

1-1-2006

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Recommended Citation

11 Suffolk J. Trial & App. Advoc. 221 (2006)

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GOOD INTENTIONS ARE NOT ENOUGH: THE ARGUMENT AGAINST A HIGHER STANDARD OF PROOF IN CAPITAL CASES

*"[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge about what happened."*¹

*"[The] no doubt standard would ... permit a single juror, harboring even an unreasonable doubt, to veto the death penalty for terrorists, serial killers, and other despicable murderers."*²

INTRODUCTION

"Until I can be sure that everyone sentenced to death in Illinois is truly guilty ... no one will meet that fate."³ With those words, Governor George Ryan suspended the death penalty in Illinois on January 31, 2000.⁴ The former capital punishment supporter became the first governor in U.S. history to declare a moratorium on the death penalty.⁵ Three years later, Ryan made history again. Just two days before he left office, the governor

¹ *In re Winship*, 397 U.S. 358, 375 (1970) (Harlan, J., concurring).

² See "Pro-Death Penalty Group Issues Report Slamming Massachusetts Gov. Mitt Romney's Death Penalty Bill," U.S. NEWSWIRE, May 9, 2005, at 1 (quoting Michael Paranzino, president of "Throw Away the Key," a national victim's advocacy group). "Throw Away the Key" strongly opposed Governor Romney's bill to reinstate the death penalty in Massachusetts, in part because the bill proposed a higher "no doubt" standard of proof in capital cases. *Id.* at 1-2.

³ Ken Armstrong & Steve Mills, "Ryan: 'Until I Can Be Sure' Illinois Is First State To Suspend Death Penalty," CHI. TRIB., Feb. 1, 2000, at 1.

⁴ See *id.* (describing state and national reaction to Illinois moratorium). Governor Ryan based his decision on a multi-part *Chicago Tribune* investigative series that described various problems with the state's death penalty system. See *id.* Since 1977, when Illinois reinstated capital punishment, more death row inmates have been exonerated than have actually been executed. *Id.*

⁵ Joshua Marquis, *The Myth of Innocence*, 95 J. CRIM. L. & CRIMINOLOGY 501, 503-04 (2005) (noting Ryan's transformation from staunch supporter of capital punishment to "folk hero" of anti-death penalty movement). In 1998, Ryan made his support for the death penalty a key part of his campaign for governor. See *id.* at 503.

commuted the sentence of every inmate on Illinois' death row.⁶ "I am not prepared to take the risk that we may execute an innocent person," he declared.⁷

There is no convincing proof that an innocent person has ever been executed in the United States in the modern capital punishment era.⁸ Theoretically, however, innocent people could be executed.⁹ The standard of proof in every criminal case is "proof beyond a reasonable doubt," not absolute certainty.¹⁰ Juries, therefore, may impose the death penalty even when they have some lingering doubts about the defendant's guilt.¹¹

Over the past several years, many have argued that there should be a higher "no doubt" standard of proof in capital cases, to ensure that no innocent person is ever executed. Two sitting federal judges and a justice on

⁶ Maurice Possley & Steve Mills, *Clemency For All*, CHI. TRIB., Jan. 12, 2003, at 1. Governor Ryan commuted the sentences of 164 death row inmates to life imprisonment without parole; four other inmates received 40-year terms. *Id.* at 2

⁷ *Id.*

⁸ Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 603 (2005). In 1972, the United States Supreme Court held that juries were imposing the death penalty in an arbitrary and capricious manner, in violation of the Eighth Amendment's ban on cruel and unusual punishment, and struck down every existing death penalty statute in the nation. *Furman v. Georgia*, 408 U.S. 238, 238 (1972) (per curiam). The modern capital punishment era dates from 1976, when the Court upheld the constitutionality of a number of newly created statutes that established procedures to help guide the jury's decision whether to impose the death penalty. See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (per curiam) (holding death penalty statutes must give capital juries "adequate information and guidance"); see also SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 190 n.3 (Palgrave MacMillan 2005) (describing post-*Gregg* "guided discretion" death penalty statutes).

Two death penalty scholars, Hugo Bedau and Michael Radelet, have argued that twenty three innocent people were put to death in the twentieth century. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 27, 78-81 (1987). But see generally Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121 (1988) (disputing Bedau-Radelet conclusions and criticizing methodology). All but one, however, were executed before 1972, under now-defunct pre-*Furman* statutes. Bedau & Radelet, *supra* note 8, at 27. In any event, Bedau and Radelet admitted that they had not "proved" that any of these twenty-three defendants were actually innocent. See Hugo Adam Bedau & Michael Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161, 164 (1988) (defending methodology).

⁹ See *infra* notes 10-11, 35-42 and accompanying text (explaining "beyond a reasonable doubt" standard); *infra* notes 75-85 and accompanying text (arguing jurors can never be absolutely certain about facts).

¹⁰ See *In re Winship*, 397 U.S. 358, 364 (1970) ("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").

¹¹ See Henry L. Chambers, *Reasonable Certainty And Reasonable Doubt*, 81 MARQ. L. REV. 655, 669-70 ("Innocent defendants occasionally may be convicted based on evidence sufficient to overcome all reasonable doubts but insufficient to overcome some ostensibly unreasonable doubts that actually reflect reality").

the New Jersey Supreme Court have made such a proposal.¹² Several legal commentators have also argued that imposing the death penalty should require a higher standard.¹³ In addition, state legislators in both Illinois and Michigan have considered proposals to restore the death penalty with a heightened standard of proof.¹⁴ Calls for a higher standard in capital cases have been fueled by growing concerns nationwide that innocent people are being convicted and sentenced to death.¹⁵ In the words of one New Jersey

¹² See *New Jersey v. Josephs*, 803 A.2d 1074, 1143-44 (N.J. 2002) (Coleman, J., concurring in part and dissenting in part) (advocating "beyond all doubt" standard when State relies primarily on circumstantial evidence); Judge Leonard B. Sand & Danielle L. Rose, *Proof Beyond All Possible Doubt: Is There A Need for A Higher Burden of Proof When the Sentence May Be Death*, 78 CHI.-KENT L. REV. 1359, 1361 (2003) (proposing "proof beyond all possible doubt" standard); Judge Jon O. Newman, *Make Judges Certify Guilt in Capital Case*, NEWSDAY, July 5, 2000, at A25 (recommending trial judge must certify guilt is "certain" before jury may consider imposing death penalty). Jon Newman is a judge on the United States Court of Appeals for the Second Circuit and Leonard Sand is a senior judge on the United States District Court for the Southern District of New York.

¹³ See JAMES LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT 398-99 (2002), available at <http://www2.law.columbia.edu/brokensystem2/index2.html> (last visited Feb. 10, 2006) (advocating "proof beyond any doubt" standard for death penalty); Craig M. Bradley, *A (Genuinely) Modest Proposal Concerning the Death Penalty*, 72 IND. L.J. 25, 27 (1996) (advocating "no lingering or residual doubts" standard of proof in capital cases); Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 126 (2001) (arguing evidence should "foreclose all doubt about guilt" before jury can consider death penalty); Elizabeth R. Jungman, Note, *Beyond All Doubt*, 91 GEO. L.J. 1065, 1082 (2003) (calling for "beyond all doubt" standard).

¹⁴ See Ray Long, *A Bid to End Execution Doubts; Bipartisan Plan Would Raise Standard of Guilt*, CHI. TRIB., Feb. 26, 2005, at C1. The state senate killed the bill in May 2005, before the full legislature could vote on the proposal. Ray Long and Rick Pearson, *Death Penalty Bill Killed; Measure Would Have Set Highest Standard For Prosecutors*, CHI. TRIB., May. 19, 2005, at C1 (reporting Illinois prosecutors' strong opposition to higher standard). See also Dawson Bell, *Death Penalty Is Voted Down Again; Strong Opposition Sinks Proposed Amendment*, DETRIOT FREE PRESS, Mar. 19, 2004, at 1 (describing Republican legislator's failed attempt to end Michigan's 158-year ban on capital punishment). He believed that the death penalty should be reinstated for first-degree murder cases when the government had established the defendant's guilt to a "moral certainty." See *id.*

¹⁵ See Erick Lillquist, *Absolute Certainty and the Death Penalty*, 42 AM. CRIM. L. REV. 45, 45 (2005) [hereinafter Lillquist, *Absolute Certainty*]. Elizabeth Jungman, for example, argues that it is "unconstitutional and morally reprehensible" to have a capital punishment system under which innocent people are sentenced to death. Jungman, *supra* note 13, at 1066. Fifty-nine percent of Americans, in fact, believe that at least one innocent person has been executed in the last five years, according to a Gallup Poll in October 2005. LYDIA SAAD, SUPPORT FOR DEATH PENALTY STEADY AT 64%, GALLUP NEWS SERVICE 4 (2005), <http://poll.gallup.com/content/default.aspx?ci=20350&pg=1> (last visited Dec. 27, 2005). Even former United States Supreme Court Justice O'Connor, who consistently supported the death penalty while on the bench, believes that "if statistics are any indication, the system may well be allowing some innocent defendants to be executed." Ken Armstrong & Steve Mills, *O'Connor Questions Fairness of Death Penalty*, CHI. TRIB., July 4, 2001, at 1.

Supreme Court justice, James Coleman, the same standard “used to determine whether an individual should be found guilty or innocent of possession of a marijuana cigarette should not be used in determining whether an accused can be executed.”¹⁶

Even some strong death penalty supporters favor a tougher burden of proof in capital cases. Former Oklahoma governor Frank Keating, a high profile supporter, believes the reasonable doubt standard is “too low” for capital cases.¹⁷ And Governor Mitt Romney, who campaigned to reinstate the death penalty in Massachusetts, touted the “no doubt” burden of proof provision of his capital punishment bill.¹⁸

This note takes the opposite position. Imposing the death penalty cannot and should not require a higher standard of proof.¹⁹ A “no doubt” standard would create the comforting, but false impression that juries will always reach the correct verdict in death penalty cases. But juries without first-hand knowledge of the facts can never determine, with absolute certainty, whether a defendant is guilty or innocent.²⁰ This note also argues that there is no justification for raising the standard of proof in capital cases (assuming jurors could actually apply a “no doubt” standard). Because the death penalty has important social benefits, and because most death row inmates are in fact guilty, the costs of imposing a higher stan-

¹⁶ *Josephs*, 803 A.2d at 1153 (Coleman, J., concurring in part and dissenting in part); see also Sand & Rose, *supra* note 12, at 1367 (asserting “fundamental difference” between incarceration and execution requires different standard of proof).

¹⁷ See Jim Myers, *Keating: “Standard Is Too Low,”* TULSA WORLD, June 23, 2001, at 1 (reporting Keating’s proposal to make “moral certainty” the new death penalty standard). Governor Keating presided over 50 executions between 1995 and 2003. *Id.*

¹⁸ H.R. 3834, 2005 Leg. 184th Sess. (Mass. 2005), available at http://www.nodp.org/ma/death_penalty_4-28-5.pdf (last visited July 20, 2005). Governor Romney based his legislation entirely on the recommendations of a special commission that the governor had created in September 2003 to design a “foolproof” capital punishment system for the state. See Raphael Lewis, *Romney Files Death Penalty Bill: Measure Sets Out Tight Restrictions*, THE BOSTON GLOBE, April 29, 2005, at 1 (describing Romney’s capital punishment bill). The Massachusetts state legislature defeated Romney’s death penalty bill by a wide margin in November 2005. Scott Helman, *Death Penalty Bill Fails in House*, THE BOSTON GLOBE, Nov. 16, 2005, at 1.

¹⁹ The United States Supreme Court has never considered whether there should be a higher standard of proof for imposing the death penalty. Sand & Rose, *supra* note 12, at 1365. The Court apparently believes that the reasonable doubt standard is “necessarily and sufficient” for capital trials. *Id.* In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), Justice O’Connor did note, “Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing,” but O’Connor spoke only for herself and Justice Blackmun. *Id.* at 188 (O’Connor, J., concurring).

²⁰ See Chambers, *supra* note 11, at 660 (stating absolute or mathematical certainty is unattainable in criminal trials).

dard (decreased use of the death penalty) outweigh the benefits (preventing wrongful executions).²¹

This note is divided into four sections. Section I briefly describes how a capital trial works and explains the impact of the reasonable doubt standard on the death penalty.²² Section II compares and contrasts five recent no-doubt proposals.²³ Section III argues why capital punishment cannot and should not be subject to a higher burden of proof. Lastly, Section IV suggests that improving the jury's understanding of the prevailing reasonable doubt standard would be a much better way of lowering the risk of erroneous death sentences.

I. THE CAPITAL TRIAL

Capital trials are divided into two stages: a guilt phase and a sentencing phase.²⁴ Unlike most regular criminal trials, the jury typically determines guilt or innocence and selects the sentence.²⁵ In the guilt phase,

²¹ See *infra* notes 107-11 and accompanying text (explaining most death row inmates are guilty); *supra* notes 122-25 and accompanying text (arguing death penalty serves important moral and penalogical benefits)

²² Thirty-eight states have the death penalty: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. THOMAS P. BONCZAR & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2004, at 2 tbl.1 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpo4.pdf> (last visited Dec. 28, 2005). Moratoriums in Illinois and New Jersey, however, have halted executions in both states. The Kansas and New York death penalty statutes were declared unconstitutional in 2004, and the state legislatures have yet to pass curative reforms. See *id.* Five states (Texas, Virginia, Oklahoma, Missouri, and Florida) have carried out two-thirds of all the executions in the United States since 1977. See *id.*

²³ This note collectively refers to the higher standard proposals as "no-doubt" proposals, even though some commentators use different terminology.

²⁴ See *Gregg v. Georgia*, 428 U.S. 153, 191-92 (1976) (requiring bifurcated capital trials to ensure juries do not impose death penalty arbitrarily and capriciously). In *Gregg*, the Supreme Court noted that "much of the information that is relevant to the [jury's] sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of [guilt]. *Id.* at 190. For example, capital juries may consider, during sentencing, the defendant's prior bad acts, and the effect of the murder on the victim's family—none of which is relevant during the guilt phase, but all of which may be relevant for sentencing. See Alexander Bunin, *When Trial and Punishment Intersect: New Defects in the Death Penalty*, 26 W. NEW ENG. L. REV. 233, 236 (2004) (describing differences between guilt and sentencing in capital trials).

²⁵ Nancy J. King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. OF CRIM. LAW 195, 196 n.4 (2004). In four states (Alabama, Delaware, Florida, and Indiana), however, the trial judge may override the jury's sentencing recommendation. Death Penalty Information Center, *State by State Information*, <http://www.deathpenalty.info.org/state/> (last visited Feb. 17, 2006). The judge alone deter-

the jury decides whether the defendant is guilty of a capital crime.²⁶ The standard of proof, as in all criminal trials, is proof beyond a reasonable doubt.²⁷

In a separate sentencing proceeding (if applicable), the same jury decides whether the defendant's crime warrants the death penalty.²⁸ In this phase, the government must prove that additional aggravating factors were present before the jury may consider imposing the death penalty.²⁹ Aggravating factors "are intended to identify those circumstances that single out the crime and the criminal as the 'worst of the worst.'"³⁰ In most death penalty states, the government bears the burden of proving each aggravating factor beyond a reasonable doubt.³¹ But juries must also consider, during their sentencing deliberations, any relevant mitigating evidence.³²

mines the sentence in both Montana and Nebraska. *See id.* The Death Penalty Information Center, an Internet-based research organization, provides a wealth of useful information about capital punishment in the United States, although it has an overt anti-death penalty bias.

²⁶ Bunin, *supra* note 24, at 243. In most jurisdictions, the death penalty is only available for first-degree or capital murder. *See* BONCZAR & SNELL, *supra* note 22, at 2 tbl.1 (listing capital offenses by state). In Louisiana, the death penalty may be imposed for the aggravated rape of a victim less than twelve years old. LA. REV. STAT. §14:42(D)(2)(a). Only Louisiana has sentenced anyone to death for a non-homicide crime over the past twenty five years. Lillquist, *Absolute Certainty*, *supra* note 15, at 54 n.45. The jury may also convict the defendant of a lesser offense (i.e. second-degree murder) "when the evidence would have supported such a verdict." *Beck v. Alabama*, 447 U.S. 625, 627-28 (1980).

²⁷ *See supra* note 10.

²⁸ Jungman, *supra* note 13, at 1089. In most states, the jury has three sentencing options: the death penalty, life imprisonment without the possibility of parole (LWOP), or life imprisonment with the possibility of parole after a certain number of years. *See* William J. Bowers & Benjamin D. Steiner, *Death By Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 646 n.198 (1999) (describing sentencing alternatives in various death penalty states). In some states, LWOP is the only sentencing alternative to the death penalty. *Id.* Certain classes of people cannot be executed under any circumstances. *See generally* *Roper v. Simmons*, 543 U.S. 551 (2005) (juveniles under eighteen); *Atkins v. Virginia*, 536 U.S. 304 (2002) (mentally retarded defendants); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (defendants who were not "major participants" in capital crime); *Ford v. Wainwright*, 477 U.S. 399 (1986) (insane defendants).

²⁹ SUNDBY, *supra* note 8, at 10.

³⁰ *Id.* Aggravating factors may include: the victim was less than twelve years old; the victim was a law enforcement officer; the defendant committed the murder while he was already serving a life sentence for another crime; and the defendant committed multiple murders. *See, e.g.,* Fla. Stat. Ann. §921.141(5) (2005) (listing aggravating factors under Florida law). Most death penalty states have a statutory list of aggravating factors. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness From Capital Sentencing*, CRIM. LAW BULLETIN 39, 70 (2003).

³¹ Bowers & Foglia, *supra* note 30, at 70.

³² *See* *Morgan v. Illinois*, 504 U.S. 719, 738 (1992) (requiring jury consideration of all relevant mitigating evidence). Mitigating evidence might include: the defendant's age, mental condition, or testimony from prison guard that the defendant is a peaceful in-

Mitigating evidence is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."³³ In most states, the jury cannot impose the death penalty unless it concludes that the aggravating factors outweigh the mitigating factors.³⁴

The reasonable doubt standard applies in both the guilt and sentencing phases.³⁵ To overcome the reasonable doubt standard, the government must convince the jury to a *near certainty* that the defendant is guilty, and that the death penalty is warranted because additional aggravating factors were present.³⁶ A standard of near certainty, by definition, does not require complete certainty, so mistakes are inevitable.³⁷ In death penalty cases, there are two general types of errors: false positives and false negatives.³⁸ False positives refer to cases where the defendant was wrongfully sentenced to death.³⁹ False negatives, on the other hand, represent cases where the jury should have imposed the death penalty, but instead imposed a life sentence.⁴⁰ The reasonable doubt standard is premised on the theory

mate. See, e.g., Fla. Stat. Ann. §921.141(6) (2005) (specifying mitigating factors under Florida law); see also SUNDBY, *supra* note 8, at 19.

³³ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (defining mitigating evidence).

³⁴ *Bowers & Foglia*, *supra* note 30, at 67. Unlike aggravating factors, which the government must prove beyond a reasonable doubt, it is not clear what standard of proof applies to mitigating factors. See *id.* at 69. The U.S. Supreme Court has never addressed this issue and neither have most states. See *id.* In North Carolina and Pennsylvania, however, the defendant must prove each mitigating factor by a preponderance of the evidence. *Id.*

³⁵ See *supra* notes 24-34 and accompanying text (describing capital trial).

³⁶ See *Jackson v. Virginia*, 443 U.S. 307, 315 (1979) (requiring juries to reach "subjective state of *near certitude*" about facts under reasonable doubt standard) (emphasis added). The Supreme Court, however, has never quantified how much proof the reasonable doubt standard actually requires. See *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (stating trial judges have no obligation to explain reasonable doubt standard to juries); see also Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 87 (2002) [hereinafter Lillquist, *Reasonable Doubt*] (noting courts consistently refuse to quantify amount of certainty required under reasonable standard). It has been estimated that "proof beyond a reasonable doubt" generally requires about 95 percent certainty, although studies have shown that juries typically convict with far less certainty. *United States v. Fatico*, 458 F. Supp. 388, 406 (1978); see Lillquist, *Reasonable Doubt*, *supra* note 34, at 111-14 (summarizing studies).

³⁷ See *supra* note 11.

³⁸ See Erik Lillquist, *False Positives and False Negatives in Capital Cases*, 80 IND. L.J. 47, 49-51 (2005) [hereinafter Lillquist, *False Positives*] (discussing accuracy in capital sentencing).

³⁹ See *id.* at 49. "False positives" can be further divided into two sub-categories: defendants who were not guilty of the crime and defendants who were guilty of a capital crime but nonetheless did *not* deserve to be sentenced to death. See *id.*

⁴⁰ See *id.* "False negatives" can also be further divided into sub-categories: defendants who were acquitted and defendants who were convicted of a capital crime but received a prison sentence instead of the death penalty. See *id.* This note assumes, for the

that, when errors do occur, false negatives are far better than false positives.⁴¹ In other words, errors should overwhelmingly favor the innocent in capital trials.⁴²

II. NO-DOUBT PROPOSALS

A number of judges, lawyers, academics, and elected officials have called for a higher standard of proof in capital cases. They believe that the capital punishment system should never willingly accept any false negatives.⁴³ One wrongful execution, they believe, is one too many.⁴⁴ This Section concentrates on five different no-doubt proposals that have been put forward in recent years.⁴⁵ None of them would raise the standard of proof for conviction in the guilt phase.⁴⁶ Only the jury's decision to impose the death penalty would be subject to a higher "no doubt" standard of proof.⁴⁷

A. *The Koosed Proposal*⁴⁸

At the end of the guilt phase, after the presentation of all the evidence, the jury chooses one of three possible verdicts: not guilty, guilty

sake of argument, that the death penalty is appropriate for some crimes. Sixty-four percent of Americans support capital punishment, according to a Gallup Poll in October 2005. SAAD, *supra* note 15, at 1. In fact, the majority (53%) believe that the death penalty should be imposed more often. *Id.* at 3.

⁴¹ Lillquist, *False Positives*, *supra* note 38, at 49.

⁴² See *Winship*, 397 U.S. at 379 (Harlan, J., concurring) ("[W]e do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty"). "Standards of proof," according to Professor Erik Lillquist, "simply allocate errors among the parties." Lillquist, *False Positives*, *supra* note 38, at 50. In civil cases, the preponderance standard allocates errors equally between the plaintiff and the defendant, whereas in criminal cases (and death penalty cases), the reasonable doubt standard allocates errors in favor of the defendant. See *id.*

⁴³ See, e.g. Jungman, *supra* note 13, at 1072 (arguing capital punishment system violates Eighth Amendment cruel and unusual ban because innocent people are at risk of being executed).

⁴⁴ Newman, *supra* note 12, at A25. "Every effort should ... be made to assure that the risk of executing an innocent person is reduced as low as humanly possible." *Id.*

⁴⁵ See *infra* notes 46-72 and accompanying text (comparing and contrasting no-doubt proposals).

⁴⁶ See Sand & Rose, *supra* note 12, at 1369-70 (summarizing recent no-doubt proposals). At least there is no risk that guilty defendants will go free under a higher "no doubt" standard. See *id.*

⁴⁷ See *id.* at 1369.

⁴⁸ See Koosed, *supra* note 13, at 125-29 (describing proposal). Margery Malkin Koosed is Professor of Law at the University of Akron School of Law.

beyond a reasonable doubt, or “guilty by proof beyond *all doubt*.”⁴⁹ Not guilty, of course, means the defendant goes free.⁵⁰ A verdict of guilty beyond a reasonable doubt means the defendant automatically receives a life sentence.⁵¹

To proceed to the sentencing phase (where the death penalty can be considered), two conditions must be met: First, every juror must individually choose the “proof beyond all possible doubt” verdict.⁵² Second, the trial judge must also conclude—after a *de novo* review of the evidence—that he has no doubt about the defendant’s guilt.⁵³ Moreover, if the defendant presents additional mitigating evidence during the sentencing phase, then each juror must re-consider the correctness of his or her original “no doubt” verdict.⁵⁴

*B. The Sand Proposal*⁵⁵

At the outset of the sentencing phase, after the jury has already convicted the defendant of capital murder in the guilt phase, the jury must decide whether the government has proved the defendant’s guilt “beyond all possible doubt.”⁵⁶ If the jury has no doubt about the defendant’s guilt, the

⁴⁹ See *id.* at 125 (emphasis added). Under Professor Koosed’s proposal, the government must prove each aggravating factor during the guilt phase, not the sentencing phase, as is currently the practice. See *id.* at 104-05.

⁵⁰ See *id.*

⁵¹ See *id.* at 126.

⁵² *Id.* at 126. The jury instruction might read:

If you unanimously find that the State has proven beyond a reasonable doubt that the defendant committed the crime of aggravated murder, it is then your individual duty to decide the following question: Based on the evidence you have received in this proceeding, are you convinced beyond all doubt of each and every one of the elements of the crime of aggravated murder?

Id. at 127. Each juror must decide the “no doubt” question individually, so that “we can reduce the likelihood of improper pressures being brought to bear. *Id.* at 125. Therefore, the jury may not reach a unanimous decision. *Id.* If one or more jurors does not conclude that the evidence does not “foreclose all doubt as to guilt,” the court automatically imposes a life sentence. See *id.* at 126.

⁵³ See *id.* at 128.

⁵⁴ See *id.* at 126. If the defendant does *not* present any additional mitigating evidence, then presumably the jury can impose the death penalty without re-visiting the question of guilt. See *id.* at 126.

⁵⁵ See Sand & Rose, *supra* note 12, at 1365-74 (describing proposal). Judge Leonard B. Sand is a senior judge on the United States District Court for the Southern District of New York and an adjunct professor at the New York University School of Law.

⁵⁶ See *id.* at 1368. More specifically, the jury cannot impose the death penalty unless it is “absolutely certain of its factual findings.” *Id.*

sentencing phase proceeds as usual.⁵⁷ But if the jury has any lingering doubts, the trial ends and the trial judge automatically imposes a life sentence.⁵⁸

C. The Bradley Proposal⁵⁹

The no-doubt standard applies *only* when the defendant maintains that he is *completely innocent* of the crime.⁶⁰ The reasonable doubt standard applies when the defendant's defense, if believed, would make him guilty of a lesser offense.⁶¹ The jury makes the no-doubt determination *after* convicting the defendant of capital murder but *before* the sentencing phase begins.⁶²

To understand Professor Bradley's more complicated proposal, consider this hypothetical fact pattern: Three men rob a small convenience store. One of the robbers waits outside in the getaway vehicle, while the other two enter the store. Just before leaving, the two robbers open fire on the clerk. One shoots and misses, but the second fires the fatal blow. After the shooting, the three robbers flee the scene, but their car breaks down on the highway. A passing motorist—who knows nothing about the robbery—picks them up. Eventually, all four are arrested and charged with capital murder. During the guilt phase, the motorist maintains his innocence, the getaway driver argues that he never entered the store, and each shooter claims that the other actually killed the clerk. The jury convicts all four of capital murder.

Under these facts, the jury cannot sentence the motorist to death unless it concludes, beyond any doubt, that he is guilty.⁶³ The getaway driver is not entitled to the higher "no doubt" standard instruction because

⁵⁷ *Id.* at 1373. Unlike Professor Koosed, Judge Sand does not believe that juries should evaluate the no-doubt question individually because "openness among jurors has been the hallmark of jury deliberations." *Id.* at 1371.

⁵⁸ *Id.* at 1373-74. It is not clear from the proposal whether the defendant would be eligible for parole.

⁵⁹ See Bradley, *supra* note 13, at 27-30 (discussing no-doubt proposal). Professor Craig Bradley, a former federal prosecutor in Washington D.C., teaches at the Indiana University School of Law at Bloomington.

⁶⁰ See *id.* at 27. For instance, the defendant argues that he was mistakenly identified as the killer and had no involvement whatsoever in the murder. *Id.* The fact that the jury disbelieved the defendant's defense in the guilt phase—because, of course, the jury found him guilty—is irrelevant at the sentencing phase. See *id.*

⁶¹ See *id.* The defendant, for example, admits that he killed the victim, but the murder was not premeditated. *Id.*

⁶² See *id.* at 29-30. "In order to ensure, as best we can, that no innocent person is executed," the jury instruction would read: "the law requires that, before the defendant is eligible for the death penalty, the original jury must unanimously conclude that they have no *lingering or residual doubts* that [the defendant is guilty]." *Id.* at 30 (emphasis added).

⁶³ Again, the fact that the jury disbelieved the motorists' innocence defense at trial is irrelevant.

he admits he was an accomplice. Finally, the two shooters do not get the benefit of the “no doubt” standard because they are not really claiming innocence.

*D. The Romney Proposal*⁶⁴

In this case, the defendant decides whether the no-doubt standard applies at the sentencing phase.⁶⁵ Following the guilt phase, the convicted defendant has two options: He can request a new jury for the sentencing phase or he can proceed to sentencing with the same jury.⁶⁶ If the defendant keeps the same jury, the “no doubt” standard applies in the sentencing phase.⁶⁷ If, however, the defendant opts for a different sentencing jury, the defendant must accept the original jury’s guilty verdict.⁶⁸ Therefore, in the second scenario, the standard for imposing the death penalty remains, as always, proof beyond a reasonable doubt.⁶⁹

E. Moral Certainty

Some elected officials have argued that “moral certainty” should be the new standard of proof for the death penalty.⁷⁰ It is not exactly clear, however, what moral certainty means. It is not even clear whether moral certainty would mean absolute certainty.⁷¹

⁶⁴ H.R. 3834, 2005 Leg. 184th Sess. (Mass. 2005). Massachusetts legislators rejected Romney’s death penalty bill in November 2005. Helman, *supra* note 18, at 1.

⁶⁵ H.R. 3834 §7, at 12.

⁶⁶ *See id.*

⁶⁷ H.R. 3834 §10(A), at 15.

[T]he jury shall be instructed that, even after finding the defendant guilty of capital murder beyond a reasonable doubt, it is possible that one or more jurors may still harbor residual or lingering doubts about the defendant’s guilt, and that the existence of such doubt, whether held individually or collectively, it is sufficient to preclude the imposition of the death penalty.

Id.

⁶⁸ *Id.* at §7, at 12-13.

⁶⁹ *Id.* at § 7, at 12. The sentencing-only jury will be instructed that the original jury found the defendant guilty of capital murder beyond a reasonable doubt. *Id.* at §9(B), at 14. The Commonwealth may inform the sentencing jury—“to the extent reasonably necessary”—about the nature and circumstances of the crime.” *Id.* The sentencing jury will not be told, however, whether the defendant contested his guilt during the guilt phase. *Id.*

⁷⁰ *See* Bell, *supra* note 17, at 1 (describing Michigan legislator’s proposal); Myers, *supra* note 17, at 1 (describing Governor Keating’s “moral certainty” recommendation).

⁷¹ *Id.* Capital jurors, Keating said, should be “pretty darn sure” before they impose the death penalty. *Id.* Juries might find a “pretty darn sure” standard easy to understand, but it probably wouldn’t survive on appeal.

III. ANALYSIS

In theory, a no-doubt standard of proof in death penalty cases makes perfect sense: unless the defendant is undoubtedly guilty, he should not be sentenced to death.⁷² After all, shouldn't everything be done to ensure that innocent people are never executed?⁷³ In reality, however, a "no doubt" standard makes little sense. Juries can never be absolutely certain about whether the defendant is guilty, and insisting that they reach an impossible state of mind would be an exercise in futility.⁷⁴ Even if jurors could apply a higher standard, they should not. The high costs of adopting a higher standard (decreased use of the death penalty) outweigh the limited benefits (preventing wrongful executions).

A. *An Impossible Standard*

The no-doubt argument is based on a faulty premise: that juries will always know for certain, after all the evidence has been presented, whether the defendant is guilty or innocent.⁷⁵ But "[t]he reasonable doubt standard itself," Professor Lillquist notes, "emerged out of a history of epistemological thought that believed that humans were incapable of that sort of thinking."⁷⁶ There are three major reasons why criminal trials do not produce the truth, the whole truth, and nothing but the truth. First, by design, jurors do not hear all the relevant evidence at trial.⁷⁷ The Rules of Evidence, for example, exclude otherwise relevant evidence that the trial court deems unfairly prejudicial.⁷⁸ Second, the evidence that juries do hear, particularly in capital cases, is not always reliable.⁷⁹ False confessions are not uncommon and "perjury by prosecution witnesses is the leading cause of error" in death penalty cases.⁸⁰ Third, people with first-hand knowledge

⁷² See Chambers, *supra* note 11, at 660 ("If a criminal trial could determine truth absolutely, it would be the perfect vehicle for determining guilt and innocence");

⁷³ Cf. Editorial, *Leaving No Doubt*, CHI. TRIB., Mar. 16, 2005, at C22. "It should be easy," the *Tribune* editorial assumes, "for supporters and opponents of capital punishment to agree on this." *Id.*

⁷⁴ See *infra* notes 75-85 and accompanying text (arguing absolute certainty impossible in criminal trials).

⁷⁵ See *supra* note 1 (quoting Justice Harlan) ("[T]he factfinder cannot acquire unassailably accurate knowledge about what happened").

⁷⁶ Lillquist, *False Positives*, *supra* note 38, at 50.

⁷⁷ See Bunin, *supra* note 24, at 249-51 (describing purpose of rules of evidence). "The rules of evidence are rules of limitation" because they restrict the kinds of evidence that the prosecutor may introduce at trial. See *id.* at 251. The Federal Rules of Evidence also generally bars out-of-court hearsay statements and evidence of the defendant's former crimes. See *id.* at 250-51.

⁷⁸ FED. R. EVID. 403.

⁷⁹ Chambers, *supra* note 11, at 660.

⁸⁰ Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions are Common in Capital Cases*, 44 BUFF. L. REV. 469, 480-81 (1996). Eyewitness testimony is generally

of the facts, such as the defendant and eyewitnesses to the crime, can obviously not serve as jurors.⁸¹ Not surprisingly, even Judge Sand, who wants juries to be “absolutely certain of its factual findings” before considering the death penalty, recognizes that trials do not produce a “flawless factual record.”⁸²

Tellingly, even the *proponents* of a “no doubt” standard acknowledge that juries can never be absolutely certain that their verdict is correct.⁸³ Juries, they admit, would still make mistakes and innocent defendants might still be executed, even under a “no doubt” standard.⁸⁴ In short, capital punishment would cease to exist under a “no doubt” standard because juries could never (in good faith) impose the death penalty.⁸⁵

B. A Misleading Standard

The “no doubt” standard, then, suffers from a major, obvious, and fundamental flaw: the standard would not mean what it purports to mean.⁸⁶ So what does the standard actually require? “I imagine that by calling for ‘no doubt,’” Professor Lillquist concluded, after evaluating the various proposals, “they are trying to articulate a formulation that requires something less than absolute certainty.”⁸⁷ In other words, “no doubt” actually means some level of certainty above “proof beyond a reasonable doubt” but less than complete certainty.⁸⁸ But what does this mean? How much certainty does the new standard actually require? The no-doubt proponents never tell us.⁸⁹

unavailable in homicides crimes because, as Professor Gross points out, “dead men don’t talk.” *Id.* at 481. As a result, prosecutors are forced to rely on more un-savory sources of information, such as “accomplices; jail-house snitches and other under-world figures.” *Id.* Furthermore, innocent defendants sometimes plead guilty because they would rather face a limited prison term than risk a death sentence. *Id.* at 487-88.

⁸¹ Chambers, *supra* note 11, at 661.

⁸² Sand & Rose, *supra* note 12, at 1369.

⁸³ See Sand & Rose, *supra* note 12, at 1369 (“This Essay does not stray from the collective legal and philosophical wisdom that it is *impossible* to determine the offense underlying the crime to an *objective absolute certainty*”) (emphasis added); Koosed, *supra* note 13, at 55 (suggesting jurors should reach “subjective state of certitude” about facts, not objective certainty); Newman, *supra* note 12, at A25 (acknowledging certification proposal will not eliminate “all risk” of executing an innocent person). Governor Mitt Romney said he could not offer a “100 percent guarantee” that innocent people would not be executed, even under his “foolproof” statute. Theo Emery, *Romney Testifies in Favor of State Death Penalty*, THE BOSTON GLOBE, July 14, 2005, at 1.

⁸⁴ See, e.g., Jungman, *supra* note 13, at 1086 (recognizing “humans are infallible and will inevitably make mistakes” regardless of standard of proof).

⁸⁵ See Lillquist, *Absolute Certainty*, *supra* note 15, at 74.

⁸⁶ *Id.* at 81 n.145.

⁸⁷ *Id.* at 74-75.

⁸⁸ See *id.*

⁸⁹ See *id.* at 74-77.

And yet, even though Judge Sand and other no-doubt proponents recognize that absolute certainty is impossible, they insist that juries never impose the death penalty unless they are absolutely certain about the defendant's guilt.⁹⁰ According to Professor Lillquist:

*In a very real sense, the proponents are counting on jurors to misunderstand the instruction; otherwise jurors should never [impose the death penalty]. This hardly seems like a recipe for ensuing jurors properly implement the instruction. Of course, it is always possible that some jurors will misunderstand the instruction to achieve precisely the result intended, but it seems much more likely that more jurors will either do exactly what the instruction tells them to do (essentially, find no cases that meet the standard) or apply a misunderstanding that was not intended. Put simply, no-doubt instructions seem to be even more likely to fail to convey useful information to the jurors than other standard of proof jury instructions.*⁹¹

Capital juries have the unenviable job of determining whether one of their fellow citizens should live or die; they must be instructed properly on how to reach this monumental decision. Juries should not be asked to apply a "no doubt" standard that cannot even be applied properly.

C. An Ineffective Standard

Jury instructions are not self-executing. Unless juries understand them and follow them correctly, jury instructions are essentially useless.⁹² But in fact, many studies demonstrate that juries do not understand basic jury instructions.⁹³ Therefore, it is unlikely that juries will correctly understand and apply an additional "no doubt" standard.

⁹⁰ See *supra* notes 84-85 and accompanying text (showing no-doubt proponents acknowledge absolute certainty is impossible in capital trials). Consider the first (misleading) sentence of Judge Sand's proposed jury instruction: "Because the death penalty presents a different form of punishment than a [long or] life sentence in prison, our system provides a further protection to ensure that this penalty is not imposed on a defendant unless you are absolutely certain of his/her guilt." Sand & Rose, *supra* note 12, at 1373 (emphasis added).

⁹¹ Lillquist, *Absolute Certainty*, *supra* note 15, at 82 (emphasis added).

⁹² See Geoffrey P. Kramer & Doreen M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 402-03 (describing jury deliberations). Juries deliberate without any outside assistance, and they "receive very little help when they are unclear about what is necessary to convict. Thus, juror comprehension of judicial instructions ... is crucial to a legally correct verdict." *Id.* at 403.

⁹³ See Lillquist, *Absolute Certainty*, *supra* note 15, at 78 (finding jury comprehension is "quite abysmal").

A disturbingly large number of jurors do not even understand the prevailing reasonable doubt standard.⁹⁴ A study out of Michigan State University found that 30.9% of jurors believed that “proof beyond a reasonable doubt” requires 100% certainty that the defendant is guilty.⁹⁵ Another Wyoming study, however, found that 15.5% of jurors believed that they should convict when there was a “better than 50-50 chance” that the defendant is guilty.⁹⁶ Half of the subjects in an older Florida study believed that the defendant actually had to *prove* his innocence.⁹⁷

Jury misunderstanding is endemic in death penalty trials.⁹⁸ The Capital Jury Project (CJP) has found that nearly 30% of capital jurors do not understand that the government must prove aggravating factors beyond a reasonable doubt, despite the fact that most states explicitly require it.⁹⁹ The CJP also found that nearly fifty percent of jurors surveyed believe that the reasonable doubt standard applied to mitigating factors.¹⁰⁰ Even in North Carolina, where jurors are explicitly told that the “preponderance” standard applies to mitigating evidence, an astonishing 43% still believed that the defendant had the burden of proving mitigating factors beyond a reasonable doubt.¹⁰¹

It is wishful thinking, therefore, to assume that juries will correctly apply a no-doubt standard, given that they don’t understand the standard already in place. The Massachusetts Governor’s Council, the special commission whose recommendations became the basis for Romney’s death penalty bill, admitted that juries may find it “confusing” to apply one standard of proof at the guilt phase and a different standard at the sentencing

⁹⁴ See *infra* notes 95-101 and accompanying text (demonstrating poor jury comprehension).

⁹⁵ Kramer & Koenig, *supra* note 92, at 414. The Juror Comprehension Project interviewed 600 Michigan jurors who served on actual criminal trials. *Id.* at 405.

⁹⁶ Bradley Saxton, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 99 (1998). The Wyoming study collected data from 253 jurors who had served on both criminal and civil trials. *Id.* at 80.

⁹⁷ David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice?* 59 JUDICATURE 478, 481 (1976). The research subjects were 116 persons who had been summoned for jury duty, but who were not selected to serve. *Id.* at 480.

⁹⁸ See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L. J. 1043, 1044 (1995) (arguing jury misunderstanding of capital sentencing instructions results in unwarranted death sentences).

⁹⁹ Bowers & Foglia, *supra* note 30, at 68 tbl.3 (2003). The Capital Jury Project has interviewed 1,198 jurors from 354 death penalty trials in fourteen states (Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia). *Id.* at 55. In Florida, however, the reasonable doubt standard does not apply to aggravating factors. *Id.* at 70.

¹⁰⁰ *Id.* at 68.

¹⁰¹ *Id.* at 70.

phase.¹⁰² Judge Sand also expressed concern that a new, no-doubt standard may “have the un-intended effect of diluting or muddling the jury’s understanding of the proof beyond a reasonable doubt” standard.¹⁰³ In short, a no-doubt standard would have very little impact.¹⁰⁴

D. An Unnecessary Standard

Assume for the sake of argument that juries can apply a no doubt standard and the death penalty can be subject to a higher standard of proof. Should it be? No-doubt advocates believe that a higher standard will reduce the risk of unwarranted death sentences and, therefore, lower the risk that an innocent person will be executed.¹⁰⁵ Professor Koosed is even more insistent: “We are bound to execute an innocent person,” she writes, “unless we make some changes.”¹⁰⁶

To justify a higher standard, then, the no-doubt proponents need to show that juries are regularly sentencing innocent people to death under the reasonable doubt standard. The evidence, however, suggests otherwise. Between 1977 and 2004 7,187 Americans were sentenced to death, but not a single, demonstrably innocent person was executed.¹⁰⁷ Without question, some innocent people have been sentenced to death, but the number is relatively low.¹⁰⁸ The Death Penalty Information Center (DPIC), an influential research organization, maintains that at least 122 people have been “freed from Death Row” since 1973.¹⁰⁹ If that is the

¹⁰² MASSACHUSETTS GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, FINAL REPORT 22-23 (2004), available at <http://www.mass.gov/Agov2/docs/5-3-04%20MassDPReport-Final.pdf> (last visited Feb. 13, 2006) (describing “no doubt” proposal); see also Andrew D. Leipold, *Strategy and Remorse in Capital Trials*, 80 IND. L.J. 47, 48 (2005) (questioning whether jurors can draw “meaningful line” between two standards). Applying Professor Bradley’s proposed “no doubt” standard might be particularly difficult for jurors, because they could end up applying both a no doubt standard and the reasonable doubt standard in the sentencing phase. See *supra* notes 59-63 and accompanying text (describing Bradley’s limited no-doubt standard).

¹⁰³ Sand & Rose, *supra* note 12, at 1375.

¹⁰⁴ See Lillquist, *Absolute Certainty*, *supra* note 15, at 82.

¹⁰⁵ See, e.g., Bradley, *supra* note 13, at 31.

¹⁰⁶ Koosed, *supra* note 13, at 41.

¹⁰⁷ BONCZAR & SNELL, *supra* note 22, at 1; see *supra* note 8 (discussing Bedau-Radelet study). The DPIC maintains a list of seven people who were allegedly “executed but possibly innocent,” but also states that “there is no way to tell” how many innocents have been executed since 1976. Death Penalty Information Center, Additional Innocence Information, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#executed> (last visited Jan. 6, 2006). That, however, does not prove that any wrongful executions have taken place. *Id.*

¹⁰⁸ Marquis, *supra* note 5, at 520 (concluding about thirty innocent defendants have been wrongfully sentenced to death out of a total of over 7000).

¹⁰⁹ Death Penalty Information Center, Innocence and the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (last visited Feb. 13, 2006) [hereinafter DPIC, *Innocence*]. The DPIC is an Internet-based research organization that

case, then the error rate is *less than 1.3 percent*.¹¹⁰ Many scholars, however, have justifiably criticized the DPIC for exaggerating the number of truly innocent people who have been sentenced to death.¹¹¹ More realistically, around fifty innocent people have been sentenced to death since 1977, so “the relative number of innocent defendants sentenced to death appears to be infinitesimal.”¹¹²

provides a wealth of useful information about capital punishment in the United States, although it does have an overt anti-death penalty bias.

¹¹⁰ The 1.3 percent figure was calculated by dividing 7,187 (total death sentences between 1977 and 2004) by 122 (the DPIC wrongful death sentences figure).

¹¹¹ See Ward A. Campbell, *Critique of DPIC List* (“Innocence: Freed from Death Row”), <http://www.prodeathpenalty.com/DPIC.htm>, at 7 (last visited Aug. 19, 2005) [hereinafter Campbell, *DPIC Critique*] (disputing DPIC figure and criticizing methodology for determining “innocence”). After reviewing the entire DPIC “innocence” list in 2002, Campbell concluded that roughly two-thirds of the allegedly “innocent” defendants were not in fact innocent. *Id.*; see also John McAdams, *It’s Good And We’re Going to Keep It: A Response to Ronald Tabak*, 33 CONN. L. REV. 819, 831 (2001) (“[O]nly a small minority of these ‘innocents’ [on the DPIC List] are in fact known to be factually innocent on the basis of compelling evidence.”). The DPIC includes on its “innocence” every defendant who had been sentenced to death and subsequently either “their conviction was overturned and they were acquitted at re-trial, or all charges were dismissed” or “they were given an absolute pardon by the governor based on new evidence of innocence.” DPIC, *Innocence*, *supra* note 109. None of these categories, however, necessarily establishes that the defendant was in fact “innocent” of the crime for which he was charged. Campbell, *DPIC Critique*, *supra* note 110, at 5. In some cases, the defendant’s conviction was overturned because of ineffective assistance of counsel, which is “no evidence at all” of actual innocence. McAdams, *supra* note 111, at 828. In other cases, the appellate court vacated the death sentence because the trial judge improperly admitted evidence. Campbell, *supra* note 110, at 6. Furthermore, according to Campbell, “a prosecutor’s decision whether to retry a case that has resulted in a ‘hung jury’ or has been reversed on appeal (for reasons other than lack of sufficient evidence)” does not necessarily mean that the defendant is actually innocent. *Id.* at 6-7.

¹¹² Campbell, *DPIC Critique*, *supra* note 111, at 29. Professors Steiker and Steiker, however, contend that the number of wrongful death sentences may be much larger than Campbell, Marquis, McAdams, and others believe. Steiker & Steiker, *supra* note 8, at 588-589. According to Professors Steiker and Steiker, “The twenty five or thirty exonerations (by Marquis’s count) largely derive from a much smaller subset of cases in which there was significant post-conviction scrutiny of the accuracy of the underlying conviction, such as cases involving preserved and testable DNA evidence.” *Id.* at 589. Therefore, “not at all 7000+ convictions have been subject to the same kind of scrutiny.” *Id.* Professors Steiker and Steiker make an excellent point. However, “[r]esponsible social policy must be based on the best information available, not ... on speculation as to what the information would show if it were available.” Cf. Markman & Cassell, *supra* note 8, at 147 (arguing minute risk of wrongful executions does not justify abandoning capital punishment) (emphasis added).

E. A Harmful Standard

Assuming the “no doubt” standard works as intended, juries will impose the death penalty less often.¹¹³ But this is not necessarily a good thing. Certainly, fewer innocent defendants will be sentenced to death, but a larger number of defendants whose crimes warrant the death penalty will avoid capital punishment.¹¹⁴ To justify a higher standard, the benefits (fewer wrongful death sentences) must outweigh the costs (sparing the lives of death-deserving defendants). The no-doubt proponents, however, focus entirely on the benefits and completely ignore the costs.¹¹⁵ They simply assume that fewer death sentences are necessarily good.¹¹⁶

What would be the benefits of a “no doubt” standard? Probably fewer innocent defendants would be sentenced to death.¹¹⁷ This is, of course, a good thing. But a no-doubt standard might actually harm defendants. The “no doubt” standard will not free any innocent defendants; at best, they will serve long prison sentences.¹¹⁸ Non-capital defendants, however, receive “far less” post-conviction assistance than capital defendants.¹¹⁹ “The result is that non-capital defendants may find it much, much harder to have their convictions and/or sentences reversed or vacated than capital defendants.”¹²⁰ In that sense, a life sentence might be the equivalent of an irrevocable death sentence.

There would also be serious costs. Many more defendants whose crimes warrant the death penalty will not be executed.¹²¹ This is a bad thing, because capital punishment has additional benefits over and above

¹¹³ Joseph F. Hoffmann, *Protecting the Innocent: The Massachusetts Governor's Council Report*, 95 J. CRIM. L. & CRIMINOLOGY 561, 572 (2005).

¹¹⁴ See *id.* at 572-573; *supra* notes 107-12 and accompanying text (suggesting most death row inmates are guilty).

¹¹⁵ See Sand, *supra* note 12, at 1370. “Our proposal,” Judge Sand writes, “seeks to navigate the twin needs to incarcerate those individuals found by juries to be culpable of serious crimes and to protect many others from wrongful executions.” *Id.* But Judge Sand misunderstands the issue; incarceration is certainly appropriate in some cases, but the death penalty may also be appropriate when defendants are “culpable of serious crimes.” See *id.*

¹¹⁶ But see Hoffmann, *supra* note 112, at 572-73 (recognizing no-doubt standard might increase number of false negatives). “Given this existing gross imbalance, any further shifting of the balance in favor of the capital defendant inevitably will produce even more ‘false negatives’ than it will eliminate ‘false positives.’” *Id.* at 573. Except for Professor Hoffman, who chaired the Massachusetts Governor's Council, none of other no-doubt proponents even acknowledge that a higher standard might have huge costs.

¹¹⁷ Lillquist, *False Positives*, *supra* note 38, at 50.

¹¹⁸ See *supra* notes 46 and accompanying text (noting no-doubt standard would only apply after conviction); *supra* note 28 (describing sentencing alternatives in death penalty cases).

¹¹⁹ Lillquist, *Absolute Certainty*, *supra* note 15, at 65 n.90.

¹²⁰ *Id.*

¹²¹ Lillquist, *False Positives*, *supra* note 38, at 50.

those of life imprisonment.¹²² First, the death penalty—unlike life in prison—saves innocent lives by permanently incapacitating murderers.¹²³ Second, recent evidence strongly suggest that the death penalty has a robust deterrent effect.¹²⁴ Finally, even if there were no deterrent effect, the death penalty is justified because some crimes are so heinous that death is the only morally acceptable punishment.¹²⁵

Ultimately, the benefits of capital punishment outweigh the miniscule risk of executing an innocent person, which is why the death penalty should not be subject to a higher standard of proof. “There is some threshold,” Professor Lillquist argues, “at which the harm from failure to execute becomes so high that it does overcome the intrinsic goodness of avoiding erroneous executions.”¹²⁶ Unfortunately, no matter how many safeguards the system puts in place (as the no-doubt proponents themselves admit), an

¹²² See Markman & Cassell, *supra* note 8, at 152-60 (arguing capital punishment justified on incapacitative, deterrence, and retributive grounds).

¹²³ See *id.* at 152-54. As of December 31, 2004, at least 265 of the 3,315 death row inmates had at least one prior homicide conviction. BONCZAR & SNELL, *supra* note 22, at 8. LWOP does not prevent inmates from committing more murders in prison, and furthermore, in some states defendants convicted of capital murder can theoretically receive parole. See *id.* at 152-53; see also Bowers & Foglia, *supra* note 30, at 82 tbl.7 (stating capital murderers not sentenced to death in Texas and Virginia can theoretically receive parole in 20 and 21 years, respectively).

¹²⁴ See e.g., Joanna M. Shepard, *Murders of Passion, Executing Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283, 283 (2004) (finding each execution deters on average three murders); Hashem Dezhbakhsh et. al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmortem Panel Data*, 5 AM. L. ECON. REV. 344, 344 (2004) (finding each execution deters on average between ten and eighteen murders); H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON 453, 474 (2003) (finding each additional execution deters murders). But see generally John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Research in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2006) (criticizing recent studies and concluding existing evidence for deterrence is “surprisingly fragile”). According to Professor McAdams, “We are thus in a situation not at all rare in policy analysis, in which there is a reasonable basis for believing that executions deter murders, but the evidence is far short of solid.” McAdams, *supra* note 111, at 839. He then frames the issue perfectly:

To state the obvious, if we execute murderers and there is in fact no deterrent effect, we have killed a bunch of murderers. If we fail to execute murderers, and doing so would in fact have deterred other murderers, we have allowed the killing of a bunch of innocent victims. I would much rather risk the former. This, to me, is not a tough call.

Id.

¹²⁵ See Cassell & Markman, *supra* note 8, at 158. That is why Governor Romney’s proposal is particularly troubling, because murderers whose crimes warrant the death penalty should have no right to benefit from the imposition of a higher burden of proof on jurors. See *supra* notes 65-69 and accompanying text (describing Romney proposal).

¹²⁶ Lillquist, *Absolute Certainty*, *supra* note 15, at 63.

innocent person may likely be executed in the United States.¹²⁷ Most Americans, understandably, accept that risk because the death penalty is morally justified.¹²⁸

IV. A PARTIAL SOLUTION

Juries will always have doubts about whether the defendant is guilty, but they can—and should be very certain about guilt before they impose a death sentence. Indeed, that is what the “proof beyond a reasonable doubt” standard requires.¹²⁹ But unfortunately, as discussed above, many jurors have a poor grasp of the reasonable doubt standard.¹³⁰

To help ensure that juries fairly administer the death penalty, the courts should make the reasonable doubt standard easier to understand. Jury instructions should be written in clear, simple language, not confusing legal jargon that is foreign to lay jurors.¹³¹ Juries should also receive written copies of the instructions, so they can refer to them during the trial and use them during their deliberations.¹³² And juries should also be instructed before and after trial, not just after.¹³³ The courts should even consider

¹²⁷ See Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1664 (1986) (noting nearly all state-sponsored activities cost lives of innocents); *supra* notes 84-85 and accompanying text (stating no-doubt proponents admit absolute certainty is impossible).

¹²⁸ See *supra* note 40 (stating Americans believe death penalty should be imposed more often).

¹²⁹ See *supra* note 36 and accompanying text (describing *Jackson* “near certainty” standard).

¹³⁰ See *supra* notes 94-101 and accompanying text (demonstrating jurors regularly misunderstand reasonable doubt standard).

¹³¹ See Bethany K. Dumas, *Communicating with Juries: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 737-38 (1996). Jury instructions usually contain lengthy sentences with multiple subordinate clauses, arcane vocabulary, and confusing syntax. *Id.* at 732. Furthermore, many of the legal terms are unfamiliar to lay jurors or, worse, may have different meanings in everyday usage. Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 99 (1999).

¹³² See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH. PUB. POL. & L. 589, 626 (1997) (suggesting written instructions improve jury understanding). Although the empirical research shows mixed results, Professor Dumas concedes, that may be because the instructions are confusing to begin with. Dumas, *supra* note 131, at 737. “If a person does not speak a foreign language, it will not matter if they are given written or verbal instructions in that tone.” *Id.* at 738. Capital juries may find written (and simpler) instructions even more helpful, because jury instructions in death penalty cases may take well over an hour to read. Lillquist, *Absolute Certainty*, *supra* note 15, at 78. “There is a nontrivial possibility that the jurors will simply never even hear what the judge says about the standard of proof.” *Id.*

¹³³ See Dumas, *supra* note 131, at 738 (asserting combination of pre-trial instruction and post-trial instruction improves juror comprehension and “juror satisfaction of trial process”). In most jurisdictions, juries are not instructed on the law until the end of the case, just before they begin their deliberations. Lieberman & Sales, *supra* note 132, at 628. It is

quantifying the reasonable doubt standard, so juries know exactly how much proof is required.¹³⁴ Ultimately, these simple proposals might succeed where a confusing “no doubt” standard alone would probably fail—in lowering the risk of wrongful executions.

CONCLUSION

No reasonable person believes that innocent people should be executed. In the perfect world, only the “truly guilty”—as Governor Ryan put it—would be sentenced to death. In the perfect world, juries would always render the right verdict. But juries are only human, and making mistakes is part of human nature. A “no doubt” standard ignores this simple maxim and makes a dangerous assumption that capital juries will always be right about matters of life and death.

There is, of course, a simple solution: the United States could abandon the death penalty. No-doubt proponents might be sympathetic to this argument, because it is the only way to ensure that innocent people are never executed. But most Americans, understandably, would not accept this radical cure. The death penalty not only makes Americans safer, it is a vehicle for expressing our moral outrage at the worst kinds of crimes. And because the benefits of the death penalty outweigh the minute risks of wrongful executions, there is no justification for a higher “no doubt” standard in capital cases. Preventing the execution of an innocent person is a noble and important goal, but is not the only goal. Good intentions are not enough.

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not surprising, Straw and Buchanan argue, why juries wouldn’t understand oral instructions given just before deliberations begin:

Consider for a moment how well a group of lawyers and speech lawyers ... would do if they were given a thirty minute lecture on how to perform an appendectomy and then were immediately tested on their comprehension. During the lecture, notetaking and questions would be prohibited. Copies of the lecture would not be allowed in the operating room. Assume further that during the lecture, a great many of the words used be particular to the medical profession and would not be explained in the lecture.

Strawn & Buchanan, *supra* note 97, at 482.

¹³⁴ Lillquist, *Absolute Certainty*, *supra* note 15, at 90.

