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REASONABLE DOUBT AND MORAL ELEMENTS

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The law is axiomatic. In order to convict a person of a crime, every element of the crime with which he is charged must be proven beyond a reasonable doubt. This Article argues that this fundamental proposition of American criminal law is wrong. Two types of elements are typically found in crime definitions: factual elements and moral elements. Proving factual elements involves answering questions about historical facts—that is, questions about what happened. By contrast, proving moral elements—such as "reckless," "unjustifiable," "without consent," or "cruel"—involves answering questions not only about what happened but also about the evaluative significance of what happened. This Article argues that the beyond a reasonable doubt requirement should not apply to such moral elements for three reasons. First, the beyond a reasonable doubt requirement applied to normative elements compels overly underinclusive interpretations of crime definitions because the standard requires factfinders to acquit where there are reasonable moral disagreements.

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Second, by, in effect, thus limiting the scope of crime definitions, the requirement undermines the value of using normative terms in crime definitions as a method of guiding citizens to behave as responsible law-abiding citizens. Third, the requirement produces a situation where important normative decisions are delegated to ultimate factfinders, especially the jury, with excessively restrictive instructions as to when they are allowed to act on their moral beliefs. The Article concludes by discussing some implications of these arguments and exploring general features of criminal law that conspire to produce these problems with the beyond a reasonable doubt standard.

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INTRODUCTION

The law is axiomatic. In order to convict a defendant, the Constitution requires a jury to determine that he is "guilty of every element of the crime with which he is charged, beyond a reasonable doubt."[1] This Article argues that this fundamental proposition of American criminal law is wrong.

Imagine someone brings you a steak and asks you to judge its level of doneness. You decide that it is somewhere in between medium and rare, so you answer that it is medium rare. Now, imagine a follow up question, "Is it medium rare beyond a reasonable doubt?" How would you answer this question?

Here is one possibility. Perhaps you did not give yourself enough time to examine the meat carefully, the room you were in was dark, you did not have your glasses on, and so on. These factors might make you unsure of your answer. These are the sources of doubt that have to do with whatever interferes with one's ability to make the necessary observations.

But what if none of these factors were in play? You had plenty of time to examine the steak carefully, and there were no problems with your eyesight or general visibility conditions. Could you still have a reasonable doubt as to how well the steak had been cooked?

Most people would instinctively respond yes. Even if you were working under perfect observational conditions, you may have a doubt about your answer because you are not certain whether you are applying terms like "rare" and "medium rare" correctly. This may especially be the case if you feel that the steak presented is a borderline case between medium rare and rare (or medium rare and medium).

The two kinds of doubts are different. We may call the first kind of doubt "doubts about facts" and the second kind of doubt "doubts about norms." When the strange question, "Is the steak medium rare beyond a reasonable doubt?" is asked, there is an ambiguity in how the question is to be understood. Is there a doubt about facts, norms, or both?

Of course, we do not use the term "reasonable doubt" when judging levels of doneness when cooking. The home of this phrase is criminal adjudication. And the same ambiguity as to the meaning of "reasonable doubt" exists in this context.

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[1] Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)); *see also In re* Winship, 397 U.S. 358, 364 (1970) (holding that Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt").

Take one of the definitions of "murder in the second degree" in New York law for instance: "A person is guilty of murder in the second degree when . . . [u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."[2] Under this definition, the prosecution has to prove that (1) "under circumstances evincing a depraved indifference to human life," (2) an individual "recklessly engage[d] in conduct," (3) which "create[d] a grave risk of death to another person," and (4) thereby "cause[d] the death of another person."

Much of what goes into proving these elements involves reconstructing historical facts, such as what the defendant exactly did and how it led to a person's death. Far more than that, however, is often involved in determining whether the person's conduct met the definition of the crime. The decisionmaker's determinations of "recklessly," "grave risk," "depraved indifference to human life," and "cause" all involve a combination of factual and moral considerations. Therefore, when we apply the beyond a reasonable doubt requirement to these questions, we can see that the requirement may involve both doubts about historical facts—or questions about *what happened*—and doubts about norms—or questions about the *evaluative significance of what happened*.

This distinction between doubts about facts and doubts about norms has been around for as long as the reasonable doubt requirement has been around, but its significance has gone largely unnoticed.[3] This lack of attention is surprising because moral or normative terms like "reckless" are prevalent in criminal law as elements in crime definitions.[4] Terms like "unjustifiable," "without consent," "depraved," "grave," "cruel," "wanton," "heinous," "debased," "perversion," and "impair or debauch the morals" are routine in criminal law, and there can be reasonable doubts about the elements containing these terms either because of doubts about facts or doubts about norms.[5]

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[2] N.Y. PENAL LAW § 125.25 (McKinney 2009).

[3] The academic legal literature that came closest to addressing the topic of this Article is Gary Lawson's discussion of standards of proof when one is "proving the law." *See* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

[4] *See, e.g.*, PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 134–35 (2d ed. 2010); Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 100–03 (2005).

[5] "Moral or normative elements," in the sense used in this Article, have the following characteristics. They, like the terms "unjustifiable," "reasonable," "depraved," and "cruel," are vague and evaluative, and are prevalent in criminal law. Such terms are rarely defined precisely and instead *invite* the factfinder to make moral judgments in the process of

The lack of attention to doubts about norms is also surprising given the common complaint that the phrase "beyond a reasonable doubt" is confusing. James Whitman, for example, reports in his recent book on the origins of reasonable doubt that the phrase is "vexingly difficult to interpret and apply," that the jurors are "baffled," that "judges flounder unhappily over the definition," and that judges are sometimes "forbidden to explain the meaning of the phrase" even when "jurors . . . beg for guidance."[6] Is it possible that the persistent jury and judicial confusion about the phrase has something to do with the fact that the phrase "reasonable doubt" is brought to apply to different types of questions, factual and moral?

Before we get to the question of how to clarify the meaning of reasonable doubt, however, we first need to be clear on how the two types of doubts differ and consider whether "beyond a reasonable doubt" is the correct standard to use for normative questions. This Article argues that the beyond a reasonable doubt requirement should not apply to moral or

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determining whether the terms apply to the conduct in question. And they are typically applied to individual cases by trial judges and juries without detailed guidance from appellate decisions and legislations. *See, e.g.*, State v. Chacon, 03-0446, p. 5 (La. App. 5 Cir. 10/28/03); 860 So. 2d 151, 153 ("Mistreatment is equated with 'abuse' and has a commonly understood meaning."); People v. Biegajski, 332 N.W.2d 413, 418 (Mich. Ct. App. 1982) (pointing out that the word "torture" has "a common, ordinary meaning"); State v. VanVlack, 765 P.2d 349, 351 (Wash. Ct. App. 1988) ("The term 'consent' does not have a technical meaning different from the commonly understood meaning . . . . Consequently the trial court was not required to instruct the jury on the definition of consent."). *See also* State v. Blount, 770 P.2d 852, 855 (Kan. Ct. App. 1989) ("A person of common intelligence could readily understand what constitutes a lack of consent and . . . does not have to guess at the meaning of 'lack of consent' to determine whether one has acted in violation of the statute."). Moral or normative elements constitute a subset of the category of what is commonly referred to as "mixed questions of fact and law," and it is not always easy to draw the line between moral or normative elements and other mixed questions. *See generally* Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101 (2005) (providing an overview of different types of mixed questions of law and fact). Nevertheless, because "moral or evaluative elements," in the sense used in this Article, are common enough a phenomenon, the question of how the reasonable doubt standard applies to these elements can be addressed without being bogged down by the question of exactly how to draw the distinction between elements that are moral or normative in the sense used in this Article and those that are not.

[6] JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 1–2 (2008). *See also* John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1188 (2002) ("A growing mountain of empirical research is concluding, with shocking accord, that jurors retain alarmingly low comprehension of the most fundamental aspects of their roles." (footnote omitted)); Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 47–48 (1999).

normative elements, which in turn jeopardizes the idea that every element of a crime must be proven beyond a reasonable doubt in order to convict.

This Article proceeds as follows. Part I provides some legal background by discussing *United States v. Gaudin*,[7] which held that the beyond a reasonable doubt standard applies to mixed questions of fact and law. It then introduces various definitions of "beyond a reasonable doubt" in order to establish some common understandings of the concept.

Part II then discusses how reasonable doubts about moral or normative elements can arise. More specifically, it introduces different types of indeterminacy in law and the ways in which those indeterminacies can give rise to reasonable disagreements and, in turn, to "reasonable doubt," as the phrase is commonly defined.

Parts III and IV address the question of whether the beyond a reasonable doubt rule *should* apply to moral or normative elements, given the ways in which reasonable doubts can arise about such terms as discussed in Part II. Part III describes the argument that the beyond a reasonable doubt standard should apply to moral and normative terms in the same way the rule of lenity counsels narrow constructions of criminal laws.

Part IV then argues that the beyond a reasonable doubt standard should not apply to normative questions, despite the considerable initial appeal of the rule of lenity analogy. First, the beyond a reasonable doubt requirement applied to moral elements compels underinclusive interpretations of crime definitions because the standard requires factfinders[8] to acquit where there

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[7] United States v. Gaudin, 515 U.S. 506 (1995).

[8] By "factfinders," I mean trial judges and jurors. Even though the discussion of the reasonable doubt standard tends to be preoccupied with the question of defining "reasonable doubt" for the jury, the issue of definition is important for both judges and juries given the existence of bench trials. There are some differences in the way judges and juries operate, and those should be discussed; but the point here is that this Article is not just about juries. It is about normative elements in crime definitions, which affect judges and juries alike, albeit in different ways.

Another issue we need to address as a preliminary matter is jury nullification, which refers to the idea that a jury, exercising its position as an institutional actor with an unreviewable power to acquit, may acquit even if every element of an offense's definition has been met. In defenses of the jury as an institution and the jury as a political actor, this power to nullify receives a lot of attention. *See generally* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003); Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999). This Article is not about nullification. Rather, it focuses on the prior step of finding whether the defendant's conduct in question meets the definition of the offense he or she is accused of committing. That is, when there are vague moral terms at play, such as "unreasonable," a jury can acquit on the basis of its moral sense in at least two different

are reasonable moral disagreements. Second, by limiting the scope of crime definitions, the reasonable doubt requirement undermines the value of using moral terms in crime definitions as a method of guiding individuals to behave as responsible law-abiding citizens. Third, the requirement produces a situation where important moral decisions are delegated to ultimate factfinders, especially juries, with excessively restrictive instructions as to when they are allowed to act on their moral beliefs. This manner of delegating not only verges on incoherence but also frustrates the role of juries as articulators and enforcers of community morality.

Part V concludes by discussing some normative implications and exploring certain features of criminal law and law generally that conspire to produce the problems with the beyond a reasonable doubt standard.

I. LEGAL BACKGROUND

A. DOES THE BEYOND A REASONABLE DOUBT REQUIREMENT APPLY TO MORAL OR NORMATIVE ELEMENTS?

One way to deny the existence of the problem that this Article raises is by arguing that the proof beyond a reasonable doubt requirement applies only to facts and not to normative questions. The Court's jurisprudence on reasonable doubt at times made this position seem plausible. However, it was subsequently foreclosed by the Court's decision in *United States v. Gaudin*.[9]

Even though the requirement of proof beyond a reasonable doubt is seemingly foundational in American constitutional law, the phrase does not appear in the Constitution. The proof beyond a reasonable doubt requirement did not become a constitutional requirement until 1970, when the Supreme Court interpreted the Due Process Clause in *In re Winship*.[10] The *Winship* Court held that "the Due Process Clause protects the accused

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ways. It may decline to judge the defendant's conduct to be "unreasonable." Alternatively, it may decide the defendant's conduct to be "unreasonable" but still acquit on any number of moral, political, and prudential grounds. This Article focuses on the former mechanism, not the latter. As William Stuntz pointed out, of course, the more vague a crime's definition is, the less need there will be for a jury to exercise its nullification power because elements like "reasonable" may be vague and expansive enough to accommodate most of a jury's moral concerns about convicting a person. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 30, 285–86 (2011).

[9] *Gaudin*, 515 U.S. 506.

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

against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[11]

As the quoted sentence indicates, the *Winship* Court appears to have believed that the things that needed to be proven beyond a reasonable doubt were "facts." There are other indications that this is how the Court understood the standard. For instance, the Court stated that the proof standard is "a prime instrument for reducing the risk of convictions resting on *factual* error."[12] In Justice Harlan's well-known concurring opinion, he wrote that "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of *factual conclusions* for a particular type of adjudication."[13]

The *Winship* formulation continues to be used in the Supreme Court,[14] but it is not how the Court always states the standard. Sometimes, the Court uses the word "element," which is more ambiguous than "facts," to state the requirement. In *Apprendi v. New Jersey*, for instance, the Court stated that the Constitution required a jury determination that a defendant is "guilty of every *element* of the crime with which he is charged, beyond a reasonable doubt."[15] Under this statement, since an element, like "reckless," may be a combination of facts and norms, it seems that the proof beyond a reasonable doubt applies to more than just factual questions.

The Supreme Court addressed the question of whether the *Winship* reasonable doubt requirement applies to facts or elements in *United States v. Gaudin*.[16] *Gaudin* involved the crime of making false statements to the Department of Housing and Urban Development. One of the crime's elements was that the false statements be "material," meaning that they had "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed."[17]

Even though the case, at first blush, appears to address only a narrow, technical question of how the term "materiality" applies in a particular

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[11] *Id.* at 364.

[12] *Id.* at 363 (emphasis added).

[13] *Id.* at 370 (Harlan, J., concurring) (emphasis added).

[14] *See, e.g.*, United States v. Booker, 543 U.S. 220, 230 (2005) (quoting *Winship*, 397 U.S. at 364); Apprendi v. New Jersey, 530 U.S. 466, 500 (2000) (Thomas, J., concurring) (citing *Winship*, 397 U.S. at 364); Almendarez-Torres v. United States, 523 U.S. 224, 239–40 (1998) (quoting *Winship*, 397 U.S. at 364); Montana v. Egelhoff, 518 U.S. 37, 54 (1996) (citing *Winship*, 397 U.S. at 364).

[15] *Apprendi*, 530 U.S. at 477 (emphasis added).

[16] United States v. Gaudin, 515 U.S. 506, 511 (1995).

[17] *Id*. at 509 (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)).

regulatory context, its significance went much further.[18] The government argued that, because "materiality" is a legal question, it does not need to be submitted to the jury or proven beyond a reasonable doubt. Among other things, the government argued that "a question of law, by its nature, is not susceptible to proof by various quanta of evidence."[19] The Court rejected this argument, stating:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was the agency trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts.[20]

The Court then described the jury's responsibility as "not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."[21] The Court concluded that "materiality," being an "ultimate question," must be determined by a jury beyond a reasonable doubt.[22]

Some people may read *Gaudin* as primarily a jury trial right case and not a reasonable doubt case. That is, perhaps the emphasis should be put on the "determined by a jury" part and not the "beyond a reasonable doubt" part of the holding. The opinion forecloses this reading, however. The Court, after indicating that the "beyond a reasonable doubt" portion is "not directly at issue in the present case" because the litigation below was about the jury trial right, stated that "[i]t is worth noting, however, that some courts which regard materiality as a 'legal' question for the judge do not require the higher burden of proof."[23] In other words, the Court was worried about *both* the jury trial issue *and* the standard of proof issue. It believed that the district court, which in its view got the jury trial issue wrong by

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[18] For examples that illustrate the broad significance of *Gaudin*, see *Apprendi*, 530 U.S. at 477 ("As we have, unanimously, explained, the historical foundation for our recognition of [the importance of the jury in criminal cases] extends down centuries into the common law." (citing *Gaudin*, 515 U.S. at 510–11) (citation omitted)); Barkow, *supra* note 8, at 51 (relying on *Gaudin*, inter alia, to argue that "the jury has broad power to apply . . . the law"); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 333–34 (2003) (discussing *Gaudin* as "[t]he first notable recent case indicating the [Supreme] Court's renewed interest in the criminal jury").

[19] Brief for the United States at 37, United States v. Gaudin, 515 U.S. 506 (1995) (No. 94-514), 1995 WL 71510.

[20] *Gaudin*, 515 U.S. at 512.

[21] *Id.* at 514.

[22] *Id.* at 512.

[23] *Id.* at 510 n.1.

defining the question at issue as a legal question, might have gotten the standard of proof issue wrong as well.[24]

Therefore, under *Gaudin*, it is clear that the proof beyond a reasonable doubt requirement goes to all elements, including mixed questions of fact and law.[25] The simple solution of applying the beyond a reasonable doubt standard only to facts and not to normative questions is thus not available.

B. WHAT IS "REASONABLE DOUBT"?

In considering how to think about proving moral terms, we should start by examining how the standard of beyond a reasonable doubt has been defined. How some of these formulations should apply to moral elements will be discussed in more detail in later sections. The purpose of this section is to lay out some common ways of thinking about the standard of proof.

1. No Definition Approach

There are many variations in how courts explain the reasonable doubt requirement to the jury.[26] One of the variations is simply to not define it. The Supreme Court in *Victor v. Nebraska* stated that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."[27] The Seventh Circuit "advise[s] against defining 'reasonable doubt' because often the definition engenders

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[24] The full footnote is as follows:

> The "beyond a reasonable doubt" point is not directly at issue in the present case, since it is unclear what standard of proof the District Court applied in making its determination of materiality, and since the Ninth Circuit's reversal of the District Court's judgment did not rest upon the standard used but upon the failure to submit the question to the jury. It is worth noting, however, that some courts which regard materiality as a "legal" question for the judge do not require the higher burden of proof.

Id. (citations omitted).

[25] The question of the proper province of the jury's power continued to be explored, in a startling and spectacular fashion, starting with *Apprendi*, which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. After *Apprendi*, the distinction between "questions of fact" and "mixed questions of fact and law," which was at issue in *Gaudin*, took a backseat, as the Court's attention was primarily focused on the meaning of the phrase "the prescribed statutory maximum." *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004).

[26] For useful overviews, see generally Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295 (2003); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 TEX. L. REV. 105, 112–19 (1999).

[27] Victor v. Nebraska, 511 U.S. 1, 5 (1994).

more confusion than does the term itself."[28] It also stated at another point that "'[r]easonable doubt' must speak for itself" as jurors "know what is 'reasonable' and are quite familiar with the meaning of 'doubt.'"[29] The D.C. Circuit, too, stated that "the greatest wisdom may lie with the . . . instruction to leave to juries the task of deliberating the meaning of reasonable doubt" given that the "terms 'reasonable' and 'doubt' are as accessible to laymen as they are to experts."[30] The Fourth Circuit similarly expressed the worry that "attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only the words themselves,"[31] given that "the term reasonable doubt has a 'self-evident meaning comprehensible to the lay juror.'"[32] The First[33] and

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[28] United States v. Martin-Trigona, 684 F.2d 485, 493 (7th Cir. 1982). *See also* United States v. Hall, 854 F.2d 1036 (7th Cir. 1988).

> The tortured attempts to define reasonable doubt have yet to produce anything which has been approved by this court. Moreover, we have recently indicated that no attempt should be made to define reasonable doubt . . . [T]he point is that, at best, definitions of reasonable doubt are unhelpful to a jury, and, at worst, they have the potential to impair a defendant's constitutional right to have the government prove each element beyond a reasonable doubt. An attempt to define reasonable doubt presents a risk without any real benefit.

Id. at 1039 (internal citation omitted).

[29] United States v. Glass, 846 F.2d 386, 387 (7th Cir. 1988). *See also* United States v. Wilson, 698 F.3d 969, 971 (7th Cir. 2012) ("Refusing to elaborate to a jury the meaning of 'reasonable doubt' is a rare example of a wise acknowledgement of the limitations of definition."); United States v. Hatfield, 591 F.3d 945, 949 (7th Cir. 2010) ("Elaborating on a term often makes it less rather than more clear . . . ; it is on this ground that some courts, including our own, tell district judges not to explain to a jury the meaning of 'beyond a reasonable doubt.'"); United States v. He, 245 F.3d 954, 959 n.3 (7th Cir. 2001) (noting that the court has "consistently admonished district courts not to attempt to define the term 'reasonable doubt'").

[30] United States v. Taylor, 997 F.2d 1551, 1558 (D.C. Cir. 1993).

[31] United States v. Walton, 207 F.3d 694, 698 (4th Cir. 2000); *see also* United States v. Hornsby, 666 F.3d 296, 310–11 (4th Cir. 2012) (quoting the same language); United States v. Lighty, 616 F.3d 321, 380 (4th Cir. 2010) (same); United States v. Ayala, 601 F.3d 256, 274 (4th Cir. 2010) (same).

[32] United States v. Headspeth, 852 F.2d 753, 755 (4th Cir. 1988) (internal quotation marks omitted).

[33] United States v. Fields, 660 F.3d 95, 96 (1st Cir. 2011) ("Our decisions hold that reasonable doubt does not require a definition." (internal quotation marks and citation omitted)); United States v. Van Anh, 523 F.3d 43, 58 (1st Cir. 2008) ("We have previously explained that reasonable doubt is difficult to define, and that a court need not define reasonable doubt for a jury." (citation omitted)). *See also* United States v. Jones, 674 F.3d 88, 93–94 (1st Cir. 2012); United States v. Frabizio, 459 F.3d 80, 86 n.9 (1st Cir. 2006); United States v. Wallace, 461 F.3d 15, 30 (1st Cir. 2006); United States v. Agne, 214 F.3d 47, 55 n.4 (1st Cir. 2000).

Ninth[34] Circuits, too, permit trial courts to leave "reasonable doubt" undefined.[35]

2. Typical Formulations

Among those jurisdictions that define the standard, the following formulations are recurrent:

- Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.[36]
- If . . . you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.[37]
- A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.[38]
- It is a doubt that is something more than a guess or a surmise. It is not a conjecture . . . . [It is], in other words, . . . a real doubt, an honest doubt, a doubt that has its foundation [in] the evidence or lack of evidence.[39]
- Proof beyond a reasonable doubt is proof that precludes every reasonable hypothesis except guilt. It . . . is inconsistent with any other reasonable conclusion.[40]
- It is a doubt which is not a vague, speculative, or imaginary doubt . . . .[41]
- [I]t is a doubt for which a reason can be assigned.[42]
- It is a doubt for which you can . . . conscientiously give a reason.[43]
- It is a doubt that a reasonable person hearing the same evidence would have.[44]
- [I]f the jury views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, the jury should . . . adopt the conclusion of innocence.[45]

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[34] United States v. Nolasco, 926 F.2d 869, 872 (9th Cir. 1991).

[35] *See also* 2 MCCORMICK ON EVIDENCE 725 (Kenneth S. Broun ed., 7th ed. 2013) ("[T]he court's discretion . . . should ordinarily be exercised by declining to define [reasonable doubt], unless the jury itself asks for a fuller explanation."); Laudan, *supra* note 26, at 313–17.

[36] FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1987).

[37] *Id.*

[38] United States v. Kieffer, 681 F.3d 1143, 1157 (10th Cir. 2012).

[39] State v. Billie, 2 A.3d 1034, 1044 n.14 (Conn. App. Ct. 2010).

[40] *Id.*

[41] People v. Munoz, 240 P.3d 311, 315 (Colo. App. 2009).

[42] *Ex parte* Brown, 74 So. 3d 1039, 1053 (Ala. 2011).

[43] *Billie*, 2 A.3d at 1044 n.14.

[44] State v. Medina, 685 A.2d 1242, 1251 (N.J. 1996).

- It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.[46]
- "Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon.[47]

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[45] United States v. Isaac, 134 F.3d 199, 202 (3rd Cir. 1998).

[46] Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850). The phrase "moral certainty" warrants an additional discussion. What is moral certainty? Philosophers use the phrase to describe levels of certainty about the truth of one's moral convictions, as opposed to factual beliefs. *See, e.g.*, Judith Lichtenberg, *Moral Certainty*, 69 PHIL. 181, 181 (1994). So, the word "moral" in philosophers' use of "moral certainty" designates the subject matter of one's certainty—what one is certain *about*. That is not how the phrase is generally understood in law. Rather, lawyers' use of "moral" in "moral certainty" designates one's level of sureness—*how certain* one is about something, "moral certainty" meaning a high degree of certainty. For an overview of the phrase's life in the American legal system, see 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, 1176–1227 (2003); see also Victor v. Nebraska, 511 U.S. 1 (1994). "Moral certainty" has been a problematic phrase for some time for the Supreme Court because it is unclear to most contemporary jurors what it means, and the term "moral" introduces a set of ideas that does not seem to travel well with objective factfinding. The Court has expressed some skepticism about this phrase for that reason. Cage v. Louisiana, 498 U.S. 39, 41 (1990) (per curiam). *See also Victor*, 511 U.S. at 37 (Blackmun, J., concurring in part and dissenting in part) (expressing the worry that the phrase "moral certainty" would "lead jurors reasonably to believe that they could base their decision to convict upon moral standards or emotion in addition to or instead of evidentiary standards").

[47] *Victor*, 511 U.S. at 18; *see also* Jon O. Newman, *Beyond "Reasonable Doubt"*, 68 N.Y.U. L. REV. 979, 982–83 (1993). This way of defining reasonable doubt has come under some especially harsh criticism. For example, in her concurring opinion in *Victor*, Justice Ginsburg approvingly quoted the following criticism of the definition from the Judicial Conference of the United States:

> [T]he analogy it uses seems misplaced . . . . Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases.

Victor, 511 U.S. at 24 (Ginsburg, J., concurring in part and concurring in the judgment) (citation omitted); *see also id.* at 34 (Blackmun, J., concurring in part and dissenting in part) ("[T]he 'hesitate to act' language is far from helpful, and may in fact make matters worse by analogizing the decision whether to convict or acquit a defendant to the frequently high-risk personal decisions people must make in their daily lives."); ROBERTS & ZUCKERMAN, *supra* note 4, at 254 ("[I]t is plainly unsatisfactory to define 'reasonable doubt' in criminal adjudication by reference to risk-taking in other contexts, when different people have different levels of enthusiasm for, and aversion to, risk and there are no uniform standards of acceptable risk-taking applicable across diverse spheres of human activity."); Laudan, *supra* note 26, at 303 (noting that "[m]any people, when confronted by major life decisions, fidget

We can say a few things about these definitions for our purposes. First, many of these definitions are not particularly informative. They are generally criticized for lacking in clarity.[48] Second, the definitions tend to be silent as to whether they apply to factual elements, moral elements, or both. This ambiguity means that they tend to do a poor job of explaining how the concept of reasonable doubt applies to moral questions. Third, many of these definitions are vague and capacious enough that we can apply them to moral elements with little adjustment.[49]

II. REASONABLE DOUBTS FOR MORAL ELEMENTS

Now that we have an understanding of how "reasonable doubt" is typically defined, we are ready to discuss how reasonable doubts about moral or normative elements can arise. In order to do so, we first need to consider different types of indeterminacy in law.

A. SOURCES OF DOUBT: INDETERMINACY

1. Vagueness

On a street in a Michigan town one evening, a mother was having a fight with a man. She was holding her eight-month old daughter. She

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and fret even when it is wholly clear and beyond doubt what course of action they should take," while at the same time "we often act, and it is often rational to act, even when the beliefs driving an important action . . . are little more than bare possibilities"). Another problem with the "pause and hesitate" formula is that the test should ideally be met in potentially every criminal case, which would mean that everyone should be acquitted, which in turn is absurd. Jurors are about to convict a person of a *criminal* case. They *should* pause and hesitate. They are *right* to pause and hesitate. Criminal law is serious stuff. "Pause and hesitate" should be the mantra for the jurors to remind themselves of the gravity of their task, but it should not be the definition of reasonable doubt.

[48] *See* sources cited *supra* note 6.

[49] Because this Article takes as its starting point existing definitions of reasonable doubt, formulations of reasonable doubt proposed by scholars will not be discussed. For some examples, see LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 82 (2006) ("If there is credible, inculpatory evidence or testimony that would be very hard to explain if the defendant were innocent, and no credible, exculpatory evidence or testimony that would be very difficult to explain if the defendant were guilty, then convict. Otherwise, acquit."); *id.* at 83 ("Figure out whether the facts established by the prosecution rule out every reasonable hypothesis you can think of that would leave the defendant innocent. If they do, convict; otherwise acquit."); Michael S. Pardo & Ronald J. Allen, *Judicial Proof and the Best Explanation*, 27 LAW & PHIL. 223, 238–39 (2008) ("In criminal cases . . . fact-finders infer (and should infer) the defendant's innocence whenever there is a sufficiently plausible explanation of the evidence consistent with innocence (and ought to convict when there is no plausible explanation consistent with innocence, assuming there is a plausible explanation consistent with guilt).").

yelled, "If you love this baby, come say goodbye." She then yelled, "If you don't love this baby, then fuck this baby," and then dropped the baby onto the sidewalk. The baby fell about four feet, landed on her feet, fell to her knees, and then down onto her face. The mother started to walk away. When a bystander yelled out that he would be calling the police, the mother turned around, picked up the baby, and drove away. Subsequent physical examination did not indicate any injuries due to the fall.[50]

In Michigan, a person is guilty of child abuse in the second degree if "[t]he person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results," and "cruel" is defined as "brutal, inhuman, sadistic, or that which torments."[51] Is the mother's act "cruel" despite the fact that the baby appeared not to have been injured? The jury in *People v. Chivis* said yes and convicted the mother of child abuse.[52]

Or consider *Munao v. State*, about a man whose children were living with their mother, his ex-girlfriend.[53] The incident in question occurred when the son was six years old. One day after the son fought with his mother, he called his father and complained about her. His father told him, according to testimony, to "go to the kitchen and get a knife" and kill his mother.[54] He appears to have refused. In a subsequent phone conversation the next day, his father repeated the suggestion that he grab a knife and stab his mother to death.

Under Florida law, one of the definitions of "child abuse" is "[a]n intentional act that could reasonably be expected to result in physical or mental injury to a child."[55] As the court considering this case noted, the man's comments are "deeply troublesome and offensive."[56] Should the man's statements to his son also be considered to be "child abuse"? The jury thought so and convicted him of child abuse, as well as solicitation to commit aggravated battery.[57]

Whether the sorts of behaviors described in the two cases rise to the level of child abuse seems to depend on where they fall on the spectrum of bad parenting behavior. And whether these are "bad enough" presents a classic problem of vagueness, in the sense of imprecision. The term lacks

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[50] People v. Chivis, No. 294524, 2010 WL 5383914, at *1 (Mich. Ct. App. Dec. 28, 2010).

[51] MICH. COMP. LAWS ANN. § 750.136b (West 2012).

[52] *Chivis*, 2010 WL 5383914, at *1.

[53] Munao v. State, 939 So. 2d 125 (Fla. Dist. Ct. App. 2006).

[54] *Id.* at 126.

[55] FLA. STAT. ANN. § 827.03(1)(b) (West 2014).

[56] *Munao*, 939 So.2d at 128.

[57] *Id.* at 126.

sharp boundaries, and there are borderline cases where it is unclear whether a particular behavior should be considered criminally abusive.[58]

2. Contestability

State v. Sedlock is a Louisiana case about a man whose son was a fourth grade student with disciplinary problems.[59] One day, the school's assistant principal had a conference with the father regarding his son's behavior. The father left with his son after the conference. As he left, he kicked his son in the buttocks and kneed him in the back. The assistant principal called the police. When the police went to the family's home, the officers noticed signs that the son had been hit. Photographs taken by the police showed marks on the son's back, abdomen, chest, face, neck, and leg. The man had whipped the child with his belt, and the man said he whipped his son because of the child's conduct at school and because he thought the boy was going to fail the fourth grade for the second time.[60]

State v. Barnett is a similar case from Louisiana.[61] The case involved a father and his six-year-old boy.[62] The court noted that it was "undisputed" that the boy could be characterized as "a problem child" with "a behavioral problem."[63] One day, the boy broke a plastic water pipe and, when questioned by his father, lied about it. The father then "administered a severe beating . . . with a belt" to the boy.[64] The beating left "severe bruises on the child's buttocks and thighs" and the doctor who examined the boy at the hospital stated that the bruises were "too numerous to count."[65] The boy "was walking very slowly and stiff-legged" at the hospital after the beating, "couldn't move very well," and "was whimpering . . . or moaning slightly."[66]

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[58] There is a large philosophical literature on vagueness. For a recent treatment, see DIANA RAFFMAN, UNRULY WORDS: A STUDY OF VAGUE LANGUAGE 2 (2014) ("Perhaps the only point on which all theorists of vagueness agree is that vagueness is a form of unclarity—specifically, an unclarity about the boundaries of things . . . . 'Tall,' 'blue,' 'heap,' 'rich,' and 'old' are prime examples of vague words: No clear line divides the tall people from the above average, or the blue objects from the green, or the old people from the middle-aged.").

[59] State v. Sedlock, 2004-564, p. 2 (La. App. 3 Cir. 9/29/04); 882 So. 2d 1278, 1279.

[60] *Id.* at 1279, 1281–82.

[61] State v. Barnett, 521 So. 2d 663 (La. Ct. App. 1988).

[62] *Id.* at 664.

[63] *Id.* at 666.

[64] *Id*. at 665.

[65] *Id.* at 666.

[66] *Id.*

Similar facts are in play in *State v. Chacon*, another corporal punishment case in which a man apparently hit his live-in girlfriend's eight-year-old son on his arm after the boy dropped "a little bucket with thirty to forty dollars of quarters" and refused to pick them up as the man requested.[67] The man punched the boy twice and left a large dark bruise in the shape of a paw print on the boy's arm.[68]

In all of these cases, each man was charged with the crime of cruelty to juveniles, defined as "[t]he intentional or criminally negligent mistreatment or neglect by anyone seventeen years of age or older of any child under the age of seventeen whereby unjustifiable pain or suffering is caused to said child."[69] And in order to determine whether the defendants' actions, which appear to have been instances of corporal punishment, rise to the level of cruelty to juveniles, one must determine that the disciplinary measures were criminally excessive, which in turn breaks down into two components: amount of punishment and justifiability of punishment.

The question of whether punishment inflicts excessive pain seems to be an instance of vagueness, which was discussed above. To the extent that one may be uncertain as to whether these cases rise to the level of cruelty to juveniles, one issue is knowing where discipline ends and cruelty begins (and the two points may not coincide). But that is not all there is to these cases. Sometimes, there can be disagreements over whether corporal punishment amounts to juvenile cruelty not because of the vagueness of the idea of juvenile cruelty, but because those with different philosophies of parenting reach different evaluations of the justifiability of the amount of force that was applied. We can call this type of indeterminacy contestability.[70] People may have different understandings as to what amount of force is necessary for the purposes of discipline and may react with different levels of horror to bruises on bodies.[71] For some parents, bruises on bodies eventually disappear and are simply byproducts of legitimate means of discipline. For others, anything more violent than a tap on the wrist easily qualifies as cruelty to juveniles. When there are

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[67] State v. Chacon, 03-0446, p. 3 (La. App. Cir. 5 10/28/03); 860 So. 2d 151, 152.

[68] *Id.* at 153.

[69] LA. REV. STAT. ANN. § 14.93 (2012).

[70] Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 512–13 (1994).

[71] For an overview of the debate, see Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575 (2003). Pollard, while noting the divided opinions on the topic, is highly critical of those who support the use of corporal punishment.

normative disagreements like these in settling the meaning of cruelty, we can say that "cruelty" is a contestable term.[72]

3. Fit

Take the case *State v. Hertel*.[73] A forty-year-old man who volunteered at a local YMCA was the chaperone for several middle-school-aged boys at an event called "Teen Night." At one point, someone (it is unclear who) suggested that the boys play a game called the "shower game." The defendant explained to the boys that the game involved holding open one's swim trunks in front of a shower and letting hot and cold water strike the area inside the swim trunks. Whoever could stay standing in front of the alternating hot and cold water the longest would win the game. The defendant offered ice cream as the prize. The boys, including an eleven-year-old, played the game for several minutes, with the defendant controlling the shower valve. It appears that the defendant did not look down the open trunks, although the objective of the game was to keep the trunks open for as long as one could.[74]

The defendant was charged with the crime of "endangering the welfare of a child," defined as follows:

> Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child who engages in sexual conduct which would impair or debauch the morals of the child is guilty of a crime of the second degree.[75]

Is this sexual conduct that would impair or debauch the morals of the child? One can imagine thinking that the game is stupid, juvenile, and even creepy, but that it is not appropriately characterized as "endangering the welfare" of a child or as "sexual conduct" or as something that "would impair or debauch the morals of the child." Here, the problem is not exactly like vagueness or contestability but the problem of a potential lack of "fit" between a legal expression and the conduct in question. That is, in cases like this, there exists uncertainty as to whether the evaluative term in a criminal statute is applicable to and appropriate for evaluating the conduct in question.[76]

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[72] *See, e.g.*, ANDREI MARMOR, THE LANGUAGE OF LAW 88–90 (2014) (discussing "extravagantly vague" terms).

[73] State v. Hertel, No. 07-05-0706, 2012 WL 3000337 (N.J. Super. Ct. App. Div. July 24, 2012).

[74] *Id.* at *1.

[75] N.J. STAT. ANN. § 2C:24–4a (West 2005).

[76] *Cf.* Jeremy Waldron, *Inhuman and Degrading Treatment: The Words Themselves*, 23 CAN. J. L. & JURISPRUDENCE 269, 276 (2010) (discussing "particular, rather than all-purpose, evaluations" that "invite[] us to look for a particular sort of badness").

Under the same law, consider also the case *State v. Hackett*,[77] which dealt with a man charged with the crime of "engag[ing] in sexual conduct which would impair or debauch the morals of the child." The defendant was charged because he had, allegedly, on several occasions, stood naked in front of a window in his home as three girls, aged eleven to thirteen, walked past the window en route to their bus.[78]

The defendant's actions in *Hackett* are unsettling, bizarre, and creepy, but is his conduct properly described as "sexual conduct," or as something that "would impair or debauch the morals of the child"? If there is any uncertainty in the matter, it arises neither from imprecise language in a statute (i.e., vagueness), nor out of a normative disagreement regarding how a statutory term should be defined (i.e., contestability), but rather because one may be uncertain as to whether certain conduct is appropriately or accurately described as belonging to that *particular* category of wrongful behavior proscribed under the statute. This sort of indeterminacy, again, has to do with "fit."

Of course, these different types of uncertainty, as is often the case when taxonomy like this is introduced, could overlap. Fit can be assimilated into the category of contestability, for instance. But one reason to separate out the idea of fit from contestability is that contestability can be a problem even if a thin concept like "justifiability" is at issue, whereas the question of "fit" tends to arise more often with the use of thicker concepts like cruelty and brutality.[79] Contestability is a question of whether something is morally justifiable, whereas disagreement over "fit" may not be about moral justifiability. There may be no question that something is morally unjustifiable, and the only question remaining may be whether a moral problem of the correct kind is present.

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[77] State v. Hackett, 764 A.2d 421 (N.J. 2001).

[78] *Id.* at 423.

[79] The phrase "thick concepts" of course comes from Bernard Williams. *See* Bernard Williams, *Truth in Ethics*, *in* TRUTH IN ETHICS 19, 25–26 (Brad Hooker ed., 1996) ("Thin ethical concepts are concepts like 'good,' 'right,' and 'wrong.' . . . Contrast with this ethical statements deploying concepts such as 'cruel,' 'brutal,' 'dishonest,' 'treacherous' . . . . Such statements . . . deploy thick ethical concepts."). *See also* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 129, 140–45 (1985). A sizable literature has grown on this topic. *See, e.g.*, Allan Gibbard & Simon Blackburn, *Morality and Thick Concepts,* 66 PROC. ARISTOTELIAN SOC'Y, SUPP. VOL. 267 (1992); Jonathan Dancy, *In Defense of Thick Concepts*, 20 MIDWEST STUD. PHIL. 263 (1995); Daniel Y. Elstein & Thomas Hurka, *From Thick to Thin: Two Moral Reduction Plans*, 39 CANADIAN J. PHIL. 515 (2009); Allan Gibbard, *Reasons Thin and Thick*, 100 J. PHIL. 288 (2003). For a recent collection of essays on the topic, see THICK CONCEPTS (Simon Kirchin ed., 2013).

B. INDETERMINACY OF MORAL ELEMENTS AND REASONABLE DOUBT

Vagueness, contestability, and fit are features of legal terms that make their meanings indeterminate. How do these features relate to the idea of reasonable doubt? Where there are indeterminacies, there can be disagreements—both actual disagreements among jurors and hypothetical disagreements between a judge or juror reflecting on an issue and an imagined "reasonable person." To illustrate how these disagreements arise in practice, let us imagine a juror who is deliberating on a case and is following the instruction of reasonable doubt in a case that involves moral elements. How would such a juror deal with indeterminate terms while working under the reasonable doubt instructions?

For example, a jury deliberating in a case like *Chivis* may be trying to determine whether the defendant "knowingly or intentionally commit[ed] an act that is cruel to a child regardless of whether harm results." A juror may think that purposefully dropping an eight-month old child about four feet in a domestic dispute meets the definition of cruelty. But there may be another member in the jury who thinks that the term "cruelty" has a specific meaning that is reserved for worse cases. The two may then have a disagreement as to where to draw the line between cruel and non-cruel.

There may be ways for the two to reconcile their differences. They may have different understandings of what the evidence showed: whether the child was dropped upside down or right side up, how far the child fell, whether the child was simply let go or thrown to the sidewalk, and so on. As stated above, these are disagreements about *facts*. For our purposes, however, let us stipulate that our two jurors resolve such factual disagreements, yet still cannot agree on whether cruelty applies. In such a case, the source of this lingering disagreement may be twofold. First, the term cruelty, as discussed above, might be vague, without clear boundaries. Second, the two jurors may also come from different personal backgrounds. As John Rawls pointed out:

> To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.[80]

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[80] JOHN RAWLS, POLITICAL LIBERALISM 56–57 (expanded ed. 2005). *See also* G.A. COHEN, IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH? 7–19 (2000); George

Our hypothetical juror who believes that the mother's act is "cruel" may then realize that another person may *reasonably* draw the line between cruel and not cruel some place other than where the juror might. The term is vague and different people coming from different personal experiences may *reasonably* have different evaluative reactions to the same set of facts. Once this understanding is reached, then we start approaching the idea that there may be a *reasonable doubt* as to whether the mother's act is to be described as "cruel."

To bring this point home, imagine that the hypothetical juror consults her definition of "proof beyond a reasonable doubt" to decide whether this is a situation that calls for an acquittal. One definition says that if you think "there is a real possibility that he is not guilty, . . . you must find him not guilty."[81] Another definition says that proof beyond a reasonable doubt is "proof that precludes every reasonable hypothesis except guilt." Another instruction tells the juror that if she "views the evidence in the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt," then she must vote to acquit. Yet another says that reasonable doubt is "a doubt that a reasonable person hearing the same evidence would have." It is also possible that there is no definition provided to her, and she is left to interpret "reasonable doubt" on her own according to the ordinary meaning of the two words.

These varying options all seem to indicate that our hypothetical juror confronting a situation of a *reasonable* disagreement over whether a term applies must vote to acquit. It seems that there is "a real possibility" that the act was not cruel (even though she herself *believes* it was cruel), that the hypothesis that the act was not cruel is "reasonable" and is not "preclude[d]" by evidence, the evidence appears to "reasonably permit[]" a finding of "not cruel," and the person sitting across the table and disagreeing about the meaning of cruelty can be "a reasonable person hearing the same evidence." Finally, she may think that doubting that the act was cruel is, while potentially, or even likely, wrong, *reasonable.*

So far we have been discussing just the type of uncertainty that may arise due to the problem of vagueness. Let us throw contestability into the mix. In the three Louisiana corporal punishment cases explored above—*Sedlock*, *Bartlett*, and *Chacon*—I posited that judges and jurors could reach different conclusions as to whether the conduct in question was "cruel" for two different reasons: (1) because the question of how much force is too

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Sher, *But I Could Be Wrong*, 18 SOC. PHIL. & POL'Y 64, 64–66 (2001).

[81] See *supra* text accompanying notes 29–35 for a summary of these (and other) jury instructions.

much force is a line drawing question with similar sorts of vagueness problems, and (2) because people from different "social groups and their ethnic variety" with "total experiences [that] are disparate enough for their judgments to diverge"[82] may have different ideas as to whether corporal punishment is an acceptable form of education and discipline of difficult children. This means that there may be a "reasonable hypothesis," "sufficiently plausible explanation," and "a real possibility" that some of these cases present facts that do not amount to cruelty and present evidence that "reasonably permit[s]" the conclusion of "not cruel."

In addition, as discussed above, we can add some of the subtler differences of opinion that may arise because there are disagreements about the "fit" of particular moral terms like "impair or debauch the morals of the child." The kinds of creepy and bizarre conduct we saw in *Hertel* (shower game) and *Hackett* (the naked man at the window) may amount to conduct that impairs or debauches the morals of the child, or may just be plain weird. And the "just plain weird, but not endangering the welfare of children" may just be the kind of "reasonable hypothesis" or "sufficiently plausible explanation" that is not ruled out by the available evidence, meaning that the evidence may "reasonably permit[]" the conclusion of "just plain weird" but nothing more.

III. WHAT'S THE PROBLEM?: BEYOND A REASONABLE DOUBT RULE AS RULE OF LENITY

In justifying the use of the beyond a reasonable doubt requirement for moral elements, an obvious analogy suggests itself. Given that the sources of reasonable doubt can be characterized in this context not as problems of proof but as problems of indeterminacy stemming from vagueness, contestability, and fit, there is a conceptual link to various legality principles, such as the "void for vagueness" doctrine. Since we are contemplating situations, however, where these laws have survived the void for vagueness challenges and have proceeded to ultimate factfinders, a more promising analogy may be the rule of lenity, the maxim that criminal statutes are to be construed narrowly.[83] That is, why not, one may suggest,

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[82] RAWLS, *supra* note 80, at 57.

[83] United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 296 (2012); 3 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 59:3 (6th ed. 2001) (describing the rule as stating that "penal statutes should be strictly construed against the government"). There are different versions of the rule of lenity, broad and narrow, and I refer to the more traditional, broader version here. *See* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV.

see jurors and judges as using the rule of lenity to err in favor of acquittal when a person's conduct falls into realms of legal uncertainty?

There are some rationales for such a position that are usually associated with the principle of legality.[84] First, there may be reasons of notice.[85] To the extent that one's behavior is in the gray area of criminality due to the indeterminacy of certain key terms in a criminal prohibition, there has not been a clear notice of the criminality of the conduct. In such a case, it would be unfair to criminally condemn an individual and punish him or her for such behavior. One may believe that the notice problem is particularly acute in situations of reasonable moral disagreement that stems from different personal backgrounds since, as Rawls pointed out, "the way we assess evidence and weigh moral and political values is shaped by our total experience," and "our total experiences must always differ."[86]

Another closely related rationale may have to do with the presumption of innocence. Peter Westen, for instance, has argued that the rule of lenity and the presumption of innocence are "inextricably linked."[87] He explains that the presumption of innocence is "a presumption that governs how uncertainties regarding the *facts* of a defendant's conduct ought to be resolved, while the presumption underlying the rule of lenity is a presumption that governs how uncertainties regarding the *statutory meaning* of a defendant's conduct ought to be resolved . . . ."[88] So, he continues, "the presumption of factual innocence requires that defendants be acquitted unless it is shown to a moral certainty that they have *in fact* done what it is known that the people of the state mean to prohibit in law," and the rule of legality "requires that defendants be acquitted unless it is shown to a moral certainty that the people of the state mean to prohibit *in*

57, 102–08 (1998).

[84] John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 200–01 (1985) (reviewing the various statements linking the rule of lenity with the principle of legality).

[85] *See, e.g.*, United States v. Bass, 404 U.S. 336, 347–48 (1971) (explaining that the rule of lenity is founded partly on the fair warning principle); McBoyle v. United States, 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."); Solan, *supra* note 83, at 134–41. For criticism of the notice rationale for the rule of lenity as both a descriptive and normative matter, see Jeffries, *supra* note 84, at 205–07, 229.

[86] RAWLS, *supra* note 80, at 56. *See also* COHEN, *supra* note 80, at 7–19; Sher, *supra* note 80, at 64–66.

[87] Peter Westen, *Two Rules of Legality in Criminal Law*, 26 LAW & PHIL. 229, 281 (2007).

[88] *Id.* at 281–82.

law what it is known that the defendants in fact did."[89] He concludes that the "two presumptions are equally fundamental because the risk of error in both cases is the risk that the state will unwittingly punish a defendant who did nothing wrong."[90]

A nice symmetry therefore appears to exist between the idea that the government must prove the facts beyond a reasonable doubt in order to convict and the idea that the government must prove beyond a reasonable doubt that the facts proven are in violation of the law.[91] If it is correct that the beyond a reasonable doubt rule applies throughout the process of determining questions of fact, questions of law, and mixed questions of law and fact, then we have an elegant solution to the problem raised in this Article about the applicability of the beyond a reasonable doubt standard to moral elements. This conclusion is further supported by its congruence with the familiar liberal idea of fairness in punishing. The next Part challenges this impression.

IV. AGAINST THE BEYOND A REASONABLE DOUBT STANDARD FOR MORAL ELEMENTS

Despite the considerable initial appeal of the rule of lenity analogy, the beyond a reasonable doubt standard should not apply to moral or normative questions. Applying the requirement to such elements would lead to overly underinclusive interpretations of criminal laws and frustrate the guidance and delegation functions of indeterminate moral terms in crime definitions.

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[89] *Id.* at 282.

[90] *Id.* Westen is not the only one who has drawn this connection. *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law–Fact Distinction*, 97 NW. U. L. REV. 1769, 1796 n.153 (2003) ("[In law, f]actual indeterminacy is dealt with by giving one party a burden of persuasion; whereas legal issues do not have an explicit burden . . . *In criminal law, however, the rule of lenity provides that indeterminacies in the law be resolved in favor of the defendant*." (emphasis added)); Lawson, *supra* note 3, at 888 ("The normative considerations underlying [the rule of lenity] are obviously the same as those underlying the reasonable doubt standard for proof of facts in criminal proceedings: criminal incarceration and stigma are deemed to be categorically more consequential than other legal outcomes and accordingly require a stricter standard of proof.").

[91] Sentiments like this probably explain a recent proposal that criminal juries be told that "the State bears the burden of showing beyond a reasonable doubt two things: (1) that the defendant committed each of the elements of the crime, and (2) *that the defendant did so in a manner that deserves your vote of censure*." Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 141–42 (2009) (emphasis added).

A. FUNCTIONS OF INDETERMINACY

As I explained above, the phenomenon I am describing—where there are reasonable disagreements about normatively rich elements—occurs because those normatively rich elements, like "reckless," "cruelty," and "impair or debauch a child's morals," are indeterminate. Two questions arise: Why use these terms at all? Why not use more precise terms that eliminate or reduce indeterminacy so that disagreements do not arise?

1. Error Avoidance

There are several well-documented reasons why indeterminate terms are often used as a general matter in law.[92] It is true that in order for the law to serve its guidance function well,[93] it needs to be written in terms that are determinate enough, often enough. However, it is sometimes difficult for legislators to specify in advance how people ought to behave in given situations. They may not be able to foresee all scenarios that fall within the scope of behaviors the law seeks to regulate and end up making mistakes. Or if they attempt to foresee all factual scenarios in advance and specify what ought to happen in each instance, the law in that area may be so complex and unwieldy that it would in fact start to compromise the guidance function of the law.[94] Attempts to eliminate indeterminacy in order to better guide will likely be self-undermining.

For instance, there are many different ways for a person to cause another person to die in a reckless manner. Some situations may come up often enough—say driving while heavily intoxicated—that bright-line rules may make sense, but there are more ways in which people can behave recklessly and cause death than we can specify or even imagine in advance. In such cases, it may be error-inducing to attempt to improve upon the formulation that one may be convicted of manslaughter if one causes a person's death in a reckless manner.

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[92] *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 124–36 (2d ed. 1994) (discussing "open texture"); Timothy A. O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUDY 1, 6–7 (1999).

[93] *See, e.g.*, HART, *supra* note 92, at 130 ("We shall thus indeed succeed in settling in advance, but also in the dark, issues which can only reasonably be settled when they arise and are identified.").

[94] *See, e.g.*, SCALIA & GARNER, *supra* note 83, at 32–33 ("Vagueness . . . is often intentional, as general terms (reasonable time, best efforts, equal protection) are adopted to cover a multitude of situations that cannot practicably be spelled out in detail or even foreseen." (emphasis removed)).

2. Guidance

A common complaint about indeterminate terms is that they seem to give people little guidance as to exactly what is allowed and what is not. What is the point at which corporal punishment goes from something people merely frown upon ("spanking") to child abuse ("beating")? What is the point at which a person's conduct goes from simply creepy and juvenile to "sexual conduct that debauches and impairs the morals of a child"? For that matter, an intelligence agency may want to know the point at which aggressive interrogation of terror suspects turns into torture.

When we are dealing with criminal behaviors, however, it may not be such a bad thing to be unclear.[95] We may have indeterminate terms as a way of warning citizens to stay well away from questionable practices, to proceed with care, to think about the purposes of the laws they may be coming close to violating, to deliberate about the meaning of words like "cruelty" and "reasonable," and so on. Indeterminate terms can be useful law enforcement devices because they induce people to stay away from gray areas and make it difficult for citizens to identify the areas in which they can engage in dubious behaviors and "get away with it."[96] In fact, familiar ordinary moral terms with vague contours may give citizens more information as to what not to do than precise technical legalese that spells out in detail what is prohibited.[97]

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[95] *Cf.* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1241 (2010) ("[W]hy exactly does the bad man want to know the precise cost of his misbehavior?").

[96] There are times, paradoxically, when we can achieve the same purpose through bright line rules, although we may debate how well this method works. A man who is considering having sex with a young-looking person who claims to be over eighteen may think twice about the possibility of sexual exploitation of a minor given that it may be difficult to verify exactly how old the object of his desire is. The wise thing to do for someone who is facing even a remote possibility of underage sex is then to walk away, and this may be precisely the kind of behavior we want to encourage. The point is that some legal uncertainty—whether done through vague terms, or, less obviously, bright line rules—can be desirable.

[97] *Cf.* John Gardner, *On the General Part of the Criminal Law*, *in* PHILOSOPHY AND THE CRIMINAL LAW 205, 246 (Antony Duff ed., 1998) ("In reality . . . what causes confusion and difficulty in the *administration* of the law . . . can be the very same thing that makes the law vivid and accessible to people outside the courtroom, on the way back from the pub or driving on the motorway or carrying the takings to the bank.") [hereinafter Gardner (1998)]; John Gardner, *Rationality and the Rule of Law in Offences Against the Person*, 53 CAMBRIDGE L.J. 502, 511–20 (1994) [hereinafter Gardner (1994)]; Jeremy Horder, *Criminal Law and Legal Positivism*, 8 LEGAL THEORY 221, 236–37 (2002); Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 327 (1998) ("Title 18 of the United States Code is a bad penal code . . . because its jumble of miscellaneous prohibitions does not intelligibly encode for the people what kinds of acts we are trying to prohibit, how those acts relate to each other, the values we hold

3. Delegation

When questions arise as to whether a particular death occurred due to a person's recklessness, the legal system must come to a resolution. We cannot just tell people to stop behaving recklessly and hope for the best. Deaths will happen, questionable behaviors leading to the deaths will be identified, and the government has to decide whether the legally established penal consequences for people who are responsible for such deaths should apply. Therefore, even though indeterminacy may be ineliminable and even desirable for the law's guidance function, determinate resolutions must be made.[98]

The point then is, as H.L.A. Hart put it, there sometimes exists a "need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case."[99] The key idea here is that when we have indeterminate terms in law, what is happening is delegation of the legislative authority to decisionmakers in different times and places when they are in better positions to make them.[100]

B. HOW THE PROOF BEYOND A REASONABLE DOUBT STANDARD INTERFERES WITH FUNCTIONS OF INDETERMINACY

1. Error Avoidance

When the beyond a reasonable doubt requirement applies to moral, as well as factual questions, error avoidance, guidance, and delegation functions are undermined. First, if the point of using indeterminate terms is to avoid having specific rules that misclassify behaviors or that fail to cover a situation that they ought to cover, it seems that the beyond a reasonable doubt standard can be at war with this purpose. Take a simple example of

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important, and how we rank the offenses in moral seriousness.").

[98] HART, *supra* note 92, at 132–33 (discussing negligence).

[99] *Id.* at 124–36.

[100] *See* Joseph Raz, *Sorensen: Vagueness Has No Function in Law*, 7 LEGAL THEORY 417, 419 (2001) ("Making law, we say, is and should be a collaborative enterprise. Different aspects of the law are made by different institutions at different times, involving courts, congress, state legislatures, local authorities, administrative authorities, regulatory authorities, and more. It is important that the right bodies will contribute the right elements to the law, and that they should do so at the right time. Therefore, when wisely used, all means and devices that ration powers to make the law among public organs and that regulate the time for the use of such powers have an important function in the law. Vagueness is one source of discretion. As such it is a power-regulating device and therefore has an important function.").

juvenile cruelty where there may be some uncertainty as to whether a behavior is cruel or not. There are behaviors that are so egregious that it would be unreasonable to reach the conclusion that they are not cruel. And there are behaviors that are so mild that it would be unreasonable to consider them to be cruel, and then those that are in between. What the beyond a reasonable doubt rule seems to counsel is that only the extremely cruel behaviors should count as "cruel" and behaviors that fall below that threshold should not count. So if what we are attempting to do with indeterminate terms like "cruelty" is to arrive at accurate decisions, what the beyond a reasonable doubt rule says is to err in favor of one direction, as opposed to adopt a strategy that would minimize the number of errors.

Some may object that this phenomenon is simply the familiar conflict between accuracy and fairness that we often see in criminal procedure (or in any legal procedure for that matter). The fact that we are willing to have a particular distribution of errors for factual elements with the beyond a reasonable doubt rule shows that there is nothing troubling about a device that purposefully permits a type of error to advance goals other than accuracy. A common justification given for the proof beyond a reasonable doubt requirement is encapsulated in the "Blackstone ratio," which states that it is better for ten guilty men to go free than for one innocent man to be convicted.[101] Why not apply the same principle here?

The answer is that there is a difference here. The relevant persons involved are not the factually innocent and the factually guilty. The mother in the *Chivis* case, the one who dropped her baby, may be "a little cruel" or "almost cruel." The men in *Sedlock* and *Barnett*, the two corporal punishment cases, may also be "a little cruel" or "almost cruel." The defendant in *Hertel*, who was responsible for the "shower game," and the man exposing himself in *Hackett*, may "impair or debauch the morals" of children "a little bit" or not quite. What would the reasonable doubt standard achieve when dealing with defendants like these? Would it be better to acquit ten who are "a little bit cruel" than to convict one who is "almost cruel, but not quite"?

We certainly want to live in a world, it seems, where people who are "almost cruel, but not quite" are not convicted. But is our preference to not convict "almost cruel" defendants so great that we are willing to let ten "a little bit cruel" defendants go free? We generally find the situation where an innocent person is convicted to be a great tragedy: witness the uproar over DNA evidence and wrongful convictions. But it is harder to believe that we

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[101] 4 WILLIAM BLACKSTONE, COMMENTARIES *352. *See also* Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

are equally sympathetic to those who undertake conduct that is "almost cruel but not quite." For one thing, such people are typically on notice that they are "in a delicate situation" and are "taking a risk."[102]

It is unwise for the law to capture too many questionable activities and label them as "criminal," but that is a question of how broad or narrow the definition of a crime ought to be. However, once we have decided to use broad, vague terms in crime definitions, the question arises as to whether we would want to limit the scope of the term, say, "cruelty" so it actually means "extremely cruel" and potentially leaves out "a little bit cruel" lest we capture "almost cruel."

Perhaps the Blackstone ratio should apply here, too. That is a value judgment we can make. The point, however, is that the nature of variables involved here is fundamentally different from what we generally think about when we think about the beyond a reasonable doubt requirement.

2. Guidance

Another reason to question the beyond a reasonable doubt standard in the context of moral questions is the guidance function of indeterminacy. Again, it sounds odd to say that indeterminate terms advance the guidance function of law better than precise terms. But, as discussed above, it can be more informative for citizens to see words like "cruel" and "unreasonable" than to grapple with a lengthy list of prohibitions that more precisely define "cruelty." This way of guiding citizens enlists their moral common sense and invites them to think about the moral implications of what they are doing in certain questionable situations.

If, however, we use the beyond a reasonable doubt standard to ultimately judge what is "cruel" or "unreasonable," we would end up with a situation where by "cruel," we really mean "extremely cruel," and by "unreasonable," "extremely unreasonable," and so on. In a sense we are already doing that, of course, by putting certain morally loaded terms into criminal codes. To the extent that there is a general understanding that criminal law deals only with serious and not trivial misbehaviors, words like "cruel" in a criminal code should be understood in a way that is consistent with a certain gravitas of criminal law.

But we would be going much further than that by applying the beyond a reasonable doubt standard to moral questions. Such an application would narrow the scope of criminal statutes to cover only such conduct or behavior that every reasonable juror, real or hypothetical, would conclude is cruel or unreasonable. That is, the doubts of a single real or hypothetical

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[102] Waldron, *supra* note 70, at 536.

reasonable juror would preclude conviction under the statute. The terms would be redefined in such a manner that whatever moral gray areas the indeterminate terms demarcate would be erased and would leave covered under the statute only the most extreme types of conduct.[103] We would, in other words, be saying one thing and meaning another and forgoing law enforcement advantages of using common-sense moral terms.

One may object that the beyond a reasonable doubt standard *already* narrows the definitions in this way. That is, because of the beyond a reasonable doubt standard, we can expect that criminal law would be enforced only in special situations where the crimes are serious enough for law enforcement to go through the trouble of jumping over numerous criminal procedural hurdles and the evidence is strong enough that prosecutors are willing to attempt to prove the crime's elements beyond a reasonable doubt. It seems, then, that there is quite a bit of underenforcement built into the system, and the meaning of "cruel" is not really "cruel" but "cruel enough for law enforcement to bother and even then only when there is reliable evidence."

It is true that in a well-working system of criminal law, there are numerous procedural protections combined with discretion given to various institutional actors to refrain from pursuing certain criminal charges. For example, police officers have discretion to walk away from certain cases and concentrate on others, while prosecutors have discretion to pursue or drop charges throughout the process. Jurors, too, can exercise their nullification power to let a defendant walk free, even if the prosecutor has successfully proven that the defendant committed a crime as defined by the law. And, finally, there is also the possibility of executive pardons. So it is

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[103] Along these lines, consider the following sentence from a story by an attorney-turned-legal-commentator defending the jury's decision to acquit the Los Angeles police officers in the Rodney King beating case:

> I like to think that, had I been obliged to subdue [Rodney] King on March 3, 1991, I would have shown the sort of courage, restraint, and presence of mind that the prosecution expert believes I should have shown. And that I would have done so even if I thought King was on PCP, and even if I didn't know whether King was armed, and even if King had continued resisting after being shot with two Taser darts, and even if King had already jumped up and attacked me once. *But do I believe it beyond a reasonable doubt?*

Roger Parloff, *Maybe the Jury Was Right*, AM. LAW., June 1992, at 7, 79 (emphasis added). The reasoning is a bit convoluted and difficult to make out, but what is important here is that he seems to agree with the prosecution that a reasonable police officer behaves differently from the way the police officers in the case actually behaved, but that he still would vote to acquit because he is not confident enough of his own assessment to say that the police officers were "unreasonable" beyond a reasonable doubt.

already the case that a law will go "unenforced" in numerous situations, which can, some may say, threaten the rule of law values.

It seems then that there are two reasons why substantive criminal law is not enforced to the letter. First, "guilty" people may go free because of stringent demand for evidence placed on the state by the beyond a reasonable doubt standard (as well as other procedural protections that may interfere with accurate outcomes, such as the exclusionary rule for evidence collected in violation of the Fourth Amendment). Second, "guilty" people may go free because the relevant institutional actors make it happen for various prudential reasons.

Importantly, however, the situation here is different. Take the discretionary devices like charging discretion and executive pardon first. It is difficult to write laws that generate results that are appropriate or intended in all cases where they apply, and there are grave legal consequences—deprivation of liberty, stigma, and so on—that come with criminal convictions. One of the reasons we have these mechanisms is so that they can act as safety valves when the law, as written, appears to suggest an outcome that we may not tolerate. But one thing that these mechanisms have in common is that they are highly discretionary, unpredictable, and obscure by design. They are safety valves that are installed into the system precisely because we do not want to damage the guidance function of criminal law by redefining the terms in advance to prevent all unintended consequences. They minimally invade substantive criminal law by doing their work without damaging substantive criminal law itself.[104] By contrast, if we apply the beyond a reasonable doubt standard when interpreting moral elements, the meaning of key terms in substantive criminal law goes through a change so that only the extreme instantiations survive.

The various procedural protections are more transparent than the discretionary devices that we just discussed, but it would be more apparent to the public that they are *procedural* hurdles and do not reflect an actual change in the definitions of criminal law from cruel to extremely cruel. People say things like "getting off on a technicality" when there is a procedural problem with a case, and that is a way of distinguishing procedure-based acquittals and dismissals from substance-based acquittals and dismissals, meaning that the damage to the ordinary language used in crime definitions is minimal. That is not so when it comes to moral elements put to the test of the beyond a reasonable doubt standard.

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[104] *Cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 634–36 (1984).

3. Delegation

To see how the beyond a reasonable doubt standard undermines the delegation function of indeterminacy, we must first consider why particular institutional actors are given the task of applying indeterminate moral terms to individual cases. Here, it is important to distinguish between judges and juries because not all rationales apply to both institutional actors.

First, as implied in the previous section, we can avoid errors by leaving the articulation of the meaning of terms like, say, "recklessness" and "cruelty" to judges and juries. Such a delegation is desirable not necessarily because judges and juries are "moral experts"—or at least not in the same way that the Environmental Protection Agency has expertise on environmental matters that Congress may lack. Rather, it is because we may simply reach higher-quality moral decisions by leaving things undecided and making case-by-case determinations as individual cases arise. So certain moral decisions, which could have been made at the legislative stage, are being deferred to other parts of the government.

We should notice here a certain anomaly. When legislators decide to outlaw cruelty and even make some decisions as to what the law ought to prohibit, there is no standard of proof that governs their decisions. We would, of course, expect them to exercise care in criminalization, and it would be even better, at least from a particular moral perspective, if the legislatures legislated in ways that are consistent with moral blameworthiness in criminalizing.[105] However, "beyond a reasonable doubt" of, say, blameworthiness is not the correct standard when legislating. So requiring jurors and judges to subject their interpretations of terms like "cruelty" and "recklessness" to the beyond a reasonable doubt standard implies that moral decisions, when made by them, have to clear a more stringent standard of proof than when made by legislators.

Such a position would not be a logical contradiction, but what would be the justification? It would have to be that legislators do not trust judges and juries to make moral decisions in individual cases with care. So we end with a paradox. Legislators use broad, vague terms like recklessness because they think they are not as well positioned to make more specific moral judgments, so they pass them on to those who are better positioned—judges and juries. However, when the questions are passed on to those who are better positioned, the level of distrust of those who are better positioned is such that the beyond a reasonable doubt standard is applied at the individualized moral judgment stage. The question that arises then is:

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[105] *See, e.g.*, DOUGLAS HUSAK, OVERCRIMINALIZATION 66–76 (2008).

Which is it? Are judges and juries better positioned or not to make particularized decisions about individual cases?

Some might object that the impression of paradox is illusory. Legislators defer factual judgments in individual cases to jurors and judges, too, but of course the standard of proof there is the beyond a reasonable doubt standard. So, here, too, jurors and judges are "better" at determining historical facts, but they have to apply the stringent standard of proof. So there is no paradox.

But the problem with this objection is that when it comes to factual judgments in individual cases, legislators are passing them on to other institutional actors because it is *not their job to make such judgments*. Their job is to pass laws that apply prospectively to broad populations and is not, by institutional design, to determine historical facts and apply the laws to individual cases. By contrast, in the case of moral decisionmaking, it is within their jurisdiction as lawmakers to determine what ought to be prohibited, and they are simply delegating *that lawmaking* task to judges and juries. There is no *delegation* for factual matters since it was not their task to begin with, but we cannot say the same with moral judgments. So the paradox remains. If judges and juries were better at certain types of moral decisionmaking than legislators, why would we want to require a more stringent standard of proof from judges and juries than from legislators?

The paradox worsens once we focus our attention on juries. The case for delegating particularized moral judgments to juries has been made by many scholars. Juries in criminal cases are tasked not only with factfinding but also with "the power to elaborate the governing norms underlying criminal laws from the perspective of the community and its sense of moral blameworthiness."[106] It is thus often argued that the jury serves as the

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[106] Barkow, *supra* note 8, at 59. *See also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 155 (1986); Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1209 (1998) ("[T]he jury's task is . . . to make individualized moral judgments through application of indeterminate rules with terms that must be given normative content from broadly held social norms."); Cahill, *supra* note 4, at 94 ("In addition to its procedural role of weighing the evidence, the jury has a substantive role of assigning moral blame . . . ."); Marder, *supra* note 8, at 904 ("There may be cases where the law is unclear, the facts are uncertain, or the standards are ill-defined. These grey areas give the jury room to bring their sense of community norms into the process of applying the law to the facts."); Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 103 (1990) ("The conflict that emerged at the birth of the jury has proved durable—that between juries as mirrors of popular (or at least lay) values and judges as representatives of a professional elite.").

community's moral conscience in bringing the community's ordinary moral sentiments to bear on specific cases.[107] Therefore, the justification for leaving particularized moral judgments to juries is not simply that it is difficult to specify in advance what kinds of behaviors are cruel or reckless. Rather, leaving such judgments to juries seems reasonable because we view jurors as more qualified to pass moral judgments than both judges and legislators. I mentioned above that the argument for deferring to judges and jurors is not necessarily like the legislature leaving pollution standards to experts at the Environmental Protection Agency. But when it comes to jurors, they *are* moral experts as members of the community, and the task of articulation and elaboration of governing norms is given to them *because* of their expertise.

Again, there is nothing in principle wrong with delegating a task and attaching a number of conditions as to how that delegated task ought to be executed. The honest truth of the matter is that we are ambivalent about

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In fact, there is historical evidence that juries had the power to decide questions of law at the time of the Founding. *See, e.g.*, JEFFREY ABRAMSON, WE, THE JURY 76 (1994) (noting that several state constitutions provided that the jury be the judge of law); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903 (1994) ("In America following the Revolution, however, the authority of juries to resolve legal issues was frequently confirmed by constitutions, statutes, and judicial decisions."); Barkow, *supra* note 8, at 66 ("[T]here is evidence that, both before the Framing and for a time thereafter, juries were deciding questions of law."); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939) ("The judges in Rhode Island held office not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury.") (internal quotation marks omitted); Marder, *supra* note 8, at 912 ("[At the time of the founding,] judges typically instructed jurors that they were free to decide the facts and the law."). That particular power, however, was curtailed in *Sparf v. United States* in 1895. 156 U.S. 51, 106 (1895).

[107] *See, e.g.*, Barkow, *supra* note 8, at 69; Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2426 (1999); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 998–99 (2003) ("[V]arious members of the Court have on occasion written about how . . . the death penalty can only be imposed by ordinary citizens with a broader imprimatur of community moral judgment than possessed by single judges . . . ."); Iontcheva, *supra* note 18, 360–61 ("A jury bias in favor of harshness may accurately reflect community sentiments—for example, that recidivists should be punished especially harshly."); Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1375–76 (1999) (reviewing KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998)) ("One of the primary functions of a jury is to express the moral sentiment of the community in applying the law."); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1775 (1999) ("The one task that juries indisputably perform better than judges is to reflect the 'conscience of the community' and to express public outrage at the transgression of community norms.").

how much power juries ought to have.[108] However, in this particular case, the delegation function of indeterminacy is threatened and made incoherent by the beyond a reasonable doubt standard. On the one hand, we are asking jurors to exercise their capacities for moral observation, deliberation, and judgment to determine whether a given defendant's behavior qualifies as "cruel." At the same time, we would be telling them not only that they should attempt to doubt their own moral convictions but that, furthermore, they are not allowed to act on their belief that an act is "cruel" if another person may *reasonably* determine that it is not cruel. If jurors are trusted enough to be asked to apply their moral conscience to criminal cases, and the task is delegated to them because of the belief that they are better positioned to judge their fellow citizens, then it is unclear why we would want to place their moral conscience in a straitjacket in this way.[109]

V. SUMMARY AND CONCLUSION

This Article has argued that the beyond a reasonable doubt requirement should not apply to moral elements because the requirement would lead to overly underinclusive interpretations of criminal laws and frustrate the guidance and delegation functions of indeterminate moral terms in crime definitions. Here are some implications:

First, if the beyond a reasonable doubt requirement should not apply to moral elements, that means that the criminal law's commitment to the state's burden to prove every element of the crime beyond a reasonable doubt is wrongheaded.

Second, the rule of lenity argument in favor of the beyond a reasonable doubt requirement for moral elements is wrong. The supposed inextricable link between the rule of lenity and presumption of innocence that Peter Westen posited does not exist.[110]

Third, *United States v. Gaudin* is a deeply flawed decision. It correctly pointed out that "the application-of-legal-standard-to-fact sort of question . . . , commonly called a 'mixed question of law and fact,' has

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[108] The literature that examines this phenomenon is enormous. *See generally* David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407 (2013).

[109] Paradoxically, giving juries more discretion in the way I am suggesting, which requires introducing a degree of unpredictability to criminal law, may actually *promote* predictability. *See* STUNTZ, *supra* note 8, at 304 ("[W]hen prosecutors have enormous discretionary power, giving other decisionmakers discretion promotes consistency, not arbitrariness. Vague legal lines give more discretion to juries and trial judges. Discretion limits discretion; institutional competition curbs excess and abuse.").

[110] Westen, *supra* note 87, at 281–82.

typically been resolved by juries."[111] However, it is a mistake to conclude from this observation that such mixed questions must be decided on the beyond a reasonable doubt standard. The *Gaudin* Court's implicit argument that juries decide mixed questions of law and thus they must apply the beyond a reasonable doubt standard is incorrect. More generally speaking, the issue as to whether a question is for the judge or for the jury needs to be decoupled from the question of the appropriate standard of proof, and the two questions need to be evaluated separately.

The sources of the problem with the beyond a reasonable doubt standard when it comes to moral elements go deep. Several structural features of criminal law and law generally conspire to create the problem. First, the law is *bivalent*. Either a person is guilty of murder or not guilty, negligent or not negligent, is in breach or not in breach. A jury is not given the option of "on a scale of one to ten, is the defendant guilty?" There are only two options, convict or acquit; cruel or not; reasonable or not; grave or not; and so on. The law requires definitive answers one way or the other, even though that is not how people generally experience the world.[112] Second, crime definitions are often *unspecific* in the sense that general terms are used to capture a class of bad behaviors that come in different shapes. Instead of spelling out what "reckless" killing means and having a detailed and precise crime definition, for instance, we simply have a provision that defines "involuntary manslaughter" as involving reckless killing. Third, crime definitions are often *loaded* in the sense that culturally and morally loaded terms like "cruelty" are used instead of dry, technical, sterile terms that lawyers sometimes like to use to bring precision.[113]

In short, criminal law is bivalent and, at least typically, unspecific and loaded, and once we throw these features of the law into a world of moral diversity and reasonable moral disagreements, we can see how problematic the beyond a reasonable doubt standard can be.

Many questions arise. Should we have two different instructions for two different types of questions? If so, how would we police the line between questions of fact and mixed questions of law and fact? Would we first have to resolve the longstanding problem of the law and fact

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[111] United States v. Gaudin, 515 U.S. 506, 512 (1995).

[112] *See, e.g.*, LEO KATZ, WHY THE LAW IS SO PERVERSE 139–45 (2011); Timothy A.O. Endicott, *Vagueness and Legal Theory*, 3 LEGAL THEORY 37, 62 (1997).

[113] *See* R.A. Duff & Stuart P. Green, *Introduction: The Special Part and Its Problems*, *in* DEFINING CRIMES 1, 13–16 (R.A. Duff & Stuart P. Green eds., 2005); R.A Duff, *Rule-Violations and Wrongdoings, in* CRIMINAL LAW THEORY 47, 56–61 (Stephen Shute & A.P. Simester eds., 2002); Gardner (1998), *supra* note 97, at 246–47; Gardner (1994), *supra* note 97, at 512–20.

distinction? Even if we can somehow figure out the boundaries between law and fact and mixed questions of law and fact, would it be more confusing to have two different standards apply to two different types of questions or to have one standard that applies to two different types of questions?

These questions cannot be taken up here. The purpose of this Article has not been to provide all the answers but to highlight a way in which the maxim that the state is required to prove beyond a reasonable doubt every element of the crime with which the defendant is charged is deeply flawed. The persistent confusion about the meaning of reasonable doubt will not be dispelled unless and until we come to grips with this fact.