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BEYOND "REASONABLE DOUBT"

JON O. NEWMAN*

Appointed to the federal bench in 1972 after a distinguished career in government, Jon O. Newman is currently Chief Judge of the United States Court of Appeals for the Second Circuit. In this Madison Lecture, Chief Judge Newman examines the "reasonable doubt" standard in criminal cases from the perspective of the federal appellate courts. After describing the current doctrine relating to this celebrated standard and suggesting some adjustments in the wording of a jury charge, Chief Judge Newman entreats appellate judges to take reasonable doubt "seriously"—that is, to invigorate their review of the sufficiency of the evidence in criminal appeals. He suggests several ways in which judges could meaningfully enforce the "reasonable doubt" standard so as to strengthen public confidence in the criminal justice system. Chief Judge Newman comes to the conclusion that more rigorous enforcement of the government's burden of proof will not only better protect the innocent against wrongful conviction, but may also help secure the conviction of guilty defendants who might otherwise be acquitted.

INTRODUCTION

It is a great honor for me to participate in the James Madison Lecture series. This series has a special significance for me that I believe is shared by only two of the distinguished men and women who have preceded me to this podium. This series was endowed by Louis Schweitzer, and it was my distinct privilege to know that remarkable individual. We met in 1970 when I was asked by the Ford Foundation to prepare an evaluation of the Vera Institute of Criminal Justice, the pioneering research and action agency that Mr. Schweitzer initially funded (and named in memory of his wife). The interview left me with a vivid impression of his commitment to an enlightened system of criminal justice. So it is a special privilege for me to participate in the lecture series that

* Chief Judge, United States Court of Appeals for the Second Circuit. This lecture was delivered as the twenty-fifth James Madison Lecture on Constitutional Law at New York University School of Law on November 9, 1993. I acknowledge the helpful assistance of my 1993-1994 law clerks, Adam Aronson, Douglas Berman, and Anupam Chander, in the research for this lecture.

he initially made possible.

The James Madison Lectures were inaugurated "to enhance the appreciation of civil liberty and strengthen the national purpose."¹ Any lecture named for the principal architect of the Bill of Rights could aspire to no lesser goal. I hope I do not stray outside the lofty objective of this distinguished series by focusing on a right that is not mentioned in Madison's handiwork and was not given formal recognition as comprehended within the general language of the Bill of Rights until 1970,² though assumed by the Supreme Court to be a requirement, at least in the federal courts, as early as 1881.³ My focus is the implicit component of the due process clause that guarantees every person the right not to be convicted of a crime unless the evidence establishes guilt beyond a reasonable doubt.

My thesis may be stated quite simply. I believe that the constitutional jurisprudence of this Nation has accepted the "reasonable doubt" standard as a verbal formulation to be conveyed to juries in jury charges but has failed to take the standard seriously as a rule of law against which the validity of convictions is to be judged. The consequences of this deficiency are, in my view, twofold: we are convicting some people who are not guilty beyond a reasonable doubt, a few of whom may in fact be innocent, and at the same time, quite paradoxically, we are acquitting some people who could be proven to be guilty beyond a reasonable doubt, most of whom are in fact guilty. Thus, the proposition I wish to discuss is that the time has come for American courts, especially federal courts, to move beyond "reasonable doubt" as a mere incantation, to give renewed consideration to what reasonable doubt means and how it should be applied as a rule of law, so that the standard might serve as a more precise divider of the guilty from the innocent.

I say "more precise" because all must recognize that factfinders are fallible and that any system of adjudicating guilt will inevitably run some risk of both convicting the innocent and acquitting the guilty. The inevitability of both types of mistakes usually leads us to say that it is better to acquit some number of guilty persons than to convict one innocent person.⁴ What we would not readily agree on is the appropriate ratio of

¹ Norman Dorsen, Foreword to *The Evolving Constitution* at ix, ix (Norman Dorsen ed., 1987).

² See *In re Winship*, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

³ See *Miles v. United States*, 103 U.S. 304, 312 (1880) ("The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt.").

⁴ See *Winship*, 397 U.S. at 372 (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free.").

guilty persons acquitted to innocent persons convicted. The cases have frequently mentioned a ratio of ten to one,⁵ though ratios of twenty to one⁶ and even ninety-nine to one have been mentioned in earlier literature.⁷

Whatever ratio we find acceptable, one of the major variables in achieving that ratio is the degree of certainty we impose on factfinders. If you would tolerate as many as one hundred guilty persons going free in preference to convicting one innocent person, then you will insist that no one be convicted unless the factfinder is sure of guilt to a degree approaching absolute certainty. If your ratio is ten to one, then you will likely impose a somewhat less rigorous standard upon the factfinder but still require a high degree of certainty. I believe that the "reasonable doubt" standard should express our society's view that criminal convictions require, at the least, a high degree of certainty of guilt. But first, let me review the current application of the "reasonable doubt" standard in our trial and appellate courts.

I

THE THEORY AND PRACTICE OF REASONABLE DOUBT

A. *The "Reasonable Doubt" Standard as a Jury Charge*

The Anglo-American tradition has chosen a standard of certainty usually captured by the phrase "beyond a reasonable doubt." I think it unlikely that this phrase was selected to implement a particular ratio of the sort I have been discussing, yet, in some imprecise way, it probably was arrived at on the assumption that it would achieve an error ratio that fell within an acceptable range. So let us examine the standard, keeping in mind that the rigor of its enforcement has a significant bearing on the mistake rate of our criminal trials.

Like most traditions we have observed for a long time, there are at least two versions as to how this one began. Most believe that the "reasonable doubt" standard was first urged upon courts in the Irish Treason

⁵ See *Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1992) (Marshall, J., concurring) (quoting William O. Douglas, Foreword to Jerome Frank & Barbara Frank, *Not Guilty* 11-12 (1957)); *Goetz v. Crosson*, 967 F.2d 29, 39 (2d Cir. 1992) (Newman, J., concurring); *Bunnell v. Sullivan*, 947 F.2d 341, 352 (9th Cir. 1991) (en banc) (Kozinski, J., concurring); *United States v. Greer*, 538 F.2d 437, 441 (D.C. Cir. 1976); see also 4 William Blackstone, *Commentaries* *358.

⁶ See Sir John Fortescue, *De Laudibus Legum Angliae* 65 (Dr. Chrimes ed., Cambridge Univ. Press 1942) (1471) ("I should, indeed, prefer twenty guilty men to escape death through mercy, than one innocent to be condemned unjustly.").

⁷ See Thomas Starkie, *Evidence* 756 (1724), quoted in IX Wigmore on Evidence § 2497, at 409-10 (Chadbourn rev. 1991) ("The maxim of the law is . . . that it is better that ninety-nine . . . offenders shall escape than that one innocent man be condemned.").

Cases⁸ in 1798 by defense lawyers who were endeavoring to *raise* the prosecution's burden of persuasion.⁹ But there is a competing view that the standard was urged by prosecutors who were trying to *lower* their burden of persuasion from an often unattainable task of having to persuade the jury beyond all doubt.¹⁰

Whichever group deserves the credit, the standard became an accepted formulation in this country of the principle, widely shared throughout the world's legal systems, that an adjudication of guilt in criminal matters requires a high degree of certainty. For example, the British also use the "reasonable doubt" formulation but on occasion tell jurors not to convict unless they "feel sure" of the defendant's guilt,¹¹ or sometimes, "feel sure and satisfied."¹² The French Code of Criminal Procedure instructs the *Cour d'Assise* to read to a mixed panel of three judges and nine lay jurors a charge that includes the following: "The law asks [judges] only the single question, which encompasses the full measure of their duties: 'Are you thoroughly convinced?'"¹³

Having come to embrace the verbal formulation "beyond a reasonable doubt," American courts have flirted with efforts to elaborate on the meaning of these familiar words. The most widely used explanation, especially favored in most federal courts, is the brief advice that a reasonable doubt is "a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life."¹⁴ Although,

⁸ Bond's Case, 27 How. St. Tr. 523 (Ir. 1798); Finney's Case, 26 How. St. Tr. 1019 (Ir. 1798).

⁹ See Charles McCormick, Law of Evidence § 321, at 682 n.3 (1st ed. 1954) (quoting May, Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases, 10 Am. L. Rev. 642, 656-57 (1876)). The phrasing has also been traced even earlier to the Boston Massacre Trials of 1770, *Rex v. Wemms*, in 3 Legal Papers of John Adams 98, 309 (L. Kinvin Wroth & Hiller Zobel eds., 1965).

¹⁰ See Anthony A. Morano, A Reexamination of the Development of the Reasonable Doubt Rule, 55 B.U. L. Rev. 507, 508 (1975).

¹¹ See, e.g., *Ferguson v. The Queen*, [1979] 1 All E.R. 877, 878 (P.C. 1978) (appeal taken from Gren.).

¹² See *Regina v. Allan*, [1969] 1 All E.R. 91, 92 (1968); see also *Regina v. Holland* (C.A. Aug. 20, 1968), digested in 118 New L.J. 1004, 1004 (unreported case affirming instruction that jury feel "satisfied" because court was confident that "the jury were left in no doubt that, before they could convict, they had to be so satisfied as to be sure" of guilt).

¹³ C. Pr. Pén. Art. 353 (Gerald L. Kock & Richard S. Frase, trans., 1988). The court must also post this instruction "in large letters in the most prominent place in the conference room." *Id.*

¹⁴ 1 Leonard B. Sand et al., *Modern Federal Jury Instructions* ¶ 4.01, Instruction 4-2 (1993). But see *United States v. Noone*, 913 F.2d 20, 28-29 (1st Cir. 1990) (criticizing charges explaining "reasonable doubt" standard with reference to hesitating in personal affairs as "risking trivialization of the constitutional standard"), cert. denied, 111 S. Ct. 1686 (1991).

The "hesitate to act" formulation may have originated in *Posey v. State*, 93 So. 272, 273 (Ala. Ct. App. 1922). The formulation from *Posey* was cited in *Bishop v. United States*, 107 F.2d 297, 303 (D.C. Cir. 1939), which, in turn, was given an authoritative citation by the Supreme Court in *Holland v. United States*, 348 U.S. 121, 140 (1954). State courts often use

as a district judge, I dutifully repeated that bit of "guidance" to juries in scores of criminal trials, I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to "hesitate to act in a matter of importance," what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?¹⁵

Some courts have used additional phrasings that seem to make the standard more rigorous. One formulation, especially favored by defense attorneys, is that the evidence must persuade the jurors of guilt "to a moral certainty." Federal courts have explicitly rejected this formulation.¹⁶ Many courts add the thought that a reasonable doubt is "a doubt based on reason."¹⁷ A juror hearing the "doubt based on reason" formulation might think that a generalized unease or skepticism about the prosecution's evidence is not a valid basis to resist entreaties to vote for conviction. That is probably a distortion of the concept that courts are seeking to implement. The "reasonable doubt" standard serves to prevent a finding of guilt unless the evidence dispels those doubts that would be entertained by that most useful construct of the law—the reasonable person—in this instance a group of twelve reasonable persons who form a reasonable jury. The standard ought not to mean that a doubt is reasonable only if the juror can articulate to himself or herself some particular reason for it.¹⁸ The Supreme Court has wisely observed that the

this formulation. See, e.g., *State v. Gomez*, 622 A.2d 1014, 1017 n.8 (Conn. 1993); *People v. Jackson*, 421 N.W.2d 697, 699 (Mich. Ct. App. 1988); *Commonwealth v. Bowser*, 624 A.2d 125, 138 (Pa. Super. Ct. 1993); *Geesa v. State*, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991).

¹⁵ A recommended pattern instruction advises jurors to convict only if sufficiently persuaded that they would not hesitate to act on important matters. See 1 L. Sand et al., *supra* note 14, ¶ 4.02, Instruction 4-2 ("Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.").

¹⁶ See, e.g., *United States v. Indorato*, 628 F.2d 711, 720-21 (1st Cir.), cert. denied, 449 U.S. 1016 (1980); *United States v. Byrd*, 352 F.2d 570, 575 (2d Cir. 1965). Some state courts, however, continue to endorse the "moral certainty" formulation. See, e.g., *People v. Sims*, 853 P.2d 992, 1024 (Cal. 1993); *People v. Dahlin*, 539 N.E.2d 1293, 1296 (Ill. App. Ct. 1989); *People v. Wong*, 619 N.E.2d 377, 381 (N.Y. 1993). But see *Victor v. Nebraska*, 62 U.S.L.W. 4179, 4185 (U.S. Mar. 22, 1994) (stating that although "we do not countenance its use, the inclusion of the moral certainty did not render the instruction" unconstitutional).

The "moral certainty" standard was originally introduced to *lessen* the prosecution's burden, since "moral certainty" was thought of as "reasonable certainty" as opposed to "absolute certainty." See *Morano*, *supra* note 10, at 513-14.

¹⁷ See, e.g., *United States v. Johnson*, 343 F.2d 5, 6 n.1 (2d Cir. 1965), cited with approval in *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972); see also *Jackson v. Virginia*, 443 U.S. 307, 317 n.9 (1979); 1 L. Sand et al., *supra* note 14, ¶ 4.01, Instruction 4-2 (noting reasonable doubt "is a doubt based upon reason").

¹⁸ See *United States v. Farina*, 184 F.2d 18, 23-24 (2d Cir.) (Frank, J., dissenting), cert.

standard serves to "impress[] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused."¹⁹ The Court should have stayed with only a requirement of "near certitude," instead of also embracing the dubious explanation of "reasonable doubt" as a doubt "based upon 'reason.'"²⁰

A somewhat curious aspect of the "reasonable doubt" standard is the reluctance of most trial courts to offer the jury any explanation as to what the standard means. Indeed, some federal courts have in recent years sternly admonished trial judges not to attempt any amplification of the standard whatsoever.²¹ I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.²²

The assumption underlying these various formulations is that any statement of the burden more rigorous than the "preponderance of the evidence" standard reduces the likelihood of conviction in close cases. Whether that assumption is true is difficult to measure. Academic exercises have provided some clues. In one study, groups of judges and jurors were asked to quantify as a percentage of certainty what the "preponderance" and "reasonable doubt" standards meant to them.²³ Both groups reported a higher percentage for the "reasonable doubt" standard than for the "preponderance" standard, although the jurors put the "reasonable doubt" percentage closer to the "preponderance" percentage than did the judges.²⁴ Another study tried a case before twenty-

denied, 340 U.S. 875 (1950); *Pettine v. Territory of New Mexico*, 201 F. 489, 495-97 (8th Cir. 1912).

¹⁹ *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). This statement is a slightly less rigorous variation of the statement in *Winship*, where the Court said that the "reasonable doubt" standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." In *re Winship*, 397 U.S. 358, 364 (1970) (quoting *Dorsen & Reznick, In re Gault and the Future of Juvenile Law*, 1 *Fam. L.Q.* 1, 26 (1967)).

²⁰ *Jackson*, 443 U.S. at 317. The Court had earlier endorsed both this "doubt based on 'reason'" explanation and the "subjective state of certitude" formulation in *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972).

²¹ See, e.g., *United States v. Hall*, 854 F.2d 1036, 1037-39 (7th Cir. 1988); *Murphy v. Holland*, 776 F.2d 470, 478-79 (4th Cir. 1985), vacated on other grounds, 475 U.S. 1138 (1986). See generally Note, *Defining Reasonable Doubt: To Define, or Not to Define*, 90 *Colum. L. Rev.* 1716, 1718-21 (1990).

²² See 1 *L. Sand et al.*, *supra* note 14, ¶ 4.01, Instruction 4-11 ("[T]he better practice is to spend some moments with the jury discussing the government's burden of proof in order to clarify the meaning . . ."); see also Note, *supra* note 21 (arguing that jury instructions defining reasonable doubt should always be given).

²³ See generally *Rita James Simon & Linda Mahan, Quantifying Burdens of Proof*, 5 *Law & Soc'y Rev.* 319 (1971); see also *Rita James Simon, "Beyond a Reasonable Doubt"—An Experimental Attempt at Quantification*, 6 *J. Applied Behavioral Sci.* 203, 207 (1970) (estimating, as result of mock trial experiment, that student jurors voted to convict when they thought probability of guilt was at least 74%).

²⁴ See *Simon & Mahan, supra* note 23, at 325.

two mock juries, giving them three different instructions on the burden of persuasion.²⁵ The conviction rate for the jurors who heard the "reasonable doubt" standard was slightly lower than the vote for the group hearing the "preponderance" standard and fell significantly among the jurors hearing the "feel sure and certain" formulation.²⁶ These studies suggest that the traditional charge might be producing some unwarranted convictions. At the very least, the conclusion one draws from such studies is that the charge currently in use is ambiguous and open to widely disparate interpretation by jurors.

B. "Reasonable Doubt" and Sufficiency of Evidence

After deciding that American factfinders, whether jury or judge, would have to be persuaded "beyond a reasonable doubt" before they could convict, our courts then encountered the crucial legal issue that determines whether the "reasonable doubt" standard is merely a verbal formulation or a rule of law. Courts had to decide whether the "reasonable doubt" standard entered into the decision judges make in determining whether the evidence in each case is legally sufficient to permit a finding of guilt. For many years, many federal courts, likely influenced by the 1944 opinion of Learned Hand in *United States v. Feinberg*,²⁷ took the position that the judicial role in determining whether the evidence sufficed to permit a finding of guilt beyond a reasonable doubt was extremely limited. Judge Hand thought that the "reasonable doubt" standard was solely a matter to be included in a jury instruction and that a judge should require no more convincing evidence in a criminal case than in a civil one before ruling the evidence sufficient for a jury.²⁸ He refused to distinguish between "the evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt."²⁹ In Hand's view, "the line between them is too thin for day to day use."³⁰

That view was challenged as early as 1947 by the District of Columbia Circuit,³¹ and by the 1970s every circuit except the Second came to accept the position that the "reasonable doubt" standard was to affect, in

²⁵ See generally London School of Economics Jury Project, *Juries and the Rules of Evidence*, 1973 *Crim. L. Rev.* 208.

²⁶ See *id.* at 216-17.

²⁷ 140 F.2d 592 (2d Cir.), cert. denied, 322 U.S. 726 (1944).

²⁸ See *id.* at 594 ("But courts—at least federal courts—have generally declared that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases . . .").

²⁹ *Id.*

³⁰ *Id.*

³¹ See *Curley v. United States*, 160 F.2d 229 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947).

some way, the judge's determination of sufficiency.³² I am chagrined to acknowledge that the Second Circuit did not formally abandon Hand's position until 1972, finally declaring that the "battle has now been irretrievably lost."³³ In rejecting Judge Hand's opinion in *Feinberg*, Judge Friendly referred to it as one of Learned Hand's "rare ill-advised opinions"³⁴ and ruled that more "facts in evidence" are needed to persuade a factfinder beyond a reasonable doubt than to persuade by a preponderance.³⁵ I prefer to think of the heightened burden as requiring evidence of greater persuasive force, not necessarily of greater quantity.

C. "Reasonable Doubt" as a Constitutional Requirement

While the courts of appeals were moving to incorporate the "reasonable doubt" standard into the legal assessment of the sufficiency of evidence, the Supreme Court was grappling with the extent to which the "reasonable doubt" standard was constitutionally required. In 1970, the Court decided in *In re Winship*³⁶ that the "reasonable doubt" standard was an implicit component of due process, required to be applied by factfinders in criminal cases in both federal and state courts.³⁷ Having made that decision, the Court did not consider the critically related issue of whether the Constitution set some standard for assessing the sufficiency of evidence that would permit a valid conviction under the "reasonable doubt" standard. At that time, the only constitutional ruling on sufficiency of evidence in a criminal case had been the unremarkable pronouncement in 1960 in the so-called "Shuffling Sam" case, more properly known as *Thompson v. City of Louisville*,³⁸ that due process was denied

³² See Robert J. Gregory, *Whose Reasonable Doubt? Reconsidering the Appropriate Role of the Reviewing Court in the Criminal Decision Making Process*, 24 *Amer. Crim. L. Rev.* 911, 927-28 (1987) (citing cases).

³³ *United States v. Taylor*, 464 F.2d 240, 243 (2d Cir. 1972). Even before *Taylor*, the Second Circuit had begun to assess sufficiency by asking whether the evidence was sufficient to convince a jury beyond a reasonable doubt. See, e.g., *United States v. Glasser*, 443 F.2d 994, 1006 (2d Cir.), cert. denied, 404 U.S. 854 (1971); *United States v. Kahaner*, 317 F.2d 459, 467-68 (2d Cir.), cert. denied, 375 U.S. 835 (1963); *United States v. Robertson*, 298 F.2d 739, 741 (2d Cir. 1962); *United States v. Lefkowitz*, 284 F.2d 310, 315 (2d Cir. 1960). The assault upon *Feinberg* had been led by Judge Frank in his notable concurring opinions in *United States v. Masiello*, 235 F.2d 279, 285 (2d Cir.), cert. denied, 352 U.S. 882 (1956); *United States v. Gonzales Castro*, 228 F.2d 807, 809 (2d Cir.), cert. denied, 351 U.S. 940 (1956); *United States v. Costello*, 221 F.2d 668, 679-80 (2d Cir. 1955), aff'd, 350 U.S. 359 (1956).

³⁴ *Taylor*, 464 F.2d at 242.

³⁵ *Id.* (quoting *Bridges v. Railway Co.*, [1874] L.R. 7 H.L. 213, 233).

³⁶ 397 U.S. 358 (1970).

³⁷ The Court said that the standard "reduce[s] the risk of convictions resting on factual error" and "provides concrete substance for the presumption of innocence." *Id.* at 363. Later, in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court divided that first rationale in two, stating that the standard operates "to ensure against unjust convictions, and to reduce the risk of factual error." *Id.* at 315.

³⁸ 362 U.S. 199 (1960).

when there was no evidence whatsoever of a required element of a criminal offense.

Then, in the 1979 case of *Jackson v. Virginia*,³⁹ the Court agreed for the first time to consider whether and how the "reasonable doubt" standard affected the constitutional sufficiency of evidence in a criminal case.⁴⁰ Writing for a surprisingly narrow majority of five, Justice Stewart ruled that merely instructing a jury to observe the "reasonable doubt" standard did not assure compliance with constitutional requirements. "The *Winship* doctrine," he wrote, "requires more than simply a trial ritual."⁴¹ Due process, the Court continued, requires some consideration of the standard to be used in assessing the sufficiency of the evidence. The Court made clear that a reviewing court need not "'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.'"⁴²

The Court was less clear in stating what *was* required. Justice Stewart's opinion used two key sentences, which might or might not have different meanings. First, the Court said that "[a]fter *Winship* the critical inquiry . . . must be . . . whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."⁴³ Then, on the next page, the Court said that "the relevant question is whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."⁴⁴ The Court underscored the word "any."

I think the two sentences convey quite different thoughts. The first sentence, correctly in my view, applies the traditional test for determining sufficiency of evidence—namely, whether the law's ubiquitous reasonable person, in this case a reasonable jury, could find the matter proven by the requisite degree of persuasion, in this case beyond a reasonable doubt. The second sentence, however, shifts the emphasis away from the law's construct of the reasonable jury and conjures up the image of a vast random distribution of reasonable juries, with the risk of creating the misleading impression that just one of them need be persuaded beyond a reasonable doubt.

Though the opinion in *Jackson* articulates both the traditional standard of whether the evidence "could reasonably support a finding of guilt beyond a reasonable doubt" and the novel "*any* rational trier" standard,

³⁹ 443 U.S. 307 (1979).

⁴⁰ Two years earlier, Justice Stewart had unsuccessfully urged the Court to decide whether due process is violated by a conviction "where the evidence cannot fairly be considered sufficient to establish guilt beyond a reasonable doubt." See *Freeman v. Zahradnick*, 429 U.S. 1111, 1116 (1977) (Stewart, J., dissenting from denial of certiorari).

⁴¹ *Jackson*, 443 U.S. at 316-17.

⁴² *Id.* at 318-19 (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966) (emphasis added)).

⁴³ *Id.* at 318 (footnote omitted).

⁴⁴ *Id.* at 319.

the Court gave no indication that it even realized it was setting out two different standards. Thus, I cannot be certain that the “*any* rational trier” standard was intended to authorize a less demanding form of review than the “reasonable jury” standard. Interestingly, the concurrence, written by Justice Stevens, and joined by Chief Justice Burger and then-Justice Rehnquist, seized on the distinction between the two standards and rejoiced that the Court had chosen the less demanding formulation.⁴⁵ Still more interestingly, the majority made no response to the concurrence, neither acknowledging nor disclaiming a preference for the less demanding standard.⁴⁶

Regrettably, it is only the second formulation that most appellate opinions have extracted from *Jackson*. In countless decisions, federal courts of appeals have quoted the “*any* rational trier” sentence, without ever acknowledging the earlier sentence that uses a more traditional and more rigorous standard.⁴⁷

D. The “Reasonable Doubt” Standard as a Rule of Law

With the “reasonable doubt” standard thus having entered the constitutional jurisprudence of our Nation, the question arises as to what

⁴⁵ [The Court] does not require the reviewing court . . . to decide . . . whether, based on the entire record, rational triers of fact could be convinced of guilt beyond a reasonable doubt. Instead . . . it chooses a still narrower standard that merely asks whether, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* at 334 (Stevens, J., concurring).

The concurring Justices noted two distinctions between the two formulations in the majority’s opinion. They emphasized not only the distinction between “rational triers of fact” and “*any* rational trier of fact,” but also between review of “the entire record” and review of “the evidence in the light most favorable to the prosecution.” *Id.* Possibly the second distinction was of more concern to these Justices.

⁴⁶ See Joseph Goldstein, *The Intelligible Constitution* 81-91, 116-24 (1992) (criticizing Supreme Court majorities for not engaging in productive dialogues with dissenters who raise significant issues).

⁴⁷ See, e.g., *United States v. Gordils*, 982 F.2d 64, 70 (2d Cir. 1992), cert. denied, 113 S. Ct. 1953 (1993); *United States v. Chaney*, 964 F.2d 437, 448 (5th Cir. 1992); *United States v. Beddow*, 957 F.2d 1330, 1334 (6th Cir. 1992); *United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir.), cert. denied, 498 U.S. 948 (1990); *United States v. Linn*, 880 F.2d 209, 215 (9th Cir. 1989).

State supreme courts reveal the same pattern. See, e.g., *People v. Clair*, 828 P.2d 705, 729 (Cal. 1992), cert. denied, 113 S. Ct. 1006 (1993); *People v. Wilson*, 614 N.E.2d 1227, 1229 (Ill. 1993); *Letica v. State*, 569 N.E.2d 952, 955 (Ind. 1991); *State v. Bourque*, 622 So. 2d 198, 242 (La. 1993); *Hebron v. State*, 627 A.2d 1029, 1035 (Md. 1993); *Commonwealth v. Montanez*, 571 N.E.2d 1372, 1382 (Mass. 1991); *State v. McLain*, 815 P.2d 147, 150 (Mont. 1991); *State v. Thomas*, 407 S.E.2d 141, 148 (N.C. 1991); *People v. Mattiace*, 568 N.E.2d 1189, 1191 (N.Y. 1990); *State v. Hawkins*, 612 N.E.2d 1227, 1231 (Ohio), cert. denied, 114 S. Ct. 486 (1993); *State v. Rogers*, 836 P.2d 1308, 1325 (Or. 1992), cert. denied, 113 S. Ct. 1420 (1993); *State v. Smith*, 857 S.W.2d 1, 9 (Tenn.), cert. denied, 114 S. Ct. 561 (1993); *Green v. State*, 840 S.W.2d 394, 401 (Tex. Crim. App. 1992), cert. denied, 113 S. Ct. 1819 (1993).

significance the standard has had as a rule of law governing the outcome of criminal trials. The answer, for the most part, is very little. Thus, in the federal courts, the primary expositors of federal requirements, we have insisted that juries be instructed that they must be persuaded beyond a reasonable doubt, but we have not insisted on meaningful observance of this standard as a rule of law for testing the sufficiency of the evidence.

I do not mean to suggest that federal courts never conclude that evidence in a criminal case is insufficient. Occasionally they do, usually to overturn a conviction on a particular count of a multi-count indictment, rather than to exonerate a defendant entirely. Rather, my factual point is that they do so very rarely, and my legal point is that they almost never do so by applying, in explicit terms, the "reasonable doubt" standard. On those rare occasions when a federal appellate court accepts a claim that a case should not have gone to a jury, it typically says simply that the evidence is "insufficient."⁴⁸ In some cases, the court is doing no more than applying the baseline rule of the "Shuffling Sam" case, concluding that there is no evidence at all to support a necessary element.⁴⁹

Though the analogy is not exact, it is interesting to compare how differently federal appellate courts review "reasonable doubt" rulings when the context shifts from whether evidence is sufficient to support a conviction to whether a constitutional error is harmless. Appellate courts rarely reverse a trial court's ruling that the evidence is sufficient to permit a finding of guilt beyond a reasonable doubt. However, when trial courts apply the harmless error doctrine to constitutional violations and rule that the prosecution has not sustained its burden of showing that a constitutional error was harmless beyond a reasonable doubt,⁵⁰ they are frequently reversed.⁵¹

If appellate courts were taking seriously the legal standard of proof that persuades beyond a reasonable doubt, we should expect to see at

⁴⁸ See, e.g., *United States v. Soto*, 716 F.2d 989, 993 (2d Cir. 1983).

⁴⁹ See, e.g., *United States v. Lopez-Alvarez*, 970 F.2d 583, 593-94 (9th Cir.), cert. denied, 113 S. Ct. 504 (1992); *United States v. Casper*, 956 F.2d 416, 421-22 (3d Cir. 1992); *United States v. Long*, 905 F.2d 1572, 1576-79 (D.C. Cir.), cert. denied, 498 U.S. 948 (1990); *United States v. Bruun*, 809 F.2d 397, 404-05, 410-11 (7th Cir. 1987).

⁵⁰ See *Chapman v. California*, 386 U.S. 18, 24 (1967).

⁵¹ See, e.g., *Tucker v. Borgert*, No. 91-1059, 1991 WL 255583, at *1 (6th Cir. Dec. 4, 1991), cert. denied, 112 S. Ct. 2311 (1992); *Logan v. Abshire*, 778 F.2d 283, 284 (6th Cir. 1985) (per curiam); see also *United States ex rel. Miller v. Greer*, 789 F.2d 438, 446-47 (7th Cir. 1986) (en banc) (reversing trial court's ruling that constitutional error was harmless under *Chapman* standard), rev'd sub nom. *Greer v. Miller*, 483 U.S. 756, 765-67 (1987) (upholding state supreme court's determination that error "was harmless beyond reasonable doubt"). But see *Clemons v. Mississippi*, 494 U.S. 738, 753-54 (1990) (vacating and remanding for clarification state supreme court ruling that constitutional error was harmless under *Chapman* standard).

least a modest number of cases in which a reviewing court says, "The evidence perhaps suffices to persuade a reasonable trier by the 'preponderance' standard but it does not suffice to persuade beyond a reasonable doubt." It is astonishing how rarely we see a federal appellate court using anything like that language. A Westlaw search of all federal court opinions disclosed only two opinions in which a federal court of appeals explicitly stated that the evidence might be sufficient to satisfy the "preponderance" standard but was insufficient to satisfy the higher "reasonable doubt" standard.⁵² Both were rendered before the decision in *Jackson*.

II

MOVING BEYOND "REASONABLE DOUBT"

My argument is that the time has come for American courts to move beyond "reasonable doubt," to take this standard seriously and apply it conscientiously as a rule of law. By "moving beyond 'reasonable doubt'" I do not mean discarding the "reasonable doubt" standard in favor of some higher degree of certainty. I am entirely content to stay with "reasonable doubt" as the standard to which the jury must be persuaded of guilt. Nor do I mean to challenge the doctrine that, on appeal from convictions, appellate courts should view the evidence "in the light most favorable to the prosecution."⁵³ Rather, my point is that courts must do more than verbalize the "reasonable doubt" standard in jury instructions; they must make that standard an enforceable rule of law. There are several ways that courts could move beyond the current approach to reasonable doubt.

⁵² See *Stevens v. United States*, 319 F.2d 733, 735 (D.C. Cir. 1963); *Wolf v. United States*, 238 F. 902, 906 (4th Cir. 1916). *Winship* itself was a case where the factfinder might have reached different outcomes by using different burdens of persuasion. In that case, the New York Family Court Judge, who had based the determination of juvenile delinquency on a finding that a larceny had been proven by a preponderance of the evidence, indicated that the proof "might not establish guilt beyond a reasonable doubt." In re *Winship*, 397 U.S. 358, 360 (1970); see also *United States v. Masiello*, 235 F.2d 279, 285-86 (2d Cir.) (Frank, J., concurring) (noting in dictum that if one particular item of evidence were put aside, the remaining evidence would have been sufficient to satisfy the "preponderance" standard but not sufficient to satisfy the "reasonable doubt" standard), cert. denied, 352 U.S. 882 (1956); *United States v. Paglia*, 190 F.2d 445, 448 (2d Cir. 1951) (comparing civil and criminal standards for purposes of determining that resentencing was required), overruled on other grounds by *United States v. Taylor*, 217 F.2d 397, 399 (2d Cir. 1954); *United States v. Milken*, 759 F. Supp. 109, 122-23 (S.D.N.Y. 1990) (finding evidence that might have been sufficient for civil liability insufficient as basis for criminal sentencing).

⁵³ See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). But see *Gregory*, supra note 32, at 980 (arguing that "reasonable doubt" standard cannot properly be infused into sufficiency review as long as all reasonable inferences are construed in favor of prosecution).

A. Taking "Reasonable Doubt" Seriously

1. Clarifying the "Reasonable Doubt" Jury Instruction

First, we could make the "reasonable doubt" instruction clearer to jurors by focusing their attention solely on the need to be sure of guilt to a high degree. A model charge, prepared in 1987 by a subcommittee of the Judicial Conference's Committee on the Operation of the Jury System, contains very useful language. Its key sentence reads: "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."⁵⁴ Notably absent from the subcommittee's model charge is the misleading phrase about a doubt "based on reason" and the ambiguous language about "hesitating on important matters."⁵⁵ For reasons not clear to me, this authoritatively formulated model instruction has not been widely adopted.

2. Redefining the Appellate Standard

Second, we could return to the genesis of the constitutional standard for assessing sufficiency in *Jackson* and discard the novel "*any* rational trier" standard for the more traditional "reasonable jury" standard. The adoption of this novel standard was flawed at the outset. The Court enlisted dubious authority for its "*any* rational trier" formulation, citing only the marginally relevant opinion in *Johnson v. Louisiana*.⁵⁶ That case held that the due process rights of a defendant were not violated by a guilty verdict subscribed to, as permitted under Louisiana law, by only nine of the twelve jurors.⁵⁷ The case had little if anything to do with appellate review of sufficiency. At the page of *Johnson* cited in *Jackson*, the Court said only that "verdicts finding guilt beyond a reasonable

⁵⁴ Federal Judicial Center, Pattern Criminal Jury Instructions 28, Instruction 21 (1987).

⁵⁵ The complete instruction reads:

As I have said many times, the government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

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

Id.; see also *Victor v. Nebraska*, 62 U.S.L.W. 4179, 4186 (U.S. Mar. 22, 1994) (Ginsburg, J., concurring) ("This Model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.")

⁵⁶ See *Jackson*, 443 U.S. at 319 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)).

⁵⁷ *Johnson*, 406 U.S. at 360.

doubt are regularly sustained even though the evidence was such that a jury would have been justified in having a reasonable doubt.”⁵⁸ There is no hint in *Johnson* that the standard of review is whether the evidence would have sufficed for “any rational trier,” a phrase nowhere to be found in *Johnson* or in any prior opinion of the Supreme Court. Indeed, prior to *Jackson*, no federal court had ever used the phrase “any rational trier” or “any rational jury” in determining whether the evidence in a criminal case was sufficient.⁵⁹

My concern is not with the word “rational.” That word is often used interchangeably with “reasonable,” though I prefer the word “reasonable” in this context. Rather, what distresses me is the word “any” and the wholly gratuitous and potentially misleading underscoring of that word, which I fear can subtly shift an appellate court’s attention from the correct construct of the reasonable jury to the quite incorrect construct of just one out of a distribution of reasonable juries.

In the civil context, the “reasonable person” construct has never been thought to require persuasion of just one out of a random distribution of many. When we ask whether the evidence in a negligence case is sufficient to permit a jury to find in the plaintiff’s favor, we ask whether a reasonable jury could have concluded that negligence was proved;⁶⁰ we do not permit a plaintiff’s verdict to stand just because it could be said that any one of a thousand reasonable juries could have found in the plaintiff’s favor.

So my second plea is that we should abandon the “any rational trier” formulation and review sufficiency determinations in criminal cases by the more traditional “reasonable jury” test, which is also set forth in *Jackson*, a test that asks only whether a reasonable jury could find guilt beyond a reasonable doubt.

Courts use the “reasonable jury” standard to assess the sufficiency of evidence in civil cases, where claims must be proved only by the modest

⁵⁸ *Id.* at 362.

⁵⁹ A Westlaw search of the words “any rational” used within two words of “jury,” “judge,” “trier of fact,” “fact finder,” “factfinder,” or “finder of fact” discloses only two uses of the phrase in any context before 1979. In *Johnson v. Estelle*, 506 F.2d 347 (5th Cir.), cert. denied, 422 U.S. 1024 (1975), the Court, endeavoring to show how preposterous it would have been to believe that the defendant could have changed his intent from robbery to rape as he crossed the victim’s threshold, said it did not believe that “any rational jury” would have so concluded. *Id.* at 351. In *United States v. Schiller*, 187 F.2d 572 (2d Cir. 1951), the Court rejected a claim that the charge on conspiracy was flawed by omission of the word “alleged,” a word the Court thought would have been regarded as implied by “any rational jury.” *Id.* at 574.

⁶⁰ See *Brady v. Southern Ry.*, 320 U.S. 476, 479-80 (1943) (“When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding”); see also 5A James W. Moore & Jo D. Lucas, *Moore’s Federal Practice* ¶ 50.02[1], at 50-25 to 50-26 (2d ed. 1993).

burden of a preponderance of the evidence. Surely, then, it makes no sense to permit a less rigorous standard of review to test the sufficiency of evidence in criminal cases, where claims must be proved by the more rigorous burden of proof beyond a reasonable doubt. At a minimum, if we cannot discard the "*any* rational trier" formulation entirely, we should at least confine it to the context in which it was first articulated—habeas corpus review of state convictions—and apply the "reasonable jury" standard to all direct reviews of federal convictions.

I recognize that the distinction between "*any* rational trier" and the "reasonable jury" might be largely semantic. But words guide action, especially words uttered repeatedly in appellate opinions. The repetition of the "*any* rational trier" formulation in countless appellate opinions persuades me that it has influenced appellate courts to regard a successful claim of insufficiency as an occurrence to be encountered only a bit more frequently than the seventeen-year locusts.

3. *Reinvigorating Appellate Review*

If, for the foreseeable future, we must accept the "*any* rational trier" formulation for testing sufficiency of evidence in a criminal case, my third and most urgent plea is that we at least take seriously our obligation to apply even this deferential standard of review. My concern is that federal appellate courts, including my own, examine a record to satisfy themselves only that there is *some* evidence of guilt and do not conscientiously assess whether the evidence suffices to permit a finding by the high degree of persuasion required by the "reasonable doubt" standard. The irony is that ever since winning the battle to discard Learned Hand's "civil sufficiency" approach, we have been losing the war to achieve meaningful appellate review of insufficiency claims in criminal cases.

Federal courts have signaled their retreat with the language they use in reviewing insufficiency claims. They rarely say that the issue is whether the prosecution has presented evidence from which a reasonable jury could be persuaded by the constitutionally required high standard of proof beyond a reasonable doubt. Instead, they often begin by saying that the defendant "bears a very heavy burden"⁶¹ or "faces a formidable burden"⁶² to persuade the appellate court that the constitutional standard of proof has not been met.

Not surprisingly, rhetoric of this sort has led to highly restrictive substantive rulings. Let me illustrate my point with an example from the law of criminal conspiracy. Preliminarily, I must briefly digress to note

⁶¹ See, e.g., *United States v. Pitre*, 960 F.2d 1112, 1120 (2d Cir. 1992).

⁶² See, e.g., *United States v. Burrell*, 963 F.2d 976, 987 (7th Cir.), cert. denied, 113 S. Ct. 357 (1992).

my long-standing doubts as to whether a conspiracy prosecution is ever warranted as to a completed crime. A conspiracy is an agreement to commit a crime.⁶³ Certainly punishment should be available for those who make such an agreement and demonstrate their seriousness by taking at least one overt act toward its accomplishment. But when the substantive crime that was agreed to has been committed, the government should prosecute only for the substantive offense, with those at the fringes of the venture culpable either for causing, or aiding and abetting, the offense whenever the elements for those specific crimes are established.⁶⁴ When a substantive offense has been completed, permitting a jury that acquits on the substantive offense to convict for conspiracy is too dangerous. It is a dragnet approach to criminal law, inviting the jurors to resolve doubtful cases by pronouncing guilt for an offense that may seem to them less serious than the substantive offense. I think many jurors who have acquitted a fringe defendant of a substantive drug offense but convicted of conspiracy would be astounded to learn that the sentences for these offenses are identical.

Whatever my reservations on this score, I recognize the established law that a conspiracy conviction is permissible even where the substantive offense has been completed. My concern is how seriously we take the obligation to insist on proof beyond a reasonable doubt when we permit conviction for this most amorphous of crimes. Consider the pervasive rule as to review of the sufficiency of evidence to support the crucial element that a defendant joined the conspiracy. Many circuits, including my own, hold that once the existence of a conspiracy has been established, it takes only "slight" evidence to connect a defendant to it.⁶⁵ How can that possibly be correct? How can "slight" evidence suffice to permit a finding beyond a reasonable doubt? Since the conspiracy count itself is a crutch available for the prosecutor to lean on when proof of the substantive offense is thin, we should at least discard the "slight evidence" test for linking a defendant to a conspiracy, and seriously insist that the evidence of participation be substantial enough to permit a reasonable jury to find this element, like all other elements, established beyond a reasonable doubt.

The "slight evidence" test seems to have entered our jurisprudence

⁶³ See *United States v. Falcone*, 311 U.S. 205, 210 (1940).

⁶⁴ See 18 U.S.C. § 2 (1988) (requiring punishment as a principal for persons culpable of causing, aiding, or abetting commission of a crime against the United States).

⁶⁵ *United States v. Vaquero*, 997 F.2d 78, 82 (5th Cir.), cert. denied, 114 S. Ct. 614 (1993); *United States v. Smiley*, 997 F.2d 475, 479 (8th Cir. 1993); *United States v. Lee*, 991 F.2d 343, 348 (6th Cir. 1993); *United States v. Brooks*, 957 F.2d 1138, 1147 (4th Cir.), cert. denied, 112 S. Ct. 3051 (1992); *United States v. Tejada*, 956 F.2d 1256, 1265 (2d Cir.), cert. denied, 113 S. Ct. 124 (1992); *United States v. Sanchez-Mata*, 925 F.2d 1166, 1167 (9th Cir. 1991).

quite unobtrusively in 1930 in a decision of the Fifth Circuit in *Tomplain v. United States*.⁶⁶ It was later embraced by several other circuits.⁶⁷ The test gained acceptance because of a confusion between the correct rule that only a slight *connection* between a defendant and a conspiracy need be shown and the incorrect rule that only slight *evidence* is needed to prove that connection.⁶⁸ A few circuits have properly rejected the "slight evidence" test to varying degrees.⁶⁹ It is time to recognize that this test is inconsistent with serious enforcement of the "reasonable doubt" standard.

The "slight evidence" test for participation in a conspiracy is not the only example of the tendency of appellate courts to accept thin evidence as sufficient to establish guilt beyond a reasonable doubt. Some courts have permitted a witness's prior inconsistent statements to provide substantial support for conviction, even though they were nominally offered only for impeachment.⁷⁰ My quarrel is not with the admissibility of such statements; it is with the courts' failure to assess the sufficiency of such evidence against a rigorous application of the "reasonable doubt" standard.

Other examples are cases where thin proof of guilt was deemed sufficient to convict because it was bolstered by evidence showing consciousness of guilt⁷¹ or an inference from the defendant's demeanor on the witness stand.⁷² Again, I do not question the relevance of such evidence,

⁶⁶ 42 F.2d 202, 203 (5th Cir.), cert. denied, 282 U.S. 886 (1930).

⁶⁷ See, e.g., *United States v. Knight*, 416 F.2d 1181, 1184 (9th Cir. 1969); *Bradford v. United States*, 413 F.2d 467, 469 (5th Cir. 1969). *Bradford* and *Knight* were cited by the Second Circuit in *United States v. Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974).

⁶⁸ See *United States v. Marsh*, 747 F.2d 7, 12-13 & n.3 (1st Cir. 1984).

⁶⁹ See, e.g., *United States v. Clavis*, 977 F.2d 538, 539 (11th Cir. 1992), cert. denied, 113 S. Ct. 1619 (1993); *United States v. Durrive*, 902 F.2d 1221, 1228-29 (7th Cir. 1990); *United States v. Coleman*, 811 F.2d 804, 807-08 (3d Cir. 1987); *United States v. Marsh*, 747 F.2d 7, 13 (1st Cir. 1984).

⁷⁰ See, e.g., *Gibbons v. State*, 286 S.E.2d 717, 721 (Ga. 1982) (holding that prior inconsistent statement of witness may be used as substantive evidence, not just for impeachment, and that statement, together with other "limited" evidence, was sufficient to support conviction); see also *People v. Brown*, 198 Cal. Rptr. 260, 263 (Cal. App. 1 Dist. 1984) (holding, under California Evidence Code § 1235 which allows prior inconsistent statements to be used as substantive evidence, that prior inconsistent statements of defendant were sufficient to support conviction); *State v. Moore*, 424 So. 2d 920, 922 (Fla. Dist. Ct. App. 1983) (holding that because Florida Evidence Code § 801(2)(a) allows prior inconsistent statements to be admitted as substantive evidence, State could survive motion to dismiss based solely on witness's prior inconsistent statements). See generally Stanley A. Goldman, *Guilt by Intuition: The Insufficiency of Prior Inconsistent Statements to Convict*, 65 N.C. L. Rev. 1 (1986).

⁷¹ See, e.g., *United States v. Morgan*, 914 F.2d 272, 276 (D.C. Cir. 1990) (holding consciousness of guilt and momentary possession sufficient to support conviction for possession of marijuana); *United States v. Nichols*, 820 F.2d 508, 512 (1st Cir. 1987) (holding that defendant's behavior allowed jury inference that defendant had "something to hide").

⁷² See, e.g., *United States v. Zafiro*, 945 F.2d 881, 888 (7th Cir. 1991) (holding that jury

only the heavy reliance on it to carry a case above the line of proof beyond a reasonable doubt. The fact that evidence is relevant does not automatically make it sufficient to support a criminal conviction. That point should be obvious, yet it is rarely mentioned in the appellate reports.⁷³

All of these examples illustrate my basic point—that courts do not take seriously their obligation to assess sufficiency of evidence in light of the “reasonable doubt” standard. They end their inquiry upon noticing the existence of “some” evidence of guilt. But the Supreme Court warned in *Jackson* against sustaining convictions supported by only a “modicum” of evidence. In a passage rarely mentioned by federal appellate courts, Justice Stewart wrote:

Any evidence that is relevant—that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401—could be deemed a “mere modicum.” But it could not seriously be argued that such a “modicum” of evidence could by itself rationally support a conviction beyond a reasonable doubt.⁷⁴

If the constitutional standard of proof in criminal cases is to have meaning, courts must heed this caution and ask themselves in every case whether a reasonable jury could have found guilt proven beyond a reasonable doubt.

If an appellate court is unwilling to say that the evidence is insufficient to permit a finding of guilt beyond a reasonable doubt, it should at least be willing to say, in some marginal cases of doubtful sufficiency, that the verdict is against the weight of the evidence and, on that ground, order a new trial. Trial courts have authority to set aside convictions as being against the weight of the evidence,⁷⁵ and some circuits have accorded them authority to reweigh evidence and even consider the credi-

could conclude on basis of defendant's demeanor and expert evidence that defendant knew she was aiding a conspiracy), aff'd, 113 S. Ct. 933 (1993).

⁷³ See *United States v. Young*, 745 F.2d 733, 766 (2d Cir. 1984) (Newman, J., concurring) (“It is one thing to permit a jury to weigh [an expert's opinion that actions are criminal] in considering an otherwise adequate case, it is quite another matter to let that opinion salvage an insufficient case.”), cert. denied, 470 U.S. 1084 (1985); *United States v. Sette*, 334 F.2d 267, 269 (2d Cir. 1964) (holding that expert evidence of government agents that behavior was criminal is insufficient to establish prima facie case).

⁷⁴ *Jackson v. Virginia*, 443 U.S. 307, 320 (1979).

⁷⁵ See *Tibbs v. Florida*, 457 U.S. 31, 42 (1982) (“[T]hese policies [underlying double jeopardy bar to retrial after insufficiency ruling] do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence.”); Fed. R. Crim. P. 33 (“The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.”); 3 Charles A. Wright, *Federal Practice and Procedure* § 553, at 246 (1982) (noting that on motion for new trial, court can conclude “that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted”).

bility of witnesses.⁷⁶ The Supreme Court has recognized that, at least in a state judicial system, even appellate courts may exercise such authority, sitting, in effect, as a thirteenth juror.⁷⁷ However, federal appellate courts generally take a restrictive view of "weight of the evidence" challenges, routinely affirming district court denials of such motions⁷⁸ and usually reversing the rare district court rulings that grant such motions.⁷⁹

A notable recent exception is *United States v. Morales*.⁸⁰ A trial judge had denied a motion to set aside a conviction as contrary to the weight of the evidence. The Seventh Circuit reversed. In Judge Posner's words: "If the complete record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong a doubt as to require a judgment of acquittal, the district judge may be obliged to grant a new trial."⁸¹ Those words could be written only by a judge who takes the "reasonable doubt" standard seriously.

4. *Examining Credibility*

My fourth plea is that, in taking seriously our obligation to determine whether the evidence suffices to permit a finding of guilt beyond a reasonable doubt, we make some modest adjustment in our absolute rejection of any inquiry as to the credibility of witnesses. Here, I acknowledge, I am moving past the provocative to the heretical! It has been an article of faith among judges steeped in the Anglo-American jury tradition that the credibility of witnesses is for the jury and not for the appellate court.⁸² So when the Supreme Court formulated its standards for testing sufficiency in civil and criminal cases, it naturally directed reviewing judges not to weigh the credibility of witnesses.⁸³

Should this always be so? I think our confidence in the ability of

⁷⁶ See, e.g., *United States v. Brown*, 956 F.2d 782, 786 (8th Cir. 1992); *United States v. Rothrock*, 806 F.2d 318, 321 (1st Cir. 1986); *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985).

⁷⁷ See *Tibbs*, 457 U.S. at 42 ("[T]he appellate court sits as a 'thirteenth juror' and disagrees with the jury's resolution of the conflicting testimony.").

⁷⁸ See, e.g., *United States v. Pitner*, 979 F.2d 156, 161-62 (9th Cir. 1992); *United States v. Garcia*, 978 F.2d 746, 748-50 (1st Cir. 1992); *United States v. Ludwig*, 897 F.2d 875, 882-83 (7th Cir. 1990).

⁷⁹ See, e.g., *United States v. Cox*, 995 F.2d 1041, 1044 (11th Cir. 1993); *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992).

⁸⁰ 902 F.2d 604 (7th Cir.), amended, 910 F.2d 467 (7th Cir. 1990).

⁸¹ *Id.* at 468.

⁸² See, e.g., *United States v. Dunigan*, 884 F.2d 1010, 1013 (7th Cir. 1989); *United States v. Shulman*, 624 F.2d 384, 388 (2d Cir. 1980).

⁸³ See *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Brady v. Southern Ry.*, 320 U.S. 476, 479 (1943); see also *Burks v. United States*, 437 U.S. 1, 16-17 (1978) ("Even the trial court, which has heard the testimony of witnesses firsthand, is not to . . . assess the credibility of witnesses when it judges the merits of a motion for acquittal. . . . Obviously, a federal appellate court applies no higher a standard.").

juries to assess credibility is generally well placed. Deciding whether a witness speaks the truth is never easy, and judges are no better than jurors at looking inside the mind or heart of a witness and detecting mendacity. But it is a romantic notion that the jury should be an infallible determiner of credibility. It is one thing to permit the jury unfettered discretion in choosing between the conflicting accounts of two upstanding members of the community. But it is quite another to defer blindly to their acceptance of testimony from a seriously impeached witness. For example, if a witness is indisputably shown to have lied on prior occasions, perhaps under oath, and is currently in a position to save himself years of jail time by accusing the defendant, does it make sense to say that his testimony alone is sufficient to prove guilt beyond a reasonable doubt, simply because twelve jurors have decided to believe him? Again, I do not mean to suggest that such testimony should be inadmissible. We should permit the jury to consider it along with other evidence. But if the other evidence is slender or nonexistent, then, at least in some cases, the substantial impeachment of an accusing witness, based on objective facts, should prompt a court to say that a reasonable jury (even *any* rational jury) could not find guilt beyond a reasonable doubt.

At one time Judge Jerome Frank expressed the view that in a criminal case a judge could, on occasion, include the judge's own assessment of credibility in determining whether a case was sufficient to persuade a reasonable jury beyond a reasonable doubt.⁸⁴ He later receded from this view,⁸⁵ though maintaining at least the possibility that a judge in a criminal case should reject testimony deemed "patently false," even though precluded by the seventh amendment from doing so in a civil case.⁸⁶ I think Judge Frank was right the first time.

5. *Heightened Scrutiny in Special Categories of Cases*

My final plea is that we give serious thought to adjusting sufficiency review in special categories of cases. If we are not going to be rigorous in enforcing the "reasonable doubt" standard in all cases, at least we should do so in those cases where we know the risk of convicting the innocent is higher than ordinary. When Professor Borchard confronted us more than sixty years ago with chilling examples of innocent persons found guilty by juries,⁸⁷ he reminded us that a major cause of such injustice is

⁸⁴ See *United States v. Castro*, 228 F.2d 807, 809-10 (2d Cir.) (Frank, J., concurring), cert. denied, 351 U.S. 940 (1956).

⁸⁵ See *United States v. Masiello*, 235 F.2d 279, 290 n.8 (2d Cir.) (Frank, J., concurring), cert. denied, 352 U.S. 882 (1956).

⁸⁶ *Id.*

⁸⁷ See generally Edwin M. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (1932).

unwarranted reliance on eyewitness testimony.⁸⁸ Are the only safeguards a jury charge that cautions about the hazards of such testimony⁸⁹ and court rejection of unduly suggestive identifications?⁹⁰

I believe that the "reasonable doubt" standard requires us to do more. Appellate courts must not end their sufficiency inquiry as soon as they notice that at least one eyewitness identified the defendant. If that witness did not previously know the accused and had only a brief opportunity to observe him, and if the remaining evidence is thin or nonexistent, courts should face up to their responsibilities and rule that, though there is some evidence of guilt, it is insufficient to persuade a reasonable jury by the high standard of proof beyond a reasonable doubt.

Another likely category for such an approach would be cases where a finding of guilt rests primarily, and sometimes entirely, on the uncorroborated testimony of an accomplice. In the federal courts, such testimony is sufficient.⁹¹ I ask you: Is it sufficient to satisfy merely the civil standard, which is all Learned Hand required,⁹² or can we honestly say, in every case, that it is sufficient to persuade a reasonable jury of guilt beyond a reasonable doubt? Rather than choose between the federal rule, which always permits a conviction on the uncorroborated testimony of an accomplice, and the New York rule, which never permits a conviction on such testimony alone,⁹³ I would prefer to see such testimony deemed sufficient only in those cases where, based on all the circumstances, we can confidently say that a reasonable jury could be persuaded of guilt beyond a reasonable doubt.

Other categories where we ought to be especially careful in determining whether a reasonable jury could have found guilt beyond a reasonable doubt are cases in which the jury might have been unduly swayed to convict by inflammatory, though relevant, evidence about the crime or the victim, and complex cases in which the jury might not have given individual consideration to each one of a large group of defendants.

In a similar vein, we might consider applying the "reasonable doubt" standard more rigorously where the penalty is severe. Should not

⁸⁸ See *id.* at xiii-xv. More than half of the 65 cases reported by Borchard of innocent persons convicted resulted from misidentification by eyewitnesses. See *id.*; see also *Kampshoff v. Smith*, 698 F.2d 581, 585-86 (2d Cir. 1983) (reporting academic studies detailing empirical unreliability of eyewitnesses identification).

⁸⁹ See 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 14.10 (4th ed. 1992).

⁹⁰ See *Gilbert v. California*, 388 U.S. 263, 272 (1967) (holding that absence of counsel at postindictment lineup violates sixth amendment right to counsel due to dangers of eyewitness identifications); see also *United States v. Wade*, 388 U.S. 218, 228-37 (1967) (same).

⁹¹ See, e.g., *Caminetti v. United States*, 242 U.S. 470, 495 (1917); *United States v. Gordon*, 987 F.2d 902, 906 (2d Cir. 1993).

⁹² See text accompanying notes 27-30 *supra*.

⁹³ See N.Y. Crim. Proc. Law § 60.22 (McKinney 1992).

“reasonable doubt” be taken more seriously when a defendant’s life is at stake?⁹⁴

B. Risk of Undeserved Acquittals

The enhanced scrutiny I have in mind is not advocated simply to tilt the balance of criminal justice a shade more favorably toward defendants. As I said at the outset, I believe that our unwillingness to apply the “reasonable doubt” standard rigorously has resulted not only in some unjust convictions, it has also precipitated some unwarranted acquittals. I cannot prove that paradoxical effect, but I can tell you why I believe it is occurring. It stems from the expectation of courts that jury verdicts of guilty are extremely unlikely to be upset on appeal for insufficient evidence. With this expectation firmly in mind, courts are reluctant to admit some evidence that is relevant to guilt but that also has some tendency to be prejudicial. I think that courts would be more receptive to relevant evidence, despite its somewhat prejudicial effects, if they were confident that when all the evidence was in, a guilty verdict resting on thin evidence would be rejected either by the trial judge or on appeal.

For example, courts do not permit juries to consider evidence that all the world regards as probative in ordinary dealings among people—the fact that the defendant has committed the same offense on prior occasions. We accept such evidence, somewhat hypocritically, for the “limited” purpose of impeaching the credibility of the occasional defendant who testifies. But when the defendant does not testify, we normally exclude such evidence, not because it is irrelevant, but because it is too relevant—that is, because it might too readily lead the jury to convict. We also exclude some forms of hearsay that people often rely on in ordinary matters.

I think we would be more willing to broaden the categories of evidence that juries are permitted to hear if we were more confident that appellate courts would scrutinize insufficiency claims with care. The lack of such evidence, I suspect, costs the prosecution some convictions that should be obtained.

C. The Approach of Foreign Courts

The reluctance of most American courts to take the “reasonable doubt” standard seriously stands in marked contrast to the approach of many foreign courts. Recently the world took note of the courageous

⁹⁴ A number of state courts require a somewhat greater showing of sufficiency of evidence in death penalty cases. See, e.g., *Kimrough v. State*, 352 So. 2d 512, 516 (Ala. 1977); *West v. State*, 485 So. 2d 681, 688 (Miss. 1985), cert. denied, 479 U.S. 983 (1986); *State v. Ramseur*, 524 A.2d 188, 291 n.84 (N.J. 1987), cert. denied, 113 S. Ct. 2433 (1993).

decision of the Supreme Court of Israel in ruling that there was a reasonable doubt whether John Demjanjuk was guilty of war crimes.⁹⁵ That decision is not precisely analogous to the American cases I have been discussing, as it involves both a review of sufficiency of a completed trial record and an assessment of newly discovered evidence. But it was a decision rendered by a court that took the "reasonable doubt" standard seriously.

In England, the Court of Appeal is obliged to set aside a conviction that it regards as "unsafe or unsatisfactory."⁹⁶ British judges take that obligation seriously.⁹⁷ They ask themselves, in the words of a 1968 decision of the Court of Appeal, "whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done."⁹⁸ The Court of Appeal frankly acknowledges that this inquiry poses "a subjective question,"⁹⁹ though it would seem that the court is not purporting to act as a thirteenth juror, deciding whether it is persuaded of guilt beyond a reasonable doubt. Instead, the court is making up its own mind as to whether the evidence, although perhaps sufficient to persuade a reasonable jury beyond a reasonable doubt, nevertheless leaves the appellate judges with a "lurking doubt [causing concern that] an injustice has been done."¹⁰⁰

Until recently, the Canadian Supreme Court had articulated two standards for testing sufficiency, paralleling the dichotomy of the language our Supreme Court used in *Jackson*.¹⁰¹ A restrictive test stated that a verdict should be vacated only if no twelve jurors "could possibly have reached it,"¹⁰² while a broader test stated that a verdict is sustainable if a jury "could reasonably have rendered it."¹⁰³ In 1987, the Canadian Supreme Court repudiated the more restrictive formulation.¹⁰⁴

Of particular current interest is the new statute of the Russian Federation that authorizes the resumption of jury trials in certain areas of

⁹⁵ See Supreme Court of Israel, sitting as a Court of Criminal Appeals, in the Matter of Ivan (John) Demjanjuk v. State of Israel (Cr. A. 347/88).

⁹⁶ See Criminal Appeal Act, 1968, ch.19 § 2(1)(a) (Eng).

⁹⁷ See, e.g., Daley v. Regina, [1993] 4 All E.R. 86 (P.C.) (appeal taken from Jam.) (overturning conviction supported by eyewitness identification because "the evidence even if taken to be honest has a base which is so slender that it is unreliable").

⁹⁸ Regina v. Cooper, [1969] 1 Q.B. 267, 271 (C.A. 1968).

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ See text accompanying notes 43-47 supra.

¹⁰² Corbett v. Regina, [1975] 2 S.C.R. 275, 278-79.

¹⁰³ Id. at 282.

¹⁰⁴ See Regina v. Yebes, [1987] 2 S.C.R. 168, 183-85; see also Regina v. R.W., [1992] 2 S.C.R. 122, 131-32 ("[A]s a matter of law it remains open to an appellate court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it concludes that the verdict is unreasonable.").

Russia this fall, a practice last seen there in 1917. Pertinent to my concern is the provision requiring the judge in a jury trial to order a new trial in any case in which "the defendant's participation in the commission of the crime has not been proved."¹⁰⁵ Though we do not yet know how this provision will be applied in practice, it appears to place the trial judge squarely in the role of a thirteenth juror, making the same subjective inquiry as to whether guilt has been proven beyond a reasonable doubt as was made by the Israeli Supreme Court in the Demjanjuk case.

CONCLUSION

I hope that all of the proposals I have outlined have given some vision of what appellate review would look like if we took the "reasonable doubt" standard more seriously. Why have we not done so? Is it simply a pro-prosecution bias in appellate courts? I think not. My guess is that American courts have permitted their unbounded enthusiasm for the jury to dilute the rigor of their enforcement of the "reasonable doubt" standard as a rule of law. We say that we do not wish to invade the "province of the jury."¹⁰⁶ But that "province" is not a fortress that can never be entered, nor is it a black box into which we dare not look. It is simply a group of twelve people doing their level best. Generally we should accept their verdict. But our task as judges includes the enforcement of constitutional standards. And a vital component of those standards is the requirement of proof beyond a reasonable doubt.

The time has come to move beyond the mere incantation of the "reasonable doubt" standard in jury charges and to apply it faithfully as a rule of constitutional law in the course of appellate review of criminal convictions. I believe that is what James Madison would have expected us to do.

¹⁰⁵ Criminal Procedure Code art. 459 (RSFSR), adopted in Law of the Russian Federation: On Making Changes to the RSFSR Law 'On the Judicial System of the RSFSR,' the Criminal Procedure Code RSFSR, the Criminal Code of the Russian Federation, and the RSFSR Code on Administrative Legal Violations 13 (July 16, 1993) (unpublished translation by Foreign Broadcast Information Service on file at the New York University Law Review).

¹⁰⁶ See, e.g., *United States v. Garcia*, 995 F.2d 556, 561 (5th Cir. 1993); *United States v. Holland*, 992 F.2d 687, 690 (7th Cir. 1993).