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The Battle over the Burden of Proof: A Report from the Trenches

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THE BATTLE OVER THE BURDEN OF PROOF: A REPORT FROM THE TRENCHES

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INTRODUCTION

After explaining the concept of proof beyond a reasonable doubt, many trial courts will conclude their instructions by telling jurors "not to search for doubt" but instead "to search for the truth."[1] Criminal defense lawyers have challenged this type of truth-based jury instruction on multiple grounds, including that it lowers the burden of proof to a mere preponderance of evidence standard.[2] That is, if a jury believes the prosecutor's version of events is only slightly more likely than not, it would follow that, in a search for the truth, the jury would be obligated to convict.[3]

Prosecutors have responded by citing a lack of evidence to support this claim, and have dismissed defense lawyers' concerns as mere speculation.[4] Most trial and appellate courts have been eager to agree, declaring that, while truth-based jury instructions could *in theory* lower the burden of proof, there was no real evidence they were causing any actual harm.[5]

Given this apparent call for empirical evidence, Professor Lawrence White and I decided to test the impact of truth-based jury instructions on verdicts. In two recently published controlled studies, we found that mock jurors who were *first* instructed on reasonable doubt and *then* told "not to search for doubt" but "to search for the truth" convicted at significantly higher rates than jurors who were simply instructed on reasonable doubt.[6] We also found that jurors who received the truth-based instruction were nearly *twice* as likely to mistakenly believe they could convict even if they had a reasonable doubt about guilt.[7] Finally, we found that jurors who held this mistaken belief were *two-and-one-half times* as likely to actually vote guilty.[8]

Citing these empirical studies, we criminal defense lawyers have been filing motions asking trial courts to modify their burden of proof jury instructions.[9] Our

[1] *See infra* Part I.

[2] *See infra* Part I.A.

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See infra* Part I.C.

[7] *See id.*

[8] *See id.*

[9] *See infra* Part I.D.

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request is that trial judges delete the truth-related language and simply conclude their jury instructions as follows: It is your duty to give the defendant the benefit of every reasonable doubt.[10]

Despite the reasonableness of this request—after all, the constitutionally-mandated burden of proof *is* beyond a reasonable doubt—prosecutors are fighting hard to preserve the burden-lowering, truth-based jury instructions on which they rely to win convictions.[11] In this battle over the burden of proof, prosecutors have deployed twenty different arguments to preserve the status quo. Some of these arguments are based on a misunderstanding of the empirical studies, others are rooted in logical fallacies, some involve misstatements of law, and others are based on misrepresentations of fact.[12]

This Article collects, organizes, and debunks these prosecutorial arguments. Its purpose is to assist criminal defense lawyers and judges in recognizing and responding to invalid arguments about the empirical studies,[13] the reach of various legal authorities,[14] the significance of jury instruction language,[15] and even the purpose of criminal jury trials and how that purpose relates to the burden of proof instruction.[16] The ability to identify and respond to these arguments is a critical step in restoring the constitutionally-mandated reasonable doubt standard for every person accused of a crime.

I. THE BURDEN OF PROOF JURY INSTRUCTION

The Constitution protects a defendant from criminal conviction unless the state can prove guilt "beyond a reasonable doubt."[17] This high burden of proof is designed to protect us "from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."[18] It is also "indispensable to command the respect and

[10] *See id.*

[11] *See id.*

[12] *See infra* Parts II–V.

[13] *See infra* Part II.

[14] *See infra* Part III.

[15] *See infra* Part IV.

[16] *See infra* Part V.

[17] *In re* Winship, 397 U.S. 358, 364 (1970).

[18] *Id.* at 362 (quoting Brinegar v. United States, 338 U.S. 160, 174 (1949)).

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confidence of the community in applications of the criminal law."[19] Given these objectives, "[i]t is critical that the moral force of the criminal law not be diluted" by a lower burden of proof.[20]

Despite the importance of this constitutionally-mandated burden of proof, trial courts have tremendous leeway when instructing jurors on the concept of reasonable doubt.[21] And strangely, after defining reasonable doubt, some courts will instruct jurors to "[d]etermine what you think the truth of the matter is and act accordingly."[22] Other courts will instruct jurors that, when reaching their verdicts, they should "evolve the truth,"[23] "seek the truth,"[24] "search for truth,"[25] or "find the truth."[26] Some courts, after discussing what kind of doubt is reasonable and what kind is not, will even make a 180-degree turn and conclude: "[Y]ou should *not* search for doubt. You should search for the *truth*."[27] As discussed below, such truth-related language poses serious constitutional problems.

A. The Trouble with Truth-Based Instructions

Criminal defense lawyers have argued that truth-based jury instructions are improper and, in many cases, unconstitutional.[28] First, at a bare minimum, such

[19] *Id.* at 364.

[20] *Id.*

[21] *See* Victor v. Nebraska, 511 U.S. 1, 5 (1994). For an extensive survey of reasonable-doubt instructions, see Miller W. Shealy, Jr., *A Reasonable Doubt About "Reasonable Doubt,"* 65 OKLA. L. REV. 225 (2013); Hon. Richard E. Welch III, *"Give Me That Old Time Religion": The Persistence of the Webster Reasonable Doubt Instruction and the Need to Abandon It*, 48 NEW ENG. L. REV. 31 (2013).

[22] State v. Dunkel, 466 N.W.2d 425, 430 (Minn. Ct. App. 1991) (formatting omitted).

[23] United States v. Pine, 609 F.2d 106, 108 (3d Cir. 1979).

[24] United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994). *See also* State v. Weisbrode, 653 A.2d 411, 417 (Me. 1995) ("The court instructed the jury to seek truth from the *evidence*."); State v. Aleksey, 538 S.E.2d 248, 251 (S.C. 2000) ("[I]nstructing the jury its 'one single objective' was 'to seek the truth.'"); State v. Benoit, 609 A.2d 230, 231 (Vt. 1992) ("During jury instructions, the trial judge twice referred to a jury's duty to 'seek the truth.'").

[25] Commonwealth v. Allard, 711 N.E.2d 156, 159 (Mass. 1999). *See also* People v. Walos, 645 N.Y.S.2d 695, 696 (N.Y. App. Div. 1996) (instructing jurors that the trial was a "search for the truth"); State v. Needs, 508 S.E.2d 857, 866 (S.C. 1998) (instructing jurors that they should be "*in search of the truth*").

[26] United States v. Gray, 958 F.2d 9, 13 (1st Cir. 1992).

[27] State v. Avila, 532 N.W.2d 423, 429 (Wis. 1995) (*rev'd, in part, on other grounds*) (emphasis added).

[28] *See, e.g.*, Erik R. Guenther, *What's Truth Got to Do with It? The Burden of Proof Instruction Violates the Presumption of Innocence*, 13 WIS. DEFENDER, Fall 2005, at 1, 2; *see also* Michael D. Cicchini, *Criminal Court: Guilty by the Preponderance of the Evidence?*, MARQ. U. L. SCH. FAC. BLOG (Nov. 16,

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instructions are internally inconsistent and therefore confusing; they first instruct jurors on the concept of reasonable doubt, but then instruct them not to search for doubt but instead to search for something else entirely.[29]

Second, by pitting the concepts of doubt and truth against each other—and, in some instances, even explicitly directing the jury to choose truth—these instructions "impermissibly portray the reasonable doubt standard as a defense tool for hiding the truth," and discourage the jury from performing its constitutionally-mandated "scrutiny of the evidence for reasonable doubt."[30]

Third, these instructions invite the jury "to disregard the evidence and instead speculate on, or search for, what it believes to be the truth. This capitalizes on the human tendency to think we can know things without evidence. How often have you heard someone say, for example, 'I know it, I just can't prove it'?"[31]

Fourth, and most significantly, "'seeking the truth' suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a *preponderance of evidence* standard."[32] That is, truth-based jury instructions create a serious constitutional problem by lowering the burden of proof below the reasonable doubt standard.

Prosecutors, however, were eager to point out that there was no *evidence* that truth-based jury instructions lowered the burden of proof. They therefore dismissed defense lawyers' objections as unfounded opinion, wild musings, and pure speculation.[33] (However, they could not explain why, if the truth-related language did *not* lower the burden of proof, they were fighting to preserve it.[34]) Without any

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2010), http://law.marquette.edu/facultyblog/2010/11/16/criminal-court-guilty-by-the-preponderance-of-the-evidence/.

[29] *See Avila*, 532 N.W.2d at 429 (defense arguing that "truth and doubt are two separate concepts").

[30] State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012).

[31] Cicchini, *supra* note 28.

[32] United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994) (emphasis added).

[33] *See, e.g.*, State's Trial Court Memorandum, Wisconsin v. Yusuf, No. 2015-CF-911 (Cir. Ct. Kenosha Cty. 2015) (arguing that defense counsel's argument was merely "personal opinion") (on file with the author).

[34] Cicchini, *supra* note 28.

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independent thought, most trial judges simply adopted this prosecutorial reasoning and continued to read truth-based instructions to their juries.[35]

Admittedly, prosecutors were half right: until very recently there was no empirical evidence regarding the impact of truth-based jury instructions on verdicts. But, as the next section explains, defense lawyers' concerns about the dilution of the burden of proof were much more than mere speculation; our concerns were firmly rooted in law, language, and logic.

B. A Simple Thought Experiment

Imagine that after hearing the evidence at a criminal trial, jurors were required to assign a numeric value to the strength of the state's case, with 0.0 being no evidence, 5.1 being the preponderance of evidence, 8.5 being proof beyond a reasonable doubt, and 10.0 being conclusive proof of guilt.[36] Assume that, as is true in most criminal trials, the evidence is mixed. As a result, our hypothetical juror assigns a value of 5.2 to the case. Should the juror acquit or convict the defendant?

The answer depends on the burden of proof. If the juror is properly instructed on proof beyond a reasonable doubt, the juror will vote not guilty as 5.2 falls well short of the reasonable doubt threshold. But if the juror is instructed, for example, "not to search for doubt" but instead "to search for the truth," the juror would be obligated to convict. Why? Because with a value of 5.2 assigned to the case, the allegation is probably true. The problem, however, is that convicting a defendant because "the charge is probably true" would be blatantly unconstitutional.[37]

Not only is this thought experiment realistic—we commonly use numeric values to assess, rank, describe, and measure a wide variety of things[38]—but it perfectly illustrates the problem with truth-based jury instructions: telling jurors to

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[35] *See, e.g.*, WISCONSIN COURT SYSTEM: CIRCUIT COURT ACCESS, Wisconsin v. Yusuf, No. 2015-CF-911 (Cir. Ct. Kenosha Cty. 2015), Entry No. 69 (denying defendant's motion to modify instruction), https://wcca.wicourts.gov/index.xsl.

[36] Reasonable minds can differ as to whether reasonable doubt should be represented by 8, 9, or some other number. However, by definition the number must be higher than the preponderance of evidence (5.1) and lower than absolute certainty (10.0), both of which are fixed. Nonetheless, the precise number assigned to reasonable doubt does not matter for purposes of this example.

[37] State v. Giroux, 561 A.2d 403, 406 (Vt. 1989) ("The jury must acquit even when it thinks the charge is probably true.").

[38] An excellent example is the zero-to-ten pain scale used by the medical profession. *See, e.g.*, Alice Rich, *Comparative Pain Scale*, STAN. MED. LANE MED. LIBR. (Dec. 2008), https://lane.stanford.edu/portals/cvicu/HCP_Neuro_Tab_4/0-10_Pain_Scale.pdf.

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ignore doubt in favor of a search for the truth creates a substantial risk they will convict a defendant by a mere preponderance of evidence.

However, as conceded above, prosecutors *were* half right: there was no empirical evidence to prove defense lawyers' burden-lowering hypothesis. Therefore, Professor Lawrence White and I designed, conducted, and published two controlled studies to test the effect of truth-based instructions on juror decision making.

C. The Empirical Studies

In our first study, we recruited participants to serve as mock jurors in a hypothetical criminal case.[39] Each juror received the *identical* case summary materials that included the elements of the charged crime, a summary of the witnesses' testimony, and the lawyers' closing arguments.[40] Before rendering their verdicts, however, jurors were randomly assigned to three groups, each of which received a *different* instruction on the burden of proof.[41]

We first hypothesized that truth and doubt were, in fact, two distinct concepts, and that jurors who were instructed only to search for the truth ("truth only") would convict at a higher rate than jurors who were properly instructed on reasonable doubt ("doubt only").[42] This hypothesis was confirmed: jurors who received a truth-only instruction voted to convict 29.6% of the time, while jurors who received the legally proper doubt-only instruction voted to convict 16% of the time.[43]

Next, we hypothesized that jurors who were *first* properly instructed on reasonable doubt but *then* told "not to search for doubt" and instead "to search for the truth" ("doubt-and-truth") would convict at a higher rate than jurors who received the legally proper doubt-only instruction.[44] This hypothesis was also confirmed: the conviction rate for jurors who received the doubt-and-truth instruction jumped back up to 29%—a rate statistically identical to that of jurors who received no reasonable doubt instruction whatsoever.[45] This is more clearly conveyed in the following table:

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[39] Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICH. L. REV. 1139, 1150 (2016) [hereinafter Cicchini & White, *Empirical Test*].

[40] *Id.* at 1151.

[41] *Id.* at 1152.

[42] *Id.* at 1150.

[43] *Id.* at 1154.

[44] *Id.* at 1150.

[45] *Id.* at 1155.

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Burden-of-Proof Instruction	Conviction Rate
A clearly unconstitutional "search for the truth" instruction with *no mention whatsoever* of beyond a reasonable doubt (truth only)	29.6%
A legally proper beyond a reasonable doubt instruction (doubt only)	16.0%
An otherwise legally proper beyond a reasonable doubt instruction that concludes with a mandate "not to search for doubt" but "to search for the truth" (doubt-and-truth)	29.0%

In our second study,[46] we conducted a conceptual replication[47] of the first study. In order to test the strength of our primary finding, we again hypothesized that the doubt-and-truth instruction would produce a higher conviction rate than a legally proper doubt-only instruction.[48] This hypothesis was again confirmed: in the second study, the two conviction rates were 33.1% (doubt-and-truth) and 22.6% (doubt only).[49]

Next, we hypothesized that jurors who received the doubt-and-truth instruction would be more likely to mistakenly believe that conviction was proper even if they had a reasonable doubt about guilt.[50] This hypothesis—tested through a post-verdict question—was also confirmed: jurors in the doubt-and-truth group were nearly twice as likely as jurors in the doubt-only group to hold this mistaken belief (28% and 15%, respectively).[51] We also found that, regardless of the group to which jurors were

[46] Michael D. Cicchini & Lawrence T. White, *Testing the Impact of Criminal Jury Instructions on Verdicts: A Conceptual Replication*, 117 COLUM. L. REV. ONLINE 22 (2017) [hereinafter Cicchini & White, *Conceptual Replication*].

[47] Regarding the importance of replication, see Stefan Schmidt, *Shall We Really Do It Again? The Powerful Concept of Replication is Neglected in the Social Sciences*, 13 REV. GEN. PSYCHOL. 90, 91 (2009).

[48] Cicchini & White, *Conceptual Replication*, *supra* note 46, at 28.

[49] *Id.* at 30–31.

[50] *Id.* at 28.

[51] *Id.* at 32.

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assigned, jurors who held this mistaken belief were far more likely to convict than jurors who properly understood the burden of proof (54% and 21% respectively).[52]

Additional findings and the concept of statistical significance will be discussed throughout this Article. But in summary, the studies provide strong empirical evidence that truth-based jury instructions lower the constitutionally-mandated burden of proof.

D. A Seemingly Simple Request

Since the publication of these studies, we defense lawyers have been filing motions asking trial courts to modify their burden of proof instructions. Our request is simply that, instead of concluding by telling jurors "not to search for doubt" but "to search for the truth," courts should simply conclude their burden of proof instructions as follows: It is your duty to give the defendant the benefit of every reasonable doubt.[53]

This request should be uncontroversial given that it so accurately and clearly conveys the constitutionally-mandated burden of proof. Further, we defense lawyers now have empirical evidence to support what was already obvious from a logical and linguistic perspective: when a court instructs jurors to ignore doubt in favor of a search for the truth, it lowers the burden of proof below the reasonable doubt standard.

Unfortunately, few things are simple in criminal law. Prosecutors continue to oppose any changes to the burden-lowering, truth-based jury instructions to which they have grown accustomed and on which they rely.[54] And in this battle over the burden of proof, they have deployed a new set of arguments—while continuing to cling to some of their old ones.

The remainder of this Article collects, organizes, and responds to each of these prosecutorial arguments, beginning with arguments that criticize the published studies. The Article's purpose is to assist defense lawyers and judges in identifying invalid arguments and responding to prosecutors who are determined to win jury

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[52] *Id.*

[53] *See, e.g.*, *Defendant's Brief in Support of the Requested Jury Instruction on the Burden of Proof*, Wisconsin v. Barnes, No. 2015-CF-1015 (Cir. Ct. Kenosha Cty. 2016) (on file with the author).

[54] *See, e.g.*, *Hearing Transcript*, Aug. 29, 2016, Wisconsin v. Barnes, No. 2015-CF-1015 (Cir. Ct. Kenosha Cty. 2016) (state requesting stay to appeal trial judge's ruling granting defendant's requested modification to jury instruction) (on file with the author).

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trials despite our constitutional protection "against conviction except upon proof beyond a reasonable doubt."[55]

II. PROSECUTOR ARGUMENTS REGARDING THE STUDIES

As is the case with most human endeavors, social science research has its limitations. Lawrence White and I even identified and discussed five such limitations in our first study,[56] and were then able to eliminate two of those five in our second study.[57]

However, as the following sections demonstrate, not all criticisms are equally valid. In fact, prosecutors' arguments that criticize the published studies demonstrate, at best, a gross misunderstanding of social science research. At worst, many of these arguments are simply disingenuous attempts to preserve the burden-lowering, truth-based jury instructions on which prosecutors depend to win convictions.

A. The Participants Who Voted "Guilty" Could Have Been Right

Some prosecutors have argued that the participants in the studies who voted guilty may have done so because the defendant was, in fact, guilty. Further, those participants who voted *not* guilty would have been *wrong*, and therefore the studies could actually support the state's position that courts should use truth-based jury instructions.

This prosecutorial argument either completely misunderstands, or deliberately mischaracterizes, the nature of the research. The studies did not analyze real-life jury trials and verdicts. Rather, both studies were controlled experiments where all participants received the identical, hypothetical fact pattern involving fictional parties and witnesses. There was simply no objective truth—whether known, unknown, or unknowable—against which the participants' verdicts could, even theoretically, be compared. Consequently, the mock jurors were neither correct nor incorrect when rendering their verdicts.

Instead, the purpose of the original study was to test the hypothesis "that when truth-related language is added to an otherwise proper beyond a reasonable doubt

[55] *In re* Winship, 397 U.S. 358, 364 (1970).

[56] Cicchini & White, *Empirical Test*, *supra* note 39, at 1159.

[57] Cicchini & White, *Conceptual Replication*, *supra* note 46, at 34–35.

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instruction, the truth-related language not only contradicts but also *diminishes* the government's burden of proof."[58] The purpose of the second study—a conceptual replication of the original—was twofold: first, to test the strength of the original study by attempting to replicate its primary finding; and second, if the finding was replicated, to identify a cognitive link between the truth-based jury instruction and the mock jurors' verdicts.[59]

The studies' general findings were explained above; additional findings, and the concept of statistical significance, will be explained below. However, for purposes of this section, one thing is already clear: given the constitutionally-mandated burden of proof beyond a reasonable doubt, and given the controlled nature of the experiments, the findings provide strong evidence for abolishing, not preserving, truth-based jury instructions.

B. Actual Jurors Are Needed to Test a Jury Instruction

As explained above, our studies did not analyze data on actual verdicts from real-life criminal cases. Instead, we used controlled experiments where juror-eligible citizens rendered verdicts in hypothetical cases. This study design has drawn criticism from some prosecutors who have argued that a real-life *jury* is necessary to test a *jury* instruction. However, the use of test subjects in a controlled setting is not only the hallmark of social-psychology research,[60] but is actually the best way to test the effect of jury instructions on verdicts.

To illustrate, assume that instead of using controlled experiments, we analyzed actual jury verdicts in two states: first, Wisconsin, which discusses reasonable doubt but concludes by instructing jurors "not to search for doubt" and instead "to search for the truth";[61] and second, Vermont, which discusses reasonable doubt and then cautions jurors that, if they have such a doubt, "you must find [the defendant] not

[58] Cicchini & White, *Empirical Test*, *supra* note 39, at 1150.

[59] Cicchini & White, *Conceptual Replication*, *supra* note 46, at 28.

[60] *See, e.g.*, Sheri S. Diamond, *Illuminations and Shadows from Jury Simulations*, 21 L. & HUM. BEHAV. 561 (1997) (discussing the use of mock jurors and trial simulations to evaluate juror behavior); Marc W. Patry, *Attractive But Guilty: Deliberation and the Physical Attractiveness Bias*, 102 PSYCHOL. REP. 727 (2008) (using mock jurors to test the impact of the defendant's attractiveness on jurors' verdicts); Lawrence T. White, *Juror Decision Making in the Capital Penalty Trial*, 11 L. & HUM. BEHAV. 113 (1987) (using mock jurors to test the impact of various factors on jurors' willingness to impose the death penalty).

[61] WIS. CRIM. JURY INSTRUCTIONS No. 140.

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guilty even if you think that the charge is probably true."[62] Further assume that the observed conviction rate in Wisconsin was higher than in Vermont. Would this be empirical evidence that Wisconsin's jury instruction dilutes the burden of proof below the reasonable doubt standard?

No, it would not. Although such a conclusion is logical, we would be left wondering—at least from a strictly scientific standpoint—whether Wisconsin's higher conviction rate was due to the different jury instructions or some other difference, such as prosecutorial charging policies, the nature and number of the allegations tried in each case, whether defendants testified in their own defense, or one of the (literally) 185 other variables that researchers have identified in real-life criminal cases.[63]

On the other hand, "controlled experiments that use random assignment solve the problem of causal ambiguity, i.e., determining what produced the effect."[64] In other words, because our studies used large sample sizes and randomly assigned participants into identical test conditions with the exception of a single variable—the closing portion of the burden of proof instruction—we can be confident that this variable (the truth-related language) produced the effect (the higher conviction rate).

In sum, actual jurors from real-life criminal cases are not necessary to test the effect of jury instructions on juror decision making. Rather, controlled studies—and in particular, case-summary studies like ours[65]—are far more efficient and effective, and are commonly used in the social sciences.

C. The Studies Are Invalid Without Participant Deliberations

In addition to criticizing the studies for using juror-eligible citizens in a controlled setting—rather than attempting to control for the 185 identified variables in real-life criminal cases—some prosecutors have argued that the studies are invalid because the mock jurors did not deliberate before rendering their verdicts.

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[62] VT. CRIM. JURY INSTRUCTIONS, Reasonable Doubt.

[63] Real-life jury verdicts can, of course, be studied, but such undertakings are costly, require several preliminary assumptions, and often have inherent methodological limitations. *See, e.g.*, White, *supra* note 60 (discussing two significant flaws in a *Stanford Law Review* study that examined 238 real-life death penalty cases and attempted to control "185 variables for each case").

[64] Cicchini & White, *Empirical Test*, *supra* note 39, at 1159.

[65] *Id.* at 1160 (discussing how case-summary materials can be used to eliminate extraneous variables such as a witness's race and ethnicity).

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First, "the evidence on the impact of deliberations is, at best, mixed."[66] We even raised and addressed this issue in our first study, giving the following example:

> [S]everal studies have tested the impact of deliberations on the physical attractiveness bias, examining the tendency for jurors to perceive and treat attractive defendants more favorably than plain-looking defendants. A study in 1974 found that deliberation *mitigated* the physical attractiveness bias. A study in 1990, however, found that deliberation *exacerbated* the bias.[67]

Second, the prosecutorial opinion that deliberations are a prerequisite for a scientifically valid study is *not* shared by the scientific community. By way of example only, in one recent study, "men and women undergraduates read a summary of a mock trial" and rendered their verdicts, without deliberations, in order to test "the influence of juror gender and infant victim disability on jurors' reactions to infanticide cases."[68] In another recent study, "[m]ock jurors" rendered verdicts, again without deliberations, to test juror decision making "when victim gender, defendant gender, and defendant age were manipulated."[69] And in yet another study, undergraduate students served as mock jurors and rendered verdicts, again without deliberations, to test "the effects of disability, abuse history, and confession evidence on jurors' perceptions of a juvenile defendant across several different crime scenarios."[70]

This prosecutorial argument about the lack of deliberations seems born of desperation. When defense lawyers originally challenged truth-based jury instructions on logical grounds, prosecutors dismissed the challenges for lack of empirical evidence. But now that defense lawyers are able to cite empirical evidence to confirm what was obvious to begin with, prosecutors are pretending to know—better than the scientific community knows—what constitutes a scientifically valid study. A likely explanation for this is that prosecutors, even when well out of their

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[66] Cicchini & White, *Empirical Test*, *supra* note 39, at 1163 (internal citations omitted).

[67] *Id.* (emphasis added) (internal citations omitted).

[68] Bette L. Bottoms et al., *Gender Differences in Jurors' Perceptions of Infanticide Involving Disabled and Non-Disabled Infant Victims*, 35 CHILD ABUSE & NEGLECT 127, 127 (2011) (parenthetical omitted).

[69] Joanna D. Pozzulo et al., *The Effects of Victim Gender, Defendant Gender, and Defendant Age on Juror Decision Making*, 37 CRIM. JUSTICE & BEHAV. 47, 47 (2010) (parenthetical omitted).

[70] Cynthia J. Najdowski et al., *Jurors' Perceptions of Juvenile Defendants: The Influence of Intellectual Disability, Abuse History, and Confession Evidence*, 27 BEHAV. SCI. & LAW 401, 401 (2009).

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depth, are willing to say anything in their attempts to preserve their burden-lowering, truth-based jury instructions.

D. The Difference in Conviction Rates Is Insignificant

In addition to criticizing the design of the published studies, prosecutors have also attacked the studies' findings. Some have argued that the differences in the studies' conviction rates are not significant; therefore, we cannot make any claim about the impact of truth-based jury instructions on verdicts. This argument is easily debunked. In social-science research, the significance of a study's findings is not left to speculation or even good-faith estimation, and significance is certainly not determined by prosecutorial wish-thinking. Instead, significance is determined by a statistical calculation.

In our studies, we twice tested a specific hypothesis, and both times the hypothesis was confirmed. To briefly recap, the conviction rates in the first study were 16% (reasonable doubt instruction) and 29% (truth-based instruction),[71] in the second study they were 22.6% (reasonable doubt instruction) and 33.1% (truth-based instruction).[72] But, how do we know if these differences in conviction rates are large enough to be significant? That is, how do we know the differences did not occur, both times, by mere chance?

We cannot make a determination of statistical significance simply by eyeballing the numbers. Rather, we need more information to compute a statistic called the *p*-value. The *p*-value considers the difference in conviction rates, along with the study's sample size, and tells us the probability that we obtained a false positive when testing our hypothesis. In other words, the *p*-value measures the probability that we are wrong. The smaller the *p*-value, the more confident we can be in our findings.[73]

More precisely, in our first study the *p*-value was 0.028 meaning that "we are more than 97% certain (1-*p*) that the difference in conviction rates . . . is a *real difference* and did not occur by chance."[74] In our second study, the *p*-value was 0.033, meaning that "we are more than 96% certain (1-*p*) that the observed difference in conviction rates . . . is a *real difference* and did not occur by chance."[75] Therefore,

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[71] Cicchini & White, *Empirical Test*, *supra* note 39, at 1155.

[72] Cicchini & White, *Conceptual Replication*, *supra* note 46, at 30–31.

[73] For a general discussion of *p*-values and statistical methodology, see ARTHUR ARON & ELAINE N. ARON, STATISTICS FOR PSYCHOLOGY (3d ed. 2003).

[74] Cicchini & White, *Empirical Test*, *supra* note 39, at 1155 (emphasis added).

[75] Cicchini & White, *Conceptual Replication*, *supra* note 46, at 31 (emphasis added).

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contrary to prosecutors' claims, the *p*-values mathematically prove that the differences in conviction rates are statistically significant.

E. We Cannot Draw Conclusions from the Studies

Despite the statistical significance of the findings, some prosecutors argue that the studies do not allow us to draw any conclusions about jury instructions and their impact on verdicts. Prosecutors who argue this have not offered any reasons why they believe it to be true. Some have gone even further and argued—again, without offering a reason or explanation—that the studies may even support the opposite conclusion, that courts should continue to instruct jurors to ignore their doubts and instead embark on a search for the truth.

To label these as arguments is a bit generous, as they are easily debunked. In plain language—and without repeating the statistics from the previous section—we can properly draw the following conclusions from the studies. With regard to the first study: (1) mock jurors who received an otherwise proper reasonable doubt instruction, but were then told "not to search for doubt" and instead "to search for the truth" (a truth-based instruction) convicted at a significantly higher rate than jurors who were properly instructed on reasonable doubt,[76] and (2) mock jurors who received this truth-based instruction convicted at the statistically identical rate as jurors who received no reasonable doubt instruction whatsoever.[77]

With regard to the second study: (1) the primary finding from the first study was replicated, as mock jurors who received the truth-based instruction *again* convicted at a significantly higher rate than jurors who were properly instructed on reasonable doubt,[78] (2) mock jurors who received the truth-based instruction were nearly *twice as likely* to mistakenly believe it was legally proper to convict the defendant even if they had a reasonable doubt about guilt (p=0.01),[79] and (3) mock jurors who held this mistaken belief, regardless of the jury instruction they received, were *two-and-one-half times as likely* to actually convict the defendant (p<.001).[80]

In short, not only does the truth-based instruction produce a higher conviction rate than a legally proper reasonable doubt instruction, but "we have identified a

[76] Cicchini & White, *Empirical Test*, *supra* note 39, at 1157.

[77] *Id.*

[78] Cicchini & White, *Conceptual Replication*, *supra* note 46, at 30–31.

[79] *Id.* at 32.

[80] *Id.*

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cognitive mechanism that explains *why* the truth-related language produces a much higher conviction rate. Specifically, the truth[-based] instruction (TI) produces in jurors a mistaken belief (B) about the legally mandated burden of proof, and jurors base their verdicts (V) on that mistaken belief."[81]

F. The Studies Were Authored by a Defense Attorney

One of the most common criticisms of the published studies is that I am a criminal defense attorney, therefore, the studies are unpersuasive or even invalid. To the extent this criticism could be based on my limited training in mathematics,[82] it ignores the credentials of the studies' coauthor Lawrence White.[83] However, having heard and read this prosecutorial argument several times, I can safely conclude that the argument is not nearly that refined. Instead, it is based on the *ad hominem* fallacy which "involves bringing negative aspects of an arguer, or their situation, to bear on the view they are advancing."[84] For our purposes, this fallacy presents itself in two ways: the "abusive" and the "circumstantial."[85]

"The abusive *ad hominem* fallacy involves saying that someone's view should not be accepted because they have some unfavorable property."[86] For example, one might claim that "Thompson's proposal for the wetlands may safely be rejected because last year she was arrested for hunting without a license."[87] This is fallacious reasoning because, "although she broke the law, [Thompson] may nevertheless have a very good plan for the wetlands."[88] Applying this to our situation, even if a prosecutor could make the case that being a criminal defense attorney is an

[81] *Id.* at 33 (emphasis added).

[82] Although I studied calculus, statistics, and other quantitative methods in undergraduate and graduate business schools before law school, I do not hold a Ph.D. in any discipline.

[83] Lawrence White holds a Ph.D. in psychology where he received advanced training in statistical and quantitative methods. He is currently Professor and Chair of Psychology at Beloit College and directs the college's Law & Justice Program. He has also authored or coauthored several books, book chapters, psychology journal articles, and law review articles, most of which include empirical tests.

[84] Hans Hansen, *Fallacies*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 29, 2015), http://plato.stanford.edu/entries/fallacies/.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

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"unfavorable property," such a claim says nothing about the validity of the published studies.

However, most prosecutors who raise this argument will simultaneously point out what they perceive to be the studies' self-serving nature. Therefore, the more likely explanation is that this prosecutorial attack is based on the "circumstantial" version of the fallacy:

> [G]iven the *circumstances* in which the arguer finds him or herself, it is alleged that their position is supported by *self-interest* rather than by good evidence. Hence, the scientific studies produced by industrialists to show that the levels of pollution at their factories are within the law may be undeservedly rejected because they are thought to be self-serving. Yet it is possible that the studies are sound: just because what someone says is in their *self-interest*, does not mean it should be rejected.[89]

In our context, assume that I have a personal interest not only in my clients' cases, but, also in cases throughout the state involving defendants and defense lawyers whom I have never met. Even if this were true, it still does not mean that the studies and their findings should be rejected; to the contrary, they must be evaluated on their merits.

But prosecutors are actually making a false assumption before they can even commit this fallacy. While a criminal defendant facing trial certainly has a personal interest in the burden of proof, I, as a criminal defense attorney, do not. The fees I charge my clients—whether set on a flat-fee or hourly basis—could not possibly be increased because of a change in the last sentence of a single jury instruction.[90] Further, although defendants statewide would win more acquittals if prosecutors were held to the constitutionally-mandated burden of proof, I am not permitted to set my fees on a contingent basis.[91]

But even *if* I had a personal interest in the matter, and even *if* this prosecutorial reasoning was not based on a logical fallacy, prosecutors who make this argument

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[89] *Id.* (emphasis added).

[90] WIS. SUPREME COURT RULE 20:1.5 (2016) (requiring that an attorney's fee be reasonable and listing multiple factors that may influence the amount of the fee).

[91] *Id.* ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee . . . for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.").

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still overlook the obvious: If my arguments are invalid by virtue of my employment, then so too are the prosecutors'. Why? Because they have an interest in *winning* convictions. Therefore, prosecutors would do well to avoid *ad hominem* attacks and instead follow this basic rule: "In argumentation we respond to the argument, not to the person behind the argument."[92]

G. The Studies Were Published in Defense Attorney Journals

Some prosecutors have argued that our studies should be dismissed based on the mistaken belief that they were published in defense attorney journals. But merely glancing at the studies quickly dispels this misconception. While defense attorney journals do exist—for example, *The Champion* "offers timely, informative articles written for and by criminal defense lawyers"[93]—our studies were not published in such journals.

Our first study was published in the *University of Richmond Law Review*, a general-interest flagship journal founded in 1958.[94] The other articles published in our issue were all written by law professors, and the topics of their articles include affirmative action, corporate whistle-blowing, the federal judicial selection process, and the regulation of industrial health risks.[95]

Our second study was published in the *Columbia Law Review Online*, the companion journal to the 117-year-old, general-interest flagship journal of the same name.[96] In recent years, elite law schools such as Columbia have launched online companions to publish shorter articles than those that typically appear in their print journals. At the time of this writing, the most recent volume of the *Columbia Law Review Online* is also dominated by law-professor authors, and includes online pieces written by professors from law schools at the University of Chicago, the University of Michigan, Stanford University, and Yale University.[97]

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[92] D.Q. MCINERY, BEING LOGICAL: A GUIDE TO GOOD THINKING 115 (2004).

[93] *The Champion*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, https://www.nacdl.org/Champion.aspx (accessed Apr. 7, 2017).

[94] *History*, U. RICH. L. REV., http://lawreview.richmond.edu/?page_id=2902 (accessed Apr. 9, 2017).

[95] *E.g.*, Scott D. Gerber, *Clarence Thomas*, Fisher v. University of Texas, *and the Future of Affirmative Action in Higher Education*, 50 U. RICH. L. REV. 1169 (2016).

[96] *About the Review*, COLUM. L. REV., http://columbialawreview.org/about-the-review-2/ (accessed Apr. 9, 2017).

[97] *E.g.*, Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44 (2016) (article written by a University of Michigan law professor).

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This is not to dismiss the contributions of authors who publish in defense lawyer journals—or in prosecutor journals, for that matter. To marginalize such work based on its journal of publication rather than its content feels like yet another twist on the *ad hominem* fallacies described above. Therefore, regardless of who is making an argument, and regardless of the journal in which that argument is published, each piece of work deserves to be evaluated on its substance.

III. PROSECUTOR ARGUMENTS BASED ON AUTHORITY

Many prosecutorial arguments to preserve the burden-lowering, truth-based jury instructions do not focus on the empirical studies, but rather turn on legal authority. Some of these authority-based arguments attempt to dismiss unfavorable authorities, others overstate the reach of favorable ones, and some simply misstate well-established law.

A. Law Reviews Are Not Binding or Persuasive Authority

Some prosecutors have argued that law reviews—including those in which our studies were published—are not binding or even persuasive authority; therefore, judges should not consider them when drafting a jury instruction on the burden of proof.

Obviously, law review articles are not binding authority, rather, they are secondary sources of law. But secondary sources of law, including law reviews, *are* persuasive authority—not just in theory but in practice. For example, although Justices on the Supreme Court of the United States rely on law review articles "less frequently since the apex of the 1970s and 1980s,"[98] law reviews still play a role in the Court's opinions. "During the first decade of the twenty-first century, on average, one or more Justices cited articles in their opinions in 37.1% of the Court's cases and, on average, the Justices cited 0.52 articles per opinion."[99]

Citation to secondary sources is also common at the state-court level. For example, regarding the issue of eyewitness identification procedures, the Supreme Court of Wisconsin recently cited empirical studies,[100] a law review article,[101] and

[98] Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399, 404 (2012).

[99] *Id.*

[100] State v. Dubose, 699 N.W.2d 582, 591–92 (Wis. 2005) (citing multiple psychological studies).

[101] *Id.* at 591 (citing Winn S. Collins, *Improving Eyewitness Evidence Collection Procedures in Wisconsin*, 2003 WIS. L. REV. 529 (2003)).

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even a "study conducted by the Innocence Project at the Benjamin Cardozo School of Law"[102] when interpreting defendants' state-constitutional due process rights.

Wisconsin's high court admitted that such research "is now impossible for us to ignore."[103] "In light of such evidence, we recognize that our current approach to eyewitness identification has significant flaws."[104] Consequently, based on these and other secondary sources, the court dramatically curtailed law enforcement's use of show-up identification procedures—procedures that, up until that point, were admissible under both state and federal case law.[105]

Admittedly, there were more studies demonstrating that show-ups lead to false identifications than there are studies demonstrating that truth-based jury instructions diminish the burden of proof. But when the jury instruction at issue explains the concept of reasonable doubt, and then literally instructs jurors "not to search for doubt" but instead "to search for the truth,"[106] the empirical studies are merely proving what was already obvious to any reasonable person.

B. The Defense Is Quoting Cases out of Context

Regardless of the issue being litigated, this is one of the most common prosecutorial arguments that defense lawyers read and hear. And prosecutors are again raising this claim—that defense lawyers are quoting cases out of context—in this battle over the burden of proof.

First, this prosecutorial argument is a nonstarter. As the late Christopher Hitchens once stated, "No letters, please, about 'quoting out of context.' One does not have to be a deconstructionist to know that quotation *is* out of context."[107] And second, if a prosecutor is going to complain that the omitted portions of a case would change the meaning of the quotation, then he or she must be prepared to explain how that is so.

For example, one case commonly cited by defense lawyers is a Fifth Circuit case where the defendant appealed because the district court, "[i]n its *closing*

[102] *Id.* at 592.

[103] *Id.* at 591.

[104] *Id.* at 592.

[105] *Id.* at 593.

[106] WIS. CRIM. JURY INSTRUCTIONS No. 140.

[107] WINDSOR MANN, THE QUOTABLE HITCHENS: FROM ALCOHOL TO ZIONISM 230 (Da Capo Press, 2011) (quotations and italics original).

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instruction to the jury on the *duty to deliberate*," told the jury to "seek the truth."[108] The Fifth Circuit held that "seeking the truth suggests determining whose version of events is more likely true, the government's or the defendant's, and thereby intimates a preponderance of evidence standard. Such an instruction *would be error if used in the explanation of the concept of proof beyond a reasonable doubt*."[109]

This quotation is directly on point because, unlike the facts underlying the Fifth Circuit case, the "search for the truth" language we defense lawyers are challenging *does* appear in the jury instruction on the "burden of proof and presumption of innocence," which explains "the meaning of reasonable doubt."[110] Nonetheless, prosecutors unfailingly argue that our quotation from the Fifth Circuit case is taken out of context.

The portion of the Fifth Circuit case that deals with this jury instruction issue is less than one page. Here, then, is the entirety of what prosecutors could possibly add to the quotation: the district court did not use "seek the truth" in its instruction on reasonable doubt; the district court's reasonable doubt instruction was clear, forceful, and accurate; a single reference to "seeking the truth" at the end of a duty-to-deliberate instruction was not reasonably likely to diminish the burden of proof that was explained in the earlier reasonable doubt instruction; and, to be cautious, courts should delete this truth-related language even from their duty-to-deliberate instructions in future cases.[111]

No fair-minded person can claim that the excluded portion changes the meaning of the quotation or even adds anything that is not already included in, or at least obvious from, the quotation. In these instances, judges should sharply criticize prosecutorial allegations about quoting out of context—particularly when such cries are accompanied by baseless accusations that defense lawyers are intending to mislead the court.

C. Case Law Requires the Use of Truth-Related Language

Appellate courts throughout the country routinely uphold convictions when defendants challenge the truth-related language in jury instructions. But these courts do not hold, as prosecutors contend, that such truth-related language is even desirable

[108] United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994) (emphasis added).

[109] *Id.* (emphasis added).

[110] WIS. CRIM. JURY INSTRUCTIONS No. 140.

[111] *Gonzalez-Balderas*, 11 F.3d at 1223.

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or accurate, let alone required.[112] Rather, the best the appellate courts can say about such language is that it probably did not cause any actual harm—a tenuous position to begin with and one that has now (twice) been empirically debunked.

For example, more than twenty years ago a Wisconsin court held "it is not reasonably likely" that the truth-related language will diminish the burden of proof.[113] More recently, but still years before the published studies, a Washington court held that such language probably "does not diminish the definition of reasonable doubt . . . but neither does it add anything of substance."[114] And nearly 20 years ago a South Carolina court held that truth-related language probably does not diminish the burden of proof, and will therefore be tolerated, "when it is not combined with other offending terms."[115]

Despite upholding the convictions based on these lukewarm justifications, many of these same states will caution trial judges about the dangers of truth-related language. For example, a Washington court warned that the phrase "search for the truth" actually "misstates the jury's duty and sweeps aside the State's burden."[116] A South Carolina Court warned that truth-related language is "disfavored" and could "shift[] the burden of proof to a defendant."[117] Similarly, as discussed in the previous section, the Fifth Circuit warned that the phrase "seek the truth" would be error if included in the instruction on reasonable doubt.[118]

In sum, not only is truth-related language not required, but trial courts' continued use of it, at best, "presents a risk without any real benefit."[119] And now that two empirical studies demonstrate that this risk of harm is actually real, there is no longer even a meek defense for truth-based burden of proof instructions.

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[112] *See, e.g.*, State v. Bennett, 165 P.3d 1241, 1248 (Wash. 2007) ("While [an] instruction may meet constitutional muster, it does not mean that it is a good or even desirable instruction.").

[113] State v. Avila, 532 N.W.2d 423, 429 (Wis. 1995).

[114] State v. Pirtle, 904 P.2d 245, 262 (Wash. 1995).

[115] State v. Needs, 508 S.E.2d 857, 867 (S.C. 1998).

[116] State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (discussing the prosecutor's use of the phrase in closing argument, which would, of course, also apply to a formal instruction from the court).

[117] State v. Aleksey, 538 S.E.2d 248, 251 (S.C. 2000).

[118] United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994).

[119] United States v. Reynolds, 64 F.3d 292, 298 (7th Cir. 1995) (discussing the risks of any attempt to even define or explain reasonable doubt).

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D. Judges Cannot Change the Pattern Instruction

Some prosecutors have argued that when truth-related language appears in a pattern jury instruction, trial judges do not have the authority to delete it. While the jury instruction committees that draft such pattern instructions are the subject of the next section, for now it is sufficient to say that this prosecutorial argument is contrary to well-established law.

The authors of the First Circuit's jury instructions wrote that while "the pattern instructions and, in particular, the commentary that accompanies them will be helpful in crafting a jury charge in a particular case, it bears emphasis that no district judge is required to use the pattern instructions."[120] Similarly, with regard to the mandate "to seek the truth," the Fifth Circuit Court of Appeals stated that, "although the sentence is taken from the Fifth Circuit Pattern Jury Instructions, trial courts, in an abundance of caution, may wish to delete it from their instructions."[121]

Even in Wisconsin—the home of probably the most constitutionally defective burden of proof instruction in the country—the law is clear: "a trial judge may exercise wide discretion in issuing jury instructions . . . This discretion extends to both choice of language and emphasis."[122] In fact, not only may a trial judge independently evaluate the pattern jury instructions, but he or she is obligated to do so. "A circuit court must, however, exercise its discretion in order to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence."[123] Given this important obligation, a trial court would be deficient in blindly adopting a jury instruction that "misstates the jury's duty and sweeps aside the State's burden[,]"[124] simply because that instruction was drafted by a jury instruction committee.

In some states, however, a pattern jury instruction may be mandatory—or at least quasi-mandatory—in order to ensure a minimum level of protection for defendants. For example, Illinois requires the use of a pattern instruction because of the state's "firm commitment to presumed innocence which can be overcome only

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[120] *Preface*, PATTERN CRIM. JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT, PATTERN CRIM. JURY INSTRUCTIONS DRAFTING COMMITTEE (Nov. 1997), http://www.rid.uscourts.gov/menu/judges/jurycharges/PJI.pdf.

[121] *Gonzalez-Balderas*, 11 F.3d at 1223.

[122] State v. Vick, 312 N.W.2d 489 (Wis. 1997).

[123] State v. Neumann, 832 N.W.2d 560, 584 (Wis. 2013) (internal quotation marks and citations omitted).

[124] State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (discussing the phrase "search for the truth").

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by proof beyond a reasonable doubt."[125] Similarly, in Washington, the state supreme court used its supervisory powers to require the use of a pattern jury instruction.[126] The state's high court did so because lower courts were explaining the burden of proof in ways that did not "inform the jury of the government's burden to prove every element of the charged crime beyond a reasonable doubt."[127] Interestingly, however, Washington trial judges retain discretion to delete the pattern instruction's truth-related language.[128]

E. Judges Should Not Change the Pattern Instruction

Most prosecutors eventually concede that trial judges do have the authority to modify the pattern burden of proof instruction. However, these prosecutors often go on to argue that judges *should* use the pattern instruction. Why? Because, they argue, the jury instruction committee is comprised of a wide cross-section of the bar and arrived at the pattern instruction after much study, thought, and debate.

Many criminal jury instruction committees *are* comprised of a cross-section of the bar. For example, Michigan's twenty-one member committee includes seven judges and fourteen attorneys "charged with providing trial courts with instructions that are concise, understandable and accurate."[129] And in Washington, the "pattern instructions are drafted and approved by a committee that includes judges, law professors, and practicing attorneys."[130]

Unfortunately, the Wisconsin jury instruction committee,[131] to which many of the prosecutors are referring, is not at all balanced. Wisconsin's eleven-member

[125] ILL. CRIM. JURY INSTRUCTIONS No. 2.03.

[126] State v. Bennett, 165 P.3d 1241, 1249 (Wash. 2007).

[127] *Id.* at 1248.

[128] WASH. CRIM. JURY INSTRUCTIONS No. 4.01, cmt. (the pattern instruction has also been approved without the use of the bracketed sentence containing the truth-related language).

[129] Model Crim. Jury Instructions, MICHIGAN COURTS: ONE COURT OF JUSTICE, http://courts.mi.gov/courts/michigansupremecourt/criminal-jury-instructions/pages/default.aspx (last visted June 7, 2017).

[130] State v. Bennett, 165 P.3d 1241, 1243 (Wash. 2007).

[131] Bylaws of the Judicial Conference of Wisconsin, art. V, § 1.A., WISCONSIN COURT SYSTEM (Nov. 5, 2009), https://www.wicourts.gov/courts/committees/docs/judconfbylaws.pdf ("The Criminal Jury Instructions Committee shall study and prepare model criminal jury instructions and related materials.").

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committee is comprised entirely of trial-court judges.[132] Of the eleven members, one has already retired from the bench.[133] Of the remaining ten, *seven* are former prosecutors[134] and *two* are former counsel for county governments.[135] (This is not an *ad hominem* attack on these prosecutors-turned-judges; rather, it is a response to the claim that the committee represents a cross-section of the bar.) The remaining committee member is a former trial-level attorney at the Office of the State Public Defender, but his term on the committee expired in 2016.[136]

As for the amount of study and thought put into the pattern jury instruction, that is unclear to me, as are many other things about the committee. In June 2016, I wrote to ten of the committee members and identified the problem with the pattern instruction. I requested a very modest change so that it accurately communicates the constitutionally-mandated burden of proof. Instead of concluding by telling jurors "not to search for doubt" but "to search for the truth," the instruction should simply conclude: "It is your duty to give the defendant the benefit of every reasonable doubt."[137] I also included a hard copy of the first published study, and referenced the second study which was, at that time, forthcoming.

As of June 13, 2017, I have not received any response from any committee member. I have, however, heard reports from current prosecutors that the existing

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[132] WISCONSIN JUDICIAL CONFERENCE OFFICERS AND STANDING COMMITTEES, WISCONSIN COURT SYSTEM (Nov. 19, 2015), https://www.wicourts.gov/courts/committees/docs/judconflist.pdf (last visited June 7, 2017).

[133] Chuck Rupnow, *"Trempealeau County Judge Retires after Two Decades,"* LEADER-TELEGRAM (June 27, 2016), http://www.leadertelegram.com/News/Front-Page/2016/06/27/lt-div-class-libPageBody Linebreak-gt-Trempealeau-County-judge-retires-after-two-decades-lt-div-gt.html.

[134] The website www.ballotpedia.org has "an editorial staff of over 60 writers and researchers" to collect and report information on elected officials, including the elected trial-court judges that are subsequently appointed to Wisconsin's Criminal Jury Instruction Committee. This website reports that Judges Cameron, Dallet, Flanagan, Hanrahan, Kremers, Metropulos, and Reyonlds are all former prosecutors, with most of them being career-long prosecutors, before taking the bench.

[135] The website www.ballotpedia.org reports that Judge Ehlers is a former government attorney for Door County, and multiple other sources report that Judge Domina is a former government attorney for Waukesha and Milwaukee Counties. *See, e.g.*, Circuit Court Judge William J. Domina: Judge Biography, WAUKESHA COUNTY: LEADING THE WAY, https://www.waukeshacounty.gov/Courts.aspx?id=21168 (accessed Nov. 25, 2016).

[136] Judge Flugar's term expired in 2016. *See* WISCONSIN JUDICIAL CONFERENCE OFFICERS AND STANDING COMMITTEES, *supra* note 132.

[137] Letter from Michael D. Cicchini to Criminal Jury Instruction Committee Members (June 7, 2016), http://www.cicchinilawoffice.com/uploads/JI_com._letter.pdf.

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ten-member committee decided not to change the burden-lowering instruction and instead opted to preserve the status quo. It is not clear to me how these current prosecutors have inside access to the committee's decision-making process. It is also unclear to whom, if anyone, the committee is accountable.[138]

Regardless, if the goal of a jury instruction committee is to "provid[e] trial courts with instructions that are concise, understandable and accurate[,]"[139] then Wisconsin's committee failed on all counts—at least with regard to the burden of proof instruction. First, the instruction is not concise: its 297 words dwarf the Seventh Circuit's 88-word instruction on the presumption of innocence and burden of proof.[140]

Second, the instruction is not understandable: in our second controlled study, mock jurors who were told "not to search for doubt" but instead "to search for the truth" were nearly twice as likely to mistakenly believe it is legally proper to convict even if they have a reasonable doubt about guilt.[141]

And third, the instruction is not accurate. It specifically tells jurors not to search for doubt, even though the Constitution requires their "scrutiny of the evidence for reasonable doubt."[142] Equally incorrect, it instructs jurors to search for the truth; however, the Constitution requires them to acquit even if they believe "the charge is probably true."[143] Quite simply, this jury instruction is not only grossly inaccurate but also blatantly unconstitutional.

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[138] *See* Bylaws of the Judicial Conference of Wisconsin, *supra* note 131 ("The committee need not submit instructions or related materials to the Judicial Conference for approval."). Equally unclear to me—but unrelated to this Article—is how the University of Wisconsin Law School has obtained a copyright on the work product of this taxpayer-funded committee, which the university then sells on a disc, without any footnotes or commentary, for $210.00 plus an annual update fee. *See* WIS. CRIM. JURY INSTRUCTIONS.

[139] Model Crim. Jury Instructions, MICHIGAN COURTS: ONE COURT OF JUSTICE, *supra* note 129.

[140] PATTERN CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, No. 1.03 (2012), http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf.

[141] Cicchini & White, *Conceptual Replication*, *supra* note 46, at 31–32.

[142] State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012).

[143] State v. Giroux, 561 A.2d 403, 406 (Vt. 1989).

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IV. PROSECUTOR ARGUMENTS BASED ON LANGUAGE

Some prosecutorial arguments to preserve the burden-lowering, truth-based jury instructions are focused on the language of the instruction itself. In making these arguments, prosecutors simply ignore some words and attempt to redefine others.

A. The Difference in Jury Instructions Is Merely Semantic

When prosecutors argue that the difference between a legally proper reasonable doubt instruction and a truth-based instruction is merely semantic, they are simply dodging the issue. This approach is reminiscent of the reluctant college debater on the television show *Community* who, instead of making an argument, dismissed the entire process and declared: "I could cite quotes or dig up statistics, but those are just words and numbers."[144]

Semantics, of course, is "the study of meanings,"[145] so to dismiss an issue on this basis is a curious position for a lawyer to take. Nonetheless, meaning matters. Jury instructions must be accurate, as "[t]he Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."[146] This is undoubtedly and especially true with regard to the burden of proof instruction.

Finally, many prosecutors who deploy this semantics-based argument are being disingenuous; what they dismiss as mere semantics in one breath they will use to their advantage in another. For example, when a defense lawyer argues to a jury that it must acquit because the state has not proved its case beyond a reasonable doubt, prosecutors are quick to turn so-called semantics in their favor. A common rebuttal argument is that the defense lawyer is wrong, and that the jury must not search for doubt but for the truth.[147] And the defense lawyer has little basis to object to this unconstitutional argument when the court has just read to the jury an equally unconstitutional instruction—for example, one that concludes: "[Y]ou are not to search for doubt. You are to search for the truth."[148]

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[144] *Community: Debate 109* (NBC television broadcast Nov. 12, 2009).

[145] *Semantics*, MIRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/semantics.

[146] Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985) (citations omitted).

[147] United States v. Harper, 662 F.3d 958, 961 (7th Cir. 2011) (rejecting the defendant's appeal based on the prosecutor's argument that jurors should "search for the truth"); State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (finding the prosecutor's argument that jurors should "search for the truth" to be harmless error).

[148] WIS. CRIM. JURY INSTRUCTIONS No. 140.

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B. Jurors Interpret "Reasonable Doubt" as "Any Doubt"

Many prosecutors argue that jurors must be told "not to search for doubt" and instead "to search for the truth" because they would otherwise mistakenly interpret *reasonable* doubt to mean *any* doubt. The burden of proving a case beyond any doubt would, of course, be too high.

This prosecutorial argument goes well beyond baseless speculation and enters the territory of either the irrational or the disingenuous. First, the burden of proof instruction uses the word reasonable. This necessarily excludes unreasonable doubt, and falls well short of any doubt. Many courts have even held that the term reasonable doubt "is self-defining, that there is no equivalent phrase more easily understood . . . that the better practice is not to attempt the definition, and that any effort at further elucidation tends to misleading refinements."[149]

Second, even if judges had reason to believe that jurors were disregarding plain language—and, for some bizarre reason, were replacing "reasonable" with "any" in order to permit guilty defendants to go free—the proper solution is not to instruct them to disregard doubt altogether in favor of a search for the truth. This would be the equivalent of a doctor refusing to prescribe insulin to a diabetic out of fear that the patient might take too much of it. Rather, the proper solution would be to explain what type of doubt is a reasonable one and what type of doubt is not.

And third, this is exactly what jury instructions already do: they go to great and unnecessary lengths to ensure that jurors do not hold the state to too high of a burden. For example, the pattern instructions of California, Indiana, Massachusetts, New York, and Virginia specifically warn jurors that reasonable doubt does not mean "all possible doubt."[150] Arizona's instruction cautions that "the law does not require

[149] United States v. Lawson, 507 F.2d 433, 443 (7th Cir. 1974); *see also* United States v. Vavlitis, 9 F.3d 206, 212 (1st Cir. 1993) (attempting to define the term "reasonable doubt" "is unnecessary, could confuse the jury, and provides fertile grounds for objections"); United States v. Headspeth, 852 F.2d 753, 755 (4th Cir. 1988) ("We have frequently admonished district courts not to attempt to define reasonable doubt in their instructions to the jury absent a specific request from the jury itself.").

[150] CAL. CRIM. JURY INSTRUCTIONS No. 103 ("The evidence need not eliminate all possible doubt"); IND. CRIM. JURY INSTRUCTIONS No. 1.1500 ("it does not mean that a Defendant's guilt must be proved beyond all possible doubt"); MASS. CRIM. JURY INSTRUCTIONS No. 2.180 ("Proof beyond a reasonable doubt does not mean proof beyond all possible doubt"); N.Y. CRIM. JURY INSTRUCTIONS, Burden of Proof ("the law does not require the People to prove a defendant guilty beyond all possible doubt"); and VA. CRIM. JURY INSTRUCTIONS, Burden of Proof (beyond a reasonable doubt "does not require proof beyond all possible doubt").

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proof that overcomes every doubt."[151] The instructions of Colorado and Florida warn that a reasonable doubt is not a "speculative" or "imaginary" doubt.[152] And Connecticut's instruction lucidly explains that "[t]he meaning of reasonable doubt can be arrived at by emphasizing the word reasonable."[153]

Even in Wisconsin, where this prosecutorial argument is commonly raised, the pattern burden of proof instruction already states:

> A reasonable doubt is not a doubt which is based on mere guesswork or speculation. A doubt which arises merely from sympathy or from fear to return a verdict of guilt is not a reasonable doubt. A reasonable doubt is not a doubt such as may be used to escape the responsibility of a decision.[154]

In light of this powerful language that already improperly restricts the scope of the term reasonable doubt,[155] the prosecutorial cry that reasonable doubt will be read to mean any doubt is, at best, unpersuasive. More likely, this argument is a disingenuous attempt to preserve the unconstitutional, burden-lowering, truth-based jury instructions on which some prosecutors must rely to win convictions.

C. Many States Use Truth-Related Language

Prosecutors often argue that many states' pattern jury instructions on reasonable doubt use the word truth. However, nearly all of these instructions do so in any entirely different way. Instead of telling jurors to evolve, seek, search for, or find the truth, these instructions equate being convinced beyond a reasonable doubt with having an abiding conviction that the charge is true.

For example, the Arkansas pattern instruction states that a "juror is satisfied beyond a reasonable doubt if after an impartial consideration of all the evidence he

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[151] ARIZ. CRIM. JURY INSTRUCTIONS No. 5b(1).

[152] COLO. CRIM. JURY INSTRUCTIONS No. E:03 (reasonable doubt "is a doubt which is not a vague, speculative or imaginary doubt"); FLA. CRIM. JURY INSTRUCTIONS No. 3.7 ("A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt.").

[153] CONN. CRIM. JURY INSTRUCTIONS No. 2.2–3.

[154] WIS. CRIM. JURY INSTRUCTIONS No. 140.

[155] Lawrence Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEXAS L. REV. 105, 143 (1999) ("Doubting, after all, *is* a matter of speculation . . . It requires one to imagine alternative models consistent with the evidence.").

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has an abiding conviction of the truth of the charge."[156] Other states take this same approach, nearly word for word. California describes satisfaction beyond a reasonable doubt as "an abiding conviction that the charge is true,"[157] and Massachusetts describes it as "an abiding conviction, to a moral certainty, that the charge is true."[158] The term "moral certainty" is then defined as "the highest degree of certainty possible in matters relating to human affairs."[159] Some states convey this same standard, but without using the word truth. For example, the Delaware, New Jersey, and Oregon instructions state that "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."[160]

The word "truth," even when used in this way, poses risks. However, instructing a juror to determine his or her confidence level after objectively evaluating the evidence is quite different from directing a juror to "search for the truth"—a phrase that several courts have criticized as "not entirely correct,"[161] as "misstat[ing] the jury's duty,"[162] as "shift[ing] the burden of proof to a defendant,"[163] as error had it been included in the reasonable doubt instruction,[164] and as reversible error because it *was* included in the reasonable doubt instruction.[165]

Even worse are those instructions that, before sending jurors on a search for the truth, specifically tell them not to perform their constitutionally-mandated duty of evaluating the evidence for reasonable doubt. In other words, to instruct a jury "not to search for doubt" but instead "to search for the truth"[166] is beyond the pale. This

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[156] ARK. CRIM. JURY INSTRUCTIONS No. 110.

[157] CAL. CRIM. JURY INSTRUCTIONS No. 103.

[158] MASS. CRIM. JURY INSTRUCTIONS No. 2.180.

[159] *Id.*

[160] DEL. CRIM. JURY INSTRUCTIONS No. 2.6; N.J. CRIM. JURY INSTRUCTIONS (Reasonable Doubt); OREGON CRIM. JURY INSTRUCTIONS (Burden of Proof Beyond a Reasonable Doubt).

[161] Commonwealth v. Allard, 711 N.E.2d 156, 160 (Mass. 1999).

[162] State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012).

[163] State v. Aleksey, 538 S.E.2d 248, 251 (S.C. 2000).

[164] United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir. 1994) ("seeking the truth" language "would be error if used in the explanation of the concept of proof beyond a reasonable doubt").

[165] State v. Giroux, 561 A.2d 403, 405 (Vt. 1989) (explaining the concept of reasonable doubt "as a search for the truth" constitutes reversible error).

[166] WIS. CRIM. JURY INSTRUCTIONS No. 140.

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language crosses any imaginable line that could possibly separate a poorly worded, barely constitutional instruction from an unconstitutional one.

D. The Language Is Harmless in the Larger Context

Some prosecutors concede that it would be error for a court to use truth-based burden of proof jury instructions. However, these prosecutors then go on to argue that such error would be harmless.

It is true that this harmless-error analysis is often used by appellate courts, after the fact, to affirm convictions. For example, a Vermont appellate court found that although a trial judge twice told the jury "to seek the truth," the defendant suffered no harm because the judge also discussed the concept of reasonable doubt on "no fewer than six occasions."[167]

While the merits of the harmless error doctrine are outside the scope of this Article, there are two problems when a prosecutor argues harmless error at the trial-court level. First, while appellate courts may use the doctrine to affirm convictions despite a trial court's error, the trial court may not use the doctrine as a reason to commit the error in the first place. And second, simply counting the number of references to reasonable doubt on the one hand, and the number of "search for the truth" mandates on the other, ignores the incredibly important *placement* of the offending language.

The most harmful burden of proof instructions first explain the concept of reasonable doubt and then conclude with a truth-related mandate. When such instructions are read "as a whole,"[168] the jurors are not likely to tally and compare the number of doubt references and the number of truth references. Rather, the concluding truth-related mandate will be viewed as "modifying, qualifying, or even overriding the reasonable doubt instruction that preceded it."[169]

In fact, this very logical conclusion was confirmed in the two published studies.[170] The concluding truth-related language is more powerful due to the well-documented recency effect: language at the end of the instruction is "better

[167] State v. Benoit, 609 A.2d 230, 232 (Vt. 1992).

[168] *Id.* at 323.

[169] Cicchini & White, *Empirical Test*, *supra* note 39, at 1149.

[170] *See supra* Part I.C.

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remembered" and "more influential" than language elsewhere in the instruction.[171] As we explained in the first published study:

> In a strict sense, the recency effect refers to items at the end of a list as being more likely to be remembered than items located elsewhere in the list. In a broader sense, the recency effect refers to decision-makers giving more weight to recently acquired information because such information is highly salient (i.e., distinctive and noticeable) and more likely to come to mind.[172]

Not surprisingly, the recency effect has also been observed in studies involving legal evidence.[173] Therefore, this prosecutorial argument—that adding truth-related language to the end of a reasonable doubt instruction is harmless—not only misapplies the harmless error doctrine but also contradicts the social science research. The reality is that "truth-related language is almost impossible to ignore *because of* its placement at the end of the instruction[,]" and therefore should not be included in the first place.[174]

V. PROSECUTOR ARGUMENTS ON THE PURPOSE OF JURY TRIALS

Finally, prosecutors sometimes argue that truth-based burden of proof instructions are justified because trials *are* about searching for the truth. The following sections identify, and then debunk, four prosecutorial twists on this "trials are about truth" mantra. Because there is a common thread connecting these prosecutorial arguments, the following four sections are interrelated. Therefore, the ideas and legal authorities in one section may be useful in responding to the prosecutorial argument set forth another section.

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[171] Matt Jones & Winston R. Sieck, *Learning Myopia: An Adaptive Recency Effect in Category Learning*, 29 J. EXPERIMENTAL PSYCHOL. 626, 626 (2003).

[172] Cicchini & White, *Empirical Test*, *supra* note 39, at 1149 (citing Jon A. Krosnick, Fan Li & Darrin R. Lehman, *Conversational Conventions, Order of Information Acquisition, and the Effect of Base Rates and Individuating Information on Social Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 1140, 1140–41 (1990)).

[173] *See* Adrian Furnham, *The Robustness of the Recency Effect: Studies Using Legal Evidence*, 113 J. GEN. PSYCHOL. 351, 351–52 (1986).

[174] Cicchini & White, *Empirical Test*, *supra* note 39, at 1149 (emphasis added).

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A. "Verdict" Means "To Speak the Truth"

In the same vein as the argument that a real-life *jury* is required to test the impact of a *jury* instruction,[175] prosecutors similarly argue that because the word verdict is Latin for speak the *truth*, juries should literally be instructed to evolve, find, seek, or search for the *truth*. Prosecutors are correct that the word verdict originates in Medieval Latin and, based on its root words, means "a true saying" or "to say the truth."[176] However, attempting to find value in a single, centuries-old Latin word is fraught with peril.

The function of the medieval jury was dramatically different than it is today and would be unrecognizable to the modern prosecutor. To begin, "[p]ositive legislation played a very small part in medieval law, especially the law of wrongs; custom, derived from shared societal assumptions, was the legal norm, not what some sovereign or his agent declared."[177] But even more significant, medieval jurors were required "to say the truth" because they were *literally* witnesses in the case.

> [T]he medieval English jury differed fundamentally from the modern jury. Its members hailed from the immediate vicinity of the dispute and came to trial already informed about the facts. Jurors based their verdicts on information they actively gathered in anticipation of trial or which they learned by living in small, tight-knit communities where rumor, gossip, and local courts kept everyone informed about their neighbors' affairs. Interested parties might also approach jurors out of court to relate their side of the case. Witness testimony in court was thus unnecessary. *The jurors themselves were considered the witnesses*—not necessarily eyewitnesses, but witnesses in the sense that *they reported facts to the judges*. They were self-informing; they came to court more *to speak* than to listen.[178]

[175] *See supra* Part II.B.

[176] *Verdict*, ONLINE ETYMOLOGY DICTIONARY, http://www.etymonline.com/index.php?term=verdict&allowed_in_frame=0 (last visited June 7, 2017).

[177] Morris S. Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 AM. J. LEGAL HIST. 267, 279 (1974).

[178] Daniel Klerman, *Was the Jury Ever Self-Informing?*, 77 S. CAL. L. REV. 123, 123 (2016) (arguing that medieval juries were, in fact, self-informing) (internal quotations and citations omitted).

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Eventually, "[e]arly modern jurors learned most of what they needed to know in court" through the testimony of outside witnesses.[179] Nonetheless, even some of these "early modern jurors" continued "to present their evidence *under oath* in open court."[180] Today, of course, "[m]odern jurors know practically nothing about the cases they decide and rely exclusively on in-court testimony. In fact, those with knowledge of the parties or circumstances are routinely excluded from the jury."[181]

This dramatic shift from *providing* evidence to *evaluating* evidence corresponds with the evolution of the word verdict, which is now simply defined as "the finding or decision of a jury on the matter submitted to it in trial."[182] And when the modern jury makes this "finding or decision," it is not declaring the truth of what actually happened; rather, it is applying our modern burden of proof to the facts presented to it.

Our modern burden of proof did not exist at the time medieval jurors were literally swearing "to say the truth" when testifying in court. It was not until 1798—several centuries later—that the phrase "beyond a reasonable doubt" was born.[183] Then, throughout the 1800s, our Supreme Court implicitly acknowledged this concept in its decisions.[184] Finally, in 1970, the Court explicitly recognized this high burden of proof as part of our constitutional guarantees.[185]

Therefore, while it may have been acceptable in medieval times to instruct a juror "to say the truth," today it is unconstitutional to instruct a juror "to search for the truth." Rather, given our modern burden of proof, each juror must instead be

[179] *Id.* at 127.

[180] *Id.* (emphasis added).

[181] *Id.*

[182] *Verdict*, MIRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/verdict (accessed Nov. 29, 2016).

[183] *In re* Winship, 397 U.S. 358, 361 (1970).

[184] *See, e.g.*, Davis v. United States, 160 U.S. 469, 488 (1895); Miles v. United States, 103 U.S. 304, 312 (1881).

[185] *In re* Winship, 397 U.S. at 364. For the history and origins of the concept of reasonable doubt, *see generally* Shealy, *supra* note 21, and Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165 (2003).

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instructed that, "If you have a reasonable doubt, you must find [the defendant] not guilty *even if you think that the charge is probably true*."[186]

The medieval origins of the word verdict simply have no place in an instruction on the role of the modern jury, which is not to offer true testimony in court but rather to scrutinize evidence for reasonable doubt. This is probably why most prosecutors are quick to abandon this halfhearted, medieval-themed argument. However, prosecutors have developed three other variations on this "trials are about truth" narrative.

B. The Purpose of the Trial Is to Search for the Truth

Prosecutors often argue that, independent of the medieval argument discussed above, the true purpose of the modern criminal jury trial *is* to search for the truth; therefore, truth-related jury instructions are appropriate. But in reality, "If one were asked to start from scratch and devise a system best suited to ascertaining the truth . . . [i]t is inconceivable that one would create a system bearing much resemblance to the criminal justice process we now have."[187] Because the state enjoys a tremendous advantage in financial resources, typically controls and even develops the physical evidence, and often has exclusive access to key witnesses, "[t]he current American system is simply not well designed to find the truth."[188]

In addition, several modern trial rules are designed specifically to *hide* the truth from the jury. The justification for these rules is that competing interests are deemed more important than the truth-seeking objective.

For example, it is well-known that a prosecutor may convict a defendant solely on circumstantial evidence and without demonstrating motive. Yet defendants typically may *not* argue that a third party, other than the defendant, is guilty, without first providing *direct* evidence of the third party's guilt and also demonstrating the third party's *motive*.[189] This double standard greatly obstructs the search for the truth, but is justified because of its judicial economy:

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[186] VT. CRIM. JURY INSTRUCTIONS, Reasonable Doubt, cmt. (citing State v. Giroux, 531 A.2d 403, 406 (Vt. 1989)).

[187] Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth*, 56 N.Y. L. SCH. L. REV. 912, 912 (2011).

[188] *Id.* at 914.

[189] *See* Michael D. Cicchini, *An Alternative to the Wrong-Person Defense*, 24 GEO. MASON U. CIV. RIGHTS L.J. 1, 14–17 (2013) (discussing evidentiary double standards imposed on defendants).

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> The argument that evidence of third-party guilt is excludable because it is a waste of time is breathtaking in its disregard for a criminal defendant's due process rights. Reviewing the cases in which this idea has been applied, one never sees a serious indication about the actual time involved in presenting the evidence. In some cases, it seems as though the offered evidence comes from a single witness whose testimony, we might estimate, is likely to take an hour or less.[190]

Other trial-related rules, including accuser-advocate privileges and rape-shield statutes, are also designed to hide relevant evidence from the jury.[191] These truth-suppressing laws are justified, once again, by elevating competing interests over the supposed search for the truth.

For example, in accusations of domestic violence, accusers will typically first speak to a police officer. After this initial report, the police or a prosecutor may refer the accuser to a domestic advocate to make further statements which are often statutorily privileged. This privilege is justified based on the accuser's expectation of privacy which is "essentially elevated over the public's need to obtain this information, even if the information is otherwise relevant to the truth-seeking process in a court of law."[192]

Similarly, regarding rape-shield laws, defendants charged with child sexual assault often seek to introduce evidence of the child-accuser's prior sexual knowledge. Such evidence is "necessary to rebut the logical and weighty inference that [the child] could not have gained the sexual knowledge he possessed unless the sexual assault[] . . . occurred."[193] However, this evidence is typically excluded by

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[190] David Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 WIS. L. REV. 337, 378 (2016) (citing People v. Elliott, 269 P.3d 494, 532 (Cal. 2012) and State v. Donald, 316 P.3d 1081, 1090–91 (Wash Ct. App. 2013)).

[191] If the evidence was not relevant, these additional laws would be unnecessary as FED. R. EVID. 402 already states that "[i]rrelevant evidence is not admissible."

[192] Viktoria Kristiansson, *Walking a Tightrope: Balancing Victim Privacy and Offender Accountability in Domestic Violence and Sexual Assault Prosecutions: Part II: Protecting Privileges and Victims Who Assert Them*, STRATEGIES: THE PROSECUTOR'S NEWSL. ON VIOLENCE AGAINST WOMEN (Aequitas, Washington D.C.), May 2013 at 1–2.

[193] State v. Pulizzano, 456 N.W.2d 325, 333 (Wis. 1990); *see also* People v. Arenda, 330 N.W.2d 814, 815 (Mich. 1982) ("Defendant claimed that evidence of sexual conduct was relevant and admissible to explain the witness's ability to describe vividly and accurately the sexual acts" for which the defendant was blamed.).

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rape-shield statutes that are designed to protect witnesses from potential embarrassment on the witness stand.[194]

These three brief examples of truth-suppressing trial rules demonstrate that, *at best*, the modern criminal jury trial "may *in some ways* be a search for truth."[195] However, as these examples also make clear, "truth is not the jury's job."[196] In fact, the Constitution requires that, even if a jury believed an allegation was *probably true*, it is still obligated to find the defendant not guilty.[197]

C. Case Law Says that Trials Are About the Truth

When confronted with examples of how modern trial rules often operate to suppress rather than reveal the truth, prosecutors must fall back on authority and argue that trials are a "search for the truth" because the case law says so. Sometimes, prosecutors become so excited upon seeing the word truth in a case that they will cite it even when it contradicts their argument.

For example, prosecutors often cite *Tehan v. United States* which explains that competing interests may *override* the truth-seeking function in order to "preserv[e] the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'"[198] More specifically, the Court explained that "the Fifth Amendment's privilege against self-incrimination is *not* an

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[194] *See Arenda*, 330 N.W.2d at 816 ("Primarily, . . . [rape shield statutes] serve the substantial interests of the state in guarding the complainant's sexual privacy and protecting her from undue harassment."); State v. Carter, 782 N.W.2d 695, 709, 716–17 n.6 (Wis. 2010) (Walsh Bradley, J., concurring) (concluding that the child accuser's prior sexual conduct would not have been admissible even though "the prosecutor repeatedly emphasized [the child accuser's] detailed sexual knowledge as proof of [the defendant's] guilt"). *Cf.* State v. Colburn, 366 P.3d 258 (Mont. 2016) (accuser's prior sexual contacts may be relevant to show an alternative source of sexual knowledge).

[195] *See* State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (emphasis added).

[196] *Id*. *See also* People v. Katzenberger, 101 Cal. Rptr. 3d 122, 127 (Cal. Ct. App. 2009) (discussing "the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt").

[197] *See, e.g.*, VT. CRIM. JURY INSTRUCTIONS CR04-101 ("If you have a reasonable doubt, you must find [the defendant] not guilty even if you think that the charge is probably true."); N.Y. CRIM. JURY INSTRUCTIONS, Reasonable Doubt ("[I]t is not sufficient to prove that the defendant is probably guilty. In a criminal case, the proof of guilt must be stronger than that. It must be beyond a reasonable doubt."); ARIZ. CRIM. JURY INSTRUCTIONS No. 7.08-C ("In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt.").

[198] Tehan v. United States, 382 U.S. 406, 415 (1966).

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adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite *different* constitutional values."[199]

Other times, prosecutors will cite cases that, while not hurting their argument, do nothing to help it. For example, in *Wardius v. Oregon* the Supreme Court declared that trials are a "search for the truth."[200] However, this case involves pretrial discovery obligations, not jury instructions. And, unlike defense lawyers' quotation of *Gonzalez-Balderas,*[201] the omitted context actually does change the meaning of the prosecutors' quotation:

> The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses. It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State.[202]

Similarly, prosecutors in Wisconsin unfailingly argue that, in 1923, the state supreme court declared "the aim of the jury should be to ascertain the truth."[203] However, not only were these words written many decades before our modern, truth-suppressing trial rules[204]—and nearly a century before the empirical studies on the burden-lowering effect of truth-based jury instructions[205]—but prosecutors fail to appreciate the larger context of this case as well. The reference to truth deals with jurors' factual determinations and not with the burden of proof:

> It is undoubtedly true that the aim of the jury should be to ascertain the truth. When the court said that the jury was not to search for doubt, he plainly intended,

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[199] *Id.* at 416 (emphasis added).

[200] Wardius v. Oregon, 412 U.S. 470, 474–75 (1973). In Wisconsin, *Wardius* is discussed in *State v. McClaren*, 767 N.W.2d 550 (Wis. 2009), which is frequently cited by the state's prosecutors.

[201] *See supra* Part III.B.

[202] *Wardius*, 412 U.S. at 475–76 (quotations in original). *See also* Taylor v. Illinois, 484 U.S. 400 (1988) (defense witness may properly be excluded from testifying despite the truth-seeking function of the trial).

[203] Manna v. State, 192 N.W. 160, 166 (Wis. 1923).

[204] *See supra* Part V.B.

[205] *See supra* Part I.C.

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> and the jury must have so understood, that the purpose of a trial is to *ascertain the facts* and not the ascertainment of doubt, which is *the negation of a fact*.[206]

The resolution of factual conflicts, of course, is a dramatically different exercise than determining whether the credible facts constitute proof beyond a reasonable doubt.[207] And today, nearly one hundred years after this case about "ascertain[ing] the facts" was published, modern juries are thoroughly instructed about factual determinations through other instructions. For example, jurors are told that "[y]ou, the jury, are the sole *judges of the facts*,"[208] and that "[y]ou are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony."[209]

Based on this distinction between resolving factual conflicts and deciding whether the state met its burden of proof,[210] courts have tolerated "search for the truth" language in jury instructions on witness credibility determinations[211] and the jury's fact-finding function.[212] However, to instruct jurors on reasonable doubt by telling them not to search for doubt but instead to search for the truth—based on a

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[206] *Manna*, 192 N.W. at 166 (emphasis added). Other Wisconsin cases that discuss "the truth" in the context of factual and witness credibility determinations include *State v. Scott*, 608 N.W.2d 753 (Wis. Ct. App. 2000) (cross-examining a witness about his motive to lie is part of the truth-seeking function) and *State v. Reid*, 479 N.W.2d 572 (Wis. Ct. App. 1991) (evidence of a witness's perjury is relevant to the truth-seeking function).

[207] In some criminal trials there are no factual conflicts to resolve and therefore no truth for which the jury could possibly search. For example, in a disorderly conduct trial, the facts are often undisputed and the only issue for the jury to decide is whether the defendant's undisputed speech or conduct would *tend to cause* a disturbance. *See, e.g.*, State v. Maker, 180 N.W.2d 707, 709 (Wis. 1970) ("Two witnesses testified, the arresting officer for the state, the defendant for the defense, and their testimony is not in conflict on material aspects of the case.").

[208] WIS. CRIM. JURY INSTRUCTIONS 100 (emphasis added).

[209] WIS. CRIM. JURY INSTRUCTIONS 300.

[210] *See* Commonwealth v. Allard, 711 N.E.2d 156, 160 (Mass. 1999) (the jury's role "involves more than resolving the credibility conflicts").

[211] *See* State v. Aleksey, 538 S.E.2d 248, 251–52 (S.C. 2000) (upholding conviction because mandate "to seek the truth" appeared in the court's "concluding . . . remarks on determining the credibility of witnesses" and not in the burden of proof instruction).

[212] *See Allard*, 711 N.E.2d at 159–60 (upholding conviction because description of trial as "a search for the truth" was made in the instruction regarding the jury's "fact finding function" and not in the burden of proof instruction).

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near century-old case, no less—simply "misstates the jury's duty and sweeps aside the State's burden."[213]

As one modern court warned, "[s]uch an instruction would be error if used in the explanation of the concept of proof beyond a reasonable doubt."[214] And as another modern court held when reversing a conviction: "The jury's task is not simply to determine the truth or falsity of the charge, to convict if it is true, acquit if it is false. The jury must acquit even when it thinks the charge is *probably true*."[215]

D. If the Trial Is Not About Truth, then What Is Its Purpose?

The danger to prosecutors when asking a rhetorical question—that is, what is the purpose of a criminal jury trial?—is that it may be answered. "The question for any jury is whether the burden of proof has been carried by the party who bears it. In a criminal case . . . [t]he jury cannot discern whether that has occurred without examining the evidence for reasonable doubt."[216] More to the point, the purpose of the criminal jury trial is to determine "whether the prosecution has submitted proof beyond a reasonable doubt."[217]

In fact, this is the answer that *prosecutors* give whenever a *defendant* argues that trials are about truth. For example, it is common practice for a prosecutor to use a defendant's prior criminal conviction as evidence of his intent or motive to commit the crime with which he is currently charged.[218] An issue arises, however, when the defendant was *acquitted* of the prior allegation. In this scenario, the defendant argues that verdict means "to speak the truth," and the jury said he was not guilty. Therefore, the defendant's argument continues, the prosecutor should not be permitted to use the allegation underlying the prior acquittal as evidence of guilt at a subsequent trial.

When the script is flipped, prosecutors quickly abandon their "trials are about truth" mantra. Instead, they argue that they should be "allowed to admit evidence of other criminal conduct for which the defendant *had been acquitted* in a prior

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[213] State v. Berube, 286 P.3d 402, 411 (Wash. Ct. App. 2012) (discussing the phrase "search for the truth").

[214] United States v. Gonzales-Balderaz, 11 F.3d 1218, 1223 (5th Cir. 1994).

[215] State v. Giroux, 561 A.2d 403, 406 (Vt. 1989) (emphasis added).

[216] *Berube*, 286 P.3d at 411.

[217] People v. Katzenberger, 101 Cal. Rptr. 3d 122, 127 (Ct. App. 2009).

[218] *See* Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451 (1993).

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action."[219] And the courts are eager to agree, holding that it is error for a defendant to "equate[] his acquittal with innocence."[220] Instead, "an acquittal only establishes that there was a reasonable doubt in the jury's mind as to whether the defendant committed the prior crime, not that the defendant is innocent."[221]

The result of this double standard is that prosecutors are able to use the defendant's alleged prior bad act—an act for which the jury found him not guilty after a supposed search for the truth—as evidence of guilt.[222] Even more alarming, despite the mantra that trials are a search for the truth, many courts "do not allow the defendant to inform the jury of his prior acquittal."[223] Their reasoning: the jury could be confused into thinking that the defendant is not guilty of the prior allegation for which he was acquitted.[224]

The prosecutor is correct to argue that a prior acquittal only established reasonable doubt about the defendant's guilt.[225] But this claim is a general truth; it is not rhetoric for the prosecutor to selectively invoke only when it suits the government's needs. Rather, as explained earlier in this Article, it is *always* the jury's role to evaluate the evidence presented to it for reasonable doubt. Trial courts must not dilute this constitutionally-imposed standard with contradictory, nonsensical, burden-lowering, truth-based jury instructions.

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[219] Craig L. Crawford, Dowling v. United States*: A Failure of the Criminal Justice System*, 52 OHIO ST. L.J. 991, 991 (1991) (emphasis added).

[220] State v. Landrum, 528 N.W.2d 36, 41 (Wis. Ct. App. 1995).

[221] *Id.* (citing Dowling v. United States, 493 U.S. 342 (1990)).

[222] *See id*. *See also* Ruth Miller, *Other Crimes Evidence: Relevance Reexamined*, 16 J. MARSHALL L. REV. 371, 386 (1983) ("Illinois courts . . . have held that a prior acquittal does not affect the admissibility of other crimes evidence."); Edward Pare III, *Restoring the Character Evidence Rule: Reconsidering Evidence of Crimes, Wrongs, and Other Acts in Rhode Island*, 21 ROGER WILLIAMS U. L. REV. 399, 414 (2016) (prior bad acts are admissible in Rhode Island "upon the determination that a jury could reasonably find that it is more likely than not that the defendant committed the prior crime, wrong, or other act"); Ted Sampsell-Jones, *Spreigl Evidence: Still Searching for a Principled Rule*, 35 WM. MITCHELL L. REV. 1368, 1403 (2009) (prior bad acts are admissible in Minnesota if "proven by clear and convincing evidence").

[223] Crawford, *supra* note 219, at 1007.

[224] *See id.*

[225] Whether this renders prior acquittal evidence admissible as other-acts evidence is beyond the scope of this Article as it invokes several other doctrines, including double jeopardy, collateral estoppel, due process, and fundamental fairness. *See id.* at 995, 1005–06.

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CONCLUSION

In theory, the Constitution protects us all from criminal conviction unless the state can prove guilt beyond a reasonable doubt. But, in reality, trial courts are given broad discretion when explaining this concept to the jury. And instead of focusing jurors on their constitutionally-imposed duty to examine the evidence for reasonable doubt, many trial courts will instead instruct them to undertake a "search for the truth" of what they think happened. Worse yet, before sending jurors on this truth-divining mission, some courts will even specifically instruct them not to examine the state's case for reasonable doubt.[226]

Defense lawyers have argued that these truth-based jury instructions—in all of their forms—create serious constitutional problems. Most significantly, the contradictory instruction "not to search for doubt" but "to search for the truth" lowers the burden of proof to a mere preponderance of evidence standard. That is, if the prosecutor's version of events is only slightly more likely than not, it would follow that, in a search for the truth, the jury would be obligated to convict.[227]

There is now empirical evidence to support this claim. In two recently published studies, mock jurors who received this truth-based jury instruction convicted at significantly higher rates than mock jurors who were simply instructed on reasonable doubt.[228] Not surprisingly, the mock jurors who received the truth-based instruction were also far more likely to mistakenly believe it was proper to convict even when they had a reasonable doubt about guilt.[229]

Based on this new evidence, defense lawyers have been requesting that trial courts remove the burden-lowering, truth-related language from their jury instructions.[230] But prosecutors, in their fight to preserve the truth-based jury instructions on which they rely to win convictions, have responded with twenty different arguments. Some of these arguments are based on a misunderstanding of the published studies, others are rooted in logical fallacies, some involve misstatements of law, and others are based on misrepresentations of fact.[231]

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[226] *See supra* Part I.

[227] *See supra* Parts I.A., I.B.

[228] *See supra* Part I.C.

[229] *See id.*

[230] *See supra* Part I.D.

[231] *See supra* Parts II–V.

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This Article has collected, organized, and debunked these prosecutorial arguments. Its goal is to assist criminal defense lawyers and judges in recognizing and responding to invalid arguments regarding the published studies,[232] the reach of various legal authorities,[233] the significance of the language used in the jury instructions,[234] and even the purpose of criminal jury trials and how that purpose relates to the burden of proof instruction.[235]

Being able to identify and respond to these prosecutorial arguments is a critical step in winning the battle over the burden of proof and ensuring that each defendant remains free of criminal conviction unless the state proves guilt beyond a reasonable doubt. Further, based on plain language, sound argument, and now empirical evidence, courts can no longer justify their use of burden-lowering, truth-based jury instructions. Instead, the Constitution demands an instruction that simply concludes: It is your duty to give the defendant the benefit of every reasonable doubt.

[232] *See supra* Part II.

[233] *See supra* Part III.

[234] *See supra* Part IV.

[235] *See supra* Part V.

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