at stake. Nor did the courts intend for the instruction to inform jurors of the importance of punishing criminals. The reasonable juror would know to take both concerns into account when determining the confidence level necessary to vote to convict. The courts introduced the BARD instruction only to remind jurors who might fear for their souls not to dismiss the importance of bringing criminals to justice. It was meant to give them the courage to put their souls on the line, when doing so could be done with “sufficient safety,” given that the alternative would be to give “public encouragement to villainy, by confessing the impossibility of bringing villains to justice.”⁷¹

In contrast with the late eighteenth century, jurors today likely do not worry that judging another endangers their immortal souls. Further, studies have shown that jurors often interpret the BARD standard in practice to mean something akin to preponderance of the evidence.⁷² This implies that they are quite ready, arguably too ready, to convict defendants, especially those who seem different and frightening.⁷³ Accordingly, the dominant concern, when instructing juries, has shifted and is now aimed at preventing them from being too ready to convict, rather than too reluctant to convict.

70. *Id.* at 205 (quoting JEREMY TAYLOR, DUCTOR DUBITANTIUM, OR THE RULE OF CONSCIENCE IN ALL HER GENERAL MEASURES 160 (1676)).

71. *Id.* at 192 (quoting PALEY, *supra* note 62, at 391–92).

72. *See infra* Part I.C.

73. *See, e.g.*, Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 901 (1996) (noting that “dissimilarity [between juror and defendant] causes ‘a shift towards harshness’” (internal quotation omitted)); Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001, 1004 (2014) (noting that “when the average age of the jury pool is older than 50 (which happens in about half of the trials), defendants are convicted 79 percent of the time. In contrast, when the average age of the jury pool is younger than 50, conviction rates are only 68 percent. These differences are statistically significant”).

Although no logical contradiction exists in repurposing the BARD instruction into a standard that aims to make convictions more difficult, rather than easier, to obtain, doing so presupposes that the BARD standard can be given a substantive meaning that the instruction did not originally have. Unfortunately, rather than directly tackling the question of what the substantive standard should be, so that the standard is high but not too high, courts have naively and vainly struggled to draw substance out of the very idea of a *reasonable* doubt.⁷⁴ Unsurprisingly, the effort has been a failure. The idea of a reasonable doubt is itself far from clear, and efforts to explain it invoke either vague platitudes or misleading epistemic nonsense.

To see this, consider the following examples of explanations of a “reasonable doubt”:

- “doubt based upon reason and common sense . . . that a reasonable person has after carefully weighing all the evidence;”⁷⁵
- “doubt that is something more than a guess or a surmise. It is not a conjecture [It is] a real doubt, an honest doubt;”⁷⁶
- “doubt which is not a vague, speculative, or imaginary doubt;”⁷⁷
- “doubt for which a reason can be assigned.”⁷⁸

Or consider these formulations of the right kind of proof:

- It is “proof that precludes every reasonable hypothesis except guilt [and] is inconsistent with any other reasonable conclusion;”⁷⁹
- “If . . . you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.”⁸⁰

74. The evidence that this is what courts are doing can be found in the instructions discussed in the text immediately following this note.

75. 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS, instr. 4-2, at 4–9 (2015).

76. *State v. Billie*, 2 A.3d 1034, 1044 n.14 (Conn. App. Ct. 2010) (internal quotation marks omitted).

77. *People v. Munoz*, 240 P.3d 311, 315 (Colo. App. 2009).

78. *Ex parte Brown*, 74 So.3d 1039, 1053 (Ala. 2011) (internal quotation marks omitted).

79. *Billie*, 2 A.3d at 1044 n.14 (internal quotation marks omitted).

80. FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1987), available at http://federalevidence.com/pdf/JuryInst/FJC_Crim_1987.pdf [<http://perma.cc/4DEX-32L7>]. The following proposal in the academic literature echoes those explanations: “A fact is proven beyond a reasonable doubt when there is a plausible explanation of the evidence and events in dispute that includes this fact and no plausible explanation that does not include this fact.” Michael S. Pardo, *Second-Order Proof Rules*, 61 FLA. L. REV. 1083, 1105 (2009); see also LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 82 (2006) [hereinafter TRUTH, ERROR, AND CRIMINAL LAW]. To be fair, one reason

These instructions fail for a range of reasons. Some are hopelessly vague. For example, telling jurors that a reasonable doubt is “real doubt, an honest doubt”⁸¹ tells them nothing they did not already know. Some suggest a standard that is too low; one that makes it too easy to convict. For example, instructing that doubt should not be “speculative”⁸² implies that doubt must be very well founded, perhaps to the point of making innocence more likely than guilt. Some suggest a standard that is too high. For example, identifying reasonable doubt with a “doubt for which a reason can be assigned”⁸³ rules out doubts the basis of which is hard to pin down but which may reflect an intuitive sense that something in the prosecutor’s case was unsound. Of course, it is to be preferred if the basis for a doubt can be articulated and held up to scrutiny, but many sound beliefs reflect judgments that rest on reasons that are hard to articulate. If doubts could not count as reasonable unless reasons for them could be articulated, and presumably defended, then many objectively reasonable doubts would be excluded.

Although all of these failings are problematic, this Article will focus on the ungrounded assumption that the notion of a “reasonable doubt” has an inherent meaning as an epistemic label, one that calls for a particular high level of proof irrespective of what is at stake in finding a defendant guilty or not. That is to say, the doctrine has been misled by the thought that the very terms “proof beyond a reasonable doubt” imply that proof of guilt must reach some level of evidence-based confidence in guilt just shy of absolute certainty. To the contrary, what counts as a “reasonable doubt” has to be understood by reference to a practical determination of what is at stake, as a moral matter, in making the judgment that a defendant is or is not guilty.

To see that the BARD standard cannot be simply associated with an SOP just shy of certainty, one need only consider how trials work in the real world. The evidence is almost always more or less credible and more or less compelling. If a jury could find a defendant guilty only when the evidence is completely compelling, convictions would become so rare that the criminal justice system would grind to a halt. Consider first the

Laudan supports such a test is that he is rightly skeptical that jurors have any reasonable basis for assessing the probability of a defendant’s guilt, given the evidence. *Id.* at 77–78; *see also infra* Part III.B.1.

81. *See Billie*, 2 A.3d at 1044 n.14. Obviously, the intention of this instruction is to contrast a real and honest doubt with a contrived doubt. But jurors do not need to contrive a doubt to engage in jury nullification. Otherwise, if they are not trying to nullify a verdict, their doubt is presumably “real,” and this instruction is of no use to them.

82. *See Munoz*, 240 P.3d at 315.

83. *See Billie*, 2 A.3d at 1044 n.14.

reliability of witnesses. All else equal, it is better if witnesses know the person they are testifying about than if he is a stranger to them; better if they are of good character than bad; better if they have no known motive to lie than if they might gain from false testimony; better if there are more of them and their stories provide independent confirmation one to the other. Similar things can be said for the physical evidence, given that exculpatory evidence might have been suppressed or overlooked, and that inculpatory evidence might have been mishandled or tampered with. In the best cases, the evidence makes innocence incredible. It would presuppose the sort of vast conspiracy to frame the defendant that no sane person would believe a realistic possibility. Guilt is, in those cases, a practical certainty. But the evidence is rarely that strong.⁸⁴ Rather, it is normally the case that one could imagine how the witnesses might be lying or mistaken, and how the physical evidence might be incomplete, mishandled, or otherwise misleading. If convictions were ruled out in such cases, convictions would become rare indeed.

One might try to embrace this conclusion and argue that morality requires that there should be many fewer convictions—that position will be examined in Part II. But the argument here is not a moral one, it concerns the concept of a “reasonable” doubt. As shown by its use in practice, the concept does not require a level of confidence just shy of certainty. Rather, what it requires depends on the context. To see that context matters, consider this thought experiment: Imagine that the judge told the jurors that their fate is tied to the defendant’s; if the defendant’s innocence is later proven, the court will have the jurors executed.⁸⁵ And imagine that the judge otherwise kept the same instruction on the BARD standard. Even if jurors would still sometimes find the courage to convict, they would certainly find that they have a “reasonable” doubt much more frequently than they do now.⁸⁶ The point is not that jurors who faced such a threat would act irrationally, finding reasons to doubt when none exist. The point is that when the costs of errors rise for jurors, the very nature of a “reasonable” doubt would change. The

84. In cases where the evidence is strong enough so that guilt is a practical certainty, only an irrational defendant, or one who oddly relished going to trial, would contest his guilt at trial rather than seek a plea bargain.

85. This rule would obviously reintroduce the kind of fear that Whitman argues was prevalent amongst jurors when the BARD standard was first devised.

86. Of course, judges cannot really threaten jurors with execution if it later turns out that a person they voted to convict is innocent. But a judge could instruct jurors to consider the thought experiment and vote to convict in accordance with that standard. And it is worth noting that there was a period in English law when jurors were in fact punished for incorrect verdicts. *See* THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800*, at 200–64 (1985) (discussing the brief history of fining and imprisoning jurors).

nature of a reasonable doubt is context dependent. It is not some a-contextual level of certainty; it depends on what is at stake.

In summary, the first step in providing a sound theoretical foundation for the BARD standard is to accept that one cannot define the quantum of doubt that qualifies as “reasonable” free of context. The quantum of doubt that properly requires an acquittal depends on what is properly held to be at stake in setting the SOP for a criminal conviction in our secular world, where a juror’s eternal soul is no longer assumed to be part of what is at stake.⁸⁷ Three different sets of views about what is at stake are considered below: general deontological theories in Part II, consequentialism in Part III, and retributivism in Part IV. But before shifting to the normative arguments, it will be helpful to add one more area of background information: a review of how juries actually use the BARD standard.

C. The BARD Standard in Contemporary Practice

Two dominant understandings of the BARD standard currently operate in the United States: one that is fairly high and endorsed by most judges, commentators, and even the general public⁸⁸—the “customary” understanding—and one that is used by lay jurors and arguably by judges⁸⁹

87. Given the balance between a juror’s strong interest in protecting his soul, and a weaker, but not insignificant, interest in doing justice and keeping society safe from criminals, it seems that the substantive SOP in use at the time the BARD standard was adopted would have been a high, but not maximally high, one. My position on the modern, substantive BARD standard is that it should be similar. Whether some distinction can nonetheless be defended is immaterial to the current law. An originalist might think otherwise, but the context is too different to reasonably think originalism relevant.

88. See, e.g., RICHARD O. LEMPET ET AL., A MODERN APPROACH TO EVIDENCE 1378 n.19 (5th ed. 2014) (observing that the general population equates the BARD standard with 85% to 90% certainty). *But see* Lillquist, *supra* note 15, at 112 (discussing a range of surveys in which the SOP associated with the BARD standard ranged from 51% to 92% certainty); GEORGE H. GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1993, at 231–32 (1994) (finding that 56% of respondents *disagreed* with the proposition that it’s “better for society to let some guilty people go free than to risk convicting an innocent person,” while only 17% strongly agreed with it).

89. While judges generally endorse the customary understanding, see *infra* notes 90–91 and accompanying text, there is reason to think they too do not use it in practice. One study found that juries voted to acquit but judges would have voted to convict in 16.9% of cases, while juries voted to convict and judges would have acquitted in only 2.2% of cases. See HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 59 (1966). In other words, when judges and juries differ, judges are more likely to convict than juries. It could be that judges follow the customary understanding of the BARD more than jurors but tend to see the evidence in a light favorable to the prosecution more than jurors. But another

in practice—the “practice” understanding. They do not match. From the point of view of the customary understanding, the standard used in practice is shockingly low.

Judges, who instruct on the BARD standard, provide a useful source for the customary understanding of the standard. In one study of federal judges throughout the United States, nearly three quarters of the 171 who responded to the poll picked a probability that was 90% or higher; and in a second study, this one of Illinois state judges, the mean probability was 89%, with 63% of the judges picking a level of 90% or higher.⁹⁰ Some judges picked much lower numbers. Nevertheless, only 7% of federal judges picked a value of 76% or lower, compared with 72% who picked a value of 90% or higher.⁹¹ It thus seems fair to say that the customary understanding of the BARD standard, shared by a clear supermajority of judges, is that it requires at least a 90% confidence in the defendant’s guilt.

The general population, from which juries are drawn, may claim to hold to the customary view of the BARD standard,⁹² but even if they talk the talk, they do not seem to walk the walk.⁹³ In one study, Robert MacCoun and Norbert Kerr constructed a trial transcript that was as equivocal as possible.⁹⁴ The authors gave the transcript to mock juries composed of four students.⁹⁵ Half of the juries received a reasonable doubt instruction, and the other half received a preponderance of the evidence instruction.⁹⁶ Only 36% of the latter juries found the defendant guilty, implying that the case was weak.⁹⁷ On that basis, one would hope that none of the juries given a reasonable doubt instruction would find the mock defendant guilty. Instead, 21% of those juries found the defendant guilty.⁹⁸

likely explanation is that judges are unaware of the gap between the customary understanding of the BARD standard that they espouse and their practice.

90. These and other studies are reported in Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases*, 78 TEX. L. REV. 105, 126 (1999); see also C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1325 tbl.2, 1332 tbl.8 (1982) (showing results of a survey of federal judges in which their mean estimate for the BARD SOP was 90.28%).

91. Solan, *supra* note 90, at 126 (Solan gave raw numbers, which have been converted into percentages here).

92. See *supra* note 88.

93. For a broader survey of the empirical data, see Lillquist, *supra* note 15, at 111–17.

94. Solan, *supra* note 90, at 123–24 (citing Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors’ Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21 (1988)).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

This shows that a substantial number of jurors interpreted the BARD instruction to allow conviction on weak evidence, evidence that would not even satisfy the preponderance of the evidence standard for more than half of the juries that considered it.

Irwin Horowitz and Laird Kirkpatrick conducted what may be an even more telling study.⁹⁹ They compared five different versions of the BARD standard: four instructions with interpretations and one instruction without interpretation.¹⁰⁰ The authors gave these instructions to six-person mock juries composed of jury-eligible adults, rather than students.¹⁰¹ The authors also gave the juries audiotapes of a mock trial, one of which was designed to have equivocal evidence, and the other of which was designed to have strong evidence of guilt.¹⁰² Only one of the instructions, the “firmly convinced” instruction drafted by the Federal Judicial Center, prevented juries from convicting on the equivocal evidence.¹⁰³ Of the juries who got the other instructions—including the instruction with no interpretation—either three-eighths or one half of the juries who got a particular instruction voted to convict on equivocal evidence.¹⁰⁴ This result implies, with high statistical significance, that these other four instructions protected defendants about as much, or as little, as a preponderance of the evidence standard. This conclusion is further supported by the fact that the mean of the jurors’ own sense of how confident they believed they had to be to vote to convict, using all instructions except for the “firmly convinced” instruction, ranged from 49.75% to 61.62% in the weak cases, even after discussing the case.¹⁰⁵ This bears highlighting: the mean was only 55% for the instruction that left the BARD standard undefined.¹⁰⁶ Therefore, this study shows that, with the exception of Federal Judicial Center’s “firmly convinced” instruction, juries took the BARD standard to be not very

99. See Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 LAW & HUM. BEHAV. 655 (1996).

100. *Id.* at 659–61.

101. *Id.*

102. *Id.* at 661.

103. *Id.* at 660.

104. *Id.* at 662–63.

105. *Id.* at 664 tbl.2. There was also an interesting “case effect;” the stronger case caused the jurors to raise their sense of level of confidence needed to convict, but not by much. *Id.* The range for those instructions, post discussion, was 57.50% to 69.75%. *Id.*

106. *But see* Chantal Mees Koch & Dennis J. Devine, *Effects of Reasonable Doubt Definition and Inclusion of a Lesser Charge on Jury Verdicts*, 23 LAW & HUM. BEHAV. 653 (1999) (finding that the firmly convinced instruction did not always lead to fewer convictions than no definition of reasonable doubt).

stringent; they took it to mean something more like a preponderance of the evidence standard than the customary understanding of the BARD standard.

This gap between the customary understanding and the practice understanding is cause for concern.¹⁰⁷ The gap seems likely to undermine respect for the law, as juries disregard in practice what the law espouses. Moreover, as Epps argues, there are costs associated with most people believing that the criminal justice system uses a high SOP, although it uses a lower SOP in practice.¹⁰⁸ For example, the social value of an acquittal is undermined if people believe that those defendants who are acquitted might very likely be guilty.¹⁰⁹ Insofar as one thinks that it is problematic for innocent defendants to face an SOP that is, in practice, so much lower than the customary understanding, these costs that Epps highlights make matters even worse.¹¹⁰ Finally, the existence of this gap reinforces the importance of determining which standard is the right one. One cannot hope to determine which standard is better unless one resolves whether the customary understanding is missing something of practical importance, or whether the practice understanding is corrupted in some way—perhaps by juries not caring enough about the fate of the defendant—and in need of being reformed by better instructions. Only a better understanding of what is properly at stake can resolve these issues and bridge the gap between the two understandings.

II. THE FAILURE OF MAXIMALIST ARGUMENTS

This Part explores non-retributive deontological arguments that aim to support the customary understanding—indeed, a maximalist version of the customary understanding—of the BARD standard.¹¹¹ These arguments

107. Another problem that results from the BARD instructions being so unclear is that it undermines uniformity in the law. Different juries will use different standards just by the luck of the draw. Some will be dominated by people who interpret the BARD standard as quite high, others will be dominated by people who interpret the BARD standard as quite low. See TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 80, at 31. One can at least hope that better instructions would limit this effect.

108. Epps, *supra* note 15, at 1114.

109. *See id.*

110. Epps thinks it also hurts the guilty. *See infra* Part III.C.

111. The category of “maximalists” is drawn from Laudan, who uses the more disparaging term: “garantistas.” Laudan, *supra* note 15, at 211. The heart of Laudan’s criticism of garantistas is that their position requires not merely a change in the SOP, but rather pervasive legal reform. *Id.* at 215–16. He presents the law’s likely rejection of such reform as a kind of *reductio ad absurdum* of their views. *Id.* Although the maximalists would be committed to pervasive reforms, understanding why their arguments fail is more instructive than being satisfied with a *reductio*.

seek to avoid taking a balancing, consequentialist approach to what is at stake in convicting a defendant. Rather, they focus primarily on what they take to be strong reasons not to convict the innocent, and let the importance of convicting the guilty do only secondary work in pushing the SOP down from absolute certainty to the high level they think is required to respect the strong reasons not to convict the guilty.

The four thinkers—here dubbed “maximalists”—whose work is highlighted in this Part are Alex Stein, Laurence Tribe, Rinat Kitai, and Antony Duff.¹¹² All of these authors take the position that what is at stake in punishment calls for using an SOP of practical certainty.¹¹³ Although none of their arguments succeed, it is important to examine them carefully. In the end, this Article concludes that maximalists are right to think that the SOP for criminal law has a deontological justification.¹¹⁴ Indeed, this Article argues that the distinction between doing and allowing *does* place a thumb on the scale in favor of innocent defendants. It is just a fairly light thumb, not heavy enough to yield the customary understanding of the BARD standard. The problem with maximalists is not their appeal to deontology; it is that their non-retributive deontological justifications do not work to justify anything like their understanding, or even a more moderate customary understanding, of the BARD standard.¹¹⁵

This Part proceeds by examining the five arguments that the maximalists offer in support of their position: (1) that accidental false convictions are permissible, but intentional ones are not, and that anything less than the maximalist position would involve the moral equivalent of intentional false convictions; (2) that “singling out the accused as a risk-absorbing unit . . . would violate both equality and fairness;”¹¹⁶ (3) that the social contract

112. See STEIN, *supra* note 13; Tribe, *supra* note 13; Kitai, *supra* note 13; DUFF ET AL., *supra* note 13.

113. See STEIN, *supra* note 13, at 72–83; Tribe, *supra* note 13, at 1374; DUFF ET AL., *supra* note 13, at 89; Kitai, *supra* note 13, at 1164.

114. Accordingly, Epps errs when he says:

[O]nce we’ve determined that a particular type of action is acceptable—as we have with respect to punishment of people determined to be guilty—and the only question is what level of *certainty* is required before we act, deontology shouldn’t continue to place a thumb on the scale.

Epps, *supra* note 15, at 1135; see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 97 (1974) (“That system is most effective which minimizes the expected value of unearned harm to me, either through my being unjustly punished or through my being a victim of a crime.”).

115. This Article argues that the distinction between doing and allowing does place a thumb on the scale in favor of innocent defendants. It is just a fairly light thumb, not heavy enough to yield the customary understanding of the BARD standard. See *infra* Part III.

116. STEIN, *supra* note 13, at 175.

requires the maximalist position; (4) that it is substantially easier to justify allowing people to suffer injustice—by not suppressing crime as much as possible—than to justify causing them to suffer injustice—by wrongly convicting them; and (5) that the special moral significance of condemnation requires that the fact finder *know* that the defendant is guilty of the crime charged to him.

A. Accidental Versus Deliberate False Convictions

Stein says that “[a]ny perceptible doubt—that is, any doubt substantiated by the evidence, thus qualifying as ‘reasonable’—must work in favour of the accused.”¹¹⁷ He adds that this position “is best understood as mirroring the moral distinction between accidentally and deliberately erroneous convictions.”¹¹⁸ Likewise Tribe expresses the view that “the [criminal justice] system dramatically—if imprecisely—insists upon as close an approximation to certainty as seems humanly attainable in the circumstances.”¹¹⁹ He defends this by claiming:

That some mistaken verdicts are inevitably returned even by jurors who regard themselves as “certain” is of course true but is irrelevant; such unavoidable errors are in no sense *intended*, and the fact that they must occur if trials are to be conducted at all need not undermine the effort, through the symbols of trial procedure, to express society’s fundamental commitment to the protection of the defendant’s rights as a person, as an end in himself. On the other hand, formulating an “acceptable” risk of error to which the trier is willing deliberately to subject the defendant would interfere seriously with this expressive role of the demand for certitude¹²⁰

117. *Id.* at 173.

118. *Id.* at 174.

119. Tribe, *supra* note 13, at 1374. He later wrote: “any ‘doubt founded on reason,’ of ‘whatever magnitude, must be resolved in favor of the accused.’” Laurence H. Tribe, *A Further Critique of Mathematical Proof*, 84 HARV. L. REV. 1810, 1819 (1971) (footnote omitted).

120. Tribe, *supra* note 13, at 1374 (footnote omitted). Lest one think that Tribe was focused only on the positive goal of treating people as ends in themselves, he also deployed, in the prior paragraph, the other side of the Kantian categorical imperative, the prohibition on using people merely as a means. *Id.* He wrote that:

[I]nsistence on the greatest certainty that seems reasonably attainable can serve . . . to affirm the dignity of the accused and to display respect for his rights as a person—in this instance, by declining to put those rights in deliberate jeopardy and by refusing to sacrifice him to the interests of others.

This argument rests on two premises, one that this Article accepts as true, the other that this Article argues is false. The premise accepted as true is that deliberately convicting the innocent to pursue some greater good is impermissible. The premise argued against is that adopting an SOP that is lower than practical certainty is morally equivalent to deliberately convicting the innocent to pursue some greater good.¹²¹

The true premise rests on a general deontological principle that is sometimes described as the Doctrine of Double Effect (“DDE”),¹²² and sometimes as the Means Principle (“MP”).¹²³ These principles hold that it is very hard to justify harming someone without his consent¹²⁴ if one does it intentionally or if one uses him as a causal means of achieving some other good. That is, these principles hold that it is impermissible to harm someone intentionally or as a casual means of bringing about some good, even if the good significantly outweighs the harm caused to the person, unless one has that person’s consent. That is because the person’s claim not to be treated or used in this manner is very strong. There is reason to think that these deontological principles are not quite right, but they are familiar and this Article will proceed on the assumption that they are close enough to the truth for present purposes.¹²⁵

Id.

121. One might object that Tribe did not say that formulating “an ‘acceptable’ risk of error” is morally equivalent to deliberately convicting the innocent. He said that this would “interfere seriously with” the expressive function of the law’s “commitment to the protection of the defendant’s rights as a person, as an end in himself.” *Id.* This could be consistent with the view the policy would merely communicate the mistaken impression that people are not being treated as ends in themselves. However logically possible, that is a substantively implausible reading of Tribe.

122. See, e.g., Jeff McMahan, *Intention, Permissibility, Terrorism, and War*, 23 PHIL. PERSP. 345, 345 (2009); MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 151–53 (3d ed. 2000).

123. See, e.g., Alec Walen, *Transcending the Means Principle*, 33 LAW & PHIL. 427, 428 (2014); VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 113 (2011).

124. Some supporters of the DDE think consent cannot cure intentional harming. See, e.g., Joseph Boyle, *Who is Entitled to Double Effect?*, 16 J. MED. & PHIL. 475 (1991).

125. The moral truth that people seek to capture with the DDE or the MP is better captured by another principle, which may be called the “restricting claims principle” (“RCP”). See Walen, *supra* note 123, at 429; Alec Walen, *The Restricting Claims Principle Revisited: Transcending the Means Principle Based on the Agent-Patient Divide*, LAW & PHIL. (forthcoming). For a related view, see Gerhard Øverland, *Moral Obstacles: An Alternative to the Doctrine of Double Effect*, 124 ETHICS 481 (2014). Given that the DDE and MP are much more familiar than the RCP, and given that the RCP, the DDE, and the MP have mostly the same implications in practice, this Part will discuss only the DDE and MP.

The problem with the false premise can be explained in three ways. First, it conflates aiming to impose an unjust harm with aiming to do something that foreseeably imposes a risk of an unjust harm. But the two aims are completely different.¹²⁶ Framing an innocent is intentionally using someone as a means. By contrast, using an SOP of less than 100% does not require that a jury actually unjustly harm anyone. Rather, this type of SOP is a policy adopted for the sake of the good, where unjust harms, should they occur, are merely a foreseen side effect of adopting the policy.¹²⁷

Second, any system of punishment, even one that aims to make “as few mistakes as possible” while still convicting the guilty, puts innocents at risk to convict the guilty. Having a system of punishment, however, is not necessary—it is a choice. Society could eliminate convictions altogether, and thereby put no innocents at risk of false convictions. Of course, losing the ability to convict, punish, and thereby incapacitate and deter criminals would presumably encourage other harms to innocents.¹²⁸ But if the moral imperative not to put the innocent knowingly at risk of a false conviction were sufficiently strong, then that is a consequence that should be accepted. Moreover, choosing to do away with the punishment altogether would presumably make little difference if the SOP for conviction were high enough to satisfy the maximalists. An SOP near certainty would make obtaining criminal convictions very difficult, greatly undermining the capacity of the criminal justice system to punish the guilty, incapacitate criminals, and deter criminal activity. If one were willing to go that far to avoid knowingly putting the innocent at risk, it is hard to see the reason not to abolish punishment entirely. Some might be willing to accept this abolitionist conclusion, but it seems that Tribe and Stein would not accept it. If that is right, then they have to abandon the premise that choosing to set up a system of criminal law that knowingly puts the innocent at risk of a false conviction—by using an SOP lower than practical certainty—is morally equivalent to intentionally convicting the innocent.

126. *But see* Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 978 (2003) (arguing that imposing risk of harm on another is imposing a kind of harm on another).

127. *See* Alan Wertheimer, *Punishing the Innocent—Unintentionally*, 20 INQUIRY 45, 62 (1977) (“[W]hen the State adopts a set of judicial policies with a certain probability of punishment mistakes, it is not intending to harm anyone.”).

128. This effect would be mitigated if those deemed dangerous were preventively detained. This raises a host of other problems, however, such as the practical problem of determining who is dangerous. Equally if not more important, they include the moral problem of justifying the preventive detention of rational, accountable agents. *See* Walen, *supra* note 24.

Third, the claim that knowingly risking harm to innocents counts the same as intentionally harming innocents, and that it is acceptable only if the risk is *de minimis*, proves too much. Consider the SOP for an arrest—probable cause. Whatever that probability is, it is surely much lower than practical certainty. And relying on that relatively low SOP imposes the risk of arrest, and all the difficulties that ensue, on innocent people. Yet Tribe and Stein presumably do not think that relying on probable cause as the SOP for arrest amounts to intentionally arresting the innocent whenever an innocent person is arrested. If they did, they would be forced into the awkward position of either insisting that police use the same maximalist SOP for arresting suspects, which would effectively ban almost all arrests, or of trying to distinguish arrests from convictions. They could try to grab the second horn of that dilemma by noting that arrests are generally less harmful than convictions. But in truth, that response misses the point. Of course there is a moral difference between, on the one hand, relying on probable cause and unintentionally arresting some innocent people, and on the other hand, intentionally arresting innocent people. That same difference must exist, however, when using an SOP lower than practical certainty when it comes to convicting the innocent.

In summary, tolerating some probability of convicting the innocent is wholly unlike aiming to convict the innocent. If some innocent persons are convicted when the jury aims to convict the guilty, the jury has simply made a mistake. That fact does not depend on the SOP having any particularly high value, much less being as close to 100% as possible. Failure to see this amounts to a failure to understand the moral role of an SOP.¹²⁹

B. Equality and Fairness

The heart of Stein's argument for a maximalist position is his thought that "singling out of the accused as a risk-absorbing unit . . . would violate both equality and fairness."¹³⁰ He offers two arguments to support his maximalist interpretation of equality and fairness,¹³¹ which will be addressed in turn.

129. See *supra* notes 5–6 and accompanying text (discussing what an SOP does).

130. STEIN, *supra* note 13, at 175. Stein takes these notions from Dworkin. *Id.* (citing RONALD DWORKIN, *A MATTER OF PRINCIPLE* 72, 79–88 (1985)). But, as Stein is aware, Dworkin does not use these notions to arrive at a maximalist position. See STEIN, *supra* note 13, at 175 n.13. Laudan unfairly lumps Dworkin with Stein in the maximalist camp. See Laudan, *supra* note 15, at 198, 209–11.

131. STEIN, *supra* note 13, at 175.

1. The “Equal Best” Standard and Weighty Evidence

Stein interprets equality and fairness to imply that “[t]he legal system may justifiably convict a person only if it did its best in protecting that person from the risk of erroneous conviction and if it does not provide better protection to other individuals.”¹³² Stein calls this the “equal best” standard.¹³³ He recognizes that a state might cite various costs of doing more to protect defendants from false convictions to defend the claim that the state is doing its best, even though the state imposes a clear risk of an erroneous conviction on defendants.¹³⁴ Stein thinks, however, that evidence law provides us with a framework for explaining why that account of an “equal best” standard is a mere “empty shell.”¹³⁵ In his view, evidence is sufficient only if it “generates [a] probability of guilt that comes close to certainty and survives maximal individualized testing.”¹³⁶ This Section will argue, however, that he simply assumes that the probability of guilt must come close to certainty.¹³⁷

The key idea for Stein is that case-specific evidence, which allows for individualized testing, must play a significant role in a trial. Although this idea is correct, Stein mistakenly thinks that the need for individualized evidence is inversely connected with some independent notion of probability, so that the two together must meet some very high SOP.¹³⁸ He is right to assert that case-specific evidence must always be considered, but that indicates nothing about the correct SOP.

To understand this mistaken contention, consider the “Prisoners in the Yard Paradox,” the case that Stein uses to argue that a very high probability of guilt that nonetheless does not take facts relative to the individual into account is insufficient for conviction.¹³⁹ In Stein’s version of the paradox, one is to imagine:

132. *Id.* (emphasis in the original).

133. *Id.*

134. *Id.* at 175–76.

135. *Id.* at 175.

136. *Id.* at 177.

137. The demand for “maximal” individual testing is also dubious, but it is unnecessary to pursue that point to argue that Stein simply assumes what he needs to argue.

138. *Id.* at 176 (“Probability and its evidential weight [the extent to which the evidence is individualized] ought to work together. . . . As the probability becomes more removed from . . . factual certainty, . . . its weight goes down.”).

139. *Id.* at 78–79. The paradox was originally formulated by Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1192–93 (1979).

[A] corrections facility accommodating 1,000 inmates. There, 999 inmates conduct a riot during which they kill a number of corrections officers. The remaining inmate stood against the wall and did not participate in the riot. However, this inmate is unidentifiable, and so every inmate accused of participating in the riot will claim to be him. Subsequently, each of the one thousand inmates is accused of murdering the officers. The probability of the accusation in each case thus equals 0.999. . . . [P]robability that equals 0.999 is extremely high, and so it should satisfy the criminal proof standard. However, the fact-finders' inability to distinguish between the inmates and the affirmative knowledge that one of these inmates is innocent block the possibility of convicting any of the inmates.¹⁴⁰

For Stein, the key to avoiding this paradox is recognizing that the probability of guilt in that case is “naked,” lacking “case-specific evidence” that would allow one to distinguish one inmate from another.¹⁴¹ And surely he is right: proceeding directly to convict all 1000 inmates on the basis of this naked, generic evidence would be wrong. One reason is that the prosecution and the defense should look reasonably hard for case-specific evidence first. Was there a witness who saw one person stand off to the side? Did he see anything that could help distinguish that one from others? Perhaps he was tall, or short, or fat, or thin, or walked with a limp. They should also interrogate all of the prisoners. Did anyone say anything that might imply that one particular person was not involved in the riot? And then there are psychological profiles and inquiries into motives. Perhaps one prisoner has developed a reputation for shrinking back from conflicts. And so on. Obviously, the state cannot rest with the naked evidence; the prosecution must try to individualize it, and the defendant must have a fair opportunity to do so as well, in the hopes of finding individualized evidence that lowers the odds in his case below the relevant SOP.

Suppose that the case-specific evidence casts particular doubt on five prisoners. Assuming that they all seem to be equally likely to be the one who did not participate, then the jury should have at most 80% confidence that each of these five participated in the riot. This is arguably sufficiently low confidence as to require the jury to acquit all five of these inmates, even though at least four are guilty. Furthermore, the jury should feel sufficiently confident that the other 995 prisoners did participate in the riot to convict them, even though the case-specific evidence is to some degree

140. STEIN, *supra* note 13, at 78–79 (footnote omitted).

141. *Id.* at 79.

unreliable, meaning that the innocent prisoner may well be among the 995 convicted.¹⁴²

Assuming this is the right way to handle the “Prisoners in the Yard Paradox,” we can now turn back to Stein’s assertion that the solution also depends on adopting the maximalist position. The requirement that the state allow and even demand individualized testing shows only that the state should require prosecutors to introduce individualized evidence, and should not deny defendants the chance to argue that evidence, which first appeared highly incriminating, is not incriminating unless and until reasonable efforts have been made to individualize it. Having the right to individualized evidence, even when the naked evidence is nearly certain, does not show that the SOP for individualized evidence is “nearly certain.” Indeed, the point of the Paradox was to show that approaching certainty does not help reach the SOP needed to convict if the evidence remains naked. If the evidence *has* been individualized, however, it remains to be determined what the SOP for conviction must be. Any claim that the relevant SOP must be close to certainty simply asserts what is to be shown.

2. *The Argument from Fairness*

Stein’s other argument for a maximalist interpretation of the “equal best” notion of evidence is based on the idea that imposing the risk of a false conviction on a particular individual is like imposing a tax on him for the general good accomplished by the criminal justice system. But the “equal” part of the equal best formulation implies that the state should impose the tax on everyone. If those who are 90% likely to be guilty must pay the tax, then those who are 10% likely to be guilty should also pay the tax. This reasoning, however, leads to a reductio, which is avoided only

142. What if the search for individualized evidence turns up nothing that distinguishes one prisoner from the rest? It is still intuitively difficult to accept that all 1000 should be punished, especially if the punishment is severe. Two questions then arise: First, what is the basis for that intuition? Second, what should be done, all things considered? My speculative answer to the first question is that what bothers us is knowing that we are punishing one person too many. As long as we can take it as a fact that there was one person standing off to the side, and that this person was not implicated by complicity or conspiracy in the acts of the others, then we *know* that punishing all would amount to punishing an innocent person. We intuitively react differently to high probabilities and certainties. See Rachael Briggs, *Normative Theories of Rational Choice: Expected Utility*, STAN. ENCYCLOPEDIA PHIL. § 3.2 (Aug. 8, 2014), <http://plato.stanford.edu/archives/fall2014/entries/rationality-normative-utility/> (discussing the Allais Paradox). My answer to the second question is that if we have given everyone an adequate chance to show that he is innocent, then we can and should convict them all.

by ensuring that the risk is not imposed at all. That is, to reach a self-consistent position that respects the “equal best” condition, the state may punish only if the fact finders, after carefully considering all of the evidence, are really sure that the defendants are guilty.

Stein’s *reductio* works as follows. How could the state impose a fair tax on those who are 90% likely to have committed a crime and on those who are 10% likely? “[T]hrough a lottery mechanism that distributes the appropriate number of conviction tickets (nine tickets for ten defendants with a 0.9 probability of guilt, and only one such ticket for ten defendants with a 0.1 probability of guilt).”¹⁴³ Though possible, this type of lottery does not fit the “best” part of the “equal best” idea. According to Stein, “[c]onvicting a person on a 0.1 probability of guilt is assuredly not the best protection that the state can provide [against convicting the innocent].”¹⁴⁴ The *reductio*, then, comes in the form of a dilemma: either society loses the “equal” part by imposing the tax only on some, or the “best” part by imposing it on those who are almost certainly not guilty. And again, according to Stein, the dilemma is avoided only by ensuring that the state punishes only those whose guilt has been established to practical certainty.

Although creative, this argument suffers a decisive objection. Stein himself seems to be willing to allow juries to convict people when the probability of their guilt “comes close to certainty.”¹⁴⁵ He does not say what that means in probabilistic terms; he shares Tribe’s reluctance to assign a number to the acceptable probability.¹⁴⁶ But choosing a number helps clarify the moral stakes. Accordingly, in the spirit of charitable transparency, then, let us set the SOP at 99%. In that case, one could use the same argument against Stein’s position. The lottery would simply have to be more fine-grained: those who are only 1% likely to be guilty would pull from a pile in which only one card in a hundred is the conviction card; those who are 90% likely to be guilty would pull from a pile in which nine out of ten cards is the conviction card, and so on. Yet surely convicting a person who is 99% likely to be innocent is not the best option available. Thus, Stein’s position implies that society would have to give up criminal convictions even when juries are 99% confident, after taking all relevant

143. STEIN, *supra* note 13, at 176.

144. *Id.*

145. *Id.* at 177.

146. *Id.* at 172 (“The conventional doctrine . . . vigorously resists the explicit introduction of numbers into” the SOP.); Tribe, *supra* note 13, at 1375 & n.146 (writing that the “fuzziness” of the BARD standard reflects, in part, that it would be too costly to “spell[] . . . out explicitly and with calculated precision” the fact that “we cannot realistically insist on acquittal whenever guilt is less than absolutely certain . . .”). For discussion of whether the SOP can appropriately be quantified, see *infra* Part III.B.2.

case-specific information into account. This argument, then, does not support using a very high SOP, one that is near certainty; it is an argument for abolishing criminal convictions altogether.

One might suggest that the right conclusion to adopt is the abolitionist one.¹⁴⁷ But a less radical response to Stein's failed argument is to acknowledge that it simply adds to the case for rejecting the idea of running a lottery with conviction tickets. The lottery is introduced to give us a model for fairly distributing the risk of being convicted of a crime. But life's lottery already gives people the suspect card or not. Of those who get the suspect card, only those who are eventually tried, and for whom the probability of guilt exceeds the relevant SOP, should be convicted. It is an unfortunate reality in our society that the poor and minorities have an unfair chance of getting the suspect card.¹⁴⁸ Life's lottery is not fair; as a society, we should seek to make it fairer. Those are the changes that are called for to meet the equal best standard.

In summary, fairness and equality do not require a maximalist interpretation of the BARD standard.

C. *The Social Contract*

Kitai shows her maximalist bona fides by stating that the government's evidence must "negate[] unequivocally any rational, plausible explanation for the defendant's innocence."¹⁴⁹ In support of this, she offers a social contract argument: "Conviction of a defendant despite reasonable doubt as to his guilt implies a violation of the state's commitment toward the individual."¹⁵⁰ Kitai believes that this claim can be grounded "on the concept that the state, which replaced 'the state of nature,' derives its power from the consent of the people."¹⁵¹ To justify the consent of each individual, according to Kitai, the state must make each individual who obeys the law, thus upholding his end of the contract, better off than he would be without the state.¹⁵² Kitai believes that, "[i]f the state can punish a person unjustly for a crime he did not commit, he is better off without the state."¹⁵³ The state

147. See *supra* Part II.A (explaining the second reason that Tribe's and Stein's arguments fail).

148. See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

149. Kitai, *supra* note 13, at 1164.

150. *Id.* at 1172.

151. *Id.*

152. *Id.* at 1175.

153. *Id.*

therefore has a duty to avoid punishment unless it has proven a defendant's guilt "with the greatest certainty possible."¹⁵⁴

The obvious flaw in this argument is that, *ex ante*, an individual is better off with the state, not without it, as long as it promotes utilitarian policies. As Larry Laudan explains:

The idea that a person would necessarily be better off in a state of nature than in a state that imposes a non-negligible risk of false conviction wholly ignores the question as to whether, under [a rule that allowed the guilty to be more easily convicted], the risk of victimization has been vastly diminished in comparison with the state of nature.¹⁵⁵

One thing Kitai could say in response is that, from the point of view of a person who is being falsely punished, that is, from the *ex post* point of view, living in a state that imposes a substantial risk of a false conviction on him might be worse than what he could have expected living in the state of nature. At least if the punishment is serious, the certain experience of a serious punishment is worse than even reasonably high odds of being victimized by others in the state of nature. But, of course, that argument cuts both ways. Living in a stateless society could have a worse outcome, *ex post*, if one is the victim of a violent crime. How can we decide which objection is stronger? One natural way to do so is by giving weight to each objection by weighing the degree of lost welfare and the odds of being a victim. But then we are back to the utilitarian position that we should choose the policy that would minimize the risk of victimization.¹⁵⁶ That policy would almost certainly not be in accord with Kitai's maximalist position.¹⁵⁷

Other scholars have offered different social contract arguments in favor of the BARD standard—as customarily understood, not as the maximalists understand it. This Section concludes by briefly considering

154. *Id.*

155. Laudan, *supra* note 15, at 213 n.32.

156. To be clear, *ex ante* thinking does not automatically reduce to utilitarian thinking. Johann Frick convincingly argues that an *ex ante* social contract theorist can defend positions that are more like utilitarianism than many *ex post* social contract theorists, but that are still, in important ways, unlike utilitarianism. See Johann Frick, *Contractualism and Social Risk – How to Count the Numbers Without Aggregating*, PHIL. & PUB. AFF. (forthcoming) (on file with author). Whether Frick's *ex ante* contractualism would allow an SOP that would be indistinguishable from the consequentialist one is a difficult question to answer, and is therefore beyond the scope of this Article.

157. See *infra* Part III (providing more on what utilitarian, or, more properly, consequentialist considerations would suggest for the SOP for criminal convictions).

three of these arguments—one by Jeffrey Reiman, one by Youngjae Lee, and one that appeals to a distinction, offered by Ronald Dworkin, between “moral harms” and “bare harms”¹⁵⁸—as well as one other intuitively appealing argument.

Reiman’s argument turns on the idea that the state should provide a “secure zone,” which he likens to being secure in one’s home.¹⁵⁹ The thought is that the state itself makes one insecure by using an SOP that is too low. The problem with this argument is obvious in light of what was just said about Kitai’s argument. If one wants to be secure in one’s home, then one would want security from all forms of wrongdoing. One would want to be protected not only from the state itself but also from others. A lower SOP than BARD might well provide more protection overall. If so, then this argument does not support using the BARD standard.¹⁶⁰

One might think that this response misses the worry that the state is a greater threat to an individual than other individuals, and that we would want, therefore, to constrain the state. But this concern about the potential for state abuse of power calls for restrictions of a far different sort than a high SOP. It calls for things like civilian control of the military, an independent judiciary, civil juries that can engage in jury nullification, and the possibility of sanctions for prosecutorial misconduct. A raised SOP could also put a thumb on the scale making it harder for the state to oppress people. But it is a crude tool to use for that purpose.¹⁶¹ Moreover, it is a tool that could get in the way of the state doing a good job incapacitating criminals and deterring potential criminals. If we assume that the state is trying to serve, rather than oppress, the people, then we would want the SOP for a criminal conviction, from the point of view of security, to balance the harms caused by wrongful punishments against the harms caused by failure to punish and incapacitate. In other words, we would want to adopt a consequentialist position on the SOP, which might well be below the BARD standard as customarily understood.¹⁶²

Lee’s contractualist argument appeals to the thought that the government has a monopoly on punishment, displacing private punishment. But, says Lee, “before the state can exercise acts of violence and attach stigma to individuals, we demand that the state be able to justify the acts it is about to take by correctly identifying wrongdoers. The proof beyond a reasonable doubt

158. See DWORKIN, *supra* note 130, at 80.

159. Reiman & van den Haag, *supra* note 21, at 237–40.

160. Other authors have provided related criticisms. See *id.* at 247–48; Epps, *supra* note 15, at 1140.

161. For more on using a heightened SOP to make it harder for the state to use the criminal law to oppress people, see *infra* note 223.

162. See *infra* Part III (arguing that consequentialism could plausibly call for using an SOP below the BARD standard on its customary understanding).

requirement is generated from this demand.”¹⁶³ Unfortunately, Lee makes this assertion essentially without argument.¹⁶⁴ He therefore makes no attempt to convince those who doubt that the state’s legitimacy depends on using the BARD standard as customarily understood.¹⁶⁵

Another argument that a social contract theorist might want to make is to appeal to the distinction Dworkin made between “bare harm” and the “moral harm” of injustice.¹⁶⁶ The thought is that the state commits an injustice when it wrongfully convicts and punishes, and that avoiding such moral harms is more important than avoiding the bare harm of being a crime victim. The problem with this argument is that harms that criminals inflict are clearly “wrongs,” not bare harms. They are not wrongs committed *by the state*, but they are wrongs that are *allowed* by the state insofar as it chooses policies that allow more of such wrongs to take place than alternative policies would probably allow, judging probability with the best available social science. Therefore, if there is a sound moral argument in play here, it works by appeal to the distinction between doing and allowing, not to the distinction between bare harms and moral harms.

The distinction between doing and allowing will be taken up in the next Section. For present purposes, it is worth adding one more thought about the distinction between bare and moral harms. If the state is using a justified SOP, it is acting blamelessly. By contrast, a criminal is not. In a straightforward sense, then, it is false convictions that are “bare” harms; it is only criminal victimizations that count as “moral” harms. Thus, if the distinction between moral and bare harms carries any weight, it should make the harm of victimization count for more and thus push for a lower SOP.

There is still one more reason that the idea of a social contract might seem to provide a tempting framework for making sense of the BARD standard: There is an undeniable sense in which people care more about state abuse authority than private wrongdoing. It is not simply that the state has more power to do wrong. Even holding wrongs constant, people get more upset, for example, when the police wrongfully kill someone than when a normal criminal does.¹⁶⁷ It is hard to be sure why that is. But this

163. Youngjae Lee, *Deontology, Political Morality, and the State*, 8 OHIO ST. J. CRIM. L. 385, 399 (2011).

164. The closest he comes to giving an argument is to gesture at the pressure the state faces to reduce crime, implying that the BARD standard is protection against doing so to an excessive degree.

165. See Epps, *supra* note 15, at 54–55 (providing similar criticisms).

166. See DWORKIN, *supra* note 130, at 80.

167. This is borne out by the fact that the police killings of African Americans in the United States are much less frequent than non-police killings of African Americans, but police killings have recently provoked huge demonstrations. See Oliver Laughland, Jon Swain & Jamiles Lartey, *U.S. Police Killings Headed for 1,100 this Year, with Black Americans Twice as Likely to Die*, GUARDIAN (July 1,

seems a plausible explanation: We are more upset when the state does wrong because we *expect* (as a normative matter, not necessarily a predictive one) that the state will act properly. Its job, its reason to exist, is to serve the people. If the state instead preys on the people, it is an outrage. It is the breach of a trust that adds an extra dimension to the base wrong. If that is the right explanation, however, then it again tells us nothing about what the right SOP for a criminal conviction should be. For whatever the right SOP is, if the state uses it, it acts blamelessly. There would be no reason to be upset that it has misbehaved or breached the trust rested in it.

In summary, it seems that the only thread of argument in the various social contract arguments that might still hold moral weight rests on the distinction that grounds the next deontological argument—the distinction between causing and allowing harm. If that distinction makes it much harder for the state to justify causing harms than allowing others to cause harms, then a social contract theorist would have a response to the consequentialist challenge. The next Section will argue, however, that the distinction does not carry that kind of moral weight.

D. The Distinction Between Causing and Allowing Harm

Many believe that the state must take special care not to inflict the horrible damages of conviction and punishment on the innocent because doing something wrongful and harmful is much more difficult to justify than allowing an equivalent wrongful harm to occur.¹⁶⁸ This belief would justify a strong skewing of the SOP in favor of the state not wronging innocent people, even if use of a high SOP would result in more guilty people going free and then harming other innocents. The appeal of this thought, however, reflects two conflations. Once they are teased apart, it becomes clear that this thought cannot justify the BARD standard as customarily understood.

The first conflation is of two parallel but different distinctions: the agent-centered distinction between doing something harmful and allowing

2015), <http://www.theguardian.com/us-news/2015/jul/01/us-police-killings-this-year-black-americans> (finding that 547 people were killed by the police in the first half of 2015, 28.3% (155) of whom were black); Crime in the United States 2001, FBI, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-1> [<http://perma.cc/3WHV-ZTSG>] (last visited Nov. 3, 2015) (Table 1) (according to which 6329 blacks were killed in 2011). Assuming that the first half of 2015 can be compared to 2011, then non-police killings of black Americans are roughly 20 times more common—6329 compared to 310—than police killings of black Americans.

168. See, e.g., Adam Omar Hosein, *Doing, Allowing, and the State*, 33 LAW & PHIL. 235, 239–40 (2014) (arguing that one way to justify the “Blackstone ratio” is by appealing to the difference between doing and allowing).

something harmful to happen, and the patient-centered distinction—patients are people affected by the choices of agents—between being caused harm and being allowed to suffer harm.¹⁶⁹ A basic commitment of liberal morality is that natural agents—real persons—have strong negative claims as agents—agent-claims—not to have to sacrifice themselves for the sake of others, even if the others are in dire need, unless they have a special relationship with them, for example, parent to child, promisor to promisee, or tortfeasor to victim.¹⁷⁰ The reason for this strong negative agent-claim is that natural agents have their own lives to lead; morality may not impose heavy burdens on them that would effectively treat them as servants for the welfare of others. But this agent-centered distinction is not what is at issue in determining whether the state can justifiably expose defendants to a non-negligible risk of a false conviction to prevent others from suffering harm from criminals who are mistakenly acquitted. What is at issue is the patient-focused question of whether the state can be prohibited from making that tradeoff even if it chooses to make it.

To see this, start with the assumption that the state exists to serve, insofar as justice permits, the interests of its citizens.¹⁷¹ This means that it cannot benefit from negative agent-claims as a real person does. But even if we assume that the state can channel the negative agent-claims of its citizens, that would give it only a claim not to be forced to do things that they do not want it to do, things that would effectively indirectly turn them into servants of the common good. In that spirit, the state could channel their claims not to have to spend huge resources to achieve some common good. But that is not the kind of thing at issue when the state decides,

169. This contrast is often framed in terms of acting versus omitting—the agent-focused distinction—and doing versus allowing—the patient-focused distinction. The problem with this way of framing the contrast is that the contrast between doing and allowing is also naturally interpreted as an agent-focused distinction.

170. See Alec Walen & David Wasserman, *Agents, Impartiality, and the Priority of Claims over Duties; Diagnosing Why Thomson Still Gets the Trolley Problem Wrong by Appeal to the ‘Mechanics of Claims’*, 9 J. MORAL PHIL. 545, 554–56 (2012) (arguing that “claims” is the best generic to cover both pro tanto liberty rights and pro tanto claim rights, and arguing that negative agent claims are strong, while positive ones carry no weight). This position on negative agent-claims is consistent with saying that agents have a duty to make small sacrifices for the sake of others, as well as to pay taxes for the general welfare.

171. Cass Sunstein and Adrian Vermeule make a similar but weaker point when they argue that “governments always and necessarily face a choice between or among possible policies for regulating third parties.” Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life–Life Tradeoffs*, 58 STAN. L. REV. 703, 721 (2005). As Hosein points out, they neglect the fact that governments not only choose policies, but act against a status quo background in particular cases. Hosein, *supra* note 168, at 247.

within its legitimate authority, to pursue criminal justice. In that case, no negative agent-claims come into play. Thus any appeal to the distinction between doing and allowing meant to skew the SOP away from maximizing the general welfare would have to turn on the strength of negative patient-claims not to be harmed, as compared to positive patient-claims to be saved from harm.¹⁷²

This difference in patient-claims, unlike the agent-focused difference, is not a deontologically weighty one. Although negative patient-claims, which are claims not to be harmed, are somewhat stronger than positive patient-claims, which are claims to be aided,¹⁷³ three reasons exist for thinking that the difference is slight.

First, the legal doctrines of necessity and lesser evil justify taking actions that harm some, who have negative claims, if doing so is necessary to avoid allowing a greater harm to befall others, who have positive claims.¹⁷⁴ Widely shared intuitions support these doctrines on the moral permissibility of performing actions like diverting a threat from a larger number of people onto a smaller number.¹⁷⁵

Second, another distinction is easily confused with the distinction between positive and negative patient-claims, making it seem like this second distinction carries more weight than it does. This second conflation confuses the distinction between negative and positive patient-claims with the distinction that the DDE and MP capture. This latter distinction differentiates between patient-claims not to be harmed as a side effect of an agent acting for the greater good and patient-claims not to be harmed as a

172. Although this Part comes to the same conclusion, with regard to the normative significance of the distinction between doing and allowing, as Sunstein and Vermeule, see Sunstein & Vermeule, *supra* note 171, it does not rely on those authors' arguments because they consistently conflate the agent-focused and the patient-focused distinctions. For example, when explaining why "a defense of the reasonable doubt standard on act/omission grounds [is] unlikely," *id.* at 727, they focus on an acquittal being an "action" just like a conviction. But while it is true that a judge or jury acts and is responsible for the decision, the important question is from the patient-side. See also Epps, *supra* note 15, at 1138 (suggesting that libertarians—who emphasize strong negative agent-claims—would respond to his argument differently than those who think the government has strong obligations, thereby showing that he is wrongly focused on the agent-focused distinction).

173. See Alec Walen, *Doing, Allowing, and Disabling: Some Principles Governing Deontological Restrictions*, 80 PHIL. STUD. 183, 190–93 (1995) (arguing that negative claims are at least somewhat stronger than positive claims, all else equal).

174. See, e.g., MODEL PENAL CODE § 3.02 cmt. 2 (1962) (explaining the "Choice of Evils" justification).

175. See, e.g., Fiery Cushman, Liane Young & Marc Hauser, *The Role of Conscious Reasoning and Intuition in Moral Judgment: Testing Three Principles of Harm*, 17 PSYCHOL. SCI. 1082 (2006).

means by which an agent can achieve the greater good. There is good reason to think that the DDE and MP track a sound moral principle.¹⁷⁶ Moreover, it is often true that claims not to be used as a means, taking the MP formulation, are also negative claims not to be harmed. For example, framing an innocent person to try to deter others from committing crimes involves both treating him as a means and doing something harmful to him. But the two types of claims can come apart. For example, allowing someone to die by withholding medical treatment so that his organs can then be used to save lives disregards both a claim not to be used as a means of achieving a greater good and a claim for aid. If one pulls the distinctions apart, it seems that what is really contributing weight is the MP or DDE, not the distinction between positive and negative claims.¹⁷⁷

Third, a theoretical case can be made to explain why negative patient-claims should not be much stronger than positive patient-claims, all else being equal.¹⁷⁸ When these two types of claims conflict, and when no one is using any of the claimants as a means to help the others, then both sets of claims impose something like a negative externality on others. Consider the case of an agent facing the choice either to allow a trolley to continue down a hill where it will kill five people, or to divert it onto another track where it will kill one person. And then consider the difference the claimants' claims seek to make against a baseline in which they are not present with their claims.¹⁷⁹ The five would have the agent kill the one to save them; the one would have the agent allow the five to die rather than kill him. Each side has claims the normative force of which is to "push" the agent to act in such a way as to make the others worse off than they would be if the agent did what she obviously should do if the other set of claimants were not present. If the one on the side-track were not present, then the agent obviously should turn the trolley away from the five. If the

176. See *supra* note 139 and accompanying text.

177. Hosein notes that both sorts of principles are morally relevant. Hosein, *supra* note 168, at 238 n.6. But he does not wrestle with lesser evil cases, which undermine the importance of the distinction between positive and negative patient-claims. He does introduce a case in which the distinction between positive and negative claims seems to be doing important work: one must drive over someone to get to a position to rescue others. *Id.* at 237. But it is not so clear that one may not do that, and insofar as there is reason to think that one may not, the notion of using him as a means can be extended to cover using what he has a prior claim to—the space in which he sits—as a means. See Walen, *supra* note 123, at 456–57.

178. What follows is a very brief summary of the core argument for the RCP. For further discussion of that argument, see Walen, *supra* note 123.

179. The baseline of not being present is a good heuristic, but ultimately not morally accurate. The right baseline refers to the agent's baseline freedom to act, which is given by her rights over property. See Walen, *supra* note 125.

one's claim had to be respected as a right not to be killed, then the five would be worse off because the agent could not permissibly rescue them from the trolley. Likewise, if the five were not present, then the agent obviously should not turn the trolley onto the one. If their claims had to be respected as rights to be saved, then the one would be worse off because the agent would be required to turn the trolley onto him.

By contrast, consider the case of an agent facing the choice either to use someone as a means of saving the five—say by pushing him in front of the trolley—or to allow the five to die. The one in this case has a claim that pushes to make others no worse off than if he were not present. Whether the agent respects his claim not to be used or he is simply not available, she cannot save the five. This shows that claims not to be used do not push to make others worse off in the way that both negative and positive claims, held by those who would not be so used, do. That can explain why claims not to be used are stronger, all else being equal, than claims that do push to make others worse off. And the fact that both negative and positive patient-claims, when no party would be used as a means of helping another, do push to make others worse off at least suggests that they are competing more or less on a par. This does not mean that negative claims should get no priority over positive ones, all else being equal. But the dominance should be much less than that given to claims that do not push to impose anything like a negative externality.

Hosein did offer an argument that negative claims should be much stronger than competing positive claims. His argument boils down to this: “[A]s an agent I must take special responsibility for what *I* do to other people as opposed to what merely befalls them or what other people inflict on them.”¹⁸⁰ The problem with this argument, however, is that it is essentially the flip side of the principle that agents have strong negative claims not to have to do things to help others unless they have done something to them. That, however, is a point about agent-claims, not patient-claims. One cannot make inferences from one to the other.

In summary, the negative claim of innocent defendants not to be harmed as a side-effect of the state adopting a relatively low SOP in criminal cases¹⁸¹ should be treated as only slightly stronger than the competing positive claims of the potential victims of crime not to be allowed to suffer harms at the hands of criminals who would be incapacitated if convictions were easier to obtain. The slight priority of negative over positive patient-claims will not suffice to significantly increase the SOP over the level a consequentialist balance of the harms recommends. If the consequentialist balance does not come close to the BARD standard, then the extra concern the state should have not to cause harm will not justify the increase to the BARD standard.

180. Hosein, *supra* note 168, at 238.

181. See *supra* Part II.A.

E. The Expressive Significance of Condemnation

Antony Duff—who believes that “conviction is appropriate only if the fact finder *knows* that the defendant is guilty”¹⁸²—articulates a position that many share. According to this position, the expressive significance of condemnation is what justifies using a high SOP in criminal cases:¹⁸³

To be convicted of a crime is not just to suffer some loss; it is to be condemned for committing a wrong. This gives us reason to make it quite hard to convict defendants, by defining proof “according to law” as proof beyond reasonable doubt. Civil liability, involving no more than liability to pay the costs of harm that has occurred, might be justly allocated to the defendant if it is proved only on the balance of probabilities that she was responsible for the harm, given that the costs must fall on one of the parties; but proof that the defendant is “probably” guilty is not enough to justify his formal condemnation and punishment by the state.¹⁸⁴

I too was initially drawn to this position. In my first published views on the topic, I wrote: “[T]he expressive content of punishment, the dimension of censure, the claim that the sanction is deserved, these all require a high level of confidence that the punishment *is* deserved. That high level of confidence is captured by the BARD standard.”¹⁸⁵ I now see three compelling reasons why this expressivist defense of the BARD standard misses the mark.

First, it is unclear why condemnation should require a much higher SOP than, say, finding liability for a tort. Duff’s claim that the harm of punishment is worse than the harm of a tort penalty is at best a valid generalization;¹⁸⁶ some tort penalties are devastating, and some criminal penalties fairly light. One might reply that the law has to reflect such

182. DUFF ET AL., *supra* note 13, at 89 (emphasis added). Duff further explains that “[f]or it to be true that the fact finder knows this, she must be entitled, on the basis of the evidence presented in court, to assert her judgment that he is guilty without qualification or hesitation.” *Id.*

183. Other authors support this view. Tribe, *supra* note 13, at 1374; Kitai, *supra* note 13, at 1181.

184. DUFF ET AL., *supra* note 13, at 89–90.

185. Mattias Kumm & Alec D. Walen, *Human Dignity and Proportionality: Deontic Pluralism in Balancing*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING 82 (Grant Huscroft et al. eds., 2014).

186. DUFF ET AL., *supra* note 13, at 89–90. Duff addresses the question of why condemnation requires a much higher SOP than finding liability for a tort, explaining that civil liability involves “no more than liability to pay the costs of harm that has occurred,” whereas criminal liability involves “formal condemnation and punishment by the state.” *Id.*

generalizations. But that position does not explain where to draw the relevant lines. It is not obvious why society could not have a range of SOPs for both torts and criminal cases that would reflect the severity of penalty and that would sometimes overlap.¹⁸⁷ Further, if the issue is reduced to harms, then it is not obvious why a utilitarian or consequentialist framework is not then the relevant one, and as we will see in the next Part, this framework might call for an SOP quite a bit lower than “knowing” that the defendant is guilty.

Second, the thought that “punishment is in part the intentional infliction of suffering, justified in a retributive framework by the idea that the defendant *deserves* it” may seem to imply that, to justify punishment, “the fact finder must positively believe that the person *deserves* such punishment.”¹⁸⁸ But there are two problems with this argument. First, even if we accept that the fact finder must believe that the person deserves the punishment before voting to convict, it is not clear why that requires a very high level of confidence. Compare, again, the civil case. To award damages to the plaintiff, the fact finder must believe, with a confidence level set by the relevant SOP, that the defendant is liable for having committed a tort, and that the plaintiff deserves to get compensation from the defendant. Yet in the United States, the relevant SOP in tort liability is a mere preponderance standard—that the defendant is more likely than not to be liable.¹⁸⁹ Second, it is not clear why the fact finder must “positively believe” that the defendant is guilty, rather than believe that the SOP has been met.¹⁹⁰ Any attempt to limit the SOP by the nature of “belief” requires a substantive justification; otherwise it simply falls into a trap that H.L.A. Hart identified, that of invoking a “definitional stop.”¹⁹¹

187. See *infra* Part III.C. In the end, Duff is correct that the SOP for criminal trials should be high and for civil trials the SOP should be mere preponderance of the evidence. But mere consideration of harms does not lead to that result.

188. Kumm & Walen, *supra* note 185, at 14.

189. In other countries, the SOP is higher. In Germany, for example, dispute persists over what the standard should be, but one standard deemed sufficient reads: “[S]uch a high degree of probability as would quiet, without eliminating, the doubts of a person of reasonable and clear perception of the circumstances of life.” PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 310 (2004) (quotations marks omitted) (citation omitted); see also Taruffo, *supra* note 31, at 667–68 (“[P]revailing opinion seems now to be that [preponderance of the evidence] is too low to fit with the idea of establishing the truth of the facts that is at the basis of § 286”—the section of the code of civil procedure dealing with the evaluation of evidence by the court).

190. See *supra* notes 5–6 and accompanying text (discussing what an SOP does).

191. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 5 (1968).

Admittedly, there are some—Lara Buchak,¹⁹² for example—who think that beliefs operate differently from what is sometimes known as a partial belief or credence—an SOP is effectively a required minimal credence¹⁹³—and that only a belief can suffice for a criminal conviction. Buchak argues that credences are appropriate for what she calls “personal action: action when the only or primary relevant stakes are for the agent.”¹⁹⁴ She argues, in contrast, that belief operates in the interpersonal realm of reactive attitudes such as resentment and indignation, as well in interpersonal activities such as blaming and punishing.¹⁹⁵ She rests her argument primarily on cases such as those discussed by Stein,¹⁹⁶ cases in which it is plain that naked statistical evidence, which suffices for a credence, does not suffice for a finding of guilt or even tort liability.¹⁹⁷ One of her examples nicely illustrates her objection to relying on naked statistical evidence for a conviction: A phone was stolen by one of two people; one is a man, one a woman. Statistical evidence indicates that 90% of phone thieves are men; nonetheless, it would be unacceptable to base conviction simply on that fact. But Buchak’s response to cases like this is different from Stein’s. Rather than assert that the evidence has to be nearly certain and based on individualized testing, she thinks that cases like this show that beliefs are required to convict. Beliefs, as Buchak conceives them, do not come in degrees; one merely believes or one does not believe that some proposition or other is true.¹⁹⁸ This is not to be confused with having a high credence. One might believe that someone committed a crime if a witness says she saw him do it, or if he looks guilty when asked about the crime, even if the odds of his guilt are lower than they would be if naked statistical evidence were used, and even if that naked statistical evidence were inadequate for a conviction.¹⁹⁹ Her point is that one must *believe* it before one convicts; one must not simply think it is likely to be true beyond some certain threshold.

Buchak’s argument has a clear intuitive appeal. It *feels* better to say that one would vote to convict someone only if one believes he is guilty. Then one does not have to own up to the fact that one is imposing the risk

192. Lara Buchak, *Belief, Credence, and Norms*, 169 PHIL. STUD. 295 (2014).

193. Having a belief that some proposition (p) is true is inconsistent with p being false, but having the credence that it is 90% likely that p is true is consistent with p being false.

194. *Id.* at 298.

195. *Id.*

196. *See supra* Part II.B.

197. Buchak, *supra* note 192, at 292.

198. *Id.* at 268 (“When an agent believes p, she in some sense rules out worlds in which not-p holds.”).

199. *Id.*

of false conviction on him. But this is, in fact, just a kind of moral obscurantism; it is a way of ducking responsibility for acting on an adequate SOP. Moreover, it is not well supported by Buchak's discussion of naked statistical evidence. The problem with naked statistical evidence is not that it lacks some unstated marker of interpersonal reliability that would make it fit for "belief." The problem with it is that it needs to be supplemented, as Stein rightly points out, by individualized testing of the evidence. Witness testimony is particularly significant because—expert witnesses notwithstanding—it is always about the individual event in question. Still, at the end of the day, introduction of individualized testing is not sufficient for a conviction. When judging whether another is guilty or liable, one needs to assess one's credences. How reliable were the witnesses? How reliable is the evidence overall? Only if one's credence crosses the relevant SOP should one act.

A third reason to reject the expressivist defense of the BARD standard is that its appeal illicitly trades on the nature of the communicative act of condemnation. The idea that there is a connection between communication and the BARD standard can be explained as follows: When one is expressing condemnation, one is addressing oneself *to* the other. This may seem to require that one be highly confident that one is indeed justified before expressing and acting on one's condemnation. But this connection is illusory. Again, all one needs to justify oneself to the other is the ability to say that one has met the relevant SOP.

It might seem that this response to the communicative thought is too quick. That is, it might seem that the relationship between those who would condemn and those whom they would condemn must have implications for what the SOP for condemnation should be. It might seem that one has no business condemning another if one is not very confident, and for good reason, that the other deserves the condemnation.

But these appearances are indeed illusory because they make it seem as though the SOP can be determined by thinking simply about a bilateral relationship. It is crucial to keep in mind, however, that the correct SOP cannot be determined simply by thinking about the relationship an agent has to the person she is contemplating condemning. An agent—whether a natural agent, or an artificial one, be it a corporation or a state—is never simply in a binary relationship with another.²⁰⁰ An agent is always

200. This fact is the central structural feature of the "Mechanics of Claims." Walen & Wasserman, *supra* note 170, at 551–53. The mechanics of claims allows a kind of aggregation that is generally frowned on in contractualist theories of morality. See, e.g., T.M. SCANLON, WHAT WE OWE TO EACH OTHER 30–32 (1998) (arguing that the right policy is one which generates the weakest *individual* complaint). But contractualist theories such as Scanlon's oversimplify the moral landscape, looking too quickly to an individual's ability to complain, without

responding to a complex set of complementary and conflicting patient-claims. Focusing on the state as a potential punisher: some will want it to condemn and punish criminals; others will want it not to wrongly condemn and punish them. The state, as the agent confronting those competing claims, has to appropriately weigh all of them. Without some reason to *disregard* their claims,²⁰¹ there is no reason to turn a blind eye to those who want the state to protect them from the guilty. And if the interests of those who desire the state's protection are on par with the interest the innocent have in not being punished—modulo the difference between positive and negative claims discussed in the previous Section—it is far from clear that the right SOP would be the BARD standard as customarily understood.²⁰²

The idea that an agent is always responding to a complex set of complementary and conflicting patient-claims bears further explication. For in some sense, one is in a binary relationship whenever rights are at stake. People have a *pro tanto* right not to be falsely condemned, and agents, including the state, have a duty to their citizens not to falsely condemn them. So why should it not be the case that one should pay attention to that relationship, to the exclusion of all others, when thinking about the right SOP for condemnation? The answer is that this feature of rights applies to all rights people have against each other, and it never allows one to simply ignore the larger context in which that binary relationship is situated.

To see the point more clearly, consider the case of an agent who is considering whether to kill another in defense of others. If she kills a culpable aggressor who would otherwise, in the immediate future, kill an innocent person, it is non-problematic;²⁰³ the aggressor, through his culpable action, has forfeited his right not to be killed as long as no lesser means will suffice to stop his aggression.²⁰⁴ If, however, the person is not aggressing, but is

setting out a normative structure for weighing competing claims. The mechanics of claims sets out such a normative structure. More specifically, contractualists like Scanlon are wary of the topic of aggregation because the topic can seem to swamp the claims of the individual. Less drastic measures, however, such as distinguishing different kinds of claims that might serve the same interest, recognizing that some types of claims can sometimes operate as lexically stronger than others, or using screening functions—the thesis of this Article—can serve the same end and can sensibly allow aggregation when not otherwise banned.

201. See *infra* Part IV (aiming to provide this “reason to disregard their claims,” as expressivism by itself does not provide it).

202. See *infra* Part III.

203. See MODEL PENAL CODE § 3.04(1) (1962) (“[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”).

204. See Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 374 (2012) (emphasizing that “self-defense is

acting in self-defense, then killing him for the sake of the other, who is aggressing against him, is impermissible. The epistemic problem is that the agent may not know which of these conditions applies. What she does know is that two parties are present in one of these relationships. If she kills the person she thought was a culpable aggressor, but who was acting in self-defense, she will have wronged him. But she will have acted without culpability if her belief that she was doing the right thing is sufficiently justified.²⁰⁵ For the belief to be sufficiently justified, the evidence and level of confidence must meet the relevant SOP. But that SOP cannot reflect simply the fact that she might be killing an innocent; rather, the SOP has to reflect as well that she might be saving an innocent. The same is true for the choice to condemn, which occurs no more in a simple binary relationship than the choice of whether to kill in defense of another. The choice to condemn occurs in a larger moral context, where others also have an interest in such actions, and one has to take their claims into account. Without some reason to screen out the interests of those who have an interest in courts convicting and imprisoning the guilty, there is no reason to think that the SOP can be set by reference only to the communicative message of condemnation.

In summary of this Part, the five non-retributive deontological arguments for the BARD standard have all failed. Before turning to examine this Article's new retributive-deontological argument, however, it will be useful to examine what consequentialism itself implies about the correct SOP for criminal trials. Consequentialism straightforwardly rests its account of the SOP for a criminal conviction on its account of what is at stake in convicting or not convicting both the innocent and the guilty. In that regard, it starts off on the right foot. But it fails in its own way to give a plausible account of the SOP for conviction and punishment, and its failure helps point the way to the right solution.

III. CONSEQUENTIALIST REJECTION OF THE BARD STANDARD

This Part examines what consequentialism might imply for the SOP for a criminal conviction.²⁰⁶ It starts with some preliminary remarks about

commonly understood in terms of rights forfeiture"); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 235 (6th ed. 2012) (listing forfeiture as involved in two of four non-utilitarian explanations for self-defense law).

205. The law uses a "reasonable person in the actor's situation" standard, but jurisdictions differ in terms of how much they allow that to vary according to subjective features the actor brings to her "situation." See DRESSLER, *supra* note 204, at 239.

206. This discussion will not be completely consequentialist because the Article leaves mostly implicit that whatever SOP consequentialism might prescribe would

consequentialism, distinguishing it from utilitarianism and distinguishing its pursuit of “the good” from the pursuit of accuracy as possible guiding norms for an SOP. It then describes the primary consequentialist considerations affecting the SOP in criminal trials and argues that they might call for a surprisingly low SOP in criminal cases. Next, it examines the implications of separating out different SOPs for different kinds of criminal cases. This possibility, implicit in the discussion up to this point, shows that the consequentialist recommendation in some cases is *very* low. Finally, this Part explores the implications of recommending, even if only in a few cases, a very low SOP, arguing that consequentialism cannot properly make sense of the idea that punishment presupposes guilt.

It is worth emphasizing, before proceeding, that the discussion that follows treats the SOP at trial as though it has significant implications for how the guilty and the innocent fare in the criminal justice system. Given that approximately 95% of convictions result from guilty pleas,²⁰⁷ one might wonder whether the SOP for trials is a sideshow. And one might think that the main reason to think not is the old trope that pleas occur in the shadow of expected trial outcomes.²⁰⁸ There are, however, problems with this trope. When it comes to minor felonies and misdemeanors, there is reason to worry that the practice of plea bargains, in combination with the practice of pre-trial detention, leads many innocents to plead guilty regardless of what would have happened at trial.²⁰⁹ On the other hand,

have to be modified slightly to accommodate the slight preference for negative claims over positive claims discussed in Part II.D. One might argue that this need not even be taken as a departure from consequentialism. That is, one might argue that a consequentialist *could* say that it is slightly worse for the state to cause harms than to allow them. But this sort of extension of consequentialism is incoherent. Consequentialism, as understood here, directs agents to maximize the good from an agent-neutral point of view. From an agent-neutral point of view, the state’s allowing criminals to act is not merely an allowing; it is also a doing on the part of criminals. But even if the consequentialist picture would have to be modified, it would only be slightly, and it would not affect the larger picture developed in this Part.

207. See Epps, *supra* note 15, at 1114 & n.236; see also Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 341 (2012).

208. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

209. See *id.* As Bibas writes:

Most criminal cases . . . involve misdemeanors or minor felonies, such as petty theft, that usually carry short sentences. Though many defendants make bail for these offenses, some do not have enough money or are detained without bail. One empirical study found that roughly four times as many defendants charged with misdemeanors or lesser felonies are imprisoned before trial as are after conviction. The pretrial detention can approach or even exceed the punishment that a

studies of post-plea interviews and exoneration statistics of major felonies indicate that the innocent rarely plead guilty to such crimes. As Oren Gazal-Ayal and Avishalom Tor write:

[O]nly 37 of the 466 exonerated defendants, or 7.9 percent, were convicted following a guilty plea. The remaining 92.1 percent were convicted by an erroneous jury decision at trial. This 7.9 percent rate stands in sharp contrast to the common rate of guilty pleas in comparable felony cases during the same period, which was approximately 90 percent.²¹⁰

The implication of these statistics is that the SOP for trial is actually more important in felony cases than the high rate of plea bargains might lead one to believe. The reason is that, “innocents disproportionately refuse the plea and go to trial.”²¹¹ Indeed, there is an extra reason why the SOP at trial is relevant. As Gazal-Ayal and Tor point out, one of the reasons that the innocent do sometimes plead guilty is that “they believe that their conviction at trial is extremely likely.”²¹² Lowering the SOP would raise the number of cases in which convictions, both false and accurate, are extremely likely to occur. Lowering the SOP would, therefore, not only lead to more false convictions at trial, but also to more false convictions based on a plea bargain. Thus, if one is concerned with protecting the innocent from false convictions, there is all the more reason to focus on the SOP at trial.

Conversely, there is still reason to focus on the SOP at trial if one is concerned with punishing the guilty. Although it is true that the vast majority of convictions result from plea bargains, there is still good reason to believe that the guilty are more likely to take their chances at trial if the odds of conviction are low and more likely to plead if the odds of conviction are high. Thus, this Article proceeds on the assumption that the SOP for trial is relevant to the fates of both the innocent and the guilty, at least for major felonies.²¹³

court would impose after trial. So even an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail. . . . Thus, pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial. In other words, the shadow of pretrial detention looms much larger over these small cases than does the shadow of trial.

Id. at 2491–93.

210. Gazal-Ayal & Tor, *supra* note 207, at 352.

211. *Id.* at 394.

212. *Id.* at 387.

213. It is presumably also relevant to minor felonies and misdemeanors, even if the use of pretrial detention clouds its relevance somewhat.

A. Preliminary Remarks on Consequentialism

As a preliminary matter, this Section seeks to clarify why this Article focuses on consequentialism, as opposed to utilitarianism, and how a concern with consequentialism is different from a concern with accuracy. Starting with the first issue, both consequentialism and utilitarianism agree that right actions or right rules—normally, the law, including the law governing the SOP, is a matter of rules, not acts judged in isolation²¹⁴—are those that maximize, from an impartial point of view, the moral value brought about or preserved. The two views differ, however, in terms of their definition of what exactly is “the good.” Utilitarians are concerned with happiness, whether understood in terms of the balance of pleasure over pain, preference satisfaction (whether informed or uninformed), or welfare.²¹⁵ Consequentialists accept other moral reasons as also shaping the good that is to be maximized.²¹⁶ Utilitarians are thus a subset of consequentialists.

Of particular relevance to this discussion, consequentialism can, but utilitarianism cannot, make sense of the thought that punishing the innocent is particularly bad. As Bentham pointed out, a utilitarian thinks that “all punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.”²¹⁷ But a consequentialist can make a distinction. A consequentialist can accept the retributive thought that the guilty deserve punishment, and she can therefore assert that punishing the guilty is intrinsically good, while punishing the innocent is intrinsically bad. Many consequentialists may not want to go that far; they may want to say only that punishing the guilty, within some proportionality limits, is not bad, or not as bad as punishing the innocent.²¹⁸ But even that position is one that a utilitarian cannot take.

214. This rule can be bent. *See infra* Part III.C.

215. *See* Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/spr2014/entries/consequentialism> (last updated Sept. 27, 2011).

216. *Id.* (“When such pluralist versions of consequentialism are not welfarist, some philosophers would not call them *utilitarian*.”).

217. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in 1 THE WORKS OF JEREMY BENTHAM 83 (John Bowring ed., 1962).

218. *See* SHELLY KAGAN, NORMATIVE ETHICS 57 (1998). Kagan contrasts what he calls the retributive view that the culpable suffering is good with the idea of a “culpability discount rate” according to which the culpable doing well is worse than if the innocent do well. Kagan is mistaken in labeling the former view “the retributive view” because, as a consequentialist, he misses something important about retributivism. He rejects the retributive commitment to the view that the good consequences that flow from punishing the innocent cannot count

Because most discussions of the BARD standard presuppose a distinction between the intrinsic disvalue of punishing the guilty and the intrinsic value of punishing the innocent, the discussion that follows is framed in consequentialist—rather than utilitarian—terms.²¹⁹

Turning to the second preliminary matter, it will be helpful to distinguish choosing an SOP with the aim of promoting accuracy from choosing an SOP with the aim of promoting good consequences. An SOP aimed at accuracy would aim to minimize the number of errors without favoring one kind of error over another.²²⁰ It would do this by not favoring one kind of mistake over others, except when seeking to compensate for various other sources of systematic error. For example, if juries tend to place too much trust in prosecutors, then using an elevated SOP for the prosecution's case would increase overall accuracy. By contrast, an SOP aimed at promoting good consequences might induce a skewing such that the jury makes fewer mistakes of one kind, while making more mistakes of another kind—and thus more mistakes overall—if doing so would promote some other good. Consider again Justice Harlan's argument for the BARD standard: "[I]t is far worse to convict an innocent man than to let a guilty man go free."²²¹ Justice Harlan makes this remark to defend an SOP that skews in favor of acquittals, even if the result is that more mistakes are made overall.

in favor of doing so. That is, as a consequentialist, he does not screen out a set of consequences as not to be taken into account. A consequentialist *could* adopt such a screening function; nothing about consequentialism itself precludes a consequentialist from adopting any particular view about value. But I am aware of no consequentialist who does adopt the screening function that is the key to the non-consequentialist, retributive account. See *infra* Part IV; *supra* text accompanying note 200 (discussing Scanlonian contractualism).

219. Among the consequentialist critics of the BARD standard that this Article discusses, Kaplow stands out as being most utilitarian. He would have the SOP set solely with reference to the goal of maximizing the value that results from deterring (broadly construed to include incapacitation) harmful acts—a good—while also chilling beneficial acts—a bad. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331, 332–33 (2003) (arguing that welfare is to be understood subjectively, such that “even tastes for fairness are included”). The idea that there is independent value in doing justice by sanctioning or punishing those who have done harmful or criminal acts does not enter his picture, except indirectly, insofar as people may be upset (a bad) if retrospective justice is not done and pleased (a good) if retrospective justice is done. See *id.*

220. See Lillquist, *supra* note 15, at 98–102 (showing that distortions in favor of one kind of error can occur without raising the number of errors, but showing that if most defendants are guilty then the number of errors is increased when accuracy is sacrificed).

221. *In re Winship*, 397 U.S. 358, 372 (1970).

One may be tempted to think that accuracy is a worthy norm for an SOP. Part of the purpose of a trial is to determine, in an authoritative way, if a defendant is guilty. And if one thinks of this purpose as an epistemic endeavor, adopting the epistemic norm of accuracy seems reasonable.²²² But a trial is not an exercise in science and is not aimed at knowledge for the sake of knowledge. Rather, a trial is a practical exercise aimed at deciding whether to convict and punish a defendant. Accuracy is a subservient norm for such a practical act, relevant only insofar as the trial promotes its practical goals. Of course, all else equal, more accuracy is better. But all else is usually not equal. The costs of one kind of error are often higher than another. Therefore, one cannot assume that the relevant practical reasons will call for maximizing accuracy.²²³

222. This is the organizing idea in TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 80. Laudan is fully aware, however, that other goals, such as protecting innocent defendants, may justify departures from pure epistemic norms. His interest is in questioning whether the departures are actually justified. *Id.* at 30.

223. Some authors do seem to make this mistake. *See, e.g.*, Richard L. Lippke, *Punishing the Guilty, Not Punishing the Innocent*, 7 J. MORAL PHIL. 462, 464–65 (2010) (taking for granted that the criminal law has two conflicting goals that have to be balanced: “success at the apprehension and punishment of serious offenders, and accuracy, understood in terms of their separating the guilty from the innocent and punishing the former proportionally with the seriousness of their offenses”); Pardo, *supra* note 80, at 1083 (taking for granted that accuracy is one of the two norms relevant to setting SOP rules). Even insofar as accuracy is a norm, one cannot assume that adjusting the SOP is the best way to promote it. *See* Lippke, *supra*, at 477–80, and Underwood, *supra* note 49, at 1306–07, for an exploration of the reasons why one might want to raise the SOP to enhance accuracy. But putting a thumb on the scale in favor of defendants is a crude tool for achieving more accuracy. *See supra* notes 55, 161 and accompanying text. Better solutions would involve doing things such as ensuring that defendants have access to experienced and motivated defense attorneys, who are provided with adequate resources and are not overburdened with an excessive caseload. Some suggest that the criminal justice system’s failure to live up to goals set in *Gideon* has shown this idea to be unattainable. *See, e.g.*, Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH L. REV. 113, 119 (2013). But this conclusion is overly dire. Four states—Massachusetts, Montana, Wyoming, and New Hampshire—were able, as of 2007, to provide enough attorneys to handle their caseload according to guidelines set by the National Advisory Commission on Criminal Justice Standards and Goals. *See* LYNN LANGTON & DONALD FAROLE, JR., STATE PUBLIC DEFENDER PROGRAMS, 2007, at 13 (2010), *available at* <http://www.bjs.gov/content/pub/pdf/spdp07.pdf> [<http://perma.cc/23BM-XBBH>]. It is not clear why other states cannot do so as well.

B. Primary Consequentialist Considerations for the SOP in Criminal Cases

Having dealt with the preliminary matters, this Section turns to the central task of this Part: considering how consequentialist considerations would affect the choice of an SOP for criminal convictions. This Section starts with the derivation of a formula by which to arrive at the right SOP for criminal convictions. It then considers objections to the use of numbers for an SOP. Finally, it seeks to provide values for the SOP by filling in plausible values for the terms in the SOP formula, and it argues that consequentialist considerations may call for using an SOP for criminal convictions clearly below the customary understanding of the BARD standard. The ultimate aim in this Section is not to show that a consequentialist *must* accept a fairly low SOP for criminal cases; the aim is only to show that, given some plausible empirical assumptions, a fairly low SOP might be called for.

1. Deriving the Equation for the SOP

For a consequentialist, the SOP should reflect the norm of efficiency: one should not prefer to shift the ratio of convictions to acquittals; the right balance has been struck.²²⁴ To achieve this balance mathematically, one should set the value of convictions equal to the value of acquittals:

$$(1) V_{\text{Con}} = V_{\text{Acq}}$$

Simplifying so that one generic conviction or acquittal can stand in for all, the value of a conviction equals the value of convicting the guilty times the probability (“P”) of guilt, plus the—presumably negative—value of convicting the innocent times the probability of innocence. In a given case, the probability that a person is innocent is one minus the probability that the person is guilty.²²⁵ Thus we can represent the value of a conviction as follows:

224. The equations presented here were first developed by John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968), and Alan D. Cullison, *Probability Analysis of Judicial Fact-Finding: A Preliminary Outline of the Subjective Approach*, 1 U. TOL. L. REV. 538 (1969). These equations are further discussed by Lillquist, *supra* note 15, at 107–08.

225. Kaplow might object that this formulation treats value as though it depends on what happened in the past—the value depends, at least in part, on whether a defendant is in fact guilty—rather than what happens in the future. This argument reflects the broader consequentialist notion of value that he, as a utilitarian, does not recognize. *See supra* note 219. But this formulation in no way

$$(2) V_{\text{Con}} = P * V_{\text{CG}} + (1 - P) * V_{\text{CI}}$$

The value of an acquittal likewise equals the—presumably negative—value of acquitting the guilty times the probability of guilt, plus the value of innocence times the probability of acquitting the innocent. This formula can be represented as follows:

$$(3) V_{\text{Acq}} = P * V_{\text{AG}} + (1 - P) * V_{\text{AI}}$$

Setting these two values equal to each other to find the P that should be the SOP yields the following equation:

$$(4) P * V_{\text{CG}} + (1 - P) * V_{\text{CI}} = P * V_{\text{AG}} + (1 - P) * V_{\text{AI}}$$

Solving for P in (4) yields the following formula:²²⁶

$$(5) \text{SOP} = P = 1 / (1 + \{ [V_{\text{CG}} - V_{\text{AG}}] / [V_{\text{AI}} - V_{\text{CI}}] \})$$

This is a fairly awkward formula to use, but the following simplifying assumptions can now be introduced: one can assume that $V_{\text{CG}} = -V_{\text{AG}}$, and that $V_{\text{AI}} = -V_{\text{CI}}$.²²⁷ These assumptions are not completely arbitrary, but rather reflect the thought that convicting the guilty and acquitting the innocent have certain net benefits, and those are lost if the guilty are

excludes the relevance of all other consequentialist values that flow from convicting the guilty and the innocent.

226. The intermediate steps between (4) and (5) go as follows:

$$P * [V_{\text{CG}} - V_{\text{AG}}] = (1 - P) * [V_{\text{AI}} - V_{\text{CI}}]$$

$$P * \{ [V_{\text{CG}} - V_{\text{AG}}] / [V_{\text{AI}} - V_{\text{CI}}] \} = 1 - P$$

$$P + P * \{ [V_{\text{CG}} - V_{\text{AG}}] / [V_{\text{AI}} - V_{\text{CI}}] \} = 1$$

$$P * (1 + \{ [V_{\text{CG}} - V_{\text{AG}}] / [V_{\text{AI}} - V_{\text{CI}}] \}) = 1$$

227. These assumptions explain why Laudan asserts that he can use equation (6) rather than equation (5). Laudan, *supra* note 15, at 207 n.18.

acquitted and the innocent convicted.²²⁸ Plugging these assumptions into (5), we get:²²⁹

$$(6) \text{ SOP} = 1/[1 + V_{AG}/V_{CI}]$$

Equation (6) is a reasonably tractable equation. One can see how this formula produces familiar results by plugging in some familiar values. Suppose, first, that the disvalue of convicting the innocent is 10 times greater than that of acquitting the guilty—the idea behind the Blackstone ratio. This supposition yields this result: $\text{SOP} = 1/[1 + 1/10] = 1/1.1 = 91\%$. Now suppose that the criminal law worked like civil trials in the sense that the disvalue of convicting the innocent is only marginally greater than the disvalue of acquitting the guilty. This supposition can be represented as follows: $\text{SOP} = 1/[1 + 49/50] = 1/1.98 = 51\%$.

2. *Objections and Replies Regarding the Use of Numbers*

Two objections can be raised to using this sort of measure for the SOP. The first and more fundamental objection is that the SOP should not be represented by a number.²³⁰ Different reasons have been given for this position. Stein, for example, rejects the idea that one can represent the SOP with a number because he thinks that a reasonable doubt must be “substantiated by the evidence.”²³¹ In other words, he thinks that what distinguishes a reasonable doubt from an unreasonable one is not the proper degree of confidence, but the source of the doubt. Even a high degree of doubt not “substantiated by the evidence” would not suffice to

228. The reasoning behind these assumptions is not, strictly speaking, accurate. An innocent person who is acquitted will likely go on to lead a productive life, and thus the acquittal produces positive value. The value of convicting the innocent, however, is more complicated. It has negative intrinsic value, but it might have positive instrumental value if most people mistakenly believe that the person convicted is guilty. If we suppose that the intrinsic negative value swamps the instrumental positive value, then we could get the position taken in the text. Of course, there is a wide range of reasonable ways to assess the values in play, and thus one could reasonably find that: $V_{AI} \neq -V_{CI}$. However, for the sake of the exercise carried out in this Section, which seeks to show what consequentialism plausibly entails, $V_{AI} = -V_{CI}$, can be accepted as in the range of plausible positions. Similar things can be said about $V_{CG} = -V_{AG}$. The sorts of subtleties papered over in these equations can also be brought back into consideration at a later stage. See *infra* Part III.C; *infra* Appendix.

229. The intermediate steps between (5) and (6) are as follows:

$$\text{SOP} = 1/(1 + \{[-V_{AG} - V_{AG}]/[-V_{CI} - V_{CI}]\})$$

$$\text{SOP} = 1/[1 + -2V_{AG}/-2V_{CI}]$$

230. This subsection satisfies a promissory note from *supra* notes 12, 146.

231. STEIN, *supra* note 13, at 173.

acquit. The problem is that it is not clear what he means by doubt that is not “substantiated by the evidence.” Jurors should, of course, always refer to the evidence when deciding whether to convict or acquit. In addition, they must also refer to their life experiences, their background knowledge, their common sense, and even their intuition.²³² Assuming jurors are taking the evidence into account in a reasonable way, the only way to distinguish between reasonable and unreasonable doubt is by determining whether the doubt is too farfetched. But what counts as too farfetched depends on the SOP, the right level of which depends, in turn, on what should be taken to be at stake in the act.²³³ Nothing in the notion of “substantiated by the evidence” implies that the SOP cannot be represented by a number.

Tribe offers a different kind of reason not to use a concrete number. His reason is that “formulating an ‘acceptable’ risk of error” would undermine the expressive “demand for certitude” and would, effectively, violate the MP.²³⁴ But most jurors seem content, in practice, to use an SOP very close to a preponderance of the evidence,²³⁵ and most judges seem content, when articulating the customary understanding, to put a probabilistic value on the SOP.²³⁶ Thus, Tribe likely underestimates the ability of jurors and society as a whole to accept, without thereby becoming disillusioned, that the SOP for a criminal conviction can be identified with a numerical probability lower than certitude.²³⁷ In addition, Tribe is confused about the connection between the MP and a demand for certitude.²³⁸ Thus he fails to give a sound reason not to associate the SOP with a concrete number.

The second objection is that jurors are in no position to make fine judgments, based on the evidence, about the probability of a defendant’s guilt. Surely that objection is based on a sound premise; jurors are amateurs who will serve on a few juries at most during their lives, and they have no scientific basis for assigning specific probabilities to guilt. Indeed, judges, professionals who may regularly adjudicate trials, have no *scientific* basis for assigning

232. A focus on the relevant degree of confidence does not displace the idea that the judgment of guilt or innocence must take the evidence into account in some reasonable way. See TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 80, at 53 (insisting that the SOP cannot be based on “the level of the juror’s degree of conviction” if that conviction is irrational—i.e., disconnected from the evidence presented).

233. See *supra* Part I.B.

234. Tribe, *supra* note 13, at 1374.

235. See *supra* Part I.C. (rejecting the expressivist argument for maximalism).

236. See *id.*

237. The concern with disillusionment is a consequentialist point, taken up in the Appendix, under consideration of “factor 3.”

238. See *supra* Part II.A.

specific probabilities of guilt.²³⁹ What Judge Posner has written about juries in this context applies to judges as well:

In [most] cases the jury's subjective [probability] estimate would float free of check and context. It is one thing to tell jurors to set aside unreasonable doubts, another to tell them to determine whether the probability that the defendant is guilty is more than 75, or 95, or 99 percent.²⁴⁰

Though the basis for this objection is certainly sound, the conclusion is exaggerated. Fact finders, be they judges or jurors, can distinguish between evidence of different strengths. Surely Posner is correct that jurors have no basis for saying that a defendant's guilt is 90% likely as opposed to 95% likely. Nevertheless, that shows only that one cannot ask jurors to make an estimation of probability that is too fine grained. It does not show that jurors' ability to apply probabilistic notions is completely imprecise. There is no reason to doubt that jurors can distinguish, relatively reliably, cases in which the evidence would suggest that the defendant's guilt is nearly 100% certain (essentially conclusive evidence), roughly 90% certain (very strong evidence), roughly 70% certain (moderately strong evidence), roughly 50% certain (equivocal evidence) and so on. If this assumption is invalid, then all bets are off; we have no business relying on jurors to serve as fact finders.

In the end, there is a plausible reason not to give jurors an SOP stated in terms of a numeric probability, even as a rough guide: it might be that jurors should do a *moral* weighing of what is at stake to arrive at the SOP for a criminal conviction, and it might prejudice and undermine their moral weighing of what is at stake if they are told that the SOP should be roughly X% certainty.²⁴¹ But assuming, for the sake of argument, that a consequentialist balance captures the relevant moral issues, and assuming one can work out the inputs to the consequentialist formula reasonably well in advance, then good reason exists to think that courts should give jurors an SOP in the form of a particular probabilistic value.

239. See TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 80, at 77–78.

240. United States v. Hall, 854 F.2d 1036, 1044 (7th Cir. 1988) (Posner, J., concurring).

241. See *infra* Part IV.E. This is, however, merely one reason. It may be morally preferable for legislators or judges to specify a target degree of confidence, based on the same moral calculus.

3. Filling in Values for the SOP

One way to try to arrive at a value for the SOP would be to seek to intuit values for the four terms in equation (5) or the two in equation (6).²⁴² But it makes more sense to try to carefully consider the range of possible consequences of punishment—of both the guilty and the innocent—then to assess, empirically, how likely those consequences are, and then to fill in the values for the two terms in equation (6).²⁴³

Seven factors can be distinguished to provide a plausible set of inputs for equation (6).²⁴⁴ They are:

1. The value of incapacitating criminals as a means of protecting their potential victims;
2. The value of deterring crime as a means of protecting potential victims of crime;
3. The value of the moral force of the law being undermined neither “by a standard of proof that leaves people in [excessive] doubt whether innocent men are being condemned,”²⁴⁵ nor by a sense that criminals can act with impunity;
4. The value of people feeling secure that their “government cannot adjudge [them] guilty of a criminal offense” unless they are guilty;²⁴⁶
5. The disvalue of punishment’s unintended effects on the lives of criminals, their families, and communities.²⁴⁷

242. Some authors have conducted empirical studies, surveying how people value the four terms in equation (5), with the result that people seem committed to an SOP of between 0.50 and 0.58. See Lillquist, *supra* note 15, at 112–13. The value of this work is limited not only by the fact that the values people offer are most likely empirically uninformed, but also by the fact that subjects often do not vote consistently with these SOP values. *Id.* at 113 n.76. These findings indicate, unsurprisingly, that people’s values are not in a stable, reflective equilibrium.

243. Tribe, *supra* note 13, at 1385, assumes that the consequentialist model used to derive equation (6) must refer only to subjective utilities rather than the objective factors considered below. But that is an unwarranted assumption.

244. These factors can work in unusual ways in certain kinds of cases, as will be shown in *infra* Part III.C. In this Section and the Appendix, it is assumed that they work in consistent ways across the range of violent crimes.

245. *In re Winship*, 397 U.S. 358, 364 (1970).

246. *Id.* This explanation by Justice Brennan is another way of expressing Kaplow’s concern with not chilling productive activity.

247. See, e.g., John Bronsteen, Christopher Buccafusco & Jonathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1063 (2009) (“[P]risoners often witness the breakups of their marriages and relationships while in prison and have greater difficulty forming other relationships (including friendships) upon their release. They experience greater rates of unemployment. . . . [U]nemployment and

6. The intrinsic disvalue of punishing the guilty, and the intrinsic disvalue of punishing the innocent; and
7. Any “dynamic” feedback mechanisms between the SOP and the operation of the criminal justice system that may change the way these other factors register.

Factors 1 and 2 call for punishing criminals and, therefore, weigh in favor of a low SOP. Factor 3 is balanced and could cut either way depending on how people feel about the effects of the criminal law. Factors 4 and 5, in contrast to the first two factors, call for reining in punishment and, therefore, weigh in favor of a higher SOP. Factor 6 can cut both ways, though how it cuts depends on whether one should accept the retributive belief that punishing the guilty contains intrinsic value, or believes instead that it is only less bad to punish the guilty than the innocent. And factor 7 aims, like factors 1 and 2, for a lower SOP. Attempting to balance these factors may seem a formidable task, but there are good reasons—as argued in the Appendix—to think that factor 1 and the concern in factor 6 with the intrinsic disvalue of punishing the innocent dominate,²⁴⁸ and that one can treat the remaining factors as minor adjustments that, overall, push the SOP lower, but only slightly. Accordingly, the discussion that follows will focus on the balance between factors 1 and 6, the balance of which will then be adjusted slightly lower.

Starting with factor 1: The failure to incapacitate has fairly clear and significant harmful consequences, at least when the criminals in question are violent.²⁴⁹ To take a first measure of these consequences, one may use the following empirical claims, as reported by Laudan:

[T]he average person who is falsely acquitted of a violent crime will continue committing a couple of them every year for about nine years, before abandoning a life of crime. Since the average time served by someone convicted of such a crime is 3.6 years, we can conclude that every false acquittal enables more than thirty-six crimes (including on average seven violent ones) during the

the dissolution of social ties are two of the most reliable predictors of long-term unhappiness and anxiety. . . . It is worth noting that these negative effects do not accrue only to the former prisoner. Individual unemployment and social dislocation impose significant negative externalities upon the rest of society; the former prisoner frequently must be supported by state aid, cannot adequately support her family, and is more likely to commit further crimes.” (footnote omitted)).

248. This argument broadly tracks the argument in Laudan, *supra* note 15.

249. The remainder of this Part assumes that one can limit the discussion to the SOP for violent crime. For a broader range, and finer gradations, of crimes, see *infra* Part III.C.

time when, but for the false acquittal, the defendant would have been incapacitated.²⁵⁰

We can take the seven violent crimes to establish the core of the harm of acquitting the guilty. The question then is: How can we compare that to the disvalue of convicting the innocent from factor 6, so that we can get a starting value for the SOP, using equation (6)? Laudan considers what it would mean “if we were to regard the harm to an innocent defendant done by a false conviction to be [on average] as egregious as the seven violent crimes it enables.”²⁵¹ Keeping in mind that, according to Laudan, the collection of seven violent crimes has an 11% chance of including a homicide, and a 44% chance of including a rape,²⁵² he suggests that preferring one innocent going to prison for the average period of time to seven violent crimes being perpetrated on innocent people is not unreasonable.²⁵³ Indeed, even if one incorporates a slight priority for allowing the innocent to suffer harm—caused by acquitted criminals—over wrongly convicting and punishing, and thus causing harm to the innocent,²⁵⁴ this tradeoff may seem reasonable.

One reason to object to the idea that one should view these harms as comparable is that the seven violent crimes are presumably dispersed among different victims, although the one innocent person suffers all the harm of punishment, along with the unintended but normally concomitant side effects of punishment—ranging from broken relationships to suffering violent crime in prison. Many consequentialists do not worry about the distribution of harms; they simply add them up. But some consequentialists think distribution matters, too.²⁵⁵ They might object that the concentration of harm on the innocent sent to prison makes that effect even worse. Weighing against that objection, however, is the fact that some possible types of harm caused by criminals who have not been imprisoned would be more extreme—and concentrated on one person—than the harm of being wrongly imprisoned. For example, although an inmate has a roughly 4% chance of being raped in prison,²⁵⁶ that

250. Laudan, *supra* note 15, at 202.

251. *Id.* at 207.

252. *Id.* at 204–05. Laudan casts his number in terms of the numbers of homicides and rapes in 63 violent crimes; dividing by nine brings that number down to seven. *Id.* at 199–200.

253. *Id.* at 205.

254. *See supra* Part II.D.

255. *See, e.g.,* KAGAN, *supra* note 218, at 48–54 (discussing various sorts of distributional concerns that might matter to a consequentialist).

256. According to the Bureau of Justice Statistics: “In 2011–12, an estimated 4.0% of state and federal prison inmates . . . reported experiencing one or more incidents of sexual victimization by another inmate or facility staff in the past 12 months or since admission to the facility, if less than 12 months.” ALLEN J. BECK ET AL., SEXUAL

percentage is substantially lower than the 44% chance that a rape will result from wrongfully acquitting a violent criminal. Some might think that suffering a rape is more devastating than being imprisoned for 3.6 years but not suffering extreme violence during that time.²⁵⁷ And surely being the victim of homicide is worse than being locked up for 3.6 years. Even if the chance of being wrongfully killed is only 11%, one could reasonably prefer 3.6 years in prison.²⁵⁸ Thus, the objection in terms of dispersed harms does not succeed.²⁵⁹

We do, however, need to add the assumption—to be adjusted immediately below—that for every innocent person convicted, a guilty person remains free. If true, that implies that the disvalue of convicting the innocent results from the harm to the innocent person plus the harm one expects that guilty person to cause. If those are equal, then the disvalue of convicting the innocent will be twice that of acquitting the guilty.²⁶⁰

Let us now adjust for the fact that in many criminal trials, there is no question whether the *actus reus* of a crime can be attributed to a particular

VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12, NATIONAL INMATE SURVEY, 2011–12, at 6 (2013), available at <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf> [<http://perma.cc/4ZNZ-XEX2>]. It seems reasonable to assume that if one has made it through one year without being sexually victimized, one is likely to continue to remain free from victimization. That is, it seems likely that the 4% who are victimized changes only slightly from year to year.

257. Of course, those in prison are also likely to be assaulted. By one estimate, 70% of inmates are assaulted by other inmates each year. ENCYCLOPEDIA OF AMERICAN PRISONS 379 (Marilyn D. McShane & Frank P. Williams III eds., 1996). Serious assaults, in which the person is “injured,” are much more rare. “In 1997, 10 percent of state inmates and 3 percent of federal inmates reported being injured in a fight since entering prison.” HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 30 (2001). Presumably, the remaining assaults are normally qualitatively less traumatic than sexual victimization.

258. The odds of a person being murdered in prison do not count significantly against this consideration as they are more than a thousand times lower than the odds of a homicide if a violent felon is wrongly acquitted and set free. The odds of being a homicide victim are generally lower in prison than out. The murder rate in state prisons from 2001 to 2010 was about 4 per 100,000. Margaret E. Noonan, *Mortality in Local Jails and State Prisons, 2000-2010 – Statistical Tables*, U.S. BUREAU JUST. STATISTICS STAT. TABLES, Dec. 2012, at 14 tbl.14 (2012). The national murder rate in 2013 was slightly higher (4.5 per 100,000), which was lower than it had been in the same period, 2000–2010. *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<http://perma.cc/U5VN-XQ9C>] (last updated Oct. 7, 2015). In both contexts, it is more than a thousand times smaller than an 11% chance of a homicide that we are assuming would result from the false acquittal of a violent felon.

259. See *infra* Part III.C.

260. Plugging into equation (6), the $SOP = 1/[1 + V_{AG}/V_{CI}] = 1/[1 + 1/2] = 1/1.5 = 67\%$.

defendant; the question is whether the defendant was culpable or instead lacked the *mens rea* required for the crime charged or otherwise has a defense. Consider, for example, a case in which the defendant is charged with rape, and the question is whether he had the consent of his accuser. Or consider a case in which a defendant in a murder case invokes self-defense. In those cases, convicting the innocent would harm him but would not leave the true criminal at large to commit other crimes,²⁶¹ while acquitting the guilty would have the bad effects of leaving a criminal at large. It is hard to find statistics regarding how often the *actus reus* is not in doubt in a trial, but if we assume that it happens in a quarter of cases, and if we continue to assume that the disvalue of convicting the innocent and letting the guilty go free are on a par, then we should adjust the harm of convicting the innocent downward slightly from 2 to 1.75. The SOP then becomes $1/[1 + 1/1.75] = 1/[1.57] = 64\%$, even lower than before.

On the other hand, there are a few reasons to think this SOP value is too low. First, there is a wide range of estimates of crimes avoided per year of incarceration, and Laudan's number of seven violent crimes is on the high end of the range.²⁶² If we lower the number of violent crimes incapacitation prevents, then we must reduce the negative value of acquitting the guilty. Second, Laudan does not "consider the replacement phenomenon—the possibility 'that some fraction of the crimes that would have been committed by incarcerated individuals are committed by nonincarcerated offenders.'"²⁶³ Taking that into account also shrinks the negative value of acquitting the guilty. Third, Laudan neglects the fact that those who are incarcerated are not completely incapacitated; inmates can still victimize others in prison.²⁶⁴ Indeed, an inmate has a 70% chance of being assaulted in prison each year of his prison term.²⁶⁵ Thus, if an inmate serves a prison sentence of 3.6 years, that inmate can expect his fellow inmates to assault him or her approximately 2.5 times. Assuming that being assaulted is not part of the "punishment" that the state intends to mete out, the innocent person wrongly convicted suffers not only the unjust punishment, but also a good fraction of the violent crimes that one hopes to prevent by incarcerating the guilty. This

261. That situation could also arise if the real criminal is independently incapacitated.

262. Laudan, *supra* note 15, at 202, relies on ALFRED BLUMSTEIN ET AL., CRIMINAL CAREERS AND "CAREER CRIMINALS" 5, 352 (1986). The range of more recent studies is discussed in David S. Abrams, *The Prisoner's Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 937–39 (2013).

263. Epps, *supra* note 15, at 1091 (quoting Emily G. Owens, *More Time, Less Crime? Estimating the Incapacitative Effect of Sentence Enhancements*, 52 J.L. & ECON. 551, 568 (2009)).

264. See *supra* notes 256–58 (discussing the occurrence of rape, assault, and murder in prison).

265. See *supra* note 257.

fact increases the disvalue of convicting the innocent. Using these three factors to change the ratio of V_{AG}/V_{CI} by another 50% yields a ratio of $0.57/2 = 0.29$. The SOP is then $1/1.29$, or 78%.²⁶⁶ Adjusting this number downward slightly to take into consideration the factors discussed in the Appendix, yields a rough estimate of 75% for the SOP, which this Article will refer to as the Laudan standard, after the person who pioneered this sort of consequentialist critique of the customary understanding of the BARD standard.²⁶⁷

C. Variable Standards of Proof

The Laudan standard stands as a plausible rebuke to both the maximalists on the BARD standard and to those who embrace the less extreme customary understanding of the BARD standard. The calculations above, however, relied on questionable assumptions about basic values. Changing those could dramatically affect the resulting SOP. For example, if the harm of a false conviction was undervalued at the beginning of the calculation by a factor of two or three,²⁶⁸ then we should double or triple V_{CI} . Tripling V_{CI} would require adjusting the ratio of V_{AG}/V_{CI} from 0.34—the level that results in an SOP of 0.75—to 0.11, and the resulting SOP becomes 90%, a number essentially identical to the customary understanding of the BARD standard.²⁶⁹

266. Another factor that may further shrink the negative value of acquitting the guilty is that the acquitted in criminal trials are less likely to be career criminals than the average criminal. This means that the acquitted, including the falsely acquitted, are less likely to commit further crimes than one would expect if one simply released 100 convicted criminals and watched to see how many crimes they committed on average. See Georgi Gardiner, *In Defence of Reasonable Doubt*, J. APPLIED PHIL. (forthcoming) (on file with author).

267. Taking into account a more limited range of considerations, Laudan comes to the figure of 67%. Laudan, *supra* note 15, at 207. Given the fuzziness of a juror's ability to estimate probabilities, these figures may come to more or less the same thing. See *supra* Part III.B.2.

268. More, surely, is not plausible. Suppose the harm was undervalued by a factor of four. Then the tradeoff would be between (a) running an average risk of spending 3.6 years in prison, along with all the assaults one would suffer there, and then living with all the negative consequences that follow from having a conviction, and (b) a 44% chance of someone dying by criminal homicide, and of two additional rapes, not to mention other lesser assaults, robberies, etc. Without the homicide risk, one might still choose being victimized by criminals. But when the odds of being a homicide victim are added to that side of the scales, imagining how one could prefer that to 3.6 years in prison is difficult.

269. Of course, one could also say that the harms caused by acquitted violent felons were undervalued. If one takes the risk of homicide seriously, one might argue that this risk was undervalued by an order of magnitude or more, in which

Consequentialists, however, cannot reasonably hope that the reformist implications of their view can be so easily contained. The Laudan standard was derived for violent crimes as a whole, but that category was broader than necessary. Of course, the law does not explicitly use a separate SOP for violent crimes. But whether one is a consequentialist or deontologist, one has good reason not to cling artificially to the idea that only one SOP must be used for all of criminal law.²⁷⁰ Juries already seem to exploit the vagueness of BARD instruction to use a range of standards of proof for different kinds of criminal cases.²⁷¹ Many judges, lawyers, and scholars think that the standard should be higher for the death penalty.²⁷² Moreover, good reason exists to think that, historically, juries used the high BARD standard only in capital cases, and that a much lower standard was used for minor cases.²⁷³ Thus, the idea of a separate SOP for violent crimes is something that has to be seriously considered. And having started down the road of selecting different SOPs for different kinds of crimes, there is no reason in principle to leave the distinction as crude as “violent” versus “non-violent” crimes. Why not distinguish between different sorts of

case the SOP called for by consequentialism would plummet. But the rest of this Part pursues more robust ways of reaching the same point.

270. See TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 80, at 55 (“Where standards of proof are concerned, I am not convinced that one size fits all.”); Kaplow, *supra* note 12, at 786 n.86 (claiming that “optimal evidence thresholds and the evidence threshold . . . will vary greatly by context, even at fairly refined levels”).

271. See Lillquist, *supra* note 15, at 164 (noting that because of the vague standard, “the appropriate level of certainty that jurors will require is left up to the jurors themselves”); *id.* at 169 (noting that studies indicate that “subjects believed that different standards should be used in different cases”); Kaplow, *supra* note 12, at 810 n.128 (“[T]he text earlier in the present Section suggests that the apparently one-size-fits-all conventional rules may already be applied by fact finders in a manner that depends importantly on the circumstances of particular cases much as would a case-specific welfare-based standard that was explicitly open-ended.”); Cullison, *supra* note 224, at 567 (speculating that “courts shun responsibility for fixing a more precise threshold probability because they feel it should vary to some extent from case to case”); Kaplan, *supra* note 224, at 1073 (arguing the same point).

272. See Lillquist, *supra* note 15, at 148–49. Lillquist traced this thought back to Judge John Wilder May’s article discussing reasonable doubt. *Id.* at 104 (citing John Wilder May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 653–56 (1876)). This Article supports that view in the end. See *infra* Part IV.E.

273. See Epps, *supra* note 15, at 1084 (noting that Bruce Smith argues defendants often “did not benefit from a presumption of innocence but, rather, struggled against a statutory presumption of *guilt*.” (quoting Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750–1850*, 23 LAW & HIST. REV. 133, 135 (2005))).

violent crimes?²⁷⁴ Crossing that bridge, however, and considering different SOPs for different types of violent crimes proves to be crucial for understanding the plausibility of a consequentialist approach to the SOP for criminal convictions. For once we start examining the SOP for more finely distinguished violent crimes, we will see that it will be quite hard for a consequentialist to deny the extremity of the implications of consequentialism.

Interestingly, consequentialists have yet to follow the logic of their position to its ultimate conclusion. But this Part will fill in that gap.²⁷⁵ An obvious place to start is with the death penalty. People often assume that the SOP for a conviction that would result in execution should be higher than for other crimes.²⁷⁶ This assumption may seem obviously correct if one considers that the V_{CI} is much greater if the innocent person is not merely incarcerated but killed. It is hard to say just how much worse being wrongly executed is, but if we assume, for the sake of argument, that this result is 10 times worse, then the ratio used to derive the Laudan standard drops to 0.03, and the SOP becomes 97%.

Nonetheless, one has to take into account the harm that would result if the guilty are acquitted. Although the focus so far has been on incapacitation, there are reasons to give special weight to deterrence in the context of the death penalty.²⁷⁷ Cass Sunstein and Adrian Vermeule report studies claiming to show that the deterrent value of the death penalty is so strong that each execution deters between 3 and 18 murders.²⁷⁸ Those

274. This idea is alien to American jurisprudence, but not unprecedented. To use the example of Germany again, the standard on the civil side can vary based on “the circumstances of the case, the nature of the issue and the kind and amount of evidence available.” MURRAY & STÜRNER, *supra* note 189, at 311. Admittedly, the German system uses professional judges in such cases, which arguably makes a difference.

275. Even Laudan ducks the math when its application seems to lead to too radical a conclusion. He writes, for example:

The argument for a revision of the [SOP] downwards is particularly powerful in the case of serial violent offenders. They are the characters who are principally responsible for the staggering amount of violence perpetrated by those who have had repeated, prior brushes with the law. It could be argued that while BARD should be preserved as the standard for first-time offenders, we should utilize a standard that makes it less difficult to convict those with multiple prior convictions.

Laudan, *supra* note 15, at 208. Notice, he does not bother to examine how low the SOP might go.

276. See *supra* note 272.

277. This argument assumes that deterrence in the death penalty context is much stronger than normal. The Appendix, which informed the Laudan standard, assumes a much weaker value for deterrence. See *infra* Appendix.

278. Sunstein & Vermeule, *supra* note 171, at 711–12.

numbers are probably incorrect,²⁷⁹ but suppose for the sake of argument that the middle of that range is as accurate, so that an execution deters 10 murders. That assumption has a tremendous impact on the value of V_{AG} .

To determine the extent of that impact, we need to start more or less from scratch, as the assumptions we used in deriving the Laudan standard were generic, and we need to use more specific ones instead. Let us start, then, with the V_{AG} of ten innocent persons killed by lost deterrence value. That will dominate the disvalue of a court not convicting the killer because even if a killer goes free, the recidivism rate for homicide—and all death penalty cases are homicide cases—is about five times lower than for the average violent crime.²⁸⁰ Therefore, even if a killer is more likely to kill than the average mistakenly acquitted violent felon, the lower recidivism rate means that the odds of him killing again are presumably on a par with the case of a mistakenly acquitted generic violent felon—about 11%.²⁸¹ That is about 100 times smaller than the deterrent effect. Thus, we can focus on the deterrent effect alone.

What makes handling this case so difficult is that the deterrent effect does not depend on the person executed being guilty. As long as people believe that someone is being executed for a horrible crime, then the deterrent effect works the same whether the defendant is actually guilty or innocent. And this deterrent effect will dominate the value of V_{CI} as well. Indeed, it will flip its valence. If we suppose that the core V_{CI} , before the deterrent effect is taken into consideration, is the lost life of the innocent defendant, then the core V_{CI} has a negative value of one lost life. But once we add in the ten lives saved by the deterrent effect, we get a V_{CI} with a value of nine saved lives. But this violates an assumption not yet brought out in deriving equation (6), namely that with the right SOP in place, the value of convictions and acquittals can be equal and positive.

To see the problem, look back at equation (3):

$$V_{Acq} = (P)V_{AG} + (1 - P)V_{AI}$$

279. See COMM. ON DETERRENCE AND THE DEATH PENALTY, NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper eds., 2012) (reviewing 30 years of empirical evidence and concluding that it was insufficient to establish a distinctive deterrent effect).

280. See Charles H. Rose III, *Should the Tail Wag the Dog?: The Potential Effects of Recidivism Data on Character Evidence Rules*, 36 N.M. L. REV. 341, 344 (2006) (summarizing recidivism rates across crimes). In all cases where this Article uses this data, rates are chosen near the high end of the spectrum that Rose reports. The “five times” figures comes from 30% for average violent crime, versus 6% for homicide. How these numbers line up with Laudan’s numbers for failure to incapacitate is unclear. Accordingly, only the ratio—not the absolute value—is used.

281. See *supra* note 252 and accompanying text.

If deterrence is a dominant effect, then the value of an acquittal will be negative no matter what P is. That is because V_{AG} is negative—it fails to get the deterrence effect, a problem that compounds its failure to incapacitate and to deliver just deserts—and V_{AI} is negative as well—as it too fails to get the deterrence effect, and that dominates the good of not punishing an innocent. If both V_{AG} and V_{AI} are negative, then there would never be a reason to acquit.

The only way to make sense of an SOP in such a context is to assume that if P goes low enough, then other factors, specifically factors 3, 4 and 7—the moral force of the law not being undermined by a standard of proof so low that it leaves people in excessive doubt about whether innocent people are being condemned; the value of people feeling secure that the government cannot adjudge them guilty unless they are actually guilty; and dynamic feedback effects—start to outweigh the positive value of deterrence. How low the SOP would have to be for that to happen is an empirical question, and it is difficult to say. But if the claim that each execution saves ten innocent lives were actually supportable with solid empirical data, the state could use that data to counter these worries by contending that one will be safer if the government uses a low SOP. Further, if the death penalty were actually that effective at deterring murder, very few capital murders would occur, thereby greatly reducing the risk that one would face such a charge. Thus it could easily be the case that the SOP should go down well below 50%.

One might object that this argument's empirical claims about the deterrent value of the death penalty are simply too implausible to take seriously.²⁸² This objection, however, is weak insofar as it does not address the counterfactual world in which the deterrent value of the death penalty is as strong as the argument assumes. It thus fails to grapple with the way in which a set of circumstances that is empirically plausible enough to be taken seriously by at least some respected scholars²⁸³ implies that consequentialism *could* call for using a very low SOP in a distinct subset of criminal trials. But even if one were tempted by this objection, one would have to confront the fact that there are other cases, with less dubious empirical assumptions, that lead to the same extreme conclusion.

282. See, e.g., Raymond Bonner & Ford Fessenden, *Absence of Executions: A Special Report, States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1 (from 1980–2000, the homicide rate in states with the death penalty was 48% to 101% higher than in states without the death penalty).

283. See Sunstein & Vermeule, *supra* note 171 (both Sunstein and Vermeule are undoubtedly respected scholars).

Consider the following terrorism hypothetical. Suppose that the government has solid evidence that the defendant, an American male, has affiliated himself with ISIS, but cannot produce any evidence that he has committed a terrorist act yet, and has only weak evidence that he has committed the crime of providing “material support”²⁸⁴ to ISIS. Suppose further that if the defendant is not convicted of providing material support to a foreign terrorist organization, then the government will have to release him. The police could attempt to track his whereabouts, but suppose that as an American citizen, the government could not legally subject him to preventive detention.

To construct an SOP for a case like this, a consequentialist would need more details.²⁸⁵ Therefore, suppose the strong evidence of the defendant’s ISIS affiliation gives the government 90% confidence that he will try to engage in a terrorist act in the near future if the government does not incapacitate him with either incarceration or death. Suppose, further, that the government reasonably estimates that if the defendant commits a terrorist act, he is likely to kill a large number people; under some scenarios he would likely kill just a few, under others he might kill a hundred or more, and the best estimates suggest that the expected lethality of a terrorist act that he would commit, should he successfully commit one, would be 20 innocent deaths. Finally, suppose that the government believes that the probability of stopping the defendant is only 50% if he remains free but under surveillance. Thus, the expected harm of acquitting the defendant, in terms of failure to incapacitate, is nine innocent deaths.²⁸⁶

284. See 18 U.S.C. § 2339A (2012); see also Lillquist, *supra* note 15, at 162 (entertaining a similar hypothetical).

285. One might think that asking for more details implies that one is leaving behind the rule-consequentialism that fits the rule-like nature of law and adopting the sort of act-consequentialism that better fits morality than law. See *supra* note 214. But this sort of shift is not necessarily problematic in the law. The law needs to rely on rules that may be over- or under-inclusive only if trying to tailor the law to individual cases is too difficult from an administrative point of view. If the law can specify a set of considerations that should be brought to bear on an individual case, and the agent in charge of handling those considerations is likely to be sufficiently competent to do so, then there is no reason to insist on a cruder rule. The case described in the text immediately before and after this footnote should be understood in that light.

286. This result is achieved by multiplying a 90% likelihood of the defendant trying to kill 20 people by a 50% likelihood of success. Note that because terrorists have a kind of commitment to their cause that tends to make them immune to deterrence via the threat of punishment, the V_{AG} remains at nine innocent deaths. For a discussion on how deterrence can work against terrorist threats, see generally Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830 (2014).

Once again, but this time within an incapacitation framework, we face a situation in which the value of convicting the defendant may be positive no matter what the SOP. The baseline V_{CI} if the defendant did not engage in providing material support to ISIS—which is consistent with his having affiliated himself with ISIS, as long as he has not yet provided any services to the group²⁸⁷—is the cost of his imprisonment to him, his family, and others who depend on him. The maximum sentence for material support is 15 years in prison.²⁸⁸ In this hypothetical case, there is no reason to worry about convicting the wrong person; the question is only whether this person committed the crime of providing material support to a terrorist organization. Thus, the baseline V_{CI} is completely captured by the harm to the defendant and those who depend on him.

But the positive value of incapacitating him does not depend significantly on his being guilty—that’s what makes this case interesting and problematic. This hypothetical supposes that there is a 90% chance that he will engage in a terrorist act whether he is guilty of material support or not. And we are supposing that the negative expected value of that act, if he is not incapacitated, is a 50% chance of 20 deaths. Applying a standard expected utility calculus to that, the positive value of incapacitating him is 9 lives. Surely that greatly outweighs whatever value one would put on the baseline V_{CI} . Again, therefore, this is a case in which there is value in convicting him whether he is guilty or innocent, and therefore he should be convicted, no matter what the odds of his innocence. This means that just about everything said in the death penalty context transfers to this context: the brake on this sort of abandonment of an SOP must come from other factors, like factors 3, 4, and 7. How low the SOP would have to be for those other factors to outweigh the value of incapacitation is an empirical question, and it is difficult to say what the value would be. Nevertheless, there are reasons to think that the value could be quite low. For example, if most people do not worry that they are at risk of being detained because they do not have certain traits that make them seem like possible terrorists—most importantly, they are not in any contact with Islamic extremists or terrorists of any stripe—then worries that the state might adjudge them guilty even if they are not guilty may arise for only a few people, while most would feel *more* secure. From a

287. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 39 (2010) (holding that the federal law banning the provision of material support to foreign terrorist organizations does not interfere with the constitutional right to associate with such groups, or even to become a member of them).

288. See 18 U.S.C. § 2339A(a). The 15-year limit assumes that the crime is inchoate and that no one dies as a result of having provided material support. If an individual dies as a result of the activity, the penalty can be as severe as life in prison. *Id.*

strictly consequentialist point of view, then, it might make perfect sense to use an SOP well below 50%, perhaps the inverse of the BARD standard as customarily understood, in cases like this.

Notice, then, what this result reveals about consequentialism. What the state is *really* concerned with in the terrorism hypothetical is simply dangerousness. Consequentialism encourages the state to use the criminal law to do an end-run around any independent restrictions that might exist on using preventive detention. If the criminal law is used that way, however, it is serving simply as a fig leaf. It is simply masking, and not very well, what is going on under the surface.

D. Drawing Moral Lessons About Consequentialism and the SOP

The primary lesson to draw from the fact that consequentialism would sometimes recommend using a very low SOP for a criminal conviction is that it does not give the distinction between innocence and guilt its proper moral significance. Consequentialism can give the distinction some weight, but, at least as used by theorists such as Laudan, it treats the existence of guilt as only one consideration among many. In certain cases, concerns with incapacitation or deterrence would swamp the concern with whether the defendant is guilty. But this outcome is morally unacceptable. Guilt should be a precondition for punishment. It cannot serve as a precondition for punishment, however, if it can be said to have been established whenever, and simply because, it would be useful to say that.

Consequentialists may want to respond in one of two ways. First, they might object that the argument in the preceding Section presupposes an overly crude view of consequentialism. In particular, it presupposes that consequentialists cannot let value functions turn on contextual conditions such as whether a low or a high SOP is used to convict. That, they may say, is clearly a false presupposition. Just as consequentialists can give different values to the conviction and punishment of an innocent person and a guilty person, so they can treat the punishment of a person who is wrongfully convicted using a low SOP as worse than the punishment of a person who is wrongfully convicted using a high SOP.²⁸⁹ If this skewing were large enough, it would allow the consequentialist to effectively rule out using a low SOP.

Admittedly, this response formally saves consequentialism from the argument in the previous Section. The problem, however, is substantive. Nothing about the idea of consequentialism itself motivates giving such

289. See Seth Lazar, *Risky Killing and the Ethics of War*, 126 ETHICS 91, 105 (2015) (stating out a similar principle in the context of “risky killing,” according to which a wrongful killing is worse the more likely it is to be wrongful).

weight to whether the SOP used is high or low. Of course, consequentialism has to get its axiology—its theory of value—from somewhere. But insofar as the axiology seems to reflect substantive moral commitments that limit how valuable states of affairs may be brought about, consequentialism seems to be doing no moral work. In other words, the more consequentialism contorts itself in unintuitive ways to match deontological moral commitments, the more it becomes like a Ptolemaic system of astronomy, adding epicycles to its epicycles to strive to match a pattern that it fundamentally does not explain.

Indeed, even granting that consequentialism can accommodate the retributive thought that it is worse to punish the innocent than it is to punish the guilty requires consequentialism to build some version of retributivism into its axiology. If there is to be an explanation for why it is so much worse to wrongly punish someone using a low SOP than a high one, that too will come from—or so the next Part will argue—a retributive account. A consequentialism that is not simply contorting itself to match this retributive account, a consequentialism that uses a more intuitive axiology, one that sets the SOP by straightforward reference to the consequences at stake in convicting and acquitting, as worked out in the previous Section, would not be able to account for the thought that guilt must be a precondition for punishment. It would, at least in certain cases, let concerns with incapacitation or deterrence swamp the concern over whether the defendant is guilty. A straightforward consequentialism like this should be rejected on substantive grounds. And a contorted consequentialism should be rejected as having no substance.

A second consequentialist response challenges the conception of punishment used in this Article. Some consequentialists may see punishment as distinctive not because punishment presupposes guilt in some robust way, but because punishment is a distinctive social practice that, as a legal matter, involves certain legal formalities. That is, some consequentialists may accept that the prosecution must prove, beyond some SOP, that the defendant has committed a crime before the defendant can be convicted and punished. But as long as that connection is met, and the formalities of prosecution and punishment are followed, some consequentialists may be happy to let the overall consequences direct their use of an SOP.

Again, the problem with this consequentialist response is not conceptual or formal, it is substantive and moral. The problem is that punishing without using guilt as a robust precondition for punishment blurs important moral lines. Moreover, blurring those lines cuts short moral inquiry in a way that is inconsistent with showing respect for the rights and dignity of individuals.

A good way to see this problem is to explore a response that consequentialists might want to offer to the criticism raised in Part III.C. Consequentialists might insist that the state must take some action in cases

like the terrorism hypothetical, because choosing merely to surveil the defendant comes with a 50% chance of him being able to successfully execute a terrorist act with an expected death rate of 20 innocent persons. Given that the odds are 90% that he would try to execute such a terrorist act, he should be incapacitated. Thus, the state should use either preventive detention or the criminal law, depending on which promises to be the more effective route to incapacitating him. If the criminal law can be used, then the metaphor of a fig leaf is, they might say, misleading. Rather, if the criminal law accommodated the use of a sufficiently low SOP, then the criminal law should be seen simply as a key that unlocks the legal door to the use of preventive detention.

This argument, although superficially reasonable, ignores a key principle of non-consequentialist moral reasoning: each type of action—in the current discussion, preventive detention versus criminal punishment—has its own conditions for justification, and justifications have their own moral integrity. One may not simply blend these justifications together for a better effect. Preventive detention is permissible only if one or more of a few conditions are met.²⁹⁰ One of these conditions is that even if the state is providing all the resources for policing that it is obliged to provide, the person cannot be effectively policed.²⁹¹ The danger presented by consequentialism is that it bypasses this and other related conditions.

Of course, consequentialists would choose to invest in better policing if that was the most efficient solution to the threat from terrorism. But what if it is not the most efficient solution? What if it would cost more, as an aggregate matter, to invest in more policing, but it would better respect the dignity of autonomous individuals to have better policing and leave even dangerous individuals, who have not yet committed a crime, free to choose whether to respect the law or to try to break it and face the consequences? Before embracing preventive detention, we must determine the strength of the state's duty to provide policing resources, and ask whether the state could, if it met its duty to provide such resources, thereby provide adequate safety to others. If the answer to the second question is no—if it could not provide adequate safety even if it met its duty to provide policing resources—then one can justify preventive detention directly. But if the answer is yes, then one cannot justify preventive detention within a moral framework that respects the dignity of autonomous individuals. Using criminal law as a key to unlock another path to preventive detention may be cheaper and may produce better consequences overall. But doing so ignores whether some extra cost is worth bearing for the sake of respecting the rights and dignity of individuals. And that is why using the criminal

290. See Walen, *supra* note 24, at 922–27, 930–33.

291. *Id.* at 924.

law in place of preventive detention is illicit. It opens a path to justifying preventive detention that does not arise from considering how preventive detention can be made consistent with respect for the dignity of individuals. That is why we must preserve the idea that guilt must be a precondition for punishment. It forces us to ask all the morally relevant questions.

This insight regarding where consequentialism goes wrong—that it does not respect the idea that guilt must be a precondition for punishment—points the way to a better understanding of the SOP for criminal law. The better way to approach the question is via the retributive commitment to that precondition.

IV. A RETRIBUTIVE JUSTIFICATION FOR THE BARD STANDARD

This Part turns from the critical to the constructive. Drawing the lesson from Part I that the right SOP has to reflect what is properly at stake in convicting and punishing a defendant who might be guilty or might be innocent, this Part takes a position on what is at stake. Drawing the lesson from Part III, it concludes that not all consequences can properly be taken to be at stake; otherwise, guilt will fail to serve as a precondition for punishment. It articulates, then, a retributive theory according to which what is at stake is, on the one hand, the importance of doing justice by punishing the guilty, and on the other hand, the importance of not wrongfully punishing the innocent.

This Part first offers an overview of the retributive framework for the BARD standard. It then explains how this retributive solution is different from an earlier one. It continues by considering more carefully one side of the balance: the intrinsic value of deserved punishment. Then it compares this with the disvalue of punishing the innocent. Finally, it examines the retributive balance and its connection to the BARD standard as customarily understood.

A. Overview of the Retributive Framework for the BARD Standard

In a retributive framework, the justifications for punishment include both the idea that people who have committed serious wrongs deserve punishment and the idea that others have a right not to be punished. A retributivist need not suppose that desert is the only reason to punish; the good that punishment can accomplish through deterrence and the incapacitation of potential criminals is, on any reasonable view, a reason

to punish.²⁹² The retributivist point is that these instrumental reasons to punish are relevant only once it has been determined that the person to be punished deserves punishment. Desert functions like a gate in the normative equivalent of a transistor; until it is switched on, the potentially greater normative force of the instrumental reasons is switched off.

The novel claim in this Article is that this transistor-like function is true not only for the act of punishing, but also for setting the SOP for determining that the state may punish someone. The basis of this new claim is the thought that using a consequentialist balance to set the SOP, even if modified by a slight priority for negative over positive patient-claims, would allow a low SOP to function as an end-run around the need to establish guilt as a precondition of punishment. In effect, by relying on the value of incapacitation and deterrence to lower the SOP, the state would declare that certain people deserve punishment simply because society would benefit if the state acted *as if* their guilt had been established. A retributivist cannot condone that sort of end-run around establishing guilt as a necessary precondition for punishment.

The only way to avoid that sort of end-run is to require that the law set the SOP for conviction independently of the overall consequentialist value of convictions. This does not mean that the SOP should not be set by reference to what is at stake in convicting and punishing defendants. The point is only that certain considerations—the instrumental benefits of punishment—must be screened off until the prosecution has established guilt. The intrinsic value of giving those who are guilty of wrongdoing the punishment they deserve is not likewise screened off. It is the retributive value of punishing the guilty, and only that value, that should weigh in the balance against the harm of punishing the innocent, thereby setting the SOP.

It is important to emphasize two things about this solution. First, it does not presuppose a particularly robust view of retributive desert. It does not presuppose, for example, that there is some particular punishment that fits each particular crime; it is consistent with the view that states have a lot of leeway in establishing schedules of proportional punishment.²⁹³ Nor does the solution presuppose that inflicting harsh treatment on wrongdoers is intrinsically desirable—surely the element of retributivism most often attacked as “barbaric.”²⁹⁴ Rather, this solution presupposes only (a) that

292. See Cahill, *supra* note 23, at 29–30; Husak, *supra* note 23, at 995; MOORE, *supra* note 23, at 154.

293. See Walen, *supra* note 25, at 30–31 (arguing that states have a lot of leeway in establishing schedules of proportional punishment). The model that this Article develops could be used, not only for the state, but also for other entities entitled to inflict punishment, such as churches, families, etc.

294. See TADROS, *supra* note 123, at 124.

wrongdoing can result in forfeiture of the right not to be punished, up to some proportional limit, and (b) that when a state establishes a proportional and instrumentally well-justified schedule of punishment, justice calls for the state to follow through and inflict appropriate punishments on those who commit crimes. The only sense in which one must suppose that a guilty person deserves punishment, then, is that he deserves to be held accountable in accordance with the established rules that everyone is expected follow.²⁹⁵ This is not to deny that a more robust retributivism is morally sound, as long as it is not taken to entail the existence of implausibly strong retributive reasons to punish, regardless of the consequences.²⁹⁶ The point is only that one does not have to accept a particularly robust form of retributivism to see that there is some intrinsic value in giving people the punishment they deserve according to well-established laws.

Second, there is no other solution that gives instrumental value of punishment a role in setting the SOP for criminal punishment that will work. One might think that one should continue to count the instrumental value of punishing the guilty, and that one should only screen off the instrumental value that sometimes follows from punishing the innocent. This might be tempting because one might think that consequentialism seemed to embrace a low SOP in death penalty cases—assuming a high deterrence value for executions—and the terrorism hypothetical only because the instrumental value of convicting the innocent gave doing so a net positive value, at least in terms of deterrence or incapacitation. But this would be a mistake, which we can see if we take those two cases in turn.

Start with the death penalty. Suppose that the positive value of convicting the guilty is that it deters murders and would save, on average, ten innocent lives. This gives us a disvalue for V_{AG} equal to the loss of those ten lives. Contrast that with the negative value of executing an innocent person, and put the other considerations to the side as secondary. This suffices to give us a first-order approximation for the value of V_{AG}/V_{CI} of 10. Plugging that into equation (6), we get an SOP of 1/11, or less than 10%! The same thing would result for the terrorism hypothetical. Even if these are only approximately correct, and the SOP would have to be raised a fair bit because of the other factors, it is still quite plausible that the final SOP would be well below 50%. Thus, merely screening off the instrumental value of convicting the innocent will not suffice for giving us an SOP that respects the principle that guilt must be a precondition for punishment. To protect the principle that guilt must be a precondition for

295. See Hugo Adam Bedau & Erin Kelly, *Punishment*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/spr2010/entries/punishment/> (last updated Feb. 19, 2010).

296. See *infra* Part IV.C.

punishment, the instrumental value of punishment—whether the defendant is guilty or innocent—must be screened out.

This retributive position appeals to the core idea shared across deontology, namely that rights must be respected, and that one cannot fully account for the rights people have by a straightforward consequentialist analysis. Certain differences—for example, between negative claims not to be harmed and positive claims to be helped so that one does not suffer harm, and between claims not to be harmed as a result of being used as a means and claims not to be harmed as a side effect—must be respected if rights are to provide a normative space in which people are all properly respected as free and equal beings whose lives register as morally valuable. But they are not the *only* differences that matter deontologically. Respect for individuals also requires that the justification of punishment must presuppose desert. This is not to say simply that it is worse to punish the innocent than it is simply to lock them up. The point is that paths of justification are morally significant.²⁹⁷ There may be more than one way to justify an act such as locking someone up. But at least one such justification must work, in its own terms, if the act is to be justified. The terms for justifying punishment include establishing that the person to be punished is guilty and therefore deserves to be punished. The SOP for establishing guilt must not undermine its role as a precondition for considering other values.²⁹⁸

The positive thesis of this Article is that this balance—in which the instrumental benefits of punishment are screened out as irrelevant to setting the SOP—tips heavily, but not absolutely, in favor of protecting the innocent, giving us the BARD standard, as customarily understood. To complete the argument, it will be necessary to argue for the following three points: (1) that the intrinsic positive value of providing retributive justice is

297. See *supra* Part III.D.

298. This point applies quite generally. If a justification for an action involves a precondition, then only the value reflected in that precondition can be taken into account in setting the relevant SOP; one must screen out other values.

Take, for example, civil trials involving two parties. Each has an equal claim not to be wronged—either by being wronged and not made whole, or by being forced to make another whole when one is not responsible for his need. Assuming that damages are on a par with the harm suffered, the SOP should be roughly 50%. But now, the anti-consequentialist significance of that commitment is clear. All the downstream effects, in terms of chilling productive behavior and deterring harmful behavior, have to be screened out. On this understanding, Kaplow's approach, in *supra* note 12, to the SOP in civil trials is *completely* backwards. Of course, we should seek to deter harmful actions and to avoid chilling beneficial ones. But civil suits are about individual justice, not social engineering. Social engineering must be achieved via other means, such as taxation, fines, policing, etc.

slight but non-negligible; (2) that this value is qualitatively lower than the total disvalue of convicting the innocent; and (3) that the balance between those different values would result in something that could fairly be captured by the customary understanding of the BARD standard. Before addressing these remaining steps in the argument, however, it will be helpful to clarify why this approach to a retributive justification for the BARD standard is different from what has gone before.

B. What is New in the New Retributive Solution

A number of authors have considered and rejected a retributive defense of a high SOP.²⁹⁹ They all target an argument made by Jeffrey Reiman.³⁰⁰ Therefore, this Section will describe Reiman's position, criticize it, and explain why this Article's argument succeeds where his fails.

Reiman's suggestion is two-fold. First, he assumes that a retributive argument has to concern itself only with the "direct negative impacts" of punishing the innocent and of not punishing the guilty.³⁰¹ In other words, he thinks a retributive argument screens off not only the consequentialist benefits of punishing the guilty, but also the consequentialist harms of punishing the innocent. Second, he mistakenly frames the duty to punish as a duty that one must owe to someone or to some collection of people.³⁰² If one grants him this mistaken idea, then his claim looks plausible, namely the claim that however great the harm or wrong to whoever holds the right that the guilty be punished, that harm or wrong pales in comparison with the harm or wrong done to a person wrongly convicted.³⁰³ In this way he reaches the conclusion that the value of V_{AG}/V_{CI} is a small fraction, which would yield an SOP close to 1.0.

299. See Epps, *supra* note 15, at 1141–42; Reiman & van den Haag, *supra* note 21, at 242–43; Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 911–12 (2002); Lillquist, *supra* note 15, at 139–42 (providing a more diffuse discussion of retributivism and its relevance to the SOP for criminal law). Lillquist considers the idea that the conflicting duties a retributivist faces—to punish the guilty and not to punish the innocent—are incommensurable. *Id.* at 140. He then suggests that retributivists might think that "the disvalue of erroneous convictions is distinctly higher than the disutility of erroneous acquittals." *Id.* at 141. But he does not explore why. Rather, he simply says that society makes tradeoffs and then discusses, in a confused way, negative retributivism, failing to take into account that negative retributivism gives positive weight to convicting the guilty only in consequentialist terms. *Id.* at 141–42.

300. See Reiman & van den Haag, *supra* note 21, at 230–34.

301. *Id.* at 232.

302. Reiman considers that it might be owed to the victim, the criminal, or society. *Id.* at 233.

303. *Id.*

However, Reiman's critics correctly take him to task for the mistaken claim that the duty to punish must be owed *to* someone. As Ernest van den Haag put it: "The two duties, to punish the guilty and not to punish innocents, are ends in themselves, independent of the losses or gains of beneficiaries. The duties are categorical, to be carried out unconditionally."³⁰⁴ Withholding judgment, for the moment, on van den Haag's position on the duty not to punish the innocent, a retributivist should embrace his claim about the duty to punish the guilty. On a retributive theory of punishment, the state has a duty to punish, the duty can be defeated by other considerations (such as it being too costly), and no one has a right that it punish the guilty.³⁰⁵

If Reiman's critics were correct in thinking that both retributive duties were on a par, then their conclusion that retributivism cannot be the ground of the BARD standard would be correct as well. For then, retributivism would either have nothing to say about the SOP,³⁰⁶ or perhaps it would suggest using something like the civil SOP of 51%.³⁰⁷ But his critics all miss an important asymmetry and in that way mirror Reiman's mistake. Reiman mistakenly thinks that both retributive duties—the duty to punish the guilty and the duty not to punish the innocent—correspond to rights. His critics mistakenly think that neither retributive duty corresponds to rights. In truth, the duties differ in this regard. The duty to punish the guilty reflects the value of doing justice. The duty corresponds to no right and is owed to no one in particular. But the duty not to punish the innocent is owed to the innocent. That asymmetry is fairly intuitive and deeply connected to the asymmetry used in the new retributive account of the SOP for criminal law.

In this new account, the reason the SOP is high is that the disvalue of not doing justice—by not punishing the guilty, screening off the instrumental harms that flow from this failure to punish—is substantially less than the disvalue of punishing the innocent. Most of the latter comes from the harm done to the innocent person, such as the harm connected to and giving magnitude to the wrong done to him.³⁰⁸ The difference in value reflects the difference between concrete harms connected immediately to a wrong and a mere abstract wrong. If one thinks of both wrongs as mere abstract wrongs, one will not see this asymmetry, which is the mistake

304. *Id.* at 242.

305. One might think that victims, if anyone, have a right to ensure that their wrongdoer is punished. *But see infra* Part IV.C.

306. *See Epps, supra* note 15, at 1142 & n.370; Reiman & van den Haag, *supra* note 21, at 242–43.

307. *See Christopher, supra* note 299, at 913 (suggesting that retributivism should settle on a preponderance-of-the-evidence standard).

308. There is no obvious reason why the SOP cannot take into account other sources of the disvalue of punishing the innocent. It simply cannot take into account any instrumental benefits of punishing the innocent.

Reiman's critics make. But if one recognizes that one wrong is measured by a concrete harm, and the other not, then one can see the retributive solution clearly.

C. The Intrinsic Value of Deserved Punishment

The proposition that there is some intrinsic value in punishing the guilty—a value that reflects in some way the idea that they deserve to be punished—can be supported in two ways. First, it is supported by strong intuitions. Consider this thought experiment: a violent rapist has been incapacitated by some accident so that he is no longer a threat to anyone; he has also agreed to cooperate in a sham punishment in which he reports to a film studio every week to be filmed as though he is in prison, thereby achieving general deterrence. This sham is very well designed, so that no one will ever discover it. In reality, however, other than being obliged to participate in this sham on a regular basis, he lives out his days in comfort, pursuing his hobbies.³⁰⁹ The instrumental goals of punishment are met in this case without him having to be punished. But most people think that punishment is still called for.

Second, holding people accountable for their wrongful acts is also crucial to treating each other as autonomous agents with dignity.³¹⁰ This point seems so clearly correct that it is hard to doubt that we should *condemn* the guilty. More problematic is justifying the infliction on them of harsh treatment proportional to the severity of their crime and their culpability for it. There are, however, a number of ways of trying to justify this second, more controversial aspect of retributivism.³¹¹ It is not necessary to rely on any of them here. It suffices to invoke the idea, already introduced, that the notion of deserved punishment is supported by the idea that justice calls for giving people the punishment they were told to expect if they chose to violate the criminal law, assuming that the law is itself sufficiently well justified and that the punishment is proportional to the gravity of the crime.³¹²

D. The Relative Weakness of the Intrinsic Value of Punishing the Guilty Compared to the Harm of Punishing the Innocent

Assuming that some retributive reason to punish exists, the next question is: How strong is it? There are two sorts of reasons to think that

309. See MOORE, *supra* note 23, at 98–101.

310. See Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475 (1968).

311. See Walen, *supra* note 25, § 5.

312. See *supra* note 295 and accompanying text.

it is not particularly strong. First, intuitively, this reason to punish cannot be very strong given the way we readily forsake seeking it. This can be seen in a number of ways. Consider, for example, the fact that we often do not object to mercy being shown. Especially when the crime was not exceedingly heinous, the criminal is repentant, and the victim endorses it, merciful forgiveness of punishment can be morally praiseworthy.³¹³ But notice what merciful forgiveness implies about the value of punishment. For the act of forgiveness to be mercy, the punishment must still be deserved. But for mercy to be praiseworthy, the intrinsic value of the deserved punishment must not be that great.

Consider also the fact that prosecutors and the police are rarely in a position to arrest and prosecute every person suspected of having committed a serious crime. The problem is not simply that the police and prosecutors may not always have enough evidence. The problem is often that they do not have the resources to obtain enough evidence, or to prosecute every case that they would ideally want to prosecute. They do not have these resources not simply because they do not exist, but because almost every society has other priorities, ranging from maintaining roads to educating children, to allowing taxpayers to keep their money. This shows that punishing the guilty is not of paramount importance, even given all the instrumental benefits it may provide. Strip aside those benefits, and the intrinsic value of punishing the guilty must be relatively weak indeed.³¹⁴

Second, there is a theoretical reason to think that the intrinsic value of punishing the guilty is not particularly strong: it is an abstract interest in justice. No individual has a particularly compelling personal interest in punishing the guilty. This may seem an odd thing to say. One might think that the victim, or the victim's close family and friends, have an acute interest in retributive justice being done. But that thought confuses retributive justice with some combination of vengeance or restorative justice. Vengeance is personal; retribution is not.³¹⁵ Admittedly, it is now common to give victims some say in how punishment is carried out.³¹⁶ But this is an accommodation of their special, personal interest in seeing justice done, and a reflection of the belief that the degree of harm done—a matter about which a victim has privileged information—is relevant to the severity of the crime. It does not imply that victims have the right to

313. This thought echoes the near universal consensus that Kant overstated things when he wrote that “blood guilt” would cling to a people that does not execute those who deserve to be executed. *See infra* note 348.

314. *See* Husak, *supra* note 23, at 996–1000.

315. *See* ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 367–68 (1981).

316. *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611 (2009).

demand that justice be done or that justice is done in their name. And restorative justice is a tort-like position, that the wrongdoer should address his victim and try, as far as possible, to make his victim—and the community—whole,³¹⁷ not a retributive concern with giving the wrongdoer the punishment he deserves.

Weighing the abstract good of doing justice against the very concrete evil in wronging a particular person, it seems clear that, all else equal, the wrong to the individual should matter more. To make this concrete, imagine again the case of a rapist.³¹⁸ Let us suppose, to make the case even more concrete, that the rapist deserves to spend ten years in prison for his crime. Now compare the concrete harm—stigma, lost liberty, high risk of assault, and lost opportunities—of wrongly being sentenced to ten years in prison as a rapist, and weigh that against the injustice of a rapist escaping punishment entirely. But to avoid bringing illicit considerations to bear, assume that the rapist will not commit any more rapes in the future. And assume that the rape victim has no interest in seeing the rapist suffer. It is hard to see how one could reasonably care equally about the disvalue of the guilty rapist not getting the punishment that he deserves and the injustice of an innocent non-rapist getting punishment that he does not deserve. This is the truth behind Justice Harlan's claim that "it is far worse to convict an innocent man than to let a guilty man go free."³¹⁹ Although Harlan thought of his claim as appealing to consequentialist reasons,³²⁰ it is better understood as reflecting a retributive insight into the comparative weight of the two possible unwanted outcomes.

E. The Retributive Balance and the BARD Standard

Assuming that the correct balance for setting the SOP tips heavily, but not absolutely, in favor of protecting the innocent, we must now determine whether to accept that the resulting balance is the BARD standard as customarily understood—a roughly 90% probability of guilt.

We can still use equation (6) to answer that question. Recall that equation (6) represents the SOP as $1/[1 + V_{AG}/V_{CI}]$. This was derived from the assumption that the two values we want to balance are the disvalue of acquitting the guilty and the disvalue of convicting the innocent, which is exactly what the retributive model says should be balanced. The difference

317. See Antony Duff, *Legal Punishment*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/> (last updated May 13, 2013).

318. See *supra* note 309 and accompanying text (introducing Moore's rapist example).

319. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

320. See *id.* at 373–74.

between the retributive model and the consequentialist model is only that the retributive model screens off the instrumental value of punishment when setting both the V_{AG} and the V_{CI} .

Admittedly, the ratio of V_{AG}/V_{CI} reflects an inherently vague moral weighing, and reasonable people could differ on what sort of numerical value will result. But the range is not completely unbounded. The SOP should not be maximally high—not 99% or higher—nor should the SOP be even close to as low as a preponderance of the evidence. It should fall somewhere between those two standards. Speaking only for my own judgment of how to strike that balance, I would put it on the high end. I find the abstract interest of justice significantly less compelling than the threat of a concrete wrong to an individual. Thus, I would peg the SOP around where the BARD standard as customarily understood lies.

This Section will argue two points about this account of the SOP: first, that this vagueness is a feature, not a bug, and second, that it provides a fairly constant value across much of criminal law.

On the feature point: If we frame reasonable doubt as the doubt that one would think sufficient if one weighed the abstract harm of not doing justice—by not giving criminals the punishment they deserve—against the concrete harm of convicting the innocent, then we invite jurors to engage in a moral weighing. Leaving the determination to a well-instructed jury, then, is arguably appropriate.³²¹ It conforms to a significant feature of the traditional role of the jury, namely ensuring that punishment is not merely technically legal, but just. A jury of the defendant's peers can use jury nullification³²² to provide a community check on the professionalized bureaucracy, ensuring that elites are not ignoring the community's sense of justice.³²³ The same interest in appealing to the community's sense of justice would support giving the jury the task of finding the appropriate moral balance to set the SOP for a criminal conviction. If that interest is

321. The jury must be well-instructed because good evidence shows that BARD jury instructions are often poorly designed and leave juries far too prone to convict. *See generally* Solan, *supra* note 90 (discussing whether the BARD standard is the best way to promote the purported values of the American criminal justice system). *But see* Lillquist, *supra* note 15, at 191–93 (arguing that there is reason to doubt that jury instructions can make much of a difference).

322. *See, e.g.*, Kent Greenawalt, *Conflicts of Law and Morality—Institutions of Amelioration*, 67 VA. L. REV. 177, 224–30 (1981). Note that the role of juries in checking the power of the government to prosecute in unjust ways explains why American juries do not have to explain their verdicts. If they explained their verdicts, that would invite overturning them on appeal.

323. *See, e.g.*, AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 87–88 (1998) (arguing that when the Constitution was drafted, the criminal jury was meant to provide populist protection against overreaching governmental officials).

judged to be sufficient, then jury instructions on the BARD standard should emphasize only what is at stake and refrain from providing any numerical or other guidance on what the SOP should be.

On the other hand, instructing jurors properly is difficult.³²⁴ It would be important to test how juries—or well-constituted mock juries—actually handle an instruction that asks them to balance the importance of doing justice by punishing the guilty, without concern for deterrence or incapacitation, against the disvalue of convicting the innocent. It may turn out that this instruction does not make much sense to juries. Or, even if it makes sense, juries may tend to interpret it too close to the Laudan standard, or too close to a maximalist interpretation of the BARD standard.³²⁵ In that case, it might be best to operationalize the standard by using a “firmly convinced” standard, or a “be sure and convinced” standard. It may be best to tell the jury to imagine themselves getting some level of penalty if they get it wrong, to help them avoid judging guilt too cavalierly. Or it may be best to insist on the importance of getting convictions if they seem to be too reluctant to convict. It might even be best to set a target probability for the relevant degree of confidence.³²⁶ These possibilities should be empirically tested and ultimately legitimated through democratic legislation. The philosophical point, however, is that the ultimate standard that any jury instruction should aim to operationalize is whatever threshold probability of guilt reasonable people would come to, after clear reflection, regarding the balance between the intrinsic value of giving the guilty the punishment they deserve and the total disvalue of convicting the innocent.

Turning now to the second issue in this Section: Would this approach to the SOP provide a constant value across different crimes? One might think not. It might seem that the present account would call for the SOP for a conviction to vary across different kinds of crimes and penalties, just as we found that it should vary if set within a consequentialist framework.³²⁷ This is because, as the severity of a crime goes up, it might be thought more important to do justice by punishing the wrongdoer, thus lowering the SOP. But there is reason for a retributivist to think that another factor would generally counterbalance this first consideration. For as the severity of the crime increases, the penalty should also increase, which would also increase the cost of a false conviction. There is no reason

324. See Lillquist, *supra* note 15, at 185–86 (discussing not only the difficulty but the danger of unleashing legal argument over how to instruct the jury, a danger that arises when a particular instruction is attempted).

325. Who is to say that a jury’s interpretation is too close to either pole? Academics and other commentators have a right to have their say, but ultimately legislatures and judges have the relevant legal authority to say.

326. See *supra* Part III.B.2.

327. See *supra* Part III.C.

to think that these would not generally rise in a proportionate tandem, keeping the right SOP generally invariant.³²⁸

There are, however, cases in which the penalties do not always rise in proportionate tandem with the severity of the crime and the SOP would therefore vary. Consider, first, the penalty for selling cocaine, which under the federal sentencing guidelines is 4.25 to 5.25 years for selling less than 2 kilograms.³²⁹ Assuming that the dealer is not selling to children, that sentence seems disproportionately large for a victimless crime. That should drive the value of convicting the guilty down, which, in terms of equation (6), is the equivalent of driving the disvalue of acquitting the guilty down.³³⁰ If we assume that V_{AG}/V_{CI} goes down, and we assume that jurors are not ready to engage in straightforward jury nullification, then they should treat the SOP as an especially high SOP for such a crime.

Now, consider again the death penalty. We noted above that consequentialists might have reason to adopt a very low SOP for the death penalty. They would have reason to do so as long as the studies showing that the death penalty has a strong power to deter murder are more or less on the mark.³³¹ But for a retributivist, those deterrence effects are screened off. Instead, what is relevant is that the harm to an innocent victim is irreversible—meaning that V_{CI} goes up. In addition, the idea that it can be deserved is dubious, meaning that V_{AG} goes down. Combining the two, the value of V_{AG}/V_{CI} goes down, meaning that the SOP should go up. Therefore, as with the selling of cocaine, if the jury is not willing to engage in jury nullification, it should at least use an unusually high SOP.³³²

328. *Contra* Lillquist, *supra* note 15, at 142 (doubting that *negative* retributivists could justify using the same SOP across cases but failing to anticipate the present retributivist model).

329. The sentencing guidelines rate the crime of possessing with intent to distribute between 500 grams and 2 kilograms of cocaine as a level 24 offense. U.S. SENTENCING COMM'N, U.S. SENTENCING GUIDELINES MANUAL § 2.D1.1(c)(8), at 148 (2014). The sentencing table assigns to that level, with no prior convictions, a term of between 51 and 63 months in prison. U.S. Sentencing Comm'n, *Sentencing Table* (Nov. 1, 2014), http://www.usc.gov/sites/default/files/pdf/guidelines-manual/2014/2014sentencing_table.pdf [<http://perma.cc/3SFC-CFGX>].

330. *See supra* note 227 and accompany text.

331. *See supra* notes 277–79 and accompanying text.

332. What if one is accused of a truly horrible crime such as the torture, rape, and murder of multiple children? Given that there is a limit to how high the penalty can go, but that the importance of doing justice can continue to go up, would this not call for lowering the SOP at the high end of horrific crimes? The clear implication of the present theory is yes. If the death penalty were involved, it might take the SOP back down to the normal criminal level. If the maximal penalty were life in prison, then it might go lower. It should nevertheless stay well above the civil standard. No matter how strong the pull of doing abstract justice is, the concrete wrong done by punishing the innocent should outweigh it.

Finally, consider the case of a very minor crime, the kind of regulatory matter aimed at keeping a certain kind of behavior from becoming too common for the general welfare, and punished by a very small penalty, such as a fine or a brief period of community service. In such a case, we may have a different reason for departing from the customary understanding of the BARD standard. The penalty may carry so little stigma and impose such a small burden that we are willing to relax the requirement that desert be established before it be given.³³³ That does not mean that the penalty can be imposed at random. But it suggests that one may approach the use of such penalties in a more consequentialist fashion. If the desert requirement can be relaxed in such cases, and the instrumental values of convicting the guilty can be brought to bear, then the disvalue of acquitting the guilty may rise relative to more serious crimes. That could lower the SOP to something more like the Laudan standard, or even the civil standard.

CONCLUSION

The SOP for convicting and punishing a criminal defendant should reflect what is properly at stake in such an act. What is properly at stake is, on the one hand, the value of doing justice by giving criminals the punishment they deserve, and, on the other hand, the disvalue of punishing, and thereby wronging, an innocent person. If the SOP for criminal punishment reflected a balance of all the consequences of punishment, one might reasonably conclude that it should be substantially lower than the customary understanding of the BARD standard. But we should not permit the instrumental importance of punishment—whether narrowed down to the instrumental value of punishing only the guilty, or considered broadly to include the instrumental value of punishing the guilty and the innocent—to affect the threshold determination that someone is guilty. Doing so would negate the retributive commitment to treating guilt as a precondition for punishment; it would allow the SOP to do an end-run around that precondition. Only by screening out those instrumental values can we properly respect the retributive commitment to punishing the guilty, and only the guilty. The resulting balance, once the instrumental values of punishment have been screened out, tips substantially in favor of protecting the innocent. The BARD standard, as customarily understood, properly captures this tipping.

333. When the imposition on a person is small enough, there is reason to think that we can relax deontological restrictions that otherwise would apply if doing so would sufficiently serve the greater good. *See* Walen, *supra* note 123, at 428 (emphasizing that the MP “holds that it is impermissible to cause *significant* harm to others.” (emphasis added)).

APPENDIX

In Part III.B, this Article derived the Laudan standard, an SOP of 75%, by considering only the first and sixth of seven factors relevant to the value of V_{AG}/V_{CI} : incapacitation and the intrinsic disvalue of punishing the innocent. That Part then claimed that the other factors, taken together, push the SOP slightly lower. This Appendix will argue for that claim, starting with an SOP of 78%, which corresponds to a value for V_{AG}/V_{CI} of 0.29, the number used in Part III.B before it was adjusted down for the considerations raised here.³³⁴

The next factor to take into account, factor 2, is deterrence.³³⁵ Convicting and punishing defendants generally has deterrent value, even if they are in fact innocent, while acquitting people generally works to lower the deterrence value. Thus, the value of deterrence generally presses for more convictions. It does so by raising the disvalue of V_{AG} and diminishing the disvalue of V_{CI} , which together lowers the value of the SOP. There is, however, a limit to how low the SOP can go without undermining deterrence. Insofar as “there is a chance of being punished no matter what one does, the benefits of following the law are reduced.”³³⁶ But as long as one is more likely to face prosecution and punishment if one is engaged in crime than if one is truly innocent, then instances of punishment will tend to deter crime.

One might naively think that the SOP would have to be at least 50% for it to be the case that one is more likely to face prosecution and punishment if one has in fact committed the crime in question than if one has not. But in truth, the SOP could go much lower. To see why, consider this artificial example. Suppose one in a hundred people is engaging in a certain crime, X. If police tended to arrest people, prosecutors tended to prosecute people, and juries tended to convict people randomly, then there would be no prudential reason, based on fear of punishment, not to commit X. But suppose the effective SOP for arrest was 10%, and that prosecutors and juries could rely on 10% likelihood of guilt to reach a conviction—they aimed to confirm that the arrest standard was properly met. That standard is far from random; one could rationally hope that by not doing X, one would not seem even 10% likely to have committed X. This means that the real question is simply: How much lower should the SOP go to achieve deterrence?

334. See *supra* note 266 and accompanying text.

335. This was also taken into account, though only in the limited context of the death penalty, in *supra* Part III.C.

336. See Epps, *supra* note 15, at 1126 n.293.

There are three reasons to think that the effect of deterrence on the SOP should not be large. First, the odds of criminal acts resulting in conviction and punishment are, as a general matter, fairly low.³³⁷ This presumably reflects, in large part, the fact that the odds of being caught are fairly low. Accordingly, even a fairly sizeable drop in the SOP that the prosecutor must meet, making it easier to get a conviction, is unlikely to register with most criminals as a significant change in the probability of conviction and punishment. Second, criminals are generally not particularly sophisticated calculators of rational self-interest.³³⁸ This is not to say that the threat of punishment does no good whatsoever. If the threat were completely removed, it is very likely that many people would commit crimes who otherwise would not. But a small rise in the conviction rate, caused by a lowering the SOP in criminal trials, is unlikely to have a pronounced effect.³³⁹ Third, as David Abrams notes, studies looking at the benefits of a 10% increase in sentences across a range of violent crimes (rape, robbery, assault, and burglary) show that incapacitation provides “the largest benefit for each crime.”³⁴⁰ Indeed, the table he provides indicates that the benefit of incapacitation is roughly twice that of deterrence—most of which is general, as opposed to specific—across the range of crimes. Suppose, then, that deterrence increases the value of V_{AG}/V_{CI} by at most 50%. If we start with a V_{AG}/V_{CI} ratio of 0.28 and increase it by 50%, we get a new value of 0.42. Plugging that into equation (6), the SOP drops from 78% to 70%.

337. One way to see this is to consider a British study of convicted felons who self-reported “that they commit offences at around 140 per year in the period at liberty, before they were imprisoned.” JOHN HALLIDAY ET AL., *MAKING PUNISHMENTS WORK*, app. 6, at 130 (2001); see also Paul Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 184 (2004) (“The overall average of conviction for criminal offenses committed is 1.3 per cent—with the chance of getting a prison sentence being 100-to-1 for most offences. Even the most serious offences, other than homicide, have conviction rates of single digits.”).

338. See e.g., Robinson & Darley, *supra* note 337, at 179 (“Available evidence suggests that potential offenders as a group are people who are less inclined to think at all about the consequences of their conduct or to guide their conduct accordingly.”). There might be reason to believe that this is particularly true for violent offenders and less true of white-collar criminals, whose crimes normally take significant forethought. If that is correct, then deterrence may have more value for them.

339. As Robinson and Darley write: “criminal law—the substantive rules governing the distribution of criminal liability and punishment—commonly does not materially effect [sic] deterrence.” Robinson & Darley, *supra* note 337, at 173.

340. Abrams, *supra* note 262, at 962.

Let us now turn to factor 3, which refers to the importance of the moral force of the law being undermined neither “by a standard of proof that leaves people in [excessive] doubt whether innocent men are being condemned,”³⁴¹ nor by a sense that criminals can act with impunity. Given that the SOP used in practice, especially when the “firmly convinced” explanation is not given, seems to hover between 50% and 70%,³⁴² there is no reason to worry that this number, 70%, would be problematic in the first way.³⁴³ And given that a lower SOP than the customary understanding of the BARD standard calls for would make it harder for criminals to act with impunity, there is reason to think that factor 3 would, if anything, push the SOP slightly lower. However, given that deterrence and incapacitation are the primary ways in which the criminal law prevents criminals from acting with impunity, we can assume that this factor has already been factored in.

Factor 4 was the importance of people feeling secure that their “government cannot adjudge [them] guilty of a criminal offense” unless they are guilty. This factor registers the importance of two distinct concerns. First, it registers the importance of being free from a general fear that one will be punished for a crime one has not committed. Second, it registers the importance of not being “chilled” or deterred from doing productive things for fear that one will be mistakenly taken to have done something criminal. Both seem to push to raise the SOP, but they are importantly different. Accordingly, it will be best to consider these two concerns one at a time.

The general worry does not seem to present much of a reason to raise the SOP above 70%. The reason is that the SOP in use seems to be at that level or lower, and yet people do not seem to be too worried that the government can adjudge them guilty if they are in fact innocent.³⁴⁴ If the

341. *In re Winship*, 397 U.S. 358, 364 (1970).

342. *See supra* notes 93–106 and accompanying text.

343. *See Epps, supra* note 15, at 1096 (“[W]e have no good reason to be confident” that something like the Blackstone principle is necessary for people to accept “that the law is morally legitimate.”).

344. Why people are not particularly worried about being falsely convicted, given the relatively low SOP in use is curious. Doubtless there are many factors. One is that they may not realize that the SOP in use is lower than the customary understanding of BARD. Another may be that the SOP has relatively little to do with whether people feel harassed by the criminal justice system. As Douglas Husak has pointed out, overcriminalization is such that “[p]erhaps over 70% of living adult Americans have committed an imprisonable offense at some point in their life.” DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 24 (2008). Yet a much smaller percentage has been sent to prison. What controls whether someone is prosecuted and convicted is mostly the discretion of the police and prosecutors. Those who feel harassed will most likely be those who are viewed suspiciously by those in power, i.e., those who are poor or African American or Hispanic. *See, e.g., Joseph E. Kennedy, Drug Wars in Black and White*, 66 *LAW & CONTEMP. PROBS.* 153, 155 (2003) (arguing that

SOP were to drop much lower, then the cost of this generic fear might rise. But even then, people would have reason to fear only if those who determine who is brought to trial—the police and prosecutors—failed to track reasonably well who was engaged in criminal activity. If the police arrest the innocent only rarely, and if prosecutors do a reasonably good job of screening out the innocent, then the odds of being punished if one is innocent will be very low, even if the SOP for conviction at trial were well below 50%.

Arguably the more important worry is the worry about chilling effects. Consider two examples: rape and fraud. If the SOP for both were very low, then one would want to protect oneself from punishment by staying far away from the line of committing either crime. But consider the costs of doing so. To avoid being wrongly convicted of rape, men would want to be very confident that their sexual partners have consented. Beyond that, they would want to be very confident that their sexual partners would never decide to accuse them of rape. Though this might at first seem to be a good thing, from a feminist point of view, it would in fact greatly chill, or at least distort, sexual relations, even within marriage. This could have seriously deleterious social consequences. A similar point could be made with fraud. It would cause people to be very cautious before engaging in business transactions. But that would put a huge damper on business activity, which could have seriously deleterious economic and social consequences. If we assume that these problems are not serious as things stand, then there may be no pressure to raise the SOP above the Laudan standard. But there is strong reason to be concerned about lowering the SOP far below that standard, especially if doing so encourages the police and prosecutors to adopt a lower SOP for their acts of arresting and prosecuting.

Factor 5 was the disvalue of the effects of punishment that are not intended as punishment on the lives of criminals, and on their families and communities. This effect is surely important. The violence that prisoners often suffer in prison is presumably not intended as part of the punishment;³⁴⁵ presumably it is merely tolerated because the costs of suppressing it are considered too high and because it is hard to motivate politicians to care about the plight of the imprisoned. Post-sentencing harm to criminals is also presumably not normally intended as part of the punishment.³⁴⁶ Both

African Americans are disproportionately impacted by drug laws because of their “otherness”); William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795 (1998) (arguing that the disproportionate impact of drug laws on African Americans is really a result of class dynamics in the criminal law).

345. See *supra* notes 256–58 and accompanying text.

346. This is an empirical, not a conceptual claim. It is quite plausible that certain deprivations that are imposed by law and continue even after a criminal has served his sentence—such as being barred from voting—should be understood as

are negative effects that weigh against punishing. Likewise, the harm to families and communities is also presumably, at least in modern, liberal democracies, not an intended effect. The fact that we are willing to inflict these harms for the sake of punishing the guilty implies that we think that the benefits of punishment outweigh these costs.³⁴⁷ But when these costs are pointlessly borne, because the person punished is innocent, they surely weigh more heavily against punishment. Let us suppose that this harm is half as great as the harm to the innocent person. If we increase V_{CI} by 50%, that would undo the 50% bump we gave the ratio of V_{AG}/V_{CI} when we took deterrence into account, bringing us back to an SOP of 78%.

Factor 6 is the intrinsic value of punishing the guilty and not punishing the innocent. The latter has already been taken into account; the former, however, has not yet played much of a role. Part III.A noted that the idea that there is some distinctive value in convicting the guilty is the reason to use a consequentialist, rather than a utilitarian, framework. The question is: What kind of value does it have? Those with retributive inclinations will think it has positive value; others, who accept only the negative retributive idea that culpability is a necessary condition for intentionally inflicting punishment, will think it is still bad thing, just a less bad thing than punishing the innocent. How should we take those possibilities into account?

Technically, V_{CG} is outside the concern of equation (6), which is concerned with only the V_{AG} and V_{CI} . But we can assume that the value for the SOP derived so far represents equation (5), which does give a role to V_{CG} , and then see how varying that value affects the SOP. As a reminder, equation (5) holds:

$$\text{SOP} = 1/(1 + \{[V_{CG} - V_{AG}]/[V_{AI} - V_{CI}]\})$$

If one thinks it is a bad thing to convict the guilty, then presumably that is because of the bad effects on the person being punished. As noted when discussing factor 5, the presumption is that these bad effects are

longer-lasting punitive responses. See Alec Walen, *A Punitive Precondition for Preventive Detention: Lost Status as a Foundation for a Lost Immunity*, 48 SAN DIEGO L. REV. 1229, 1264–65 (2011). Nevertheless, it seems unlikely that this is the case for the majority of post-sentence harms.

347. *But see, e.g.*, Bronsteen et al., *supra* note 247, at 1064 (arguing that these extra costs, while “understood,” are “ignored” by politicians writing sentencing codes). Another harm that wrongful conviction might impose on both the wrongly convicted person and the community is the risk that innocent people sent to prison might be converted into criminals. Again, we willingly run the risk that the guilty will turn into more hardened criminals in prison. The risk is worth adding to the calculation only when it is pointlessly borne.

outweighed by the good effects of punishment, so taking them into account means, at most, that the value of convicting the guilty is slightly lower than it would be if this were not taken into account. Plugging that into equation (6) reduces the numerator in the ratio of Vs. That means that if the SOP had been $= 1/(1 + 0.29)$, then we can reduce the value of 0.29, which raises the SOP. If, however, one thinks it is a good thing to punish the guilty, then the change in V_{CG} will be in the opposite direction; it will grow. That will cause the value in the numerator in the ratio of Vs to grow, which has the effect of shrinking the SOP.

How large would these effects be? Not large. There is a common view that retributivists must think that the importance of punishing the guilty is on a par with that of not punishing the innocent.³⁴⁸ But this is an extreme view of retributivism, held by few of its modern proponents.³⁴⁹ A reasonable view would hold that punishing the guilty is only one of many goods to be achieved, and moreover that it is a good that one would not sacrifice *much* to do.³⁵⁰ Accordingly, it seems fair to say that one should be willing to raise the numerator only a bit, say 20%, even if one accepts that it is good to punish the guilty. And we can say that the alternative view, that the suffering of the guilty is bad, should shrink the value of the numerator to the same extent. That would change the ratio of the number

348. Kant and Hegel seem to have held this view. See IMMANUEL KANT, THE METAPHYSICS OF MORALS 142 (Mary Gregor trans., 1991) (1797) (arguing that a person sentenced to die must be executed, even if the society in which he lives were to disband); GEORG HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 120 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (1821) (Punishment “is . . . not only conditionally right but necessary—namely as a second coercion which cancels an initial coercion.”). “[P]unishment is merely the negation of the negation.” *Id.* at 123. The implication of Hegel’s view is that if the wrongdoer is not punished, his crime is not negated, and it stands as a wrong. Not punishing, therefore, effectively wrongs, and thus is on a par with punishing the innocent. For more modern writers, see for example Reiman & van den Haag, *supra* note 21, at 242 (“The duties are categorical, to be carried out unconditionally.”); Russell Christopher, *The Prosecutor’s Dilemma: Bargains and Punishments*, 72 *FORDHAM L. REV.* 93, 101 (2003) (“Retributivism imposes an absolute duty to punish culpable wrongdoers whenever the opportunity arises.”).

349. Moore, the most prominent retributive theorist of the past few decades, has said that it is a possible view. MOORE, *supra* note 23, at 157 n.11. (“The retributivist might adopt a principle of symmetry here—the guilty going unpunished is exactly the same magnitude of evil as the innocent being punished. . . . Or the retributivist might share the common view (that the second is a greater evil than the first). . . .”). But the saner view, as established in *supra* Part IV.B, is that there is a categorical difference between the “good” of punishing the guilty and the right of the innocent not to be punished. See also LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 7–9 (2009) (defending “moderate retributivism”).

350. See *supra* Part IV.D.

added to 1 in the overall denominator from 0.29 to either 0.35 or 0.23. That would yield a new SOP of either 74% if one thinks that punishing the guilty has some intrinsic positive value, or 81% if one thinks it does not have intrinsic value.

Factor 7 referred to what Daniel Epps calls the “dynamic” effects that the previous six factors leave out.³⁵¹ Epps’s concern is that the customary understanding of BARD might actually hurt innocent defendants, the very people it was supposed to protect, as well as others. For example, Epps notes that a high SOP would increase the number of crime victims (a fact already taken into account), which could induce lawmakers to introduce draconian sentences to regain the lost deterrence (a fact not yet taken into account).³⁵² An innocent person convicted would then face a harsher punishment. Another example: he suggests that acquittals will be less likely to convey innocence if they can result despite it being fairly likely that the defendant was guilty.³⁵³ Thus the higher the SOP, the more chance that an innocent person who is acquitted would nonetheless face stigma as if he were likely to be guilty.

A particularly interesting feature of Epps’s analysis is his questioning of whether a high SOP protects innocent defendants at all. He distinguishes three different types of innocent defendants and explains how a high SOP might make each worse off. First, there are those who would be acquitted whether the law used an SOP like the customary understanding of BARD, or a moderate SOP, like the Laudan principle. They suffer more under a higher SOP regime because they are more likely to be treated as though they are really guilty.³⁵⁴ Second, there are those who would be convicted using either SOP. They suffer more under a higher SOP regime because they are more likely to face harsh punishments.³⁵⁵ Third, there are those who would seem to benefit from a higher SOP, those who would be convicted under a lower SOP, but who would not be convicted under a higher one. But even for this group, the benefit may be less than it seems at first, if it exists at all. If the higher SOP produces more crime, then the system is likely to respond with more arrests and prosecutions. As a result, “even if [a higher SOP] lowers the *rate* of false convictions, it could still increase the total *number* of false convictions.”³⁵⁶ Thus instead of it being less likely that one will suffer a false conviction, it might become more likely.

How do these effects impact the SOP? Epps discusses these effects only in the context of criticizing the customary understanding of the

351. See Epps, *supra* note 15.

352. *Id.* at 1098.

353. *Id.* at 1100–01.

354. *Id.* at 1110–11.

355. *Id.* at 1111–12.

356. *Id.* at 1112–13.

BARD principle, and only contrasting that with an SOP aimed at accuracy. In truth, however, there is nothing inherently significant about accuracy as a break on these effects.³⁵⁷ The effects all push for adopting, or at least pretending to adopt,³⁵⁸ a lower SOP than one would choose without taking them into account. This is not to suggest that nothing else pushes the other way. There may also be dynamic effects that call for a higher SOP. For example, if people believe that too many innocents are convicted, they may come to distrust law enforcement, thereby undermining the cooperation necessary to control crime. But the overall and plausible thrust of Epps's discussion is to suggest that even the Laudan standard may be too high.

The overall effect would probably not be large; the effects Epps discusses are fairly marginal.³⁵⁹ For example, the pursuit of effective deterrence through harsher punishment may be limited by a general social sense of proportional punishment, causing prosecutors not to prosecute and juries not to convict if the punishments are too harsh.³⁶⁰ It may also be limited by awareness that more draconian punishments do less to control crime than ensuring that punishment is more certain.³⁶¹ Thus, a high SOP may not lead to draconian punishments. But to give Epps's arguments some credit, it is still worth shaving a few points off the SOP that we were left with after considering the first six factors.

In the end, if we continue to differentiate the two influences of factor 6, we get an SOP range of 71 to 78%. And if we average the influence of factor 6, we come up with an SOP of approximately 75%, the Laudan standard.

357. See *supra* Part III.A (arguing that accuracy has only at most instrumental value for setting the SOP).

358. As Epps notes, most of these effects do not depend on the criminal law actually using a high SOP. Most depend primarily on the *belief* that the criminal law uses a high SOP. See *supra* note 108 and accompanying text.

359. Epps expresses his own caution, if not skepticism, admitting that “some of the . . . dynamic costs may be fairly marginal. For example, the additional stigma acquitted innocent defendants suffer may be real but small in any given case.” Epps, *supra* note 15, at 1122.

360. See, e.g., Robinson & Darley, *supra* note 337, at 185 (“To the extent that the threat of official punishment stems from a legal rule that people perceive as unjust—which is by definition the case where deterrence-based rules deviate from perceived desert—the offender may discount the threat of punishment in the belief that, no matter what the law on the books says, the lawyers and judges and jurors in the system would not in fact be so unjust as to actually enforce the rule as written.”); see also Neal Kumar Katyal, *Deterrence’s Difficulty*, 95 MICH. L. REV. 2385 (1997).

361. See 1 NAT’L RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE: REPORT OF THE NATIONAL RESEARCH PANEL ON THE UNDERSTANDING AND CONTROL OF VIOLENCE 6 (Albert E. Roth, Jr. & Jeffrey A. Roth eds. 1993).