MAKING SENSE OF REASONABLE DOUBT: UNDERSTANDING CERTAINTY, DOUBT AND RULE-BASED BIAS FILTERING

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ABSTRACT
The standard of “proof beyond a reasonable doubt” is meant to, at least in part, ensure that the government meets the highest practical standard of proof possible before imposing criminal penalties on persons. This article argues that the standard, as currently applied in trial settings, does not succeed in its goal of being the vanguard of prudence and equity. Specifically, it falls short of this high standard because of its vagueness coupled with our cognitive peculiarities, including our tendency to feel certain about facts more easily than we should. This article describes the problem and ultimately suggests a relatively simple solution that is consistent with cognitive science research. Namely, providing jurors with concrete examples of reasonable doubt, thus providing cognitive models that the jurors may reference when making difficult decisions.

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INTRODUCTION: AN UNDELIVERED PROMISE

The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence.

~Justice Potter Stewart.

Jurors are asked to answer two questions when deliberating the fate of an accused criminal: (1) do you think the defendant is guilty?; (2) if so, how certain are you of their guilt—namely, are you certain beyond a reasonable doubt?

This article explores the feeling of certainty that jurors rely on when making a determination of guilt beyond a reasonable doubt in criminal prosecutions. The descriptive portion of this article is composed of three factual claims: (1) reasonable doubt is not well defined, and thus, jurors are left to rely on their feelings of certainty in reaching verdicts, instead of coming to conclusions based on a well defined rule or set of instructions; (2) the feeling of certainty alone is an unreliable method for determining the strength or weakness of the case presented; and (3) the fickle nature of reasonable doubt is further exacerbated by the fecund existence of biases.

The prescriptive portion of this article, crudely stated at a glance, is to use a jury instruction that requires the jury to create a paradigmatic example of reasonable doubt before the facts of the case have been presented. Subsequently, the jury will reference the example and compare it to the specific facts presented. The purpose of this two-step process is to create a standard before biases have the ability to surreptitiously affect the standard. Moreover, jurors will have a standard against which the feeling of certainty can be checked. The empirical research supporting this prescription will be explored throughout this article.

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Section I provides a brief history of reasonable doubt to illustrate its place and purpose in the criminal justice system. Section II provides insight—through a linguistic analysis—into why reasonable doubt is so hard to define, thus, providing some of the tools necessary to solve the problem. Section III reviews research in the cognitive sciences that demonstrates that the feeling of knowing is a poor indicator of guilt or innocence.

Section IV examines concrete biases found in jury trials and the pervasive nature of biases in general. By implementing findings in the cognitive and social sciences, the section demonstrates how biases about which we may be unaware, nonetheless affect the decisions we make—including coming to conclusions of guilt and innocence in criminal trials.2

Section V sets forth the first step toward the prescriptive solution. Namely, it demonstrates how applying rule-based reasoning can help filter out biases. Coupled with section VI—which further elaborates on the implementation of the jury instruction—these two sections constitute the prescriptive claim. Finally, section VII addresses a concern that may remain. Specifically, it addresses work by Gregory Mitchell that suggests people may automatically correct for biases without ever having the need to consciously correct for them. This article argues that the malleability of the reasonable doubt concept creates fertile ground for conviction decisions based on implicit biases that should play no role in the decision making process.

I. A REASONABLE HISTORY

*I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.*

~Jon Newman, Chief Judge of the US Court of Appeals for the 2nd Circuit3

It is not hyperbole to say that life, liberty, and justice are on the line in criminal cases. Moreover, the risk of a false conviction or an erroneous release of a criminal back into society rests on the tenuous concept of “proof beyond a reasonable doubt” – a concept so fragile, some courts have opined that any attempt to define it could

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2The word “bias,” as used in this article, is a broadly construed normative evaluation about our reasoning. That is, we have a bias when we give data in our reasoning more or less weight than we ought to. For example, in evaluating someone’s running speed we should not give any weight to the person’s skin color. If skin color plays a role, either by bolstering or undermining the evaluation of speed, then skin color is said to be a bias. See infra section IV for further discussion of biases.

only lead to, at best, no clarification of the concept and at worst further "confusion."\(^4\)

Yet, belief beyond a reasonable doubt has been a barometer of justice in criminal cases since at least the mid-nineteenth century.\(^5\) Reasonable doubt was put forth as a means of getting a jury to meet a “moral certainty.”\(^6\) In turn, moral certainty was seen as the highest possible degree of certainty attainable when mathematical certainty was not possible.\(^7\) Thus, moral certainty was the highest possible certainty attainable through inductive inquiries, in contrast to mathematical certainty, being the certainty attainable through strictly deductive reasoning (i.e. formal logic and mathematics).\(^8\) For example, we can be mathematically certain that five minus four equals one, but only morally certain that the earth revolves around the sun.\(^9\) As Professor Steve Sheppard has phrased it: “for a writer in 1800 to claim, ‘I am morally certain,’ roughly equates to my saying two centuries later, ‘I am as certain as I can be, based on what I have seen and heard.’”\(^10\)

Regardless of whether the concept of moral certainty clarifies that of reasonable doubt, the two concepts began to be interpreted as wedded to each other, if not synonymous, beginning in the nineteenth century.\(^11\) This is important for understanding the weight

\(^4\) United States v. Hall, 854 F.2d 1036, 1038 (7th Cir. 1988) (stating that “defining reasonable doubt is often more confusing than illuminating”) (citing reasoning in United States v. Lawson, 505 F.2d 433, 443 (1974)).


\(^6\) Id. at 202.

\(^7\) Id. (“First, the jury must understand there are two separate categories of human knowledge. There is the mathematical category in which it is possible to achieve certainty to the highest level. For example, it is absolutely certain that two plus two equals four. Additionally there is the empirical category in which absolute certainty is not attainable.”).

\(^8\) Id.

\(^9\) It may seem unintuitive to some that we are unable to be “mathematically” or deductively certain about the fact that the earth revolves around the sun. After all, there is a deductive component in coming to this knowledge—namely, the mathematics involved in the calculation. However, there are many inferences involved. For example, we must assume our instruments are accurate and the trajectory of the sun does not change based on our observations. Additionally, and perhaps most crucially, we must assume the observations we have made in the past and the nomological framework we rely on, continue to hold true—also known as “the problem of induction”. This example is purposely extreme, thus helping to illustrate how strong a moral certainty can be.


\(^11\) See id. at 1195–96 (explaining that “the replacement of the ‘any doubt’ standard with a hybrid view of moral certainty and reasonable doubt . . . came in Thomas Starkie’s very successful Evidence, first printed in London in 1822 and in America two years later, running through numerous editions.”).
that reasonable doubt was meant to carry: the highest possible level of inductive certainty.

Interestingly, the use of “reasonable doubt” may in fact have been introduced to help the prosecution, not prevent wrongful convictions.12 Reasonable doubt was seen as more favorable to prosecutors than other permissible instructions such as the following given by John Adams: “[w]here you are doubtful never act; that is, if you doubt the prisoner’s guilt, never declare him guilty; this is always the rule, especially in cases of life.”13 In short, “a reasonable doubt” allowed more room for error than “any doubt.”

Despite the reasonable doubt standard’s protracted usage, the Supreme Court did not establish it as an explicit constitutional standard until 1970 in the case of In re Winship.14 In Winship, the Court held the due process clause of the Fifth and Fourteenth Amendments allow for criminal convictions only where “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [one] is charged” has been established.15 The Court reasoned that this heightened standard of proof was necessary in criminal cases because “[t]he accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”16

The opinion in Winship further supports the historical weight of the standard by asserting the importance “in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with the utmost certainty.”17 In his concurring opinion, Justice Harlan reasoned that a standard higher than a “preponderance of the evidence” was needed because of “a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”18 However, the Winship Court provided no guidance

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12 See Id. at 1195 (“[I]t is also evident, if from nothing else than Adams’s preference for doubt and Robert Pain’s preference to reasonable doubt in the Boston Massacre cases, that prosecutors sought to limit juror doubt to a reasonable doubt.”).
13 Id. at 1191.
14 See In re Winship, 397 U.S. 358, 364 (1970 (holding that “[l]est there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the 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.”).
15 Id.
16 Id. at 363.
17 Id. at 364 (emphasis added).
18 Id. at 372.
concerning a definition, and left the language used to convey the concept of “reasonable doubt” in the hands of the lower courts.¹⁹

Twenty-four years after Winship, the Court was given the opportunity to clarify the reasonable doubt concept in Victor v. Nebraska.²⁰ Unfortunately, the Court did not take advantage of that opportunity. The opinion begins with Justice O’Connor acknowledging that “[a]lthough [reasonable doubt] is an ancient and honored aspect of our criminal justice system, it defies easy explication.”²¹ The opinion further asserts that the Constitution neither prohibits trial courts from defining reasonable doubt nor requires a definition from trial courts.²² Indeed, so long as the court instructs the jury on the necessity that the defendant’s guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof.²³

The closest thing to a standard found in the opinion is that “[t]he Constitutional question…is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard.”²⁴ Thus, lower courts have a tremendous amount of latitude when it comes to articulating reasonable doubt to jurors.

Due to the wide rein given to lower courts when implementing reasonable doubt, court instructions have ranged broadly. For example, some state and federal courts have concluded that instructions need not be given unless the jury requests an instruction.²⁵ Others require instructions in all cases.²⁶ Yet other courts prevent the term from being defined even when jurors who express confusion with the meaning of the concept explicitly request an instruction.²⁷ According to these courts, defining reasonable doubt actually makes it less clear. Given that experts in the field are unable to reach a consensus on the definition, it is not surprising that empirical evidence shows that jurors, often tasked with making the

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²⁰ 511 U.S. 1 (1994).
²¹ Id. at 5.
²² Id. (“[t]he beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.”).
²³ Id. at 6.
²⁴ Id.
²⁵ See, e.g., United States v. Adkins, 937 F.2d 947, 950 (4th Cir. 1991); see also Lansdowne v. Maryland, 412 A.2d 88, 93 (Md. 1980).
decisions regarding the fate of the accused, do not understand the
classification, and often misapply it.28

The history of reasonable doubt thus reveals a concept of
great importance that has nonetheless been vaguely articulated. It is
with this significance and vagueness in the backdrop that this article
argues for a need to better “define” reasonable doubt.29 The
subsequent section will elucidate the reasons behind reasonable
doubt’s vagueness.

II. THE GOOD, THE BAD AND THE REASONABLE: VAGUE WORDS

GALORE

It is difficult, if not impossible, to so define the term “reasonable doubt” as to
satisfy a subtle and metaphysical mind, bent on the detection of some point,
however attenuated, upon which to hang a criticism.

~Supreme Court of Virginia30

One of the primary challenges in attempting to standardize
reasonable doubt, and to subsequently create a rule for applying it, is
the term’s inherent vagueness. This section explains why the
problem arises, as a first step in devising a definition for reasonable
doubt.

It is no secret that the word “reasonable” is vague. Legal
scholars tend to treat vagueness with great trepidation, if not outright
disdain. Yet, logicians and philosophers since at least Eubulides have
recognized that vagueness is fecund. Take a leg off of a chair—is it
still a chair? How many pieces of a car can one remove before it
ceases to be a car? Almost any object around can be turned into a
vagueness “problem.” Despite being surrounded by vagueness, we
seem able to refer to things with general success. Part of this is due
to context. Although “a heap of sand” is vague, if a construction
worker has seen the hole that the sand is meant to fill, vagueness
ceases to be a practical challenge to fulfilling the request.31 It is
through this context that we come to “know” what is meant by the
word “heap.”

Part of the confusion comes from the fact that English, unlike
some other languages, lacks an important linguistic distinction.

28 See, e.g., Henry A. Diamond, Reasonable Doubt: To Define, Or Not To Define,
90 Colum. L. Rev. 1716, 1723 (1990) (citing a study that demonstrated, in part,
that reasonable doubt was not obvious to a sample of 606 college students. Given
that there is no requirement that jurors be college educated, the lack of clarity
found in the study likely translates even more strongly to a randomly selected jury
population.).
29 “Define” is in scare quotes, because the elucidation of reasonable doubt requires
examples, rather than words which are usually associated with a definition. See
infra section II for further elaboration on this point.
31 Thanks to Shaughan Lavine at the University of Arizona who provided me with
this example during a talk on vagueness.
Namely, to “know” can mean either “knowledge by acquaintance” or “knowledge by description.” In the heap example, the construction worker knew what “heap” meant through acquaintance, that is, she saw the specifications that “heap” had to satisfy. In this sense, “heap” is self-explanatory. However, attempting to define “heap” with words is a sisyphean task, leaving the best definition wanting for more.

Understanding this distinction helps shed light on Justice Stewart’s famous line in Jacobellis v. Ohio, “I know it when I see it.” Stewart intuitively realized that defining pornography was not an easy task, in part because it required knowledge by acquaintance—one cannot fully understand the meaning of pornography through words alone. It is doubtful that Stewart explicitly knew the distinction between the two types of knowledge. However, he realized he knew what pornography was, yet was still unable to develop an articulable definition.

Similarly, “reasonable doubt” may seem deceptively easy to understand, yet elusive when one tries to pin it down with a traditional definition. This is because it is a concept that is much better understood through acquaintance than by description, much like “pornography.”

In section VI the “definition” of reasonable doubt through a jury instruction requiring jurors to come up with paradigmatic examples will be explained. This section underscores the importance of such an unconventional jury instruction.

32 BILL BRYSON, THE MOTHER TONGUE 14 (HarperCollins 2001) (1991) (Bill Bryson gives a historic perspective of the English language and points out that other languages do in fact make the “knowledge by acquaintance” and “knowledge by description” distinction, although he does not use that terminology. “[O]ther languages have facilities we lack. Both French and German can distinguish between knowledge that results from recognition (respectively connaître and kennen) and knowledge that results from understanding (savoir and wissen).” The terms, and their use in academic discourse can best be ascribed to BERTRAND RUSSELL, THE PROBLEMS OF PHILOSOPHY Chp. V (Oxford University Press paperback 1959) (Reprinted, 1971-2).
34 An extreme case of knowledge by acquaintance is knowledge of colors. There is no way one can define red with words to a person who has only seen in grey scale. The best one could do is explain that red is a darker color than yellow, etc. Yet this would be woefully lacking. There are also ambiguous cases that can refer to both types of knowledge. Both a coach and a pitcher “know” how to throw a ball. But it is clear that the best pitchers do not always make the best pitching coaches and vice-versa. The coaches must be able to describe the action. However, the pitcher may have acquaintance knowledge she is unable to describe to anyone else.
III. KNOWING! WE KNOW, OR, ON BEING CERTAIN

Despite how certainty feels, it is neither a conscious choice nor even a thought process. Certainty and similar states of “knowing what we know” arise out of involuntary brain mechanisms that, like love or anger, function independently of reason.\(^{35}\)

~Robert A. Burton, Neuroscientist

Reasonable doubt is deeply interrelated with the feeling of certainty. Thus, one would hope—and it often seems taken for granted—that the feeling of certainty arises as a result of well-founded reasoning. This section demonstrates the folly of this assumption.

A. Certainty and Accuracy: Unfaithful lovers

Certainty is important to our analysis of reasonable doubt because the feeling of certainty is what gives reasonable doubt its seal of approval, and thus, is the putative executioner of justice in criminal trials. If the criminal justice system has implemented reasonable doubt solely for the sake of ensuring a good night’s sleep to those deciding the fate of the accused, then there is little need for further analysis.

However, if we are interested in truly achieving justice, an important question arises: how well does the feeling of certainty correlate with accuracy? Stated another way, how often is the feeling of being correct, actually correct? This is a key question tackled by the “overconfidence” literature.\(^{36}\) The overconfidence literature has produced hundreds of articles examining how and why people tend to feel more certain about facts than they ought to. Thus, the literature can be an important source of information with regard to the relationship between the feeling of certainty and accuracy.

The term of art used to describe an individual’s feeling of certainty in relation to their success rate is “calibration.”\(^{37}\) A person is well calibrated if her feeling of certainty directly correlates to the accuracy of her predictions. To use a concrete example from the literature, if in the course of four days it rains three times, then a weather person who predicted a 75% chance of rain on each of those four days is well calibrated, while a person who predicted a 90% chance of rain is poorly calibrated.\(^{38}\)

\(^{35}\) ROBERT A. BRUTON, ON BERING CERTAIN xi (St. Martin’s Press) (2008).

\(^{36}\) See e.g. Don A. Moore and Paul J. Healy, The Trouble with over confidence, PSYCHOLOGICAL REVIEW, VOL. 115, NO. 2, 502 (2008).


\(^{38}\) Id. at 276. (in this article, an experiment using the whether forecaster probability predictions was used to demonstrate how laypersons tend to attribute success to probability judgments).
The research has found that at times of high confidence, people tend to be poorly calibrated. In one study, subjects were given a quiz with 180 questions, broken up into ten 18-question quizzes. The quiz questions were varied and the subject matter included science, movies, history, sports, geography, and music.\(^{39}\) The subjects were incentivized with cash for accurately predicting how well they would do.

On average, when the subjects felt 90.5% certain, they were only correct 73.1% of the time.\(^{40}\) Of note, this 16.6% disparity between certainty and accuracy is on the conservative end. Previous studies found instances in which those who feel 90% certain their answers are correct, correlate as low as 30% to 50% with accuracy.\(^{41}\) However, the author notes that the higher rate is consistent with other research, because participants in this study had access to some information regarding correlation between predictions and success after different quizzes.\(^{42}\) Thus, the participants had information that could help them become better calibrated.

Earlier studies also showed that when people made judgments with extreme confidence there was a poor correlation with accuracy. For example, in the classic paper *Knowing with certainty-the appropriateness of extreme confidence*, researchers found that when subjects indicated they felt odds of being correct were 90.91% (10:1)\(^{43}\) subjects were only correct 75% (3:1) of the time.\(^{44}\) Even when expressing extremely high odds, such as a-million-to-one, subjects were wrong almost 7% of the time.\(^{45}\)

The calibration studies demonstrate that overconfidence

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\(^{39}\) See Moore and Healy, *supra* note 36 at, 508.

\(^{40}\) *Id.* at 510. (“This 90.5% confidence is significantly greater than the 73.1% accuracy; a binomial test confirmed that the odds of observing accuracy rates of 73.1% or lower for 90.5% confidence intervals are about 6 per million.”).

\(^{41}\) *Id.* (“Our participants’ 73.1% hit rate may appear substantially above prior findings, which documented hit rates of 30% to 50% for 90% confidence intervals.”) (citing Teigen & Jorgensen, 2005).

\(^{42}\) *Id.* (“Hit rates were substantially higher at the interim (85.6%) and posterior (84.4%) phases, consistent with research showing that knowledge of the judgment domain moderates the strength of overprecision”)

\(^{43}\) The article requested subjects to respond in proportions (i.e. 10:1), which in some cases provide more accurate representations than percentages. When reporting results, the article tends to use proportions for the level of certainty, and percentages for the level of accuracy. For ease of reading, this article has converted all the proportions into approximate percentages, while keeping the proportions in parenthesis for those who prefer its accuracy.


\(^{45}\) *Id.* (“Over the large number of question for which people gave odds of 1,000,000:1 or higher, they were wrong an average of about 1 time out of every 16.”).
occurs frequently and is not merely a “statistical artifact.” Thus, the onus would seem to be on those who think jurors are well calibrated. That is, when they believe themselves to be 99% certain of guilt, what makes the trial environment less likely to produce a significant discrepancy with accuracy? The effect of overconfidence with specific regard to complex legal cases and its direct affect on reasonable doubt will be explored below.

B. Certainty in Uncertain Circumstances: Coherence Theory

There is a further empirical reason to believe that the feeling of certainty is poorly calibrated to accuracy and thus, the reasonable doubt standard is weak. Cognitive scientists have been finding, since at least the mid 1980s, that our brains prefer our beliefs to be certain as apposed to ambiguous. Specifically, when people are presented with complex and ambiguous problems, once the person feels the evidence is in favor of one side, no matter how slight, there is a strong corresponding feeling of certainty. More recently, Dan Simon has run empirical studies that have found coherence based reasoning occurring in subjects who were given ambiguous criminal case hypothetical situations and asked to evaluate how sure they were of their conclusion (either guilty or innocent).

In Simon’s own words, “[c]oherence-based reasoning posits that the mind shuns cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions.” Thus, if jurors initially feel the evidence is ambiguous, but eventually lean slightly towards guilt, “the evidence is bolstered from overall ambiguity to a belief beyond a reasonable doubt.” Therefore, what was meant to be the highest standard of proof possible in our legal system, has been demoted to what, at best, is no stronger than a preponderance of the evidence.

Recounting the most relevant experiments from Simon’s article will provide a better understanding of this neurological phenomenon. First the experimenters had subjects take a pretest. The pretest required subjects—all of whom were jury eligible—to view seven apparently unrelated vignettes. At the end of each

46 Gideon Keren, supra note 37 at 274 (“There is also sufficient empirical evidence to dismiss the claim that overconfidence is entirely a statistical artifact.”).
49 Id. at 513.
50 Id. at 519.
51 Id. at 524 (“Participants were first presented with a pretest that contained a number of apparently unrelated vignettes.”)
52 Id.
vignette, subjects were asked to assess the strength of certain inferences related to the vignette.\(^{53}\) For instance, “a vignette that concerned an eyewitness identification of a person was followed by a factual question about the likelihood that the identification was correct.” \(^{54}\)

Second, once the pretest was finished, subjects were asked to act as jurors in a case requiring suspect identification.\(^{55}\) The case had seven pieces of unrelated circumstantial evidence. Four pieces were inculpatory, and three were exculpatory.\(^{56}\) The evidence was designed to be “sufficiently multifarious and balanced so as to create a complex case.”\(^{57}\) Furthermore, the seven pieces of evidence in the case were designed to be “virtually identical” to the seven pieces of evidence presented to subjects in the first part of the experiment (unbeknownst to the subjects).\(^{58}\)

Subsequently, subjects were presented with arguments from counsel on both sides pertaining to the inferences from the pieces of evidence.\(^{59}\) The subjects were then asked to “render a verdict and rate their confidence in the decision.”\(^{60}\) Finally, they were asked to determine the likelihood of a defendant’s guilt as supported by each piece of evidence. Importantly, the questions were designed to be “virtually identical” to those in the pretest.\(^{61}\)

However, despite the pretest evidence and the subsequent evidence being virtually identical, there was a significant shift in certainty. Namely, in the pretest stage, subjects who eventually decided on guilt seemed almost equally convinced by the strength of

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\(^{53}\) Id. (“Ratings were made on an eleven-point scale, ranging from-5 ("strongly disagree") to +5 ("strongly agree"), with a rating of 0 indicating neutrality. In total, participants rated twelve inferences.”).

\(^{54}\) Simon, supra note 48 at 529.

\(^{55}\) Id. (“The second phase of the experiment presented participants with a whodunit case that involved a theft of money from a construction company's safe. The sole question in the case concerned the identity of the perpetrator. One of the company's employees, Jason Wells, was suspected of committing the theft. Participants were asked to play the role of jurors assigned to decide the case.”).

\(^{56}\) Id. at 529-30 (“Four items tended to incriminate the defendant: an eyewitness identification; a security camera that captured a car like the one defendant drives screeching out of the parking lot soon after the crime was committed; a call the defendant made on his cell phone from the vicinity of the building soon after the crime; and an apparent grudge that he held against the company … Three pieces of evidence had an exonerating effect: he was seen far away from the crime scene later that evening; payments he made after the crime came from legitimate family transactions; and it was possible that he was working harder to make amends with the company.”).

\(^{57}\) Id. at 530

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Simon, supra note 48 at 530.

\(^{61}\) Id. at 530 (“The evidence was virtually identical to the factual issues contained in the vignettes.”).
the inculpating evidence as they did by the exculpating evidence (consistent with the experiment’s design intent). Yet, at the point that subjects were asked to make a decision on guilt or innocence, those who decided on guilt felt the inculpating evidence was very strong, while the exculpating evidence was very weak. A similar effect was also found with subjects who found for innocence. That is, while they found the evidence in the pretest relatively even, by the time they had to make a decision, they felt the exculpating evidence was significantly stronger.

These findings were predicted and consistent with a previous experiment that used a similar design but used tort law. Similar to the aforementioned case, subjects in the pretest did not show particularly strong degrees of certainty, yet once they were required to make a decision in the second part of the test, “75 percent of participants indicated that they had maximal or next-to-maximal confidence in their verdicts; conversely, only 5 percent indicated low or next-to-low confidence.”

All these results are predicted by and bolster the theory behind coherence-based reasoning. That is, after spending time weighing ambiguous and relatively complex evidence, subjects tended to feel strong degrees of certainty despite their own initial impressions that the evidence did not clearly point in favor of one verdict or the other.

C. The extent of the problem

While the research in cognitive science shines an unflattering light on our feelings of certainty, it is also important not to take these findings to extreme nihilistic conclusions. First, the overconfidence research still finds a correlation between the strength in the feeling of certainty and the accuracy of that certainty. That is, the more certain one feels the more likely one is to be correct. Yet, this still comes with the caveat that there is a dangerous disparity between the

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62 Id. at 531 (“[B]y the point of decision, the mental models of the evidence are skewed toward strong support of the respective verdicts. Notably, these coherent representations were not inherent to the perceptions of the evidence itself. Rather, they resulted from the polarizing transformation of the originally ambiguous and nonprobative evidence toward either one of the two coherent mental models, each of which was decidedly probative with regard to the respective verdict.”).
63 Id. at 530-32.
64 Id.
65 Id. at 526 (the civil fact pattern also had findings that “were consistent with these predictions.” That is, while the evidence evaluated was at first considered ambiguous by mock jurors, nearly identical evidence in the context of a case led to strong feelings of certainty).
66 Id. at 526.
67 Moore and Healy, supra note 36 at 510 (“It is worth noting that confidence and accuracy were nonetheless correlated.”).
degree of certainty and the degree of accuracy – a disparity that may lead to pernicious effects in criminal trials.  

Second, the coherence research deals with complex and ambiguous cases. That is, in straightforward cases, the worries found in this research are much less applicable. This is quite consistent with the overconfidence research that has found the polar opposite problem with straightforward questions. Specifically, there seems to be an underconfidence effect where people are presented with straightforward questions they should feel quite confident about are not confident.  

Thus, while this research does not leave the criminal legal system in shambles, its findings are sufficiently robust and widespread that a legal system in search of equity must account for them. Additionally, the problem cannot be fully appreciated without addressing an issue that further compounds the problems presented in this section. Namely, unbeknownst to jurors, their reasons for feeling certainty with regard to guilt may rest on unconscious biases. Therefore, their ultimate feeling of certainty may be premised on little more than a bias that nudged them in one direction, and due to human nature, produced a strong feeling of knowing where such a feeling was not warranted.  

The extent of the problem can be summarized in two parts. First, in ambiguous criminal cases, cognitive science tells us that jurors will eventually feel strongly towards one side, even if they initially felt the evidence did not clearly indicate guilt or innocence. This was the problem articulated in the current section. Second, unbeknownst to jurors, their reasons for feeling that one side may possess more credibility could rest on unconscious biases. Thus, their ultimate feeling of certainty may be premised on little more than a bias that nudged them in one direction, and due to human nature, produced a strong feeling of knowing.

The following section will look at the second part of the problem: unconscious biases.

IV. HOW BIASES WE CANNOT SEE AFFECT CONSCIOUS DECISION MAKING

[Most of our behavior is governed by a cauldron of motives and emotions of which we are barely conscious. Your conscious life, in short, is nothing but an elaborate post-hoc rationalization of things you really do for other reasons.]

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68 See Simon, supra note 62 (Finding that people may become overconfident in their decisions as time goes on).
69 See Moore and Healy, supra note 36 at 503 (“Underestimation of performance is most likely to occur on easy tasks, on easy items, when success is likely, or when the individual making the estimate is especially skilled.”).
70 See infra Section IV.
This section examines how our decisions can be affected by superfluous facts. These irrational yet influential factors all fall into the category “biases” in this article. The full impact of these biases can only be appreciated in light of the preceding section. In particular, while these factors may seem only to slightly tilt the scales of decision-making, these slight tilts may eventually lead to feelings of certainty as illustrated above.

The psychological biases literature is expansive. Recently, its importance has been realized and incorporated in disciplines from economics to philosophy and law. The theme that has attracted such disparate disciplines is the fascinating implications they have for human reasoning. The work in human reasoning has even led to a Nobel Prize in economics for one of its pioneers. Given the vastness of the literature, it would make little sense to bombard the reader with dozens of studies. Instead, it will be helpful to examine some pertinent and representational studies.

A. Biases in Rape Cases

Rape is one of the most heinous crimes one human being can commit against another. The victim is tormented long after the crime. The severity of the crime therefore makes it all the more disturbing to know that unconscious biases can play a significant role in the final verdict.

In one study cited by Jon Hanson and David Yosifon, researchers found that jury-eligible subjects were significantly less likely to find that a woman had been raped if the woman was viewed...
as “more respectable.”  Specifically, the subjects found it more likely that a divorced woman had been raped than a virgin or married woman. This seemingly unintuitive finding is actually compatible with a body of research known as “just world theory.” In brief, just world theory postulates that as people, we tend to find explanations that are compatible with the view that the world is just. Thus, subjects are more willing to believe that a divorcee has been raped because it is more compatible with a just world than a married woman or virgin being raped—due to the latter two being perceived as more virtuous.

Another bias that seeps into rape cases is the beauty bias. This bias is the favoring of individuals who are deemed better looking over those who are deemed less good looking. Although more intuitive, it is equally disturbing. In rape trials this plays out in the form of a jury more readily believing an “ugly” man raped a “beautiful” woman than would be the case if the man were deemed “handsome” and the woman “ugly.” Thus, less attractive women are at a greater risk of having their rapist found innocent and less attractive men are at a higher risk of being found erroneously guilty.

B. Race-Based Biases

Implicit racial biases are probably what most readily come to mind when people hear the word “bias.” The Implicit Association Test (IAT) run out of Harvard University is a research methodology that studies race bias, amongst other biases, and has come to be popular with legal scholars. One race-based IAT that has been administered requires people to quickly associate “Black names” with positive words, and “White names” with negative words. Next, the task requires the opposite, quickly matching black faces to

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75 Id.
76 Id.
77 Note that there are no normative claims being made as to virtuousness. Instead it is a descriptive claim about, likely tacit, societal views.
78 See e.g. Marsha B. Jacobson, Effects of Victim’s and Defendant’s Physical Attractiveness on Subject’s Judgments in a Rape Case, 7 SEX ROLES 247 (1981) (studying simulated-jury and concluding that defendants in rape trials are more likely to be found guilty when victim is attractive).
79 Id. at 253
80 Available at: https://implicit.harvard.edu/implicit/ (the website is open for anyone who wants to take a test on implicit biases).
negative words and white faces to positive words.\textsuperscript{82} The program has found statistically significant time differences.\textsuperscript{83} More explicitly, people tend to more quickly attribute positive words to White names and more quickly attribute negative words to Black names.\textsuperscript{84}

So what? Even if this test is actually able to pick out implicit biases, what we really care about as a society is the “cashing out” of such biases as measurable pernicious effects. Thus, below is a sample of some of the pernicious effects of unconscious biases.

In their paper \textit{Fair Measures} researchers Jerry Kang and Mahzarin Banaji examine an experiment whose outcome was readily explainable by IAT results.\textsuperscript{85} The researchers randomly assigned two hundred and ninety-one medical interns “to view, read symptom profiles, and make diagnosis and treatment recommendations for a hypothetical Black or White patient.”\textsuperscript{86}

Consistent with the population of the United States, a significantly higher number of Black patients were diagnosed with coronary artery disease (CAD) than White patients.\textsuperscript{87} Thus, an equitable distribution would require that a higher number of Blacks receive the state-of-the-art treatment than Whites in order to stay proportional. Disturbingly however, in proportion to their respective population, significantly fewer Blacks were prescribed the state of the art treatment than Whites.\textsuperscript{88} Furthermore, “[t]he most highly biased medical interns as measured by the IAT were also more likely to treat White patients with [the state of the art treatment], despite their own diagnoses of Black Americans' higher likelihood of” CAD.\textsuperscript{89}

Importantly, the medical interns were aware that their evaluations were being scrutinized, thus, they had a strong incentive to at least appear unbiased, even if they realized they harbored racist

\textsuperscript{82} This explanation is for simple demonstrative purposes, leaving out some of the design elegance for the sake of not being bogged down by details that are not particularly material to this article. For example, the order in which the tasks are presented changes to account for ordinal effects.

\textsuperscript{83} Greenwald et al., note 79 at 1474 (“More specifically, the data indicated an implicit attitudinal preference for White over Black, manifest as faster responding for the White + pleasant combination…than for the Black + pleasant combination.”).

\textsuperscript{84} Id.


\textsuperscript{86} Id.

\textsuperscript{87} Id. at 1074 (“Consistent with the prevalence of coronary artery disease (CAD) in Black and White Americans, Black patients were more likely to be diagnosed with CAD than White patients.”).

\textsuperscript{88} Id. (“[T]reatment with state of the art Thrombolytic Therapy was given equally to both Black and White patients thereby creating a greater discrepancy between diagnosis and treatment for Black than White patients.”).

\textsuperscript{89} Id.
feelings. Therefore, these biases are likely something the interns were completely unaware of, yet could have a profound effect on people’s lives.

It would be surprising if biases found in highly educated professionals under scrutiny would somehow disappear once people stepped in a courtroom—especially given that the guardian of equity (the reasonable doubt standard) is woefully lacking in its current iteration. Fortunately, there is little need for major inferences, since a recent article by Justin D. Levinson, Huajian Cai, and Danielle Young has specifically tested to see if race plays a role in jury decision making with concern to guilt.

Amongst other tasks, sixty-seven jury eligible students took an IAT that measured the correlation between Black and guilty. The IAT results “suggest participants held an implicit association between Black and Guilty.” However, this alone would not be sufficiently interesting without reasons to believe that such implicit biases would lead to pernicious consequences.

To test this, researchers designed vignettes with either a White defendant or a Black defendant. These vignettes included several pieces of evidence (identical in both iterations of the vignette). The participants were asked to indicate how pertinent certain evidence was towards an assessment of guilt. The study found that “having stronger implicit associations between Black and Guilty… predicted judgments of ambiguous evidence as more indicative of guilt.”

Finally, the implicit nature of these biases is underscored by a surprising finding. Namely, researchers found that “implicit attitudes of race and guilt are quite different than attitudes of race revealed by using explicit measures—in fact, one explicit measure even showed opposite results—participants who felt warmer towards African Americans actually showed more bias on the Guilty/Not Guilty IAT.”

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90 Id. at 1074-75 (“[E]ven when the participants (doctors) were making recommendations in a serious context and were arguably subject to strong demand effects to demonstrate that they were colorblind, they still engaged in disparate treatment that correlated with their implicit biases.”).
91 Justin D. Levinson, et al., Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test, forthcoming 8 OHIO ST. J. CRIM. L. 187, 189 (2010) (“We designed this IAT to examine whether people hold implicit associations between African Americans and criminal guilt, a finding that would call into question criminal law’s presumption of innocence and evoke larger questions of racial justice.”).
92 Id. at 201 (“Participants in the empirical study were sixty-seven jury eligible undergraduate and graduate students at the University of Hawaii who participated in the study for extra course credit.”).
93 Id. at 204.
94 Id. at 206.
95 Id. at 20.
C. Miscellaneous Biases

It may be tempting to focus in on specific biases and attempt to counteract them. This can range from calls to try and counterweigh the unconscious influences consciously,\(^96\) to jury nullification.\(^97\) Even assuming that these countermeasure have equitable consequences the problem of identifying all the biases that exist would be a daunting if not impossible task. This is because the psychological biases literature makes it clear that biases are fecund, as will be illustrated below.

Due to our heightened awareness of race and sex biases, studies concerning biases have tended to focus on those two areas. However, by their very nature, unconscious biases are difficult to ascertain outside of formal studies. Furthermore, devising a study presupposes that the researcher believes the study will yield interesting results. Thus, only factors researchers assume may be susceptible to biases will be studied. To get a sense of how pervasive and surprising some of the biases can be, it may help to glimpse outside of the narrow scope of jury trials.

For example, in one study discussed in the classic paper *Telling More Than We Can Know: Verbal Reports on Mental Processes*\(^98\), researchers Amos Tversky and Daniel Kahneman found that the order in which products were placed created a bias.\(^99\) Researchers spread identical dresses in one study, and nylons in another so that they were in a row.\(^100\) Subjects were then asked to pick the “best quality product.”\(^101\) Subjects were found—particularly in the nylon study—to heavily over-choose from the right side.\(^102\)

This outcome occurred despite the fact that all the products were identical. Nisbet and Wilson noted that, “[w]hen asked about the reasons for their choices, no subject ever mentioned spontaneously the position of the article in the array.”\(^103\) Subjects...
denied being influenced by the position of the article even when specifically asked, “usually with a worried glance at the interviewer suggesting that they felt either that they had misunderstood the question or were dealing with a madman.”

Dozens of experiments were recounted in the paper, all of them tied by one theme: namely, people were consistently unaware as to why they chose what they had chosen, or felt the way they had felt. This was particularly surprising because researchers often suggested to the subjects that a certain feature such as the order could have had an effect, yet they denied being aware of the order at anytime.

Another example comes from a study conducted by Kenneth Mathews and Lance Canon. The researchers found that when ambient noise levels were normal (approximately 50db), people were almost five times as likely to help an apparently injured individual than when ambient noise was loud (approximately 87db). As one researcher has noted: “[t]hese experiments are not aberrational, but representative.”

104 Id.
105 Id. at 237. (For example, in another experiment researchers gave subjects placebo pills and were told that the pill would produce “heart palpitations, breathing irregularities, hand tremor, and butterflies in the stomach.” After taking the pill, the experimenters asked the subjects to endure a series of shocks in which the amperage was slowly heightened. Researchers would heighten the shocks until the subject said they could no longer take the pain. A control group that was not given placebo pills went through an otherwise identical experiment. Those who had been administered a placebo were able to take, on average, four times as much amperage as those who did not. A result the experimenters anticipated; assuming the patients would attribute their symptoms to the pill and not the shock. Surprisingly however, (though perhaps not as surprising as the fact that the experiment passed ethics boards) was that when researchers asked subjects if they believed the pill had any role in their ability to take the shock, they would say “no.” Researchers even pressed subjects, and a typical response would be, “[n]o, like I said, I was too busy worrying about the shock.”).
106 Id. (“When asked about the reasons for their choices, no subject ever mentioned spontaneously the position of the article in the array. And, when asked directly about a possible effect of the position of the article, virtually all subjects denied it, usually with a worried glance at the interviewer suggesting that they felt either that they had misunderstood the question or were dealing with a madman.”)
108 John Dorris, Moral Psychology: Empirical Approaches, Stanford Encyclopedia of Philosophy, available at: http://plato.stanford.edu/entries/moral-psych-emp/ (Dorris’ use of the literature is to show that surrounding circumstances, rather that individual dispositions, are the key factor in determining peoples moral actions. However, the fact that individuals are unaware of why they acted the way they did in each of these cases advances the position in this section as well).
D. Reasonable doubt coupled with implicit biases

The only assurance of equity, and barrier against implicit biases, is the fact that reasonable doubt is uniformly implemented. However, due to its malleability it tends to be little more than a façade. Furthermore, it is also highly unlikely that the disparities we see in such studies are due to jurors not caring. Studies show that jurors really do try and apply the standards, but genuinely have trouble understanding jury instructions (if provided to them at all).109

The eventual prescription compels jurors to essentially create their own definition of reasonable doubt by having them imagine what degree of evidence would amount to being beyond a reasonable doubt.110 This mental exercise is done before the facts of the case are known, thus preventing the biases from creeping into the reasonable doubt analyses.

Again, the extent of the problem can be summarized in two parts. First, in ambiguous criminal cases cognitive science tells us that jurors will eventually feel strongly towards one side, even if they initially felt the evidence did not clearly indicate guilt or innocence. This was the problem articulated in section III. Second, unbeknownst to jurors, their reasons for feeling one side may possess more credulity may rest on unconscious biases—the problem articulated in this section. Thus, their ultimate feeling of certainty may be premised on little more than a bias that nudged them in one direction, and due to human nature, produced a strong feeling of knowing.

V. SETTING STANDARDS THROUGH “RULE-BASED BIAS FILTERING”

This section demonstrates how utilizing rule-based reasoning can help minimize the extent to which biases play a role in our reasoning. In conjunction with section VI—which explains both how reasonable doubt can be defined and used as a rule—this section constitutes the prescriptive claim.

The biases that lead us to convict some individuals when there is little evidence against them and exonerate others when there is a plethora of evidence against them can incite various reactions. Some may see the radical cost of revamping the legal system as too high, and thus downplay the extent to which these biases undermine the very foundations of this legal system. Others may call for counter and compensatory measures such as jury nullification in cases where biases are likely to occur in favor of the prosecution.111 Fortunately,

109 Walter W. Steele, Jr. and Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. Rev. 77, 94-5 (1988) (citing cases that show juries often misapply the law because they do not understand the instructions, not because they are attempting to carry out an agenda.).
110 See infra section V.
111 See Butler, Racially Based Jury Nullification, supra note 97.
by standardizing the reasonable doubt concept, many of the biases can be ameliorated, without having to choose between doing nothing, and possible over-compensation.

This idea can be illustrated using one of the aforementioned biases. For example, if we were to introduce a rule for lending aid to people it could help us eliminate the bizarre environmental noise bias found in the Mathews and Canon study.\footnote{Mathews and Canon, \textit{supra} note 107 (finding that high environmental noise—measured as approximately 50 decibels—biased people against helping an apparently injured individual).} An aid-lending rule could be formulated as follows, “when someone needs help, always assist unless doing so would make you late to an important engagement or otherwise harm you.” The merits of the rule are not of importance. What is important is that by having a rule and following it, the rule may override the biases. So, a subject who applies this rule may still walk by someone who needs help while ambient noise is heightened and feel no inclination to help. However, having the rule in mind gives them a reason to override the lower level bias. The feeling is the same, but now our subject has an anchor by which they may effectively filter out the irrelevant “noise” (in this case both figuratively and literally).

Note that this solution does not require the individual to even be aware of the bias. For all we know there are biases related to aid rendering that are produced by what we had for breakfast, the laundry detergent we use and the color of our underwear. An individual may be aware that they are not inclined to help the person in distress, but they need not know why in order to successfully apply the rule. What is needed is a contextual cue that triggers the explicit aid-lending rule and that the prospective aider follows the rule. In this case, the cue is noticing an individual in distress. In a jury trial, the cue is an explicit jury instruction.

Importantly, there is an inverse correlation between the precision of the rule and the flexibility of the rule. Also, there is a positive correlation between the flexibility of a rule and the amount of biases that can seep in. For example, if instead of the aforementioned assistance rule, we replaced it with “help someone anytime you feel like it.” Such a vague rule makes a person just as susceptible to bias influence as a person with no rule.

Also, imagine creating a rule meant to protect one from wily sales persons, well versed in cognitive biases. A rule lacking flexibility might be stated as, “under no circumstance will you spend more than $200.” As long as one sticks to the rule, a person can feel secure that they will not spend more than they had planed on. Compare that to a rule that states, “spend no more than seems reasonable.” While this rule has much greater flexibility, it comes at the cost of doing very little to protect against biases.
The problem carries over to the reasonable doubt concept. The more narrowly it is defined, the less it is susceptible to biases, but it may also become less flexible. So how can reasonable doubt keep a degree of flexibility while having the rigidity necessary for rule based bias filtering to work? The following section provides an answer.

VI. USING KNOWLEDGE BY ACQUAINTANCE TO STANDARDIZE REASONABLE DOUBT

The current section explains how knowledge by acquaintance can be used to define reasonable doubt and serve as a rule through which rule-based bias filtering may occur.\textsuperscript{113} Furthermore, the section ends by dispelling a possible concern arising out of the literature.

From the lack of a clear definition, it is apparent that reasonable doubt cannot be simply defined using words. As one author has observed, “[a]ttempts to define reasonable doubt simply establish ‘analytic connections between words and words’ that belie the concept’s inherent quality of vagueness.”\textsuperscript{114} Instead of words, a jury instruction requiring jurors to come up with concrete examples that serve as definitions should be used. These examples act as definitions and rules, thus allowing rule-based bias filtering to occur. Jurors still have the ultimate deciding power with regard to whether the criteria are met, but instead of just relying on the unreliable feeling of certainty, they can rely on an illustrative definition.

Thinking of cases where we would all find a suspect guilty beyond a reasonable doubt is not difficult. For example, a suspect who is caught on a clear video recorder committing a crime, DNA evidence was found at the scene, the suspect had a motive and there was no evidence that undermined those facts. We can also think of cases in which we definitely would not feel comfortable finding someone guilty beyond reasonable doubt. For example, a case where no plausible motive is given and the only evidence is a witness who saw the individual in the area shortly after the crime. Yet, when jurors are asked to come to a decision of guilt or innocence they rely on their unreliable feelings.\textsuperscript{115}

The examples are meant to use the juror exemplars as anchors to create positive guidelines. Much like it is better before one steps into a store to think about what she is willing to pay for an item, it is much better to think about what counts as reasonable doubt before the trial begins.

\textsuperscript{113} See supra section II for a discussion of knowledge by acquaintance.


\textsuperscript{115} See supra section III.
These anchors achieve at least three things. One, jurors create the standard that functions like the rules that were explored earlier, thus helping to filter out biases. The rule could be construed as: “do not find guilt beyond a reasonable doubt unless the evidence presented is comparable to that of your reasonable doubt exemplar.” Two, by creating the rule before the facts of the trial are known, it is less likely that unconscious biases will weigh into its formulation. Finally, the flexibility of the standard is kept. Jurors create their own exemplars, thus worries concerning stripping the jurors of their ability to use personal beliefs is gone.

The idea of conscious thoughts (rules in the present case) acting to essentially veto lower level thoughts is one supported by neuroscientific research. The neurophysiologist Benjamin Libet’s research putatively demonstrated that our conscious “will” to act occurs only after the neural commands for triggering that act have occurred. Yet, he conceded that his research supported the idea that higher order (conscious) thoughts could act as a veto mechanism even once the lower order neural commands have been triggered. Bolstering this position, the neurologist John Burton concurs with the aforementioned opinion adding, “[i]f you see conscious thoughts as being subsequent inputs into the hidden layer, you can see where a conscious decision can then be incorporated into unconscious decision-making.”

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116 The fewer facts before the jury at the time they decide on a reasonable doubt model, the fewer biases they may be exposed to. However, it is realistic that jurors will have been exposed to some facts even before opening statement due to voir dire.

117 Such worries have been stated in, for example: Harvard Law Review Association, Reasonable Doubt: An Argument Against Definition, 108 HVL 1955, 1970 (1995) (stating that “[r]esponsibility for determining the precise meaning [beyond a reasonable doubt] is better located within the criminal jury because jurors, as community representatives, have the collective capacity legitimately to make the value judgment required to interpret the reasonable doubt standard and impose the criminal sanction.”)


119 Id. (“Libet noted that the conscious function still had enough time to affect the outcome of the process; that is, it could allow the volitional initiative to go to completion, it could provide a necessary trigger for the completion, or it could block or veto the process and prevent the act’s appearance.”).

120 E-mail from Robert A. Burton, former Chief of Neurology Division of UCSF-Mt. Zion Hospital (August 3, 2008, 11:53 PST)(on file with author) (“I completely agree with Libet and the idea of the veto power of conscious thought. If you see conscious thoughts as being subsequent inputs into the hidden layer, you can see where a conscious decision can then be incorporated into unconscious decision-making.”).
There is also research at the higher order cognitive levels showing that mental models work. One study found that while, “[d]irect approaches, like informing participants of the existence of the bias and imploring them to “try harder” or to “be unbiased” have been generally unsuccessful, some success has been obtained with techniques that induce participants to actively create mental models in which they imagine alternative conclusions by urging them to consider the correctness of the opposite conclusion and to note the weaknesses of their preferred conclusion.”  

The exemplars would work as alternative conclusions where needed, that is, where the case at hand deviates from the mental model. If a case does not deviate from the model, there is no need to imagine alternatives, because by comporting with the mental model, the reasonable doubt standard has been achieved.

Further support for this idea comes from an unlikely candidate, viz. Gregory Mitchell. Mitchell, who criticizes much of the research in implicit biases used in the legal context, points out that part of what makes us uniquely human is our ability to correct inaccurate (or biased) thoughts through higher order thoughts. In short, while humans may have unconscious biases, it is not always clear that the biases affect our decision making, because we are able to self correct with these “second thoughts.”

Mitchell’s criticism supports the prescriptive claim that conscious mental models can serve to override conscious biases. The rules used in rule-based bias filtering are second thoughts that are used to correct potentially pernicious biases. In Mitchell’s own words, use of “mechanical rules and decision aids…[make] it more likely that simple computational errors and inappropriate weighting of data points will be avoided.” Thus, although Mitchell would generally be viewed as a critic of the bias literature in the law, his findings actually support this article’s prescriptive claim.

However, although Mitchell’s research bolsters the prescriptive claim, his views may seem to undermine the descriptive

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121 Simon, supra note 48, at 553–4.
122 Gregory Mitchell, Second Thoughts, 40 MCGEORGE L. REV. 687, 688 (2009) (“[A]ll persons with cognitively normal functioning possess the ability to engage in some amount of deliberation, ‘metacognition,’ or thought about one's own thoughts--indeed, metacognition is sometimes described as a uniquely human characteristic.”).
123 Id. at 687 (“Biases in judgment and decision-making often arise at the level of first-order thoughts. If these initial thoughts are not overridden by second-order thoughts, they may lead to biased outputs . . . . [H]owever, . . . . [t]here is considerable evidence that individuals often naturally engage in self-correction and that situational pressures often encourage self-correction.”).
124 Id. at 702.
Namely, Mitchell thinks people may automatically correct for biases without ever having the need to consciously correct for them. He argues that cognitive biases are overstated because we can correct for such biases. Yet, he does not seem to provide any data that shows we are more likely to filter out biases than not. Furthermore, findings such as those in the work of Kang and Banaji evidence the fact that these biases may creep in even if we take conscious steps to counter them.

Additionally, while we may be well aware of sex and race biases, there may be many biases whose effects we do not fully comprehend or even know about (e.g. beauty bias, weight bias, tattoo bias). Even for unconscious correction to occur under Mitchell’s model there must be some impetus—conscious or unconscious—that results in second thoughts that correct for such biases. Assuming a strong impetus to correct for biases we are completely unaware of seems foolhardy. Thus, in addition to Mitchell’s arguments lending support to this article’s prescriptive claim, the arguments do little to undermine the descriptive claim.

Admittedly, there will always be borderline cases that are not only difficult to decide but also open the door for biases our mental models may not foresee. Therefore, the goal is not to eliminate implicit biases, but rather, ameliorate them. Furthermore, this solution need not be the only one. The hope is that it will help compliment other solutions such as graphical illustrations and instructions simplified with the help of psycholinguistics.

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125 See supra sections III & IV for an overview of the descriptive claim. The sections describe how the feeling of certainty coupled with bias leads people to, much too easily, feel proof beyond a reasonable doubt has been met.

126 Mitchell, supra note 122, at 715. (“Conscious attention to the law’s prohibitions may lead to the online monitoring of our behavior for bias, but conscious thoughts about the appropriateness or inappropriateness of certain considerations may lead to offline debiasing as well, through the creation of metacognitive validity tags.”).

127 Id. at 702–3. (“[T]he unconscious is less prejudiced and less stereotype-driven than many psychologists and legal scholars have assumed.”).

128 See generally Kang and Banaji, supra note 85.

129 These cases are particularly good because the effects are seen even in medical care decisions. These cases are plagued by biases we are conscious of and would most likely want to counter, yet are evidently unable to. See id.

130 See supra section IV (outlining different biases and their effects).

131 Mitchell, supra note 123 (“Conscious vigilance and deliberate introspection certainly can lead to efforts to avoid bias, but we now know that bias avoidance can also occur as a result of vague or inchoate thoughts, feelings operating at the fringe of consciousness, and even through processes operating fully below the level of consciousness.” The thoughts may be “vague” or “inchoate” but there needs to be thoughts nonetheless to create the impetus for correction.).

132 See e.g., Firoz Dattu, Illustrated Jury Instructions: A Proposal, 22 LAW & PSYCHOL. REV. 67, 81 (1998) (arguing that “the overwhelming conclusion is that pictures enhance comprehension and memory” with regard to jury instructions).
In particular, jurors should be reminded that those accused of crimes need not show any evidence supporting their innocence, because they are presumed to be innocent. Also, it may help to frame reasonable doubt against the other standards such as preponderance of the evidence. Both of these clarifications are easy to explain and of the utmost importance because jurors are often found to not understand them. With Jury instructions that take these standards into account, jurors will have sufficient individual flexibility while still being able to avoid some of the pernicious effects caused by implicit biases.

Also, this solution is compatible with a reasonable doubt that changes based on severity of crime or sentencing (a cost-benefit model of reasonable doubt). This could be achieved by giving the jury information while they are constructing their reasonable doubt exemplars, so as to influence these mental models. For example, “while thinking about what constitutes a reasonable doubt, one should keep in mind that the current case carries with it the possibility of death.” Jurors would thus be free to take the penalty into consideration when constructing their reasonable doubt mental model.

CONCLUSION

The inherent vagueness of reasonable doubt leaves jurors with nothing more than their gut feelings of certainty to rely on. While these feelings of certainty may sometimes rest on well-founded reasons, research in cognitive science shows that such feelings are no guarantee of cogent reasoning or accuracy. Particularly in factually complex and ambiguous cases, juror’s feelings may be unconsciously swayed by biases. This problem is exacerbated by the fact that—not only are jurors unaware of their biases—but it is quite likely that laypersons and experts alike have several biases that have never been considered. In such ambiguous cases, research also reveals that jurors are likely to

133 Diamond, supra note 28, at 1723 (citing a study that showed after receiving a traditional presumption of innocence and reasonable doubt instruction “only fifty percent of the jurors understood that the defendant did not have to present any evidence of his innocence . . . and two percent believed that the burden of proof of innocence lay with the defendant”).

134 See e.g., Erik Lillquist, Recasting Reasonable Doubt: Decision Theory And The Virtues Of Variability, 36 U.C. DAVIS L. REV. 85 (2002) (arguing in favor of a cost-benefit model of reasonable doubt, stating that “ . . . reasonable doubt standard of proof is inevitably flexible in nature: in some cases juries will require more proof than in other cases. The Article goes on to suggest that this result is in fact preferable to a standard of proof that requires a high level of certainty in all criminal cases.”).
experience strong feelings of certainty, not due to factual clarity, but instead due to the nature of the human cognitive architecture.

Fortunately, a standard can be created once it is realized that “reasonable doubt,” while not amenable to a customary definition, can become an explainable standard by providing jurors with examples. Specifically, jurors can be instructed to create concrete exemplars of proof beyond a reasonable doubt, through which they may evaluate their final conclusions. Cognitive science leads us to believe that such a strategy (rule-based bias filtering) will help jurors reassess conclusions that strongly diverge from the exemplars. This is significant because such divergence is indicative of the fact that the conclusions were by-products of biases.

Finally, rule-based bias filtering through exemplars is not mutually exclusive with other putative solutions to the problem. Despite the impressive benefits of rule-based bias filtering, it is essential to stay open to the fact that empirical research may lead to further solutions. At the very least, empirical research may help maximize the manner and timing in which reasonable doubt mental models are constructed.