Note

Definite Convictions: *United States v. Alt* and the Seventh Circuit's Prohibition on Defining "Beyond a Reasonable Doubt"

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The Seventh Circuit prohibits judges and attorneys from defining "beyond a reasonable doubt" to jurors. While United States v. Alt *crystalized this prohibition in early 2023, the circuit has effectively banned definition of the phrase for much longer. Yet, a growing consensus of psychological research into the standard reveals that when left undefined, it fails to protect criminal defendants from uncertain convictions that violate the requirements of due process. What's more, the phrase was never supposed to serve as a standard of proof in the first place—its historical origins reveal it functioning to assuage the spiritual concerns of early Christian jurors when sitting in judgement of defendants. Nonetheless, the Supreme Court has refused to require lower courts to define the phrase or give any meaningful guidance in their attempts to do so, enabling* Alt's *misguided prohibition.*

This Note argues that the Seventh Circuit's prohibition against defining "beyond a reasonable doubt" violates Due

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Process, threatens judicial legitimacy, obstructs the development of American criminal law, and is ethically wrong. To achieve this, this Note engages in an interdisciplinary investigation of the standard, exploring it as an object of occult history, American jurisprudence, and psychological study. This Note concludes by marshaling this interdisciplinary understanding into a genealogical critique of the Alt *prohibition as a legal solution sufficient to redirect the Seventh Circuit's precedent and offering practical workarounds and implications for criminal practitioners.*

INTRODUCTION

On March 28, 1967, twelve-year-old Samuel Winship had school off.[1] His mother, Ethel, took Samuel and his sister to the zoo in the morning, after which the trio returned to their apartment.[2] Samuel and his sister then rode their bicycles around town through the afternoon, until Ethel called them home for dinner around 5:00 PM.[3] After the family ate together, Samuel spent the evening watching television before going to bed.[4]

The next evening, police grabbed Samuel, arrested him, and took him to the local police precinct.[5] There, Samuel came face to face with a Mrs. Rae Goldman.[6] Mrs. Goldman worked at a local furniture store where, the previous day at 6:15 PM, she saw a young boy burst out of the bathroom and race out the door.[7] Her suspicions raised, Mrs. Goldman went to check the locker where she kept her personal belongings during the workday and found her pocketbook missing.[8] She ran out into the street after the boy, but he was long gone.[9] Mrs. Goldman then went to the boy's hiding place in the bathroom and found her pocketbook strewn on the floor, with $112 in cash missing.[10] Now, upon seeing Samuel at the precinct, Mrs. Goldman was certain that he was the same boy who made off with her money.[11]

After Samuel was charged in New York Family Court, a judge found that the City had proven Samuel guilty by a preponderance of the evidence—but it had not proven his guilt beyond a reasonable doubt.[12] However, under New York state law,

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1. Brief for Appellant at 3, 6, *In re* Winship, 397 U.S. 358 (1970) (No. 778) [hereinafter Winship Brief].
2. *Id.* at 5–6.
3. *Id.*
4. *Id.* at 6.
5. *Id.*
6. *Id.* at 5.
7. *Id.* at 3–6.
8. *Id.* at 3–4.
9. *Id.* at 4.
10. *Id.*
11. *Id.* at 5.
12. The transcript includes the following exchange between Winship's civil aid lawyer and the judge:

> Counsel: "Your Honor is making a finding by the preponderance of the evidence."
>
> Court: "Well, it convinces me."

meeting the lower preponderance standard was all that was required to prove a juvenile's guilt in criminal adjudications.[13] Samuel was sentenced to placement in a reform school for an eighteen-month period, with the court retaining complete discretion to extend his placement for up to six years until he turned eighteen.[14]

Samuel's civil aid lawyers tirelessly fought his case up to the United States Supreme Court.[15] There, the Court overturned Samuel's conviction in the landmark decision *In re Winship*, holding that the Due Process Clause of the Fourteenth Amendment requires the accused's guilt to be proven beyond a reasonable doubt.[16] In righteous, soaring language, the Court deemed it preposterous for a boy facing "confinement for as long as six years" to receive any lesser degree of protection than the beyond a reasonable doubt (BARD) standard.[17] The Court continued, lauding the BARD standard as "basic in our law and rightly one of the boasts of a free society" and one of "the fundamental principles that are deemed essential for the protection of life and liberty."[18] *In re Winship* was quickly deemed a crowning achievement in American criminal jurisprudence, celebrated by scholars and jurists alike.[19]

> Counsel: "It's not beyond a reasonable doubt, Your Honor."
>
> Court: "That is true . . . . Our statute says a preponderance and a preponderance it is."

In re Winship, 397 U.S. 358, 359–60 n.2 (1970).

13. *Id.* at 360 (explaining that the New York Family Court Act permitted adjudications of juveniles to be decided upon the preponderance of the evidence standard).

14. *Id.*

15. *Id.* at 358.

16. *Id.* at 364 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

17. *Id.* at 368 (quoting *In re* Winship, 247 N.E.2d 253, 260 (N.Y. 1969) (Fuld, J., dissenting)).

18. *Id.* at 362 (first quoting Leland v. Oregon, 343 U.S. 790, 802–03 (1952) (Frankfurter, J., dissenting); and then quoting Davis v. United States, 160, U.S. 469, 488 (1895), *abrogated by* Dixon v. United States, 438 U.S. 1, 2 (2006)).

19. *E.g.*, Miller W. Shealy, Jr., *A Reasonable Doubt About "Reasonable Doubt"*, 65 OKLA. L. REV. 225, 231 (2013) ("While *Winship* was not the first case to discuss the concept of reasonable doubt, it was the first case to do so in a manner that was profoundly constitutional with broad and sweeping implications for criminal justice."); Victor v. Nebraska, 511 U.S. 1, 28–29 (1994)

But none of that mattered to Samuel Winship. While his case worked through appeals, state authorities tore Samuel from his family and marooned him in an upstate reform school, notorious for neglectful staff and atrophying programming, to serve his eighteenth-month placement.[20] After these first eighteen months, the state court made good on its threat and extended his placement by one year.[21] Regardless of the Supreme Court's promise that "the case against him must be proved beyond a reasonable doubt,"[22] Samuel Winship spent what was then a fifth of his life in confinement based upon a preponderance of the evidence.[23]

The dissonance between *Winship*, the decision, and Winship, the person, unmasks the BARD standard's two faces that continue to sneer at American criminal law. As it was in *Winship*, the decision, the BARD standard continues to be hailed by courts and scholars alike as the proud bedrock of the American criminal legal system.[24] Requiring the government to prove a defendant's guilt beyond a reasonable doubt has been solidified as a quintessential guarantee of due process for those accused of a

(discussing the importance of the *Winship* decision (quoting *Winship*, 397 U.S. at 361, 364)).

20. Winship Brief, *supra* note 1, at 8 (discussing Samuel's placement in the New York Training School for Boys); Sherman Cahal, *Warwick State Training School for Boys*, ABANDONED (Dec. 25, 2018), https://abandonedonline.net/location/warwick-state-training-school-for-boys [https://perma.cc/VRW6-WTSL] (explaining that the school faced high-profile criticism for its faculty's poor treatment of the boys by 1945, was systematically unable to meet the programming needs of its clientele by 1970, and was shut down by the state in 1976). *See generally* COLSON WHITEHEAD, THE NICKEL BOYS (2019) (novelizing the terrifying history of an American reform school).

21. Winship Brief, *supra* note 1, at 8.

22. *Winship*, 397 U.S. at 368.

23. Winship Brief, *supra* note 1, at 9.

24. *E.g.*, *Victor*, 511 U.S. at 5 ("The government must prove beyond a reasonable doubt every element of a charged offense. Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication." (citing *Winship*, 397 U.S. 358); Shealy, *supra* note 19, at 227 ("This great right is at the very core of our system of ordered liberty; it is a great bulwark of our freedom, a fundamental, bedrock aspect of our criminal justice system."); Sarah R. Fishel, How Solid is the Foundation? Assessing Jurors' Pre-Trial Application of the Presumption of Innocence 4 (Mar. 3, 2023) (Ph.D. dissertation, Drexel University) (on file with the Minnesota Law Review) (characterizing the State's responsibility to overcome its burden of proof as a foundational assumption of American criminal law).

crime and a celebrated feature of the American justice system.[25] The phrase is so ubiquitous that it has bled into the public zeitgeist and is reliably familiar to ordinary Americans.[26]

Yet, as it was for Winship, the person, the BARD standard lacks substance for the criminally accused it purports to protect. Nobody knows what the phrase "beyond a reasonable doubt" actually means.[27] Studies repeatedly show that jurors misunderstand it as permitting convictions with a disturbing degree of uncertainty.[28] States and federal courts are just as confused and flail when interacting with the standard.[29] The Supreme Court has given lower courts almost no guidance on the phrase—repeatedly refusing to define it and providing minimal parameters

25. *E.g.*, Zhuhao Wang & Eric Zhi, *Lifting the Veil of Mona Lisa: A Multifaceted Investigation of the "Beyond a Reasonable Doubt" Standard*, 50 GA. J. INT'L & COMPAR. L. 119, 122 (2021) ("[I]t is magically important in theory that as the cornerstone to American criminal jurisprudence, an accused shall be presumed innocent until the government proves guilt beyond a reasonable doubt." (emphasis omitted)); Alec Walen, *Proof Beyond a Reasonable Doubt: A Balanced Retributive Account*, 76 LA. L. REV. 355, 356 (2015) ("The [BARD] standard . . . is now part of American legal folklore.").

26. William Douglas Woody & Edie Greene, *Jurors' Use of Standards of Proof in Decisions About Punitive Damages*, 30 BEHAV. SCIS. & L. 856, 868 (2012) (mentioning the BARD standard's "ubiquity in both news and popular media related to crime"); Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH., PUB. POL'Y, & L. 589, 614 (1997) (discussing general awareness of the BARD standard); Svein Magnussen et al., *The Probability of Guilt in Criminal Cases: Are People Aware of Being 'Beyond Reasonable Doubt'?*, 28 APPLIED COGNITIVE PSYCH. 196, 199 (2013) (explaining that people in Western societies are generally aware of the standard of proof applied in criminal cases).

27. *See, e.g.*, Wang & Zhi, *supra* note 25, at 123 (noting the seeming inability of courts or scholars to offer a definition of this phrase); Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295, 295 (2003) ("Stated succinctly, the notion of guilt 'beyond a reasonable doubt' . . . is obscure, incoherent, and muddled.").

28. *Compare, e.g.*, Magnussen et al., *supra* note 26, at 199 (finding that jurors uninstructed on the BARD standard were comfortable voting to convict a defendant with sixty-eight percent certainty of their guilt), *with* Daniel Pi et al., *Quantifying Reasonable Doubt*, 72 RUTGERS U. L. REV. 455, 474 (2020) (reviewing surveys of judges which suggest most judges quantify the probabilistic meaning of beyond a reasonable doubt averaged at ninety percent).

29. *See, e.g.*, United States v. Shaffner, 524 F.2d 1021, 1023 (7th Cir. 1975) (stating that any attempt to define "reasonable doubt presents a situation equivalent to playing with fire"); United States v. Lawson, 507 F.2d 433, 443 (7th Cir. 1974) ("[T]he better practice is not to attempt the definition [of reasonable doubt], and that any effort at further elucidation tends to misleading refinements.").

as to what it encompasses.[30] Rather, it has explicitly let lower courts off the leash to experiment with defining the phrase.[31]

Instead of gravitating towards any consensus, federal and state courts across the country have adopted widely different approaches to defining and permitting explanations of the BARD standard.[32] Pattern jury instructions on the phrase vary significantly between jurisdictions,[33] and the federal circuit courts have divided themselves into camps that discourage, encourage, or even compel defining the phrase for jurors.[34]

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30. *E.g.*, Miles v. United States, 103 U.S. 304, 312 (1880) (finding no error in a "reasonable doubt" instruction but refusing to offer its own definition); Hopt v. Utah, 120 U.S. 430, 440–41 (1887) (upholding a reasonable doubt instruction without providing a definition); Coffin v. United States, 156 U.S. 432, 460 (1895) (defining reasonable doubt only in comparison to presumption of innocence).

31. Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("[T]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.").

32. *See* Lawrence T. White & Michael D. Cicchini, *Is Reasonable Doubt Self-Defining?*, 64 VILL. L. REV. 1, 3–4 (2019) (surveying differences across federal and state court instructions and instruction practices on the BARD standard).

33. *Id.* (discussing variations in pattern instructions on the BARD standard). *Compare, e.g.*, *Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit*, NINTH CIR. JURY INSTRUCTIONS COMM. 112 (May 2023), https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2023_05.pdf [https://perma.cc/6JTE-M239] ("A reasonable doubt is a doubt based upon reason and common sense and is not based purely on speculation. It may arise from a careful and impartial consideration of all the evidence, or from lack of evidence."), *with Chapter 3. Final Instructions: General*, U.S. CT. APPEALS FOR THE THIRD CIR. § 3.06 (Jan. 2024), https://www.ca3.uscourts.gov/sites/ca3/files/1%202024%20Chapter%203%20for%20posting.pdf [https://perma.cc/WD37-4SV2] ("A reasonable doubt is . . . a doubt of the sort that would cause him or her to hesitate to act in matters of importance in his or her own life."), *and Manual of Model Criminal Jury Instructions for the District Courts of the Eight Circuit*, JUD. COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIR. § 3.11 (2023) [hereinafter *Eighth Circuit Model Instructions*], https://juryinstructions.ca8.uscourts.gov/instructions/criminal/Criminal-Jury-Instructions.pdf [https://perma.cc/SKR3-DCQ7] ("Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person, after careful consideration, would not hesitate to rely and act upon that proof in life's most important decisions.").

34. *E.g.*, Brown v. Greene, 557 F.3d 107, 113 (2d. Cir. 2009) ("[T]rial judges should use the model jury instructions [on reasonable doubt] when applicable."); United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985) ("District courts are again admonished not to define reasonable doubt in their jury instructions, but merely because they do so does not require reversal."); Thompson v. Lynaugh, 821 F.2d 1054, 1061 (5th Cir. 1987) (stating that attempting to define "reasonable doubt" for juries is "disfavored by this court"); *Eighth Circuit Model*

In January 2023, the Seventh Circuit established a new hard line on this issue in *United States v. Alt*.[35] Within an otherwise banal federal criminal case,[36] the court would shift from its practice of discouraging judges and attorneys from defining the phrase "beyond a reasonable doubt" to outright prohibiting any definition on the phrase.[37] While the Seventh Circuit had been slouching towards this position for some time,[38] *Alt* established it as the only federal circuit to forbid explanation of the phrase.[39]

This Note will interrogate the implications of the Seventh Circuit's prohibition for both criminal defendants and the court itself through an interdisciplinary investigation of the "beyond a reasonable doubt" standard. Upon this foundation, it will argue that history and psychology prove the *Alt* prohibition neuters the BARD standard's factual proof function while maintaining its moral comfort functions.[40] This is illegal,[41] a threat to judicial

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Instructions, *supra* note 33, § 3.11 (citing Friedman v. United States, 381 F.2d 155, 160–61 (8th Cir. 1967), as standing for the proposition that courts must instruct the jury on reasonable doubt); *see also* White & Cicchini, *supra* note 32, at 34 (surveying attitudes of federal district courts in defining the BARD standard).

35. United States v. Alt, 58 F.4th 910, 920 (7th Cir. 2023) (explicitly prohibiting courts from defining "beyond a reasonable doubt").

36. *Id.* at 913 (explaining Alt's conviction of attempted enticement of a minor).

37. *Id.* at 919 (explaining that "we have been explicit about the inappropriateness of defining 'reasonable doubt,'" and the district judge's admonition that the phrase had not been defined was curative of any prosecutorial error (citation omitted)).

38. *See* United States v. Alex Janows & Co., 2 F.3d 716, 723 (7th Cir. 1993) (admonishing against defining "reasonable doubt" to juries); United States v. Bruce, 109 F.3d 323, 329 (7th Cir. 1997) (stating that it is "well established" that Seventh Circuit courts should not attempt to define "reasonable doubt" (citations omitted)).

39. *Alt*, 58 F.4th at 921 (Kirsch, J., concurring) ("Our rule stands alone."); *see also supra* note 34 and accompanying text.

40. *See infra* Part III. This Note makes use of Professor James Q. Whitman's taxonomy of "proof procedures" and "moral comfort procedures" for mechanisms within criminal trials. *See* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 6 (2008). Whitman explains "proof procedures" as mechanisms that "aim to achieve proof in cases in which the truth is unknown," whereas "[m]oral comfort procedures . . . aim to relieve the moral anxieties of persons who fear engaging in acts of judgment . . . ." *Id.*

41. *See infra* Part II.B.1.

legitimacy,[42] an obstruction to legal development,[43] and wrong.[44] Yet, through the emerging legal argumentation schema of genealogical critique,[45] these interdisciplinary findings become the necessary tools to overturn the Seventh Circuit's precedent and restore this foundational protection for the accused.

To achieve this, Part I of this Note will review the historical literature on the intermingled theological and epistemological origins of this phrase,[46] the development of the BARD standard in the American courts,[47] and the psychological literature on its efficacy with jurors as a heuristic.[48] Part II will chronicle the Seventh Circuit's treatment of the BARD standard up to the *Alt* decision[49] and then apply this breadth of understanding to argue that refusing to define the BARD standard nullifies its protections for criminal defendants while leaving its legitimizing effect on the judiciary intact.[50] Finally, Part III marshals this interdisciplinary understanding into the legal framework of a genealogical critique capable of diverting the Seventh Circuit away from *Alt* and its associated precedent.[51] Part III also suggests Seventh Circuit practitioners can compensate for this rule by explaining

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42. *See infra* Part II.B.2.

43. *See infra* Part II.B.3.

44. *See infra* Part II.B.4.

45. *See infra* Part III.A. "Genealogies" are historical narratives that decipher "an aspect of human life by showing how it came into being." Mark Bevir, *What is Genealogy?*, 2 J. PHIL. HIST. 263, 263 (2008). Genealogical critiques use such historical narratives to undermine the authority of their subjects by exposing their arbitrary or "shameful origins." *Id.* at 264 (internal quotation marks omitted). *See generally* Michel Foucault, *Nietzsche, Genealogy, History* ("Genealogy . . . is to identify the accidents, the minute deviations . . . the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us."), *in* LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 139, 146 (Dondald F. Bouchard ed., 1977). The legal community, and particularly the Supreme Court, is beginning to use genealogical critiques as a framework for legal arguments that seek to upset settled precedent, statutes, practices, and other features of the American legal system. Charles W. Tyler, *Genealogy in Constitutional Law*, 77 VAND. L. REV. (forthcoming 2024) (manuscript at 4–6) (on file with the Minnesota Law Review).

46. *See infra* Part I.A.

47. *See infra* Part I.B.

48. *See infra* Part I.C.

49. *See infra* Part II.A.

50. *See infra* Part II.B.

51. *See infra* Part III.A.

the "presumption of innocence" to jurors, and criminal litigators elsewhere ought to define the BARD standard for their juries.[52]

I. AN INTERDICIPLINARY INVESTIGATION OF THE "BEYOND A REASONABLE DOUBT" STANDARD

An interdisciplinary understanding of the BARD standard brings into sharp relief *Alt*'s legal and ethical implications. This Part will first walk through the intertwined theological and epistemological origins of the BARD standard[53] before discussing its development in the American courts[54] and the findings of psychological research into the standard.[55]

A. THE THEOLOGICAL AND EPISTEMOLOGICAL ORIGINS OF THE "BEYOND A REASONABLE DOUBT" STANDARD

The BARD standard has a debated early history in which scholars argue that the standard emerged from either the theological concerns of early Christian jurors or as an

52. *See infra* Part III.B. This Note does not propose a specific definition of the BARD standard for the Seventh Circuit, or for courts in general, to adopt. *See id.* As this Note makes the preliminary argument that the BARD standard *should* be defined, rather than *how* it should be defined, the Author believes this argument is bolstered by demonstrating that multiple definitions succeed in improving the BARD standard's proof procedure function. *See infra* Part I.C.2. For literature endorsing a specific BARD standard definition, see, for example, Shealy, *supra* note 19, at 234 n.40, 292 (endorsing Chief Justice Shaw's "moral certainty" definition of the BARD standard (citing Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850), *abrogated by* Commonwealth v. Russell, 23 N.E.3d 867 (2015)); White & Cicchini, *supra* note 32, at 24 (endorsing a definition that compares the BARD standard to lower burdens of proof); Pi et al., *supra* note 28, at 507–08 (endorsing a BARD standard definition quantifying the level of certainty required to convict); Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 UC DAVIS L. REV. 85, 187 (2002) (endorsing a purposefully vague BARD standard definition); Michael D. Cicchini, *Reasonable Doubt and Relativity*, 76 WASH. & LEE L. REV. 1443, 1479–80 (2019) (arguing that courts must define both the presumption of innocence and the BARD standard and emphasize that the latter requires "near certitude" (emphasis omitted)); Victor v. Nebraska, 511 U.S. 1, 26–27 (1994) (Ginsburg, J., concurring) (endorsing a BARD standard definition from the Federal Judicial Center).

53. *See infra* Part I.A.

54. *See infra* Part I.B.

55. *See infra* Part I.C.

Enlightenment-era standard of proof for inherently uncertain facts.[56] The debate over which tradition is the most responsible for birthing the BARD standard remains a live issue among scholars, with each camp weathering its fair share of criticism.[57] However, examining how the growing pains of jury trials intertwine with the philosophical development of "doubt" explains how the BARD standard careened into the dual role of providing both factual proof and moral comfort functions in American law.[58]

1. 1250 A.D.: The End of Ordeals

Scholars on both sides of the debate agree that the history of the BARD standard traces the development of English jury trials.[59] This dates back to the thirteenth century, when the abolition of trials by ordeal led to their replacement by the Roman

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56. *Compare* Barbara J. Shapiro, *To a Moral Certainty: Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153, 191 (1986) ("The 'beyond reasonable doubt' standard articulated in both the cases and the evidence treatises stemmed from the late seventeenth-century cluster of ideas associated with the concept of moral certainty and with, to use Lockean terminology, the highest degree of probability."), *with* WHITMAN, *supra* note 40, at 3 ("Convicting an innocent defendant was regarded . . . as a potential mortal sin. The reasonable doubt rule was one of many rules and procedures that developed in response to this disquieting possibility . . . intended to reassure jurors that they could convict the defendant without risking their own salvation, so long as their doubts about guilt were not 'reasonable.'").

57. *Compare, e.g.*, WHITMAN, *supra* note 40, at 63 ("It is precisely because the theology of doubt worked its way into the philosophy of science that historians like Franklin and Shapiro could come to . . . the conclusion that the reasonable doubt rule had something to do with . . . an early effort to create a standard of . . . proof . . . ."), *and* George Fisher, *The Jury's Rise as a Lie Detector*, 107 YALE L.J. 575, 610 (1997) ("Although it is probably true that the ideas of Hale and others influenced in some degree the shape of change, the immediate impetus for change had more to do with parochial politics than with any advancing epistemology of the sort Shapiro describes."), *with* Samuel H. Pillsbury, *Fear and Trembling in Criminal Judgment*, 7 OHIO ST. J. CRIM. L. 827, 828 (2010) ("Whitman's view of moral comfort rules as archaic depends on a view of decision-maker anxieties, religion, and criminal adjudication, each of which can be questioned in important respects." (reviewing WHITMAN, *supra* note 40)).

58. Shealy, *supra* note 19, at 290–91 (discussing how the BARD standard serves both factual proof and moral comfort functions but emphasizes the later).

59. *Compare* Shapiro, *supra* note 56, at 155 (arguing that later Enlightenment-era influences on the laws of evidence built upon earlier twelfth-century reformations), *with* WHITMAN, *supra* note 40, at 6, 87 (explaining the abolition of ordeals and the imposing anxiety on early Christian jurors).

canon law inquisitorial system on the European continent and early jury trials in Britain.[60]

From about the time the Roman Empire adopted Christianity as a state religion in 380 A.D., criminal adjudication in Europe was often conducted through "judicial ordeals."[61] In these ordeals, those suspected of a crime were subjected to physical violence upon the belief that God would perform a miracle and deliver them from harm if their soul was innocent.[62] For example, in the popular ordeal of the "hot iron," the accused was forced to grasp a red-hot iron and suffer a severe burn; if their wound healed without infection within three days, they were deemed innocent.[63] A member of the clergy would oversee these ordeals,

60. Fisher, *supra* note 57, at 586; Shapiro, *supra* note 56, at 155. *See generally* Melodie H. Eichbauer, *Medieval Inquisitorial Procedure: Procedural Rights and the Question of Due Process in the 13th Century*, 12 HIST. COMPASS 72 (2014) (explaining that early European inquisitorial procedure first involved a judicial investigation into an alleged or rumored offense and then a trial with the judge acting as prosecutor); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL (2003) (explaining early English criminal trials as "lawyer-free" confrontations between the victim acting as prosecutor and an unrepresented defendant who is expected to testify); *infra* notes 61–79 and accompanying text (explaining trials by ordeal).

61. Criminal procedure during the Middle Ages nominally took the form of an accuser coming forward with a charge and attempting to prove their accusation at the risk of punishment for failing to do so. WHITMAN, *supra* note 40, at 60–61. Judicial ordeals were used in situations where there were significant rumors of a criminal act, but no witnesses came forward with an accusation or testimony and the accused would not confess to any wrongdoing. *Id.* at 60. However, this situation was exceedingly common, as the often-deadly punishments for false accusations, risk of vengeance by the accused's family, and the spiritual peril of judgement deterred accusers from coming forward. *Id.* at 74–75; Eichbauer, *supra* note 60, at 73–74 (discussing the role of *publica fama*, or criminal rumors, in the inquisitorial system); *see also* Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 944 (2009) (discussing the history of Christianity's adoption in the Roman Empire and its effect on criminal procedure in Europe (reviewing WHITMAN, *supra* note 40)).

62. WHITMAN, *supra* note 40, at 53 (summarizing the various types of ordeal as "picturesque and most of them violent"); Shealy, *supra* note 19, at 271–72 (explaining a number of common ordeals in Europe).

63. Trisha Olson, *Of Enchantment: The Passing of the Ordeals and the Rise of the Jury Trial*, 50 SYRACUSE L. REV. 109, 117 (2000) (explaining the ordeal of the hot iron); *see also, e.g.*, *id.* (explaining the ordeal of the "cauldron," in which the accused was forced to pluck an object from boiling water and deemed innocent if their wound healed within three days); WHITMAN, *supra* note 40, at 60 (explaining the ordeal of the "cold water," in which the accused was stripped naked, bound, and thrown into icy water, where if the accused floated, they were

beginning them with an oral prayer inviting the *judicium Dei*—the judgement of God—upon the accused.[64] However, the Fourth Lateran Council of the Christian Church would prohibit clergymen from participating in ordeals in 1215 A.D., leading to their dissipation across Europe by 1250 A.D.[65]

Scholars have come to conceptualize judicial ordeals as serving two functions to the societies that used them.[66] First, as scholars traditionally understood, ordeals functioned as an early proof procedure in European criminal adjudications.[67] Ordeals served as a way of divining the omniscient knowledge of God to factually determine the accused's guilt in the absence of witness testimony.[68] Accordingly, their rejection correlated with European society's increasing sophistication regarding rational

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deemed guilty); Olson, *supra* note 63, at 117–18 n.41 (explaining the ordeal of the "Eucharist," in which a feather was hidden in the accused's food, who was deemed innocent if they did not choke on it); WHITMAN, *supra* note 40, at 53 (explaining that trial by combat was often used as a form of judicial ordeal); *cf.* MONTY PYTHON AND THE HOLY GRAIL, at 00:19 (Python (Monty) Pictures et al. May 25, 1975) (parodying judicial ordeals in a scene where a woman accused of witchcraft is tried by comparing her weight to that of a duck—because witches burn due to being made of wood, and as both wood and ducks float in water, if the woman weighs as much as a duck she must be made out of wood and therefore a witch).

64. Gallanis, *supra* note 61, at 944–45 (explaining the clergy's role in judicial ordeals).

65. WHITMAN, *supra* note 40, at 53. The Lateran Councils were a series of five Roman Catholic legislative conferences across six centuries in which the Pope and church authorities met to enact canonical law. *Lateran Councils*, CATHOLIC ANSWERS (2024), https://www.catholic.com/encyclopedia/lateran-councils [https://perma.cc/U49W-PGZF]. Rome's Lateran Palace housed these councils, from which their name is derived. *Id.* Pope Innocent III assembled the Fourth Lateran Council in November 1215 to codify church dogma and regulate the upcoming Crusade. *Id.*

66. *See infra* notes 67–68 and accompanying text (explaining the two functions).

67. WHITMAN, *supra* note 40, at 55 ("According to . . . many, indeed most, historians, the strange and brutal ordeals that were in use around 1100 were fact-finding devices."); *see also* Shapiro, *supra* note 56, at 155 (describing ordeals as "irrational proofs" that functioned to determine fact).

68. WHITMAN, *supra* note 40, at 61 ("[T]he ordeal could be avoided if there was an accuser or sworn witness."); *see* Shealy, *supra* note 19, at 271–72 (explaining the ordeal of the hot iron and perception among early Christian society that a healed wound proved God's salvation of the innocent).

methods of fact-finding and justice.[69] However, the understanding of ordeals as solely a proof procedure could not explain why they were still used in cases without any factual disputes.[70]

Over time, scholars came to understand that the primary purpose of the judicial ordeal was not to serve as a mechanism for proving guilt but as a moral comfort procedure for the actors involved.[71] Potential complainants and witnesses were often far too anxious to participate in formal criminal proceedings because Medieval norms of vengeance meant that the accused's relatives would almost inevitably come after them,[72] and their Christian faith warned that they jeopardized their souls when testifying under oath.[73] As ordeals were initiated by rumor and cast God as their sole witness, they allowed European societies to sidestep these corporeal and spiritual perils and maintain a functional judiciary.[74] For the clergy involved, the ordeal allowed them to shift the responsibility of inflicting punishment upon the

69. Shapiro, *supra* note 56, at 155 (explaining "rational" systems of proof developing in Europe after the abolition of the ordeals); *see also* WHITMAN, *supra* note 40, at 55–56 (summarizing the viewpoint of many scholars with this understanding of ordeals).

70. WHITMAN, *supra* note 40, at 79–80 (explaining that a review of historical sources on judicial ordeals reveals that they were rarely used in situations where the factual guilt of the accused was in question and mostly in situations where witnesses chose not to come forward); *id.* at 72–73 (explaining that ordeals were often conducted in tight-knit, small communities where everyone "usually [had] a pretty good guess as to whether the accused is guilty or innocent"); *see also* Olson, *supra* note 63, at 112–14 (arguing that the view of ordeals as proof mechanisms is based on scholars' bias towards written codes and treaties and that nontraditional sources such as oral histories give better insight into how ordeals were understood by a largely illiterate populace).

71. WHITMAN, *supra* note 40, at 56 (arguing the case that ordeals functioned not primarily as fact-finding mechanisms but "to spare human beings the responsibility for judgment").

72. *Id.* at 75 (explaining that the "normal first resort" of Medieval societies was not justice through the courts but through self-help, and relatives of the accused often sought vengeance against their accusers).

73. *Id.* at 75 (explaining that European Christians understood that taking an oath and procuring sworn testimony "was to take God as your witness," and any perjury would thus result in damnation). *See generally Matthew* 7:1–7:2 (King James) ("Judge not, that ye be not judged. For with what judgment ye judge, ye shall be judged: and with what measure ye mete, it shall be measured to you again.").

74. WHITMAN, *supra* note 40, at 56–57, 75.

guilty from themselves and onto God.[75] Moreover, the decline of ordeals had less to do with a demand for more sophisticated proof procedures and was instead driven by the Fourth Lateran Council's decree that they no longer insulated the clergy involved from this burden of punishment, thereby denying them the benefits of this moral comfort procedure.[76]

This is not to say that judicial ordeals *never* operated as a proof procedure; historical sources do document instances in which ordeals were used to settle disputed facts.[77] Rather, ordeals ought to be understood as having functioned in both a proof procedure and moral comfort procedure capacity in certain circumstances but primarily, and always, as a moral comfort procedure.[78] Their coming abolition would wreak spiritual panic into the European criminal system, but this insight foreshadows how whatever might come to restore these moral comforts could easily bleed into its procedures for factual proof.[79]

2. 1300–1700: Continent Overcomes, England Evades, Questions of Doubt

The cessation of judicial ordeals had two foundation-shaking impacts on European criminal justice. First and immediately, it created a vacuum of moral comfort procedures for participants in the legal system whose own spiritual cleanliness remained

75. *Id.* at 53 (explaining that until the Fourth Lateran Council prohibited clergy from participating in ordeals, they were believed to enable the clergy to participate in judicial proceedings that would permit blood-shedding punishments upon the guilty, despite the Christian proclivities against such punishments); *see id.* at 34–35 (explaining that while Christians believed that to come into contact with blood was to "pollute" oneself in the eyes of God, judges who rendered just decisions were not tainted by the "blood punishments" imposed upon the guilty); *Genesis* 9:6 (King James) ("Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man.").

76. WHITMAN, *supra* note 40, at 53 (explaining that the council's 1215 edict pronouncing that ordeals polluted the clergyperson that oversaw its proceeding with the taint of blood).

77. *Id.* at 73 (explaining that in cases of theft, adultery, and disputed parentage, ordeals were sometimes used "to clarify murky facts").

78. *Id.* at 56 ("[F]actual proof was not the issue at all, for the most part. What was primarily at stake was the moral responsibility for judgment.").

79. *See infra* Part I.A.2 (explaining the repercussions and implications of the abolition of judicial ordeals).

their primary concern.[80] Second and gradually, it cleared the way for more professionalized fact-finding procedures to take over European criminal law.[81] However, resolving these issues would require centuries of development in theological and epistemological thought, with stop-gap measures propping up European criminal justice in the meantime.[82]

The end of the ordeal in 1250 meant that European criminal legal systems no longer had a moral comfort procedure that shifted the spiritual burdens of judgement and punishment from their human actors and onto the Almighty.[83] At this time in the Middle Ages, bearing these burdens was of paramount concern to these actors, to whom damnation was a real and terrifying threat.[84] Proper fact-finding procedures were a secondary concern, especially as the communal and simple nature of Medieval societies meant that most actors knew all the facts of local criminal matters.[85] Abandoning the ordeal thus required European

80. WHITMAN, *supra* note 40, at 96 (giving an overview of the dearth of moral comfort procedures following the decline of the ordeal in both England and on the European continent).

81. Shapiro, *supra* note 56; Laudan, *supra* note 27, at 297–98 (explaining the development of the BARD standard as driven by jurists attendant to "new insights in epistemology").

82. WHITMAN, *supra* note 40, at 153 (explaining how early Middle-Age juries used legal loopholes to avoid "the morally fraught business of inflicting blood punishments").

83. *Id.* at 57–58 (explaining that the abolition of ordeals obliged agents in both the Continental and English system to judge others according to their conscience); *see also supra* Part I.A.1 (explaining the moral comfort procedure function of judicial ordeals).

84. WHITMAN, *supra* note 40, at 3 ("[T]he medieval Christian world was simply typical of premodern societies all over the world, in which the act of judging was often seen as full of menace, both for the judge and for the witnesses who gave testimony against their neighbors.").

85. *Id.* at 203 ("The paradigmatic case, in this older world, did not involve any great mystery about the particular facts: it was assumed that the guilt of the accused would be more or less clear, much or most of the time, to the 'neighbours' who were called upon to judge them."); *cf.* Shapiro, *supra* note 56, at 155 (noting that proof procedures were not the central concern of early jurors, who lived in tight-knit, small communities and were expected to know the facts of the case from their private knowledge); Fisher, *supra* note 57, at 596 n.55 ("What is more, crime victims sometimes served on presenting juries and presumably offered their personal knowledge of the facts.").

systems of criminal justice to create a substitute moral comfort procedure to continue functioning.[86]

On the European continent, the answer lay in developing a highly rule-bound, bureaucratized system.[87] While judges considered their souls to be in jeopardy whenever they entered a verdict, theologians determined that by making that decision by *iuris ordine servato*—"observing correct procedures"—their soul was safe.[88] Questions of how judges should decide a case when they had doubts of the accused's guilt were central in this conversation.[89] Drawing from centuries of theological discussion on the subject, canon-law authorities established the "safer path" doctrine: in cases of doubt, judges must decline from issuing punishment to avoid the possibility of polluting their souls.[90]

The European Continental system compensated for ordeals' moral comfort functions that encouraged witness testimony through adopting the infamous inquisitorial process.[91] Potential accusers and witnesses were still just as concerned with the spiritual consequences of rendering judgement and could no longer rely on an ordeal to forego testifying.[92] However, rather than focusing on finding ways to encourage witness testimony, the Continental system instead adopted the wide use of judicial torture

86. WHITMAN, *supra* note 40, at 39 (explaining that the abolition of ordeals obliged agents in both the Continental and English system to judge others according to their conscience).

87. *Id.* at 17 (explaining that canon lawyers maintained that judges should convict based upon a highly rule-bound heuristic in order to avoid incurring moral responsibility).

88. *Id.* at 114 (explaining that the generalities of the theological development that justified bureaucracy as a substitute for alternative moral comfort procedures). *See generally id.* at 35–40 (surveying the writings of Saint Ambrose, Saint Jerome, and Saint Augustine that argued that judges would be safe from the "taint of blood" as long as they acted as a dispassionate administrator of the laws).

89. *Id.* at 116–22 (discussing the generalities of how questions of doubt influenced the development of Continental civil law).

90. *Id.* at 117 (explaining that Pope Innocent III, who presided over the Fourth Lateran Council, endorsed the "safer path" doctrine as a method for thirteenth-century judges to maintain spiritual purity).

91. *Id.* at 98–99 (explaining that the inquisitorial system arose in large part to deal with the same scenarios of witness and accuser hesitancy previously solved through ordeals).

92. *Id.* at 98–99 (explaining spiritual tensions of witnesses in the emergent inquisitorial system).

to extract confessions from the accused.[93] While the Continental system would also develop means of compelling witness testimony, it played second fiddle to tortured confessions.[94] This early iteration of the civil law system would become well-established across the European continent around the thirteenth century.[95]

However, in England, the Crown's adoption of a jury-trial system in reaction to the abolition of ordeals levied acute spiritual pressure upon jurors rather than judges.[96] As English jurors had the responsibility to enter the verdict and thereby cast judgment, it would be their souls that would be polluted by an erroneous verdict rather than the judge's soul.[97] Furthermore, the English system would not adopt a system of judicial torture and would instead focus on compelling accusers and witnesses to testify.[98] By both demanding spiritually-jeopardizing testimony and forgoing methods that would allow confessions to resolve cases for juries, the jury system exacerbated the post-ordeal dearth of moral comfort procedures in English justice.[99]

This spiritual threat of judging while in doubt caused extreme resistance against jury service by English jurors.[100] From

93. *Id.* at 96 ("Continental law had increasingly moved toward a system in which the accused was threatened with torture in order to coerce a confession.").

94. *Id.* at 103–04 (explaining that by the mid-thirteenth century, Continental canonists came to endorse compelling witness testimony as spiritually permissible); *id.* at 96 (discussing the primacy of extracting confessions over compelling witness testimony in the Continental system).

95. *Id.* at 96 (explaining that this system was well-established throughout the European continent by the mid-thirteenth century).

96. *Id.* at 126–27 (explaining that in reaction to the Fourth Lateran Council's prohibition on ordeals, King Henry III established a jury trial system to substitute for ordeals upon the recommendation of English justices). For a description of the procedural operations of early English jury trials, s*ee generally* LANGBEIN, *supra* note 60, at 13–16 (2003) (overviewing early primary sources documenting English jury trials).

97. WHITMAN, *supra* note 40, at 128 (explaining that England and the Continent shared the same moral philosophy, but the English system endowed jurors with the particularly jeopardizing role of entering a "guilty" verdict); *id.* at 147–48 ("[F]rom the point of view of the English judge, it could be described as a special glory of the common law that, by leaving the job of the verdict to the jury, it avoided putting the souls of its professional judges in any jeopardy.").

98. *Id.* at 128–29 ("Unlike Continental law, the English common law never developed a practice of judicial torture . . . .").

99. *Id.* (explaining that the English system placed "uniquely severe" pressure on jurors).

100. *Id.* at 150 (discussing the intense spiritual anxieties of early common law jurors).

the thirteenth to the seventeenth century, the English system would punt on creating any substitute moral comfort procedures to satisfy jurors and instead rely first on loopholes[101] and then compulsion to avoid combustion. By 1326, juries adopted a wide practice of entering "special" verdicts that only decided factual matters rather than a defendant's guilt, evading the peril of casting judgement.[102] Even when jurors issued a general verdict, they would often stretch the facts of the case to avoid inflicting spiritually-suspect punishments upon the accused.[103] Starting in 1516, the English system would switch from carrot to stick by threatening jurors with criminal punishments of their own if they refused to enter general verdicts.[104] This practice matured into the familiar criminal charge of contempt by the end of the sixteenth century and would continue to be widely used to compel jury service.[105]

Thus, upon the dawn of the seventeenth century, the English jury system was still without a permanent solution for the moral anxieties of jurors.[106] But because of this delay, the BARD standard would not emerge until after two revolutionary developments—the first in philosophy, the second in law. First, the secularization of epistemological thought during this period fueled a disconnect between how the general public and professionalized jurists understood concepts of "doubt."[107] Second, the increasing professionalization of criminal trials exacerbated this disconnect and allowed it to manifest in rules of criminal

101. *Id.* at 162 (explaining how Star Chamber, introduced in 1516, began to punish jurors for using common loopholes that allowed them to avoid entering general verdicts).

102. *Id.* at 155.

103. Olson, *supra* note 63, at 183–84 (explaining how jurors in larceny proceedings would often undervalue stolen goods to avoid a felony and thus a capital charge or in murder proceedings jurors would extend self-defense to nullify the charge, thereby avoiding blood punishments). *See generally supra* note 75 and accompanying text.

104. *See* WHITMAN, *supra* note 40, at 162.

105. *See* J.S. COCKBURN, A HISTORY OF ENGLISH ASSIZES 1558–1714, at 114 (1972) ("By the early seventeenth century the threat of proceedings for contempt was widely used to compel juries to return bills as directed.").

106. WHITMAN, *supra* note 40, at 163.

107. *See infra* Part I.A.3 (discussing how changes in thinking during the seventeenth century Enlightenment period affected adjudication).

procedure.[108] This would ultimately lay the foundation for the confused understanding of the BARD standard's function in American criminal law.[109]

3. 1600: The Enlightenment's Mixing of Fact and Faith

While the English jury system struggled to develop a moral comfort procedure that could assuage jurors' spiritual concerns, theological thought on the concept of "doubt" continued to develop.[110] By the seventeenth century, Enlightenment thinkers would come to co-opt this doctrine and layer it with a professional and secular sheen.[111] It would be out of this intermingled doctrine of theology and secular epistemology that the BARD standard would emerge.[112]

From roughly the thirteenth to the sixteenth centuries, the Continental and English judicial systems' growing pains inspired theologians to continue examining questions of human knowledge and doubt.[113] Crucially, this would include trying to

108. *See infra* Part I.A.4 (presenting the background in which the BARD standard developed).

109. *See infra* Part I.B.1 (discussing the role of the BARD standard in American jurisprudence).

110. WHITMAN, *supra* note 40, at 119 (explaining that by the twelfth century, canonist philosophers and judges had begun discerning the theology of doubt's implications for criminal procedure and would continue to theorize upon the topic). *See generally The History of Epistemology*, ENCYCLOPEDIA BRITANNICA (2024), https://www.britannica.com/topic/epistemology/The-history-of-epistemology [https://perma.cc/S8T5-GTFL] ("For most of the Middle Ages there was no distinction between theology and science . . . . Science was knowledge that was deduced from self-evident principles, and theology was knowledge that received its principles from God, the source of all principles.").

111. Shapiro, *supra* note 56, at 191 (explaining that the writings of many Enlightenment thinkers played a major role in Anglo-American concepts of evidence, attempting to "bring English law into conformity with the most advanced philosophical thought"); Laudan, *supra* note 27, at 297–98 (explaining the development of the BARD standard as driven by jurists attendant to "new insights in epistemology").

112. *See infra* Part I.A.4; *see also The History of Epistemology*, *supra* note 110 ("From the early 17th century until the middle of the 18th century, all the great [epistemological] philosophers incorporated substantial religious elements into their work.").

113. WHITMAN, *supra* note 40, at 163–64 (connecting the development of theological scholarship on questions of "doubt" from the fifteenth to seventeenth century to the scholarship of the twelfth century); *see also The History of Epistemology*, *supra* note 110 (explaining that Middle Age epistemological thought was indistinguishable from theology).

categorize different quantifications of "doubt" and determine upon what quantity of doubt judicial actors could comfortably take certain actions against the accused.[114] Theologians would produce basic tiers of doubt by the mid-thirteenth century.[115] By the sixteenth century, a mature hierarchy of certainty emerged, rising from "doubt," to "suspicion," to "opinion."[116] While Continental judges contemporaneously incorporated these theological developments into their judgements,[117] such cutting-edge, erudite theology was mostly out of reach for English commoners serving on juries.[118] Still, these were explicitly religious endeavors guided by a philosophy of fideism that assumed that God, and humankind's innate certainty of the Almighty, was the ultimate source of all knowledge.[119]

The European intellectual environment and its treatment of doubt began shifting towards secularism in the sixteenth century with the re-emergence of skepticism and general scientific progression.[120] Philosophers such as René Descartes and Francis Bacon began critiquing epistemology reliant on religious assumptions and articulating a way of knowing founded on reason and experience.[121] This began to displace discussions of doubt,

114. WHITMAN, *supra* note 40, at 119 (discussing the history of Christian theology on quantifying "doubt").

115. *Id.* (explaining Albertus Gandinus's thirteenth-century contributions to the theology of "doubt" as applied to criminal procedure).

116. *Id.* at 119–20 (summarizing Prosper Farinacci's contributions to the theology of "doubt").

117. *Id.* at 120–21 (noting that Continental criminal procedure handbooks used by judges cited to Farinacci and incorporated this theology on doubt).

118. *See id.* at 163 (explaining that moral theology on doubt would re-emerge in England in the late seventeenth-century through a few key cases and popular pamphlets).

119. *The History of Epistemology*, *supra* note 110 (discussing the relationship between early epistemological thought and fideism).

120. Shapiro, *supra* note 56, at 156 (explaining that the revival of skepticism entailed a repudiation of religious doctrine); *The History of Epistemology*, *supra* note 110 (discussing how Copernicus' and Galileo's sixteenth-century scientific discoveries challenged biblical ways of knowing and influenced early modern epistemologists).

121. *See* Shapiro, *supra* note 56, at 156 (discussing how the revival of skepticism and its adherence challenged the validity of religion-based ways of knowing by arguing for sense-based knowledge); WHITMAN, *supra* note 40, at 165 (explaining how early epistemological thought, "like Descartes' exercise in 'radical doubt,'" grew out of the longer theological canon on doubt); *The History of Epistemology*, *supra* note 110 (discussing Descartes', Benedict de Spinoza's, and

certainty, and proof from their theological origins and associate them with secular thought and empirical sciences.[122] Yet, these early epistemologists sought to use their secular deductive approach to craft a stronger argument for the existence of God, prolonging the discipline's religious associations.[123]

In the seventeenth century, with the Enlightenment in full swing, English naturalists began to pilfer the study of doubt and evidence from their theological predecessors.[124] A particular focus for these thinkers was building on theologians' earlier ideas of quantified doubt.[125] This endeavor climaxed with the articulation of "moral knowledge" and "moral certainty."[126] These thinkers identified "moral knowledge" as knowledge that can only be based on secondhand reports, as opposed to knowledge that can be derived from personal sensation or logical demonstration.[127]

George Berkeley's intermingled naturalist and nonsecular contributions to epistemology); RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY (1641) (engaging in a radically skeptical thought experiment in which Descartes reasons that because he can question his existence, he must exist), *reprinted in* THE PHILOSOPHICAL WORKS OF DESCARTES 149–57 (Elizabeth S. Haldane trans., Cambridge Univ. Press 1911).

122. Shapiro, *supra* note 56, at 157 (discussing the intersection between the English philosophic and scientific communities).

123. *The History of Epistemology*, *supra* note 110 (explaining that Descartes and Benedict de Spinoza offered proofs for God, and further explaining how Berkeley's arguments were premised on God's omniscient perception); *e.g.*, DESCARTES, *supra* note 121, at 134 ("[I]t seems as though we were shown that all that which can be known of God may be made manifest by means which are not derived from anywhere but from ourselves, and from the simple consideration of the nature of our minds. Hence I thought it not beside my purpose to inquire how this is so . . . .").

124. Shapiro, *supra* note 56, at 157–58 (discussing how both English naturalists and theologians concluded that reasonable men could derive truths they had no reason to doubt).

125. *See id.* (discussing English naturalists' and theologians' attempts to "build an intermediate level of knowledge, short of absolute certainty but above the level of mere opinion"); WHITMAN, *supra* note 40, at 165 ("[I]n the early modern period, scientists and philosophers concerned with epistemological proof drew directly on the terminology of the theology of doubt.").

126. Shapiro, *supra* note 56, at 157–58 (discussing the distinctions that English naturalists and theologians drew between "knowledge" or "science" and "probability").

127. *Id.*

Accordingly, "moral certainty" was the highest degree of confidence one could have in such indirect knowledge.[128]

John Locke then epitomized the secular takeover of epistemology with his 1690 *Essay Concerning Humane Understanding*.[129] Locke openly attacked his theological predecessors' fideism, challenging their foundational assumption that people are born with God-given knowledge from which certainties about the world may be derived.[130] He asserted that reason and reflection are the ultimate sources of human knowledge and religious beliefs must yield to reason when the two conflict.[131] The essay then delves into Locke's categorization of the levels of certainty humans may have in an uncertain fact when presented only with indirect evidence.[132] Locke's essay and the underlying concept of "moral certainty" proved massively influential and arguably birthed the modern doctrine of evidence law.[133] Early and influential eighteenth-century treatises on common-law evidence drew heavily from both ideas.[134]

Yet, this recontextualization of the study of doubt is the core reason why American jurists did—and arguably continue—to misunderstand the BARD standard as primarily serving a

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128. *Id.* This language continues to influence the American understanding of the BARD standard, appearing in multiple and often-challenged BARD-standard definitions. *See infra* Part I.B.3.

129. *See* JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (Generic NL Freebook Publisher 1998) (1690); *see also* Bird T. Baldwin, *John Locke's Contributions to Education*, 21 SEWANEE REV. 177, 179–80 (1913) (describing Locke as having "founded the predominating empiricism of England" and discussing the significance of LOCKE, *supra*).

130. LOCKE, *supra* note 129, at 20 ("It would be sufficient to convince unprejudiced readers of the falseness of this supposition, if I should only show . . . how men, barely by the use of their natural faculties may attain to all the knowledge they have, without the help of any innate impressions . . . .").

131. *Id.* at 528 ("[N]othing that is contrary to, and inconsistent with, the clear and self-evident dictates of reason, has a right to be urged or assented to as a matter of faith, wherein reason hath nothing to do.").

132. *Id.* at 15 (distinguishing between "degrees of BELIEF, OPINION, and ASSENT").

133. Shapiro, *supra* note 56, at 157–58 (discussing how the "first treatise writers on legal evidence attempted to build on Lockean foundations" established in his 1690 essay).

134. *Id.* at 175–77 (discussing the use of similar language drawing from "moral certainty" in Sir Geoffrey Gilbert's 1729 treatise on evidence and John Morgan's 1789 writings on evidence).

factual proof rather than moral comfort function.[135] Reframing religious theology on doubt into a secular taxonomy of probability would ensure that learned scholars and legal professionals would understand "doubt" in this epistemological context.[136] But its deep religious connections would remain top-of-mind for the eighteenth-century commoners serving as English jurors and motivate its adoption as a moral comfort procedure.[137] Thus, by the eighteenth century, the BARD standard had donned the disguise with which it would fool American courts.[138] All that remained was for it to make its introduction.

4. 1600–1700: Emergence of the Early BARD Standard

By the seventeenth century, the English jury system was facing a spiritual crisis.[139] The Tudor and Stuart monarchies' attempt to amass far greater state power than their predecessors motivated the Crown to crack down on crime—and unruly juries alongside it.[140] The Crown made greater demands of its people to serve as jurors while discarding many loopholes that long compensated for a lack of moral comfort procedures for jurors.[141] Out of this incomparable moral pressure on jurors, the early formations of the BARD standard would emerge.[142]

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135. *See* WHITMAN, *supra* note 40, at 166 (arguing that the co-optation by English naturalists and philosophers of the theological language of doubt contributes to the continued misunderstanding of the BARD standard's origins).

136. *Id.* at 5 (arguing that modern scholars have thus far gotten the history of reasonable doubt wrong, as it was historically more tied up in the fate of the jurist rather than the accused).

137. *Id.* at 166 ("The prevailing conception of the trial, and of the jury's role, still revolved around the moral responsibility for judgement."); *see also infra* Part I.A.4.

138. *See infra* Parts I.A.4, I.B.1.

139. WHITMAN, *supra* note 40, at 162 ("The sixteenth and seventeenth centuries were thus moral hard times for English criminal jurors.").

140. *Id.* at 161–62 (discussing how this shift began with the "Tudor Revolution in Government" in the sixteenth century and continued into the seventeenth century).

141. *Id.* (discussing the increased activity of Star Chamber, followed by common-law judges imposing their own contempt punishments, against "special" verdicts during this time); *see also supra* notes 101–05105 (explaining "special" verdicts and other loopholes in Medieval English jury trials).

142. *See* WHITMAN, *supra* note 40, at 161 ("If matters had rested as they were in the Middle Ages, jurors would have faced relatively little of the pressure that eventually gave rise to the doctrine of reasonable doubt.").

A series of high-profile cases from 1664 to 1670 in which recalcitrant jurors faced harsh punishment for refusing to enter an obvious guilty verdict brought the issue to a head.[143] To stave off calamity, English theologians began a pamphleting campaign lionizing the "moral glories of jury service" and arguing it was a duty for Christians under their sovereign.[144] These theologians drew upon the popular theological understandings of doubt to argue that jurors could protect their souls through acquittal whenever they had conscientious "doubts."[145] By the early eighteenth century, English theologians made this approach functional by advocating for jurors to follow this familiar "safer way" when they faced legitimate spiritual doubts—but not when those doubts would fail a basic test of reason.[146]

As English jurors and judges began to rely on these reasonable "safer way" acquittals, they were memorialized in the Old Bailey reporter.[147] The reporter demonstrates that by 1783,

143. *Id.* at 173 (explaining a series of cases in the 1660's known as the "Quaker Cases" in which, although the accused were not subject to blood punishments, jurors felt spiritually compelled under Christian theology to return "not guilty" verdicts against Quakers accused of forming seditious gatherings); *see also* Rex v. Wagstaffe, (1655) 83 Eng. Rep. 1331, 1331 (KB) (HeinOnline, Eng. Reps.) (holding that King's Bench judges were authorized to issue punitive fines against jurors who conscientiously refused to issue guilty verdicts); *see also* Bushell's Case, (1670) 89 Eng. Rep. 2 (KB) (HeinOnline, Eng. Reps.) (reaching the opposite holding in declaring that jurors could not be fined for entering verdicts in accordance with their conscience).

144. WHITMAN, *supra* note 40, at 178; *see also id.* at 178–81 (surveying the post-*Bushell* wave of pamphleting on the importance of jury service and availability of the *Bushell* "safer way" doctrine by Richard Baxter in 1673, Gilbert Burnet in 1682, Benjamin Calamay in 1683, and Zachary Babington in 1677, culminating with Sir John Hawle's "much-reprinted pamphlet," *The Englishman's Right* in 1680).

145. *See supra* note 144.

146. WHITMAN, *supra* note 40, at 189–90 (discussing Henry Grove's writings differentiating between a juror's legitimate "doubting conscience" and an illegitimate "scrupulous conscience"); *id.* at 190–91 (discussing Jeremy Taylor's writings differentiating between a "positively doubtful" conscience and "a doubt that is merely [sic] speculative"); *see also id.* at 4 ("'In cases of doubt,' as the safer way formula ran, 'the safer way is not to act at all.'").

147. *Id.* at 194–99 (surveying the Old Bailey Reporter and cataloging its influence on early-American jurisprudence); *id.* at 194 ("[T]hese Old Bailey cases show the presence, in the minds of all involved, of safer path moral theology . . . ."); *accord* Shapiro, *supra* note 56, at 164–68 (surveying Old Bailey cases for discussions of conscience); *see also* Gallanis, *supra* note 61, at 963 (explaining that while the Old Bailey may document early recorded uses of the BARD

English judges were regularly inducing reluctant jurors to convict by instructing them that they should vote for an acquittal if they "think there is any reasonable cause for doubt."[148] Ultimately, the cases reported in the Old Bailey would prove to be an important source for the nascent American bar, acquainting the United States with this language and procedure.[149]

Overall, this history of the BARD standard reveals two truths essential to understand its contradictory nature in American courts. First, the BARD standard as it emerged into the English jury system was never meant to serve a factual proof function that protected defendants.[150] Rather, it was meant to serve a moral comfort function for jurors at the expense of defendants.[151] Second, the conflation of theological and epistemological thought on "doubt" would obscure the occult origins of the phrase and prime it to be misunderstood by professionalized audiences as solely a fact-finding procedure.[152] The consequences of these two phenomenon would be borne out through the development of the BARD standard in American jurisprudence[153] and ultimately produce the Seventh Circuit's holding in *Alt*.[154]

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standard, this formulation of the standard had most likely already been in use for some time). *See generally Publishing History of the Proceedings*, OLD BAILEY ONLINE, https://www.oldbaileyonline.org/about/publishinghistory#origins [https://perma.cc/RS35-VXLB] (explaining that the Old Bailey began as a salacious mass-market publication on London crime that began covering criminal trials in 1678 before growing into a pseudo-official city publication targeted at a legal audience).

148. WHITMAN, *supra* note 40, at 197–98 (quoting from the murder trial of John Clarke).

149. Shapiro, *supra* note 56 at 170–72 (discussing the early yet comfortable usage of the BARD standard in American jurisprudence).

150. WHITMAN, *supra* note 40, at 202 ("This centuries-old tradition of moral theology was still alive in late eighteenth-century England, when London jurors still sought to take the 'safer,' 'surer,' or 'most pleasant' path in the face of 'doubt,' in order to avoid 'wronging their souls.'").

151. *Id.* (discussing how the standard functioned to encourage the conviction of defendants in spite of certain doubts).

152. *Id.* ("We treat beyond a reasonable doubt as a fact-finding principle, as a heuristic formula that can help guide the individual juror in the effort to achieve sufficient certainty about uncertain facts.").

153. *See infra* Part I.B.

154. *See infra* Part II.

B. THE DEVELOPMENT OF THE "BEYOND A REASONABLE DOUBT" STANDARD IN AMERICAN JURISPRUDENCE

Upon reaching American shores, the BARD standard spread through common-law adoption throughout the lower courts, absent almost any involvement from the Supreme Court.[155] While the Supreme Court would eventually require the standard in criminal adjudications, it would offer very little guidance on how to define it before explicitly authorizing lower courts to experiment with its language.[156] However, a scrutinous read of the Court's language on the BARD standard demonstrates its solidification in the American jurist's mind as a proof procedure rather than as serving a moral comfort function.[157] This section will first chart the BARD standard's entry into and spread across American courts,[158] then discuss the Supreme Court's inauguration of the modern BARD era with *In re Winship*,[159] and finally discuss the *Victor* decision and its implication for lower courts' interaction with the standard.[160]

1. Pre-*Winship* Jurisprudence: The Decentralized Spread of the BARD Standard

While scholars are confident that something like the BARD standard permeated American courts from their earliest days, the first instance of this exact formulation of the standard has probably been lost to time.[161] However, the BARD standard's first recorded use in the Colonies, and perhaps ever, comes from a pivotal moment in American history: the Boston Massacre.[162]

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155. *See infra* Part I.B.1.

156. *See infra* Parts I.B.2–B.3.

157. *See infra* Parts I.B.2–B.3.

158. *See infra* Part I.B.1.

159. *See infra* Part I.B.2.

160. *See infra* Part I.B.3.

161. Gallanis, *supra* note 61, at 963 ("All we can safely say, given the state of the evidence, is that something changed in the 1780s—or earlier, but was recorded in the 1780s—to prompt the use of the reasonable doubt instruction."); *In re* Winship, 397 U.S. 358, 361 (1970) (discussing scholars' understanding of the BARD standard "crystaliz[ing]" into this formula by 1798 (citing JOHN HENRY WIGMORE, EVIDENCE § 2497 (3d ed. 1940))).

162. Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 515–16 (1975) (noting that the use of the BARD formulation in the Boston Massacre Trials of 1770 predates its use in a 1798 series of treason trials in Ireland).

After eight British soldiers and their captain fired into a mob of Bostonians on March 5, 1770, killing five, the Crown quickly indicted the servicemen to prevent rioting.[163] The eight soldiers were tried jointly in late 1770 in *Rex v. Wemms*.[164] John Adams, serving as a pseudo-public defender for the soldiers,[165] framed his closing argument to the jury in the familiar terms of the "safer path" doctrine, stating, "where you are doubtful never act; that is, if you doubt of the prisoner's guilt, never declare him guilty."[166] Robert Paine, prosecuting the soldiers for the Crown, tweaked Adams' language in his response.[167] Paine argued that the jury ought to acquit not if they had any doubts, but only if "the Evidence is not sufficient to Convince you *beyond reasonable Doubt* of the Guilt of all or of any of the Prisoners."[168] Ironically, the first recorded usage of the BARD standard thus sees it *lowering* the burden of proof required for a criminal conviction—foreshadowing its coming misfires as a factual proof function.[169]

The pitched notoriety of the Boston Massacre Trials[170] combined with their wide publication across the Colonies[171]

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163. L. Kinvin Wroth & Hiler B. Zobel, *The Boston Massacre Trials*, 55 A.B.A. J. 329, 329 (1969).

164. Morano, *supra* note 162, at 516–17 (explaining that the court severed the trial of the officer from the trial of the eight soldiers, as the soldiers' defense revolved around their officer ordering them to fire upon the crowd, whereas the officer's defense was rooted in denying ordering his troops to fire); Wroth & Zobel, *supra* note 163, at 329 (explaining that the officer and eight soldiers were indicted in five separate indictments).

165. Wroth & Zobel, *supra* note 163, at 329–30 (discussing how the patriotic John Adams and co-counsel Josiah Quincy would later romanticize their choice to represent the British soldiers based in the virtues of providing due process for all accused of a crime).

166. Morano, *supra* note 162, at 517 (quoting John Adams, Argument for the Defense, *in* 3 LEGAL PAPERS OF JOHN ADAMS 243 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

167. *Id.* (explaining that Paine argued that the jury's doubts must be reasonable to acquit the soldiers).

168. *Id.* (emphasis added) (quoting Thomas Paine, Argument for the Crown, *in* 3 LEGAL PAPERS OF JOHN ADAMS, *supra* note 166, at 271).

169. Wang & Zhi, *supra* note 25, at 131–32 (explaining the school of thought that the BARD standard arose to allow jurors with religious anxieties about judging to convict the accused).

170. Morano, *supra* note 162, at 516 n.72 (noting that the trials had to be delayed to account for public fervor over the killings).

171. *Id.* at 518–19 (explaining that while publications of *Wemms* "immediately available both in the colonies and in England" omitted Paine's argument,

catalyzed the BARD standard's spread across state courts through common-law adoption.[172] Over the next century, a series of state high courts would recognize the BARD standard as their state's burden of proof for criminal convictions.[173] For most of these courts, however, the BARD standard replaced an "any doubt" standard, lowering the standard for conviction[174]—just as it did in the Boston Massacre Trials.[175] By the mid-1800s, most states had adopted the BARD standard.[176]

In 1880, the Supreme Court interacted with the BARD standard for the first time in *Miles v. United States*.[177] John Miles was charged with bigamy, a crime under federal law and Utah's territorial legislature, and was tried in Utah Territory District Court.[178] On the burden of proof, the trial court instructed the jury to apply the BARD standard, stating "[t]he prisoner's guilt must be established beyond reasonable doubt."[179] But, the trial judge then attempted to explain the BARD standard to the jurors as requiring a "moral certainty"—directly

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they included the jury instruction of a Justice convinced by Paine to use the reasonable doubt language).

172. *Id.* at 519 ("It is at least as likely as not that, because of their notoriety, the Boston Massacre Trials . . . significantly contributed to the rule's development as the accepted burden of persuasion in criminal cases.").

173. *E.g.*, Giles v. State, 6 Ga. 276, 285 (1849) (distinguishing between reasonable doubt from both "a bare possibility of innocence" and "mathematical or metaphysical certainty"); Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 320 (1850) (carefully explaining how the court should understand the BARD standard based on the principle of moral certainty); Winter v. State, 20 Ala. 39, 42 (1852) (stating that proving a defendant's guilt to the BARD standard is "so well settled and established, that no citation of authority is necessary to sustain them"); State v. Nash, 7 Iowa 347, 357–58 (1858) (discussing the necessity of the BARD standard of proof in criminal prosecutions).

174. Morano, *supra* note 162, at 527 (explaining that the BARD standard offered less protection than the preceding "any doubt" standard followed by many courts).

175. Wang & Zhi, *supra* note 25, at 128 n.31 (noting that prosecutors first began to use the BARD standard to lower their burden of proof).

176. Morano, *supra* note 162, at 519 (explaining that the BARD standard was "not fully incorporated into American jurisprudence until the mid-nineteenth century").

177. 103 U.S. 304 (1880).

178. *Id.* at 306, 308. "Bigamy" is the act of wedding to second spouse while already being legally married. Legal Info. Inst., *Bigamy*, CORNELL L. SCH. (June 2022), https://www.law.cornell.edu/wex/bigamy [https://perma.cc/7N2C-BMGU].

179. *Miles*, 103 U.S. at 309.

pulling from the English naturalists' language.[180] Miles argued up to the Supreme Court that the trial court's choice to define the BARD standard to jurors constituted reversable error.[181] However, inherent in this argument is an assumption that the BARD standard is a permissible standard of proof for criminal convictions to begin with.[182] The Supreme Court would thus have an opportunity to address both issues in *Miles*.

The Court held that neither the judge's use, choice to define, nor specific definition of the BARD standard were grounds for error.[183] First, the Court spoke approvingly of the BARD standard in dicta, stating that the evidence for a criminal conviction "must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt."[184] While this constituted an endorsement by the Court of the BARD standard as the standard of proof for criminal convictions, the Court stopped short of requiring the BARD standard as a matter of law.[185]

Second, the Court concluded that the trial judge's choice to define the BARD standard for jurors in and of itself was not an

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180. The judge's definition reads in full:

> Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.

Id.; *see also supra* Part I.A.3 (discussing the origins of the "moral certainty" phrase).

181. *Miles*, 103 U.S. at 312 ("The charge of the court defining what is meant by the phrase 'reasonable doubt' is assigned as ground of error.").

182. *Cf. id.* (stating that the BARD standard is "very favorable to the accused, and is sustained by respectable authority").

183. *Id.* ("We think, there was no error in the charge of which the plaintiff in error can justly complain.").

184. *Id.*

185. *Compare id.* (approving the BARD standard as the standard of proof for a criminal conviction), *with In re* Winship, 397 U.S. 358, 364 (1970) (explicitly holding that the Due Process Clause requires the BARD standard as the standard of proof for a criminal conviction). *See also Winship*, 397 U.S. at 362 (citing *Miles*, 103 U.S. at 304, in support of the assertion that the Court has "assumed" the BARD standard is constitutionally required).

error.[186] The Court cautioned lower courts against defining the phrase, asserting that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."[187] However, the Court stopped at an admonition and did not go as far as to say that lower courts were forbidden from defining the phrase.[188]

Finally, the Court held that the trial court's specific instructions on the BARD standard were not in error.[189] The Court reasoned that as the trial judge's definition was both "very favorable to the accused" and supported by "respectable authority" from state supreme courts, Miles could not "justly complain" about any error in the instruction.[190] Yet, keeping with its pattern of restraint, the Court held itself back from giving any of its own guidance on how to define the phrase; implicitly, its endorsement of a "moral certainty" definition betrays that the Court already understood the BARD standard as serving a secular, proof procedure function.[191]

The *Miles* decision serves as an excellent synecdoche of the Supreme Court's interaction with the BARD standard for the next ninety years.[192] During this period, a litany of cases would appear before the Court for review of a trial judge's instruction on the BARD standard.[193] The Court would review and

186. *Miles*, 103 U.S. at 312 (ultimately holding that the choice to instruct the jury on the phrase and the specific instruction used did not constitute an error).

187. *Id.*

188. *See id.*; *see also* Victor v. Nebraska, 511 U.S. 1, 5 (1994) (holding that lower courts are not constitutionally bound to either define or decline to define reasonable doubt for juries).

189. *Miles*, 103 U.S. at 312.

190. *Id.*

191. *See id*; *supra* Part I.A.3 (discussing the secular grounding of "moral certainty" as an epistemological concept). While he lost on this issue, Miles would win a reversal of his bigamy conviction with a creative legal argument regarding spousal privilege. *Id.* at 315–16.

192. The Supreme Court would decide *In re Winship* in 1970, ninety years after deciding *Miles* in 1880. *In re* Winship, 397 U.S. 358 (1970); *Miles*, 103 U.S. at 304.

193. *E.g.*, Hopt v. People, 120 U.S. 430, 439 (1887) (reviewing a BARD instruction that described the confidence required to convict the defendant as one a juror would "be willing to act upon in the more weighty . . . matters relating to your own affairs"); Coffin v. United States, 156 U.S. 432, 452–53 (1895) (reviewing a BARD instruction in its interaction with a "presumption of innocence" instruction); Holt v. United States, 218 U.S. 245, 254 (1910) (reviewing a BARD

ultimately approve the instruction, comfortably drawing upon lower-court authority when doing so.[194] However, this would be the extent of the Court's guidance; it would neither hold that the BARD standard of proof was required as a matter of law nor offer its own definition of the phrase.[195] Rather, the Court would often re-assert its concern that defining the BARD standard would only serve to confuse jurors—sometimes by quoting *Miles*.[196]

The Court's laissez faire approach to the BARD standard permitted its spread through common-law adoption to continue through the late-nineteenth and early-twentieth centuries with nary an oversight.[197] By the time the Court decided *In re Winship* in 1970, adherence to the BARD standard had become "virtually unanimous" across the country.[198]

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instruction explaining a "reasonable doubt" as one that would cause "a reasonable man in any matter of like importance [to] hesitate to act"); Wilson v. United States, 232 U.S. 563, 570 (1914) (reviewing a BARD instruction explaining a "reasonable doubt" as one that would cause a juror in a "matter of importance . . . [to] pause and hesitate before acting"); Holland v. United States, 348 U.S. 121, 140 (1954) (reviewing a BARD instruction explaining a "reasonable doubt" as one that the jurors "in the more serious and important affairs of your own lives might be willing to act upon").

194. *E.g.*, *Hopt* 120 U.S. at 440–41 (approving of the trial court's instruction based on a comparison to BARD definitions offered in two Massachusetts Supreme Court cases); *Coffin*, 156 U.S. at 454, 460–61 (approving of the trial court's BARD definition but holding that a proper BARD instruction cannot cure for an erroneous presumption of innocence instruction); *Holt*, 218 U.S. at 254 (approving of the trial court's BARD definition); *Wilson*, 232 U.S. at 570 (same); *Holland*, 348 U.S. at 140 (approving the trial court's instruction based on a comparison to a BARD definition offered by the United States Court of Appeals for the District of Columbia).

195. *See, e.g.*, *Hopt*, 120 U.S. at 440–41 (approving the trial court's BARD definition without holding the BARD standard to be constitutionally required or offering its own definition); *Coffin*, 156 U.S. at 432, 460–61 (same); *Holt*, 218 U.S. at 254 (same); *Wilson*, 232 U.S. at 570 (same); *Holland*, 348 U.S. at 140 (same).

196. *E.g.*, *Hopt* 120 U.S. at 440–41 ("The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them."); *Holland*, 348 U.S. at 140 ("Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." (quoting *Miles*, 103 U.S. at 312)).

197. *See* Morano, *supra* note 162, at 527 (discussing the continued spread of the BARD standard through the back half of the nineteenth century).

198. *In re* Winship, 397 U.S. 358, 361–62 (1970).

2. *In re Winship*: Due Process Requires the BARD Standard

In 1970, the Supreme Court would inaugurate a new era in its BARD standard jurisprudence with its seminal decision *In re Winship*.[199] The case's unique facts as applied to New York State's juvenile delinquency statutes demanded the court face head-on questions of when due process demands the use of the BARD standard.[200]

Twelve-year-old Samuel Winship was charged as a delinquent for an alleged theft of $112 in New York Family Court.[201] After each party presented its case, the judge found that he was convinced of Samuel's guilt "by a preponderance of the evidence" but not beyond a reasonable doubt.[202] Yet, the New York Family Court Act only required a juvenile's guilt to be proven to this lower standard.[203] Samuel was sentenced to at least eighteen months of confinement at a reform school.[204] New York's appellate courts would affirm the family court's decision and the constitutionality of its juvenile adjudication procedures on appeal before the case rose to the Supreme Court in 1969.[205]

The Supreme Court reversed the lower courts, holding that the New York Family Court Act was unconstitutional as due process required Samuel's guilt to be proven beyond a reasonable doubt.[206] In doing so, the Court spoke to the BARD standard in its most direct and forceful terms to date.[207] The Court lauded

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199. Shealy, *supra* note 19, at 237 ("*Winship* is at the very heart of the modern Court's 'reasonable doubt' jurisprudence.").

200. *Winship*, 397 U.S. at 359 ("This case presents the single, narrow question whether proof beyond a reasonable doubt is among the essentials of due process and fair treatment required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult." (internal quotation marks omitted)).

201. *Id.* at 359 (explaining that the New York Family Court Act adjudicated people as juvenile delinquents if they are alleged to have committed criminal acts between ages seven and fifteen). See also *supra* notes 1–19 and accompanying text for a factual summary.

202. Winship Brief, *supra* note 1, at 7.

203. *Winship*, 397 U.S. at 360 (explaining that the New York Family Court Act must base its findings on a preponderance of the evidence standard).

204. *Id.* at 360.

205. *Id.* at 360–61.

206. *Id.* at 368.

207. *See id.* at 362 (acknowledging that the Court has discussed the BARD standard previously but never explicitly ruled upon if it is constitutionally required).

the BARD standard's "vital role in the American scheme of criminal procedure" and affirmed that convicting the accused based upon the standard of evidence required in a civil case would "amount[] to a lack of fundamental fairness."[208] Dispensing any ambiguity, the court "explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [they are] charged."[209]

While the *Winship* Court recognized the "virtually unanimous" adoption of the BARD standard across jurisdictions, it nonetheless tasked itself with supporting its decision.[210] The Court offered two justifications for its holding.[211] First, it spoke to the value of the BARD standard in its proof procedure function, describing it as "a prime instrument for reducing the risk of convictions resting on factual error."[212] To the Court, criminal trials present the terrible conundrum of facing the accused with the immense stakes of lost liberty and the stigmatization of conviction despite an inherent margin of error in factfinding.[213] Thus, reasoned the Court, the BARD standard is "indispensable" in communicating to the factfinder the paramount importance of acting only upon "a subjective state of certitude of the facts in issue."[214]

Second, the *Winship* Court spoke to the value of the BARD standard in its moral comfort function.[215] The Court identified a fundamental concern in "the *moral force* of the criminal law," and asserted that this moral force must "not be diluted by a standard of proof that leaves people in doubt whether innocent [people] are being condemned."[216] In this pursuit, the Court

208. *Id.* at 363 (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)).

209. *Id.* at 364.

210. *Id.* at 361–62.

211. *See id.* at 363–64.

212. *Id.* at 363; *see also* WHITMAN, *supra* note 40, at 9; *supra* note 40 and accompanying text (explaining how the BARD standard prioritizes its function as offering moral comfort rather than ensuring factual proof).

213. *See Winship*, 397 U.S. at 363–64 ("There is always in litigation a margin of error, representing error in factfinding, which both parties must take in account.").

214. *Id.* at 364 (citation omitted).

215. *Id.* (discussing the BARD standard's important role in giving the community confidence in the criminal legal system); *see also* WHITMAN, *supra* note 40, at 10–11 and accompanying text (same).

216. *Winship*, 397 U.S. at 364 (emphasis added).

understood the BARD standard as its central tool, describing it as "indispensable to command the respect and confidence of the community in applications of the criminal law."[217] In this sense, the Court is acknowledging an expansion of the standard's moral comfort function; while the standard still plays a role in assuaging jurors in the difficult act of judgement,[218] the Court also sees the BARD standard playing a moral comfort function by assuring jurors of the integrity of the system they are participating in.[219] While the Court undoubtedly paid its dues to this legitimizing effect of the BARD standard in its moral comfort function, it presented these benefits as secondary to the BARD standard's value in its proof procedure function.[220]

However, equally significant to what *Winship* did do is what it did not do: define "beyond a reasonable doubt."[221] Furthermore, *Winship* itself gives very little guidance on how to approach defining the phrase; the only commentary the Court offers on the matter is its rejection of the appeals court's argument that the BARD standard is roughly equivalent to the preponderance of the evidence standard as "singularly unpersuasive."[222]

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217. *Id.*

218. *See* Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2424 (1999) ("[J]udgement is indeed a terrible thing. Those whose job it is to ask juries for convictions have learned that turning in a conviction can be a difficult thing to do, even for jurors convinced that a conviction is warranted and fully justified."); Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 484–85 (1997) (discussing how surveyed jurors often discuss the inherent difficulty of judging another).

219. *See Winship*, 397 U.S. at 364 (explaining that the BARD standard is indispensable because it provides a "subjective state of certitude"); s*ee also* Clark, *supra* note 218, at 2404 ("[W]e as a community must judge and, on occasion, condemn our fellow citizens . . . . Do we do so bravely and honestly . . . [o]r, do we hide behind a regime of facially neutral procedures in an effort to wash our hands of responsibility for the fate of those we condemn?").

220. *Winship*, 397 U.S. at 364 (introducing the BARD standard's moral comfort function benefits as a further matter to their proof procedure function benefits, spending roughly one third of the opinion on these issues, and discussing these issues without any citation to authority).

221. *See id.* at 361–65 (discussing the constitutional requirement of the BARD standard without expounding upon what it substantively means).

222. *Id.* at 367 ("[W]e reject the Court of Appeals' suggestion that there is, in any event, only a 'tenuous difference' between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive.").

Neither would the Court rule on or offer any suggestion as to if lower courts are required to define the phrase for jurors.[223]

Overall, the only question that *Winship* answered for the lower courts was one the common law had already answered in effect: whether due process requires the guilt of the criminally accused to be proven beyond a reasonable doubt.[224] The lower courts would have to wait for answers on many of their remaining questions on the BARD standard[225]—and may be waiting still for others.[226]

3. *Victor*: Lower Courts Off-Leash

While the Court tied up some ancillary questions about the BARD standard in the years following *Winship*,[227] its next

223. *See id.* at 361–65 (discussing the constitutional requirement of the BARD standard without any mention of lower courts' obligations or responsibilities in defining the phrase).

224. *Compare id.* at 364 (holding the Due Process Clause requires proof to the BARD standard in criminal adjudications), *with id.* at 361 (noting that even years before the *Winship* decision, almost all common-law jurisdictions required proof to the BARD standard in criminal adjudications).

225. *See, e.g.*, Victor v. Nebraska, 511 U.S. 1, 5 (1994) (ruling that lower courts are not constitutionally required to define the BARD standard for juries).

226. *See* Laudan, *supra* note 27, at 299–300 (noting the persistent challenge in accurately defining BARD).

227. The Supreme Court's first rulings on the BARD standard after *Winship* standardized the review and remedy of challenged BARD instructions in a line of cases beginning with *Cage v. Louisiana*. 498 U.S. 39, 41 (1990) (finding a BARD instruction erroneous and reversing the defendant's conviction); Estelle v. McGuire, 502 U.S. 62, 72 n.4 (1991) (establishing the Court will review BARD instructions for error based upon the "reasonable likelihood" standard); Sullivan v. Louisiana, 508 U.S. 275, 281–82 (1993) (holding that an erroneous BARD instruction always constitutes reversable error). In *Cage*, the Court ruled for the first time that a trial court's BARD standard instruction was erroneous and remedied the error by reversing Tommy Cage's conviction. *Cage*, 498 U.S. at 41. In *Estelle*, the Court tweaked *Cage*'s review standard for BARD instructions to unify the Court's standard of review for jury instructions under the "reasonable likelihood" approach. *Estelle*, 502 U.S. at 72 n.4 ("[W]e now disapprove the standard of review language in *Cage* . . . and reaffirm the standard set out in *Boyde*."); *see also* Boyde v. California, 494 U.S. 370, 380 (1990) (deeming the proper standard of review for a challenged jury instruction "is whether there is a reasonable likelihood that the jury has applied the challenged instruction" in violation of the Constitution). Finally, in *Sullivan v. Louisiana*, the Court standardized *Cage*'s remedy of reversing the lower court's conviction and remanding the case for consistent proceedings as the remedy for an erroneous BARD instruction. *Sullivan*, 508 U.S. at 278–80 (affirming *Cage*, 498 U.S. 39 (1990), and deeming an erroneous BARD instruction to always warrant reversal on Sixth

consequential ruling came in 1994's *Victor v. Nebraska*.[228] While the Court would offer up some of its most extensive analysis of BARD standard instructions,[229] it denied itself the opportunity to define the standard.[230] Quite to the contrary, the Court would make it clear that the Constitution affords the lower courts wide discretion as to if and how they define the BARD standard.[231]

Victor combined two cases in which the petitioners, Clarence Victor and Alfred Sandoval, each raised a number of objections to the BARD instruction in their cases.[232] Both petitioners argued that the trial court erred by using the phrase "moral certainty" to explain the standard, relying on the Court's rejection of a "moral certainty" instruction in *Cage v. Louisiana*.[233] Each defendant also raised a number of objections to the particular wording of the instruction in their respective case.[234] The Court reviewed these BARD instructions based on the *Estelle* standard, where a jury instruction is found erroneous if there is a

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Amendment grounds). While these cases provide meaningful guidance to lower courts on interacting with the BARD standard, they duck defining the phrase. *See Cage*, 498 U.S. at 41 (finding a BARD instruction erroneous but refusing to define the standard); *Estelle*, 502 U.S. at 72 n.4 (establishing the review standard for erroneous BARD instructions but refusing to define the standard); *Sullivan*, 508 U.S. at 281–82 (finding a BARD instruction erroneous but refusing to define the standard).

228. 511 U.S. 1 (1994).

229. *Compare id.* at 10–17 (engaging in a roughly eight-page review of the BARD instruction in petitioner Alfred Sandoval's case), *and id.* at 19–23 (engaging in a roughly five-page review of the BARD instruction in petitioner Clarence Victor's case), *with Cage*, 498 U.S. at 41 (finding the BARD instruction in Cage's case erroneous within less than a page of analysis).

230. *See Victor*, 511 U.S. at 22–23 (holding that the petitioners' jury instructions on the BARD standard did not violate the Constitution without offering its own definition).

231. *Id.* at 5 (holding that lower courts are not bound by the Constitution to define the BARD standard for jurors or use a certain definition).

232. *Id.* at 10, 19–21 (laying out Sandoval and Victor's objections to the BARD instruction used in their respective cases).

233. *Id.* at 15–16, 21 (discussing Sandoval and Victor's objection to the "moral certainty" language used in their cases); *see also supra* note 227 (explaining the Court's invalidation of the BARD instruction in *Cage*, 498 U.S. 39 (1990)).

234. *Victor*, 511 U.S. at 10, 17 (explaining Sandoval's objections to the use of the phrases "moral evidence" and "not a mere possible doubt" in the trial court's BARD instruction); *id.* at 19, 22 (explaining Victor's objections to the use of the phrases "substantial doubt" and "strong possibilities" in the trial court's BARD instruction).

"reasonable likelihood" the jury applied it in an unconstitutional manner.[235]

The Court distinguished the BARD instructions in Victor and Sandoval's cases from that in *Cage* and held both to be constitutional, despite their "moral certainty" language.[236] In doing so, the Court emphasized that it considers if the instruction "taken as a whole" creates a reasonable likelihood of unconstitutional application.[237] While the Court was sympathetic to the petitioners' argument that the "moral certainty" language is anachronistic and may confuse jurors in the abstract,[238] it held that the instructions as a whole guided jurors towards a proper understanding of the term and thus application of the BARD standard.[239] On these grounds, the Court distinguished the use of "moral certainty" in the petitioners' instructions from its use in the *Cage* instruction, as the latter "provided insufficient context to lend meaning to the phrase."[240] Using the same logic that the instructions "taken as a whole" communicated the BARD standard to the jury despite some uncouth language, the Court disposed of the petitioners' remaining objections and affirmed their convictions.[241]

However, in laying the foundation for the Court's "taken as a whole" approach to BARD instruction review, the Court would make its widest-reaching constitutional statements about the BARD standard since *Winship*.[242] To justify this approach, the

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235. *Id.* at 6 (citing Estelle v. McGuire, 502 U.S. 62 (1991), and applying the standard to the case at bar); *see also supra* note 227 (explaining the Court's *Estelle* holding and "reasonable likelihood" standard).

236. *Victor*, 511 U.S. at 6 (affirming the lower state courts' judgements that the BARD instructions were constitutional).

237. *Id.* at 22–23 (quoting Holland v. United States, 348 U.S. 121, 140 (1954)).

238. *Id.* at 13 ("We are somewhat more concerned with Sandoval's argument that the phrase 'moral certainty' has lost its historical meaning . . . .").

239. *Id.* at 14–15 ("Although in this respect moral certainty is ambiguous in the abstract, the rest of the instruction given in Sandoval's case lends content to the phrase."); *id.* at 21 ("Instructing [Victor's] jurors that they must have an abiding conviction of the defendant's guilt does much to alleviate any concerns that the phrase 'moral certainty' might be misunderstood in the abstract.").

240. *Id.* at 21, 22.

241. *Id.* at 22–23.

242. *Id.* at 5 (quoting *Holland*, 348 U.S. at 140). *Compare id.* (stating that the Constitution does not require the BARD standard to be defined and declining to provide a specific definition), *with supra* note 227 (surveying the

Court announced two new constitutional rules regarding the BARD standard:

> [T]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt . . . the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof.[243]

In deeming that the Constitution does not require a specific definition or even *a* definition of the BARD standard, the Court made explicit the hands-off approach to the BARD standard it had subtly practiced for over two centuries.[244]

These passages from *Victor* gave state and federal courts express permission to choose whether they permit defining the BARD standard for jurors.[245] By the beginning of 2023, the federal courts' stances on this issue had solidified into four camps.[246] The first camp consisted of circuits that would strongly discourage their lower courts from any attempt to define the phrase, such as the Fourth[247] and Seventh Circuits.[248] The second camp included circuits that would encourage their courts to define the BARD standard but only through their circuit's

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immediate post-*Winship* cases that refined *Winship* but never made any constitutional holdings).

243. *Victor*, 511 U.S. at 5 (citations omitted).

244. *See supra* Part I.B.1 (providing an overview of pre-BARD American jurisprudence).

245. *See Victor*, 511 U.S. at 5.

246. The following tetrachotomy almost certainly oversimplifies each circuit's approach, as this Note demonstrates for any such reduction of the Seventh Circuit's BARD rule. *See infra* Part II (discussing United States v. Alt, 58 F.4th 910 (7th Cir. 2023)).

247. United States v. Brooks, No. 21-4569, 2023 WL 20874, at *2 (4th Cir. 2023) ("[W]hile we have stopped short of actually forbidding district courts from defining 'reasonable doubt,' we have repeatedly warned them away from doing so.").

248. United States v. Hatfield, 591 F.3d 945, 949 (7th Cir. 2010) ("[S]ome courts, including our own, tell district judges not to try to explain to a jury the meaning of beyond a reasonable doubt."). Arguably, the Seventh Circuit had already adopted its hardline rule against defining the BARD standard by this time; the nuances of the circuit's position are discussed more thoroughly in Part II.A below.

pattern jury instructions, such as the Second,[249] Fifth,[250] Tenth,[251] and Eleventh Circuits.[252] The third camp is generally comfortable with their courts trying to define the standard on their own, such as the First,[253] Third,[254] and Sixth,[255] and Ninth Circuits.[256] In the fourth and final camp, the Eighth Circuit goes as far as to compel its lower courts to define the BARD standard.[257]

Overall, the Supreme Court and lower court treatment of the BARD standard reveals two assumptions. First, the repeated invocation of "moral certainty" and other secular epistemological phrasing demonstrates that the lower courts and Supreme Court assumed the BARD standard operated first and foremost as a factual proof function—an assumption made explicit in *Winship*.[258] However, the historical origins of the BARD standard reveal this to be a mistake, born out of the disconnect between

249. Brown v. Greene, 577 F.3d 107, 113 (2d Cir. 2009) ("[W]e repeat our suggestion that trial judges should use the model jury instructions when applicable.").

250. United States v. Hunt, 794 F.2d 1095, 1101 (5th Cir. 1986) ("[W]e take this opportunity to encourage the district courts to follow the Pattern Jury Instructions promulgated by the United States Fifth Circuit District Judges Association.").

251. Tillman v. Cook, 215 F.3d 1116, 1126–27 (10th Cir. 2000) (criticizing an instruction that strayed from the pattern instruction).

252. United States v. Daniels, 986 F.2d 451 (11th Cir. 1993) (approving the circuit's pattern instruction).

253. Morgan v. Dickhaut, 677 F.3d 39, 47 (1st Cir. 2012) ("[W]e have attempted to describe the level of certainty necessary to support a criminal conviction.").

254. United States v. Hernandez, 176 F.3d 719, 728 (3d Cir. 1999) ("[T]rial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." (quoting Victor v. Nebraska, 511 U.S. 1, 22(1994))).

255. United States v. Ashrafkhan, 964 F.3d 574, 580 (6th Cir. 2020) ("[O]ur role in reviewing a district court's reasonable-doubt instruction must focus solely on whether the instruction would tend to confuse the jurors or indicate to them that the standard does not place a high burden of proof on the government.").

256. United States v. Velazquez, 1 F.4th 1132, 1136 (9th Cir. 2021) (upholding use of pattern instruction on reasonable doubt); United States v. Soto-Zuniga, 837 F.3d 992, 1004 (9th Cir. 2016) (noting that the Circuit has repeatedly upheld an alternative reasonable doubt instruction to its pattern instruction).

257. *Eighth Circuit Model Instructions*, *supra* note 33, § 3.11 (8th Cir. 1967) (citing Friedman v. United States, 381 F.2d 155 (8th Cir. 1967), as standing for the proposition that courts must instruct the jury on reasonable doubt).

258. *See supra* Part I.B.1–B.2.

the sources from which professional jurists and ordinary people drew upon to understand it.[259] Second, the Supreme Court's caution against defining the phrase and general laissez faire approach to policing it demonstrate an assumption of its elegancy and effectiveness.[260] To evaluate the validity of this assumption, we must turn to a second discipline: psychology.[261]

C. THE PSYCHOLOGY OF THE "BEYOND A REASONABLE DOUBT" STANDARD AND ITS INSTRUCTIONS

Ever since research psychology found an application in analyzing the behavior of juries, scholars have made it their goal to grasp jurors' understanding and application of the BARD standard.[262] While much of this area's early research is contested,[263] the modern literature proves that an undefined BARD standard fails to communicate to jurors the level of confidence due process requires for a criminal conviction.[264] However, defining the standard can largely cure this shortcoming.[265] These findings shatter the long-running assumption of the Supreme Court and many lower courts that defining the BARD standard will confuse jurors or water down the standard.[266] Rather, they show the opposite: an undefined BARD standard will fail to fulfill its proof procedure function.[267]

1. Pre-1995: Boom and Bust of Jury Instruction Psychology

As the American judiciary and its BARD-standard jurisprudence continued to develop throughout the eighteenth, nineteenth, and twentieth centuries, so did philosophical conversations on ways of knowing.[268] Following the Enlightenment's

259. *See supra* Part I.A.3–A.4.

260. *See supra* Part I.B.

261. *See infra* Part I.C.

262. *See generally* J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 79–80 (1990) (explaining the expansion of psychology into legal studies and discussing early studies on the BARD standard).

263. *See infra* Part I.C.1.

264. *See infra* Part I.C.2.

265. *See infra* Part I.C.2.

266. *See infra* Part I.C.2; *see also supra* Part I.B.

267. *See infra* Part I.C.2.

268. Yale Courses, *Introduction to Theory of Literature with Paul H. Fry*, YOUTUBE (Sept. 1, 2009), https://www.youtube.com/watch?v=4YY4CTSQ8nY&list=PLD00D35CBC75941BD.

focus on the power of the conscious mind, philosophers began to turn their attention onto the unconscious mind and the extent of its influence on the conscious mind.[269] From this primordial intellectual soup, the experimentally inclined of these thinkers birthed psychology, which employs the scientific method and experimentation to understand cognition.[270] By 1876, experimental psychology had a foothold in the United States.[271] It would grow to become the dominant strain of American psychological academia by 1910.[272]

Shortly thereafter, experimental psychology found ready application in legal studies. In 1959, psychological research on jury instructions exploded into academia following a groundbreaking study on admonitions from the *University of Chicago Jury Project*.[273] Contrary to longstanding assumptions of legal practitioners, these researchers concluded that a judge's admonition to a jury to ignore evidence has the unintended and opposite effect of focusing their attention on said evidence.[274] This shockwave triggered a forty-year tsunami of psychological research on jury instructions, with many studies focusing on jury instructions on the BARD standard.[275]

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269. *Id.*; *see also* Baldwin, *supra* note 129, at 179 (characterizing pre-eminent Enlightenment philosopher John Locke's work as attempting to "determine the power of the individual"). More specifically, early psychologists drew heavily from John Locke and *An Essay Concerning Human Understanding*. Baldwin, *supra* note 129, at 179–80 (describing Locke as "a pioneer in psychology" and discussing the influence of *An Essay Concerning Human Understanding* on the field); Rand B. Evans, *William James,* The Principles of Psychology*, and Experimental Psychology*, 103 AM. J. PSYCH. 433, 435–36 (1990) (describing the work of William James, the forefather of American experimental psychology, as building upon Lockean foundations).

270. *See* Evans, *supra* note 269, at 438–39 (discussing the development of experimental psychology in mid-nineteenth-century Europe).

271. *Id.* at 433, 440 (explaining that William James, credited as America's first experimental psychologist, established his laboratory "in 1875 or 1876").

272. *Id.* at 444 ("By the time James died in 1910, experimental psychology had taken over the American psychological scene.").

273. *See* Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753–60 (1959) (explaining some of the relevant findings of the research project); Tanford, *supra* note 262, at 71–73 (discussing the impact of Broeder's study).

274. Tanford, *supra* note 262, at 86 (noting that researchers with the University of Chicago Jury Project concluded that neither instructions to disregard nor limiting instructions were effective).

275. *Id.* at 79 (surveying the results of the prior thirty years of psychological research).

Overall, these researchers reached pessimistic conclusions on the efficacy of jury instructions. Repeatedly, experiments on mock jurors found that jury instructions have a paltry effect on jurors' comprehension of legal topics.[276] Researchers argue that this is due to their focus on legal precision rather than clarity,[277] abstract nature,[278] and the procedural norm of giving jury instructions only once at the end of the trial.[279] However, some studies suggested that instructions on procedural legal topics were more effective than those on substantive legal topics, and could even "significantly" improve jurors' understanding of them.[280] Other studies found that jurors comprehended instructions better on legal topics to which they had some level of preexposure.[281]

The specific research on juror comprehension of the BARD standard during this period is contradictory and criticized. First, scholars consistently found that when given no instructions but the phrase alone, the level of certainty jurors believed the BARD standard required for a conviction was far below what legal professionals considered sufficient.[282] However, their experiments

276. *Id.* ("They all reach the same conclusion: typical pattern jury instructions, drafted by lawyers in an effort to be legally precise, are incomprehensible to jurors.").

277. *Id.* at 80 ("Researchers assert that the attempt to make them legally precise has resulted in instructions so full of jargon and modifying clauses that they are not understandable." (emphasis omitted)).

278. *Id.* at 82 ("The abstract nature of many instructions also interferes with comprehension.").

279. *Id.* at 83 ("Jurors might do a better job if they heard the instructions at the beginning."); *id.* at 84 ("The one point upon which all researchers are agreed is that repeating the instructions two or more times aids comprehension and improves the accuracy of verdicts."); Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 550 (1992) (noting mock jurors' understanding of instructed topics increased by fourteen percent when instructions were repeated).

280. Reifman et al., *supra* note 279, at 550–51 ("Judges' instructions significantly improved performance on questions about the procedural law, but instructions had no effect on jurors' knowledge of the substantive law they were supposed to apply.").

281. Lieberman & Sales, *supra* note 26, at 614 (explaining that instructing on a popular phrase has the benefit of working off a juror's existing mental schema rather than requiring the construction of a new one).

282. In 1993, Professor Reid Hastie compiled twenty-seven studies quantifying the degree of certainty its subjects demonstrated the BARD standard required for a conviction. Reid Hastie, *Algebraic Models of Juror Decision*

produced contradictory results as to whether instruction on the phrase increased juror comprehension.[283] Much of this research is criticized for using non-representative samples, failing to sufficiently simulate a trial setting, having language inconsistencies across studies, or misunderstanding the legal terminology.[284] In the summarizing words of one scholar, "[c]learly this area needs more research."[285]

While this period's specific findings on the BARD standard are mostly unhelpful, plenty of its more generalizable findings on jury instructions seem applicable. Despite the general pessimism in the efficacy of jury instructions,[286] instructions on the BARD standard may have the potential to be an exception as an instruction on a procedural law topic that is generally familiar to jurors.[287]

Processes, *in* INSIDE THE JUROR: THE PSYCHOLOGY OF JUROR DECISION MAKING at 102–05 (Reid Hastie ed., 1993). The three studies investigating judges found that they conceptualized the BARD standard as requiring 86%, 89%, and 90% certainty for a conviction. *Id.* at 102. However, the studies that presented mock jurors with the undefined BARD standard and no further instruction found that they were comfortable to convict upon 60% and 82% certainty. *Id.* at 102, 105.

283. In Professor Hastie's catalog, the studies, except where noted, provided their subjects with "one version or another" of a BARD standard instruction. Hastie, *supra* note 282, at 101. Of the twenty-four studies that investigated mock jurors, the subjects' estimation of the level of confidence the BARD standard required for a conviction ranged from 51% to 92%. *Id.* at 102–05 (the Author is omitting from this range a study focused specifically on pro-death penalty subjects). Between these two endpoints, the reported probabilities varied widely. *Id.*; Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. (PSYCH. & L.) 153, 195 (1982) ("[T]he data on verdicts indicate fewer guilty verdicts among deliberating jurors who receive instructions than among deliberating jurors who receive no instructions.").

284. Hastie, *supra* note 282, at 106 (arguing that much of the variation in results is likely attributable to the differentiating methods used by researchers); *Id.* at 107 ("[S]o few of the empirical studies conducted to date have utilized realistically complex trial simulations."); Lieberman & Sales, *supra* note 26, at 598 n.2 ("[T]o some extent, this confusion may be due to the methodology used by the researchers."); Magnussen, *supra* note 26, at 197 (criticizing prior BARD-instruction experiments for using subjects unrepresentative of eligible United States jurors and small sample sizes).

285. Lieberman & Sales, *supra* note 26, at 599.

286. *See supra* notes 276–81 and accompanying text (summarizing research finding jury instructions to be generally ineffective).

287. *See* Reifman et al., *supra* note 279, at 550–51 (explaining the efficacy of jury instructions on procedural law topics); Lieberman & Sales, *supra* note 26, at 614 (explaining the unique efficacy of jury instructions on topics with which

2. Post-1995: Refined Methods, Consistent Results

Scholars have since learned from the methodological shortcomings of the pre-1995 period and taken a second look at BARD standard instructions.[288] These modern findings demonstrate that the undefined BARD standard cannot suffice as a factual proof function, but jury instructions may largely cure these shortcomings.[289]

First, researchers consistently find that jurors will not afford defendants the expected protections of the BARD standard without instruction.[290] While judges routinely conceptualize the BARD standard as requiring ninety percent certainty to convict a defendant,[291] uninstructed jurors convict at drastically lower degrees of certainty.[292] A 2016 study that subjected a large

jurors have some pre-existing familiarity); *In re* Winship, 397 U.S. 358, 364 (1970) (establishing the BARD standard as a constitutionally mandated procedural requirement of American criminal law); Lieberman & Sales, *supra* note 26, at 614 (explaining jurors' general familiarity with the BARD standard).

288. *E.g.*, White & Cicchini, *supra* note 32, at 8 (discussing methodological failings of earlier studies and how their study solves for them); Magnussen et al., *supra* note 26, at 196–97 (same).

289. *See infra* notes 290–301 and accompanying text (arguing that modern BARD jurisprudence is inadequate and presenting a solution).

290. *See, e.g.*, White & Cicchini, *supra* note 32, at 2–3 (concluding that the BARD standard must be defined to effectuate its due process requirements); *see also* Pi et al., *supra* note 28, at 473–74 (concluding that jurors have an insufficient understanding of the requirements of the BARD standard).

291. Pi et al., *supra* note 28, at 474 (reviewing judicial surveys which suggest most judges quantify the probabilistic meaning of beyond a reasonable doubt at ninety percent). This is consistent with Professor Hastie's catalog. Hastie, *supra* note 282, at 102–05.

292. While this Note draws heavily upon probabilistic expressions of the BARD standard, scholars disagree as to if the BARD standard can, or even should, be expressed this way. Pi et al., *supra* note 28, at 469–76 (discussing alternative interpretations of the BARD standard). Many scholars consider it inapposite to reduce the complexity of human judgment to a simple probability, and that attempting to quantify the BARD standard "may impermissibly lower the prosecution's burden of proof." McCullough v. State, 657 P.2d 1157, 1159 (Nev. 1983); Hastie, *supra* note 282, at 85. Instead, these scholars argue that "reasonable doubt" should be conceptualized as a doubt that can be articulated or give a reasonable person pause. Pi et al., *supra* note 28, at 469–76. Proponents of the probabilistic conceptualization counter that these critiques are "exclusively" based on intuitions of law professors and highlight that the law has no issue with quantifying other standards of proof. Hastie, *supra* note 282, at 97; Pi et al., *supra* note 28, at 508 (discussing courts' comfort with expressing the "preponderance of the evidence" standard as requiring greater than fifty

sample of jury-eligible adults to simulated mock juror deliberations concluded that uninstructed jurors were comfortable convicting at sixty-eight percent certainty.[293] Similar 2019 and 2020 studies repeated these results, finding uninstructed jurors were comfortable convicting at sixty-five percent certainty.[294] Disturbingly, researchers also observe that mock jurors instructed to convict upon an undefined BARD standard do so at an indistinguishable rate to those instructed to convict upon a "preponderance of the evidence" or "clear and convincing evidence" standard.[295] This has led to the alarming consensus that an undefined BARD standard does not offer defendants any more protection than the standard of proof deemed a due process violation in *Winship*.[296]

Second, researchers have consistently found that giving instructions on the BARD standard vastly improves its proof-procedure functionality.[297] An early study sampling jury-eligible

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percent certainty). Furthermore, supporters of a probabilistic approach argue that the specific definitions created by algebraic analysis allow accurate mapping of juror decision-making which is uniquely functional for research purposes. Hastie, *supra* note 282, at 97. As this Note focuses on the implications of such research rather than arguing for a specific definition of the BARD standard, it is comfortable using these quantifications for their probative value and takes no position in this debate.

293. Magnussen et al., *supra* note 26, at 199.

294. White & Cicchini, *supra* note 32, at 17 (reporting that ninety percent of their participants "voted to convict when they believed that more than 65% of the evidence favored the State"); Cicchini, *supra* note 52, at 1476 n.148 (finding jurors given an undefined BARD standard were comfortable convicting at around a sixty-five percent confidence level).

295. White & Cicchini, *supra* note 32, at 15–16 ("[T]he different standards of proof—[preponderance of the evidence], [clear and convincing evidence], and B[A]RD—had no discernible impact on mock jurors' verdicts. We observed the same null effect across four criminal cases with different fact patterns and varying evidence strength.").

296. *Id.* at 16 ("To our knowledge, no researcher has been able to demonstrate that the [BARD standard], particularly when left undefined or only minimally defined, provides defendants with more protection than the civil burdens of proof."); *In re* Winship, 397 U.S. 358, 362–64 (1970) (discussing the constitutional impermissibility of allowing criminal convictions based on the preponderance of the evidence standard).

297. *See, e.g.*, White & Cicchini, *supra* note 32, at 3 (concluding that exposing jurors to instructions that compare different levels of doubt can help cure the undefined BARD standard's shortcomings); *see also* Pi et al., *supra* note 28, at 507–08 (concluding that instructing jurors based on a probabilistic quantification of what the BARD standard requires is the "most practicable alternative"

adults and utilizing simulated deliberations found that jurors required roughly eighty percent certainty to convict when the BARD standard was explained as requiring them to be "firmly convinced" of the defendant's guilt and greater than the civil burdens of proof.[298] A 2012 study found jurors instructed with a probabilistic definition of the BARD standard required roughly 80–84% certainty, and jurors instructed with a "hesitate to act" definition required roughly 82–86% certainty.[299] Finally, researchers in 2019 found that a definition distinguishing the BARD standard from the civil burdens of proof but doing nothing more resulted in mock jurors requiring between 70–75% certainty to convict.[300] This series of methodologically-sound studies quantitatively demonstrate that the BARD standard must be defined to offer any measure of protection greater than the civil burdens of proof.[301]

Scholars lament that none of these definitions have brought jurors up to the ninety percent certainty threshold expected by judges.[302] Yet, they interpret these findings as demonstrating a positive correlation between the sophistication of a trial court's BARD instruction and the due process protections they render

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to the "guessing game" that is the undefined standard); *see also* Fishel, *supra* note 24, at 39 (supporting judicial clarification of the State's burden of proof).

298. Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 LAW & HUM. BEHAV. 655, 660–61, 669 (1996) (concluding that only jury instructions that required participants to be "firmly convinced" of guilt "significantly increase[d] jurors' comprehension of the basic concept as compared to an 'undefined' instruction.").

299. Woody & Greene, *supra* note 26, at 862, 867 (explaining their two BARD standard definitions and reporting their results from two different simulated cases). This study may be distinguishable. While it required mock jurors to apply the BARD standard, it did so by asking jurors to determine whether punitive damages should be awarded in two simulated civil cases rather than by testing for a criminal conviction. *Id.* at 861–62. Further, the study did not test an undefined BARD standard. *Id.*

300. Cicchini, *supra* note 52, at 1471, 1476 (explaining the comparative BARD standard definition and reporting results).

301. White & Cicchini, *supra* note 32, at 17 (concluding that the BARD standard must be defined to offer a greater protection than the civil burdens of proof).

302. Cicchini, *supra* note 52, at 1476; *see also* Horowitz & Kirkpatrick, *supra* note 298, at 666–67 (arguing that none of their tested instructions "do what most courts would like them to do: set the certainty of guilt in the high 80s").

for defendants.[303] Accordingly, some researchers endorse instructing jurors with a probabilistic quantification of "reasonable doubt."[304] Others endorse a definition distinguishing the BARD standard from the civil burdens of proof.[305] Others stop at encouraging definition of the phrase without committing to a particular formulation.[306] It is settled, however, that the constitutional protection of due process "is only as strong as the trial court's burden of proof instruction to the jury."[307]

While it may be too early to advocate for a particular formulation of the BARD standard,[308] this research makes clear that for the BARD standard to act in its assumed capacity as a factual proof procedure, it cannot remain undefined.[309] Without any sort of definition or explanation of the standard, jurors will conceptualize it as permitting criminal convictions in situations far more ambiguous than any judge would permit.[310] Leaving the standard undefined thus exposes criminal defendants to a standard of proof indistinguishable from what was afforded to Samuel Winship rather than what was promised in *Winship*.[311]

II. *UNITED STATES V. ALT*: THE SEVENTH CIRCUIT'S NEW HARD LINE

The Seventh Circuit Court of Appeals committed to a new hard line against defining the BARD standard in January

303. Cicchini, *supra* note 52, at 1494 (describing the relationship between a BARD definition and due process).

304. Pi et al., *supra* note 28, at 507–08 (despairing that courts should instruct jurors on the BARD standard through a "probabilistic articulation of the standard.").

305. White & Cicchini, *supra* note 32, at 2 ("[W]e recommend doing so by using a comparative framework.").

306. *Cf.* Fishel, *supra* note 24, at 39 (arguing that measures of perceived guilt should be defined in criminal trials but refusing to endorse specific definitions).

307. Cicchini, *supra* note 52, at 1494.

308. *See supra* notes 304–05 and accompanying text (summarizing the findings of research studies that demonstrate that there is still work to be done to find a proper BARD instruction).

309. *See supra* note 307 and accompanying text (highlighting the need to differentiate BARD from other standards of proof through jury instructions).

310. *See supra* notes 290–95 and accompanying text (demonstrating that mock jurors consistently quantify the BARD standard as well below the threshold that judges would allow for a conviction).

311. *See supra* notes 15–23 and accompanying text (explaining the importance of the *Winship* decision and its impacts on criminal law).

2023.[312] While the circuit had already cemented an effectual ban on defining the standard,[313] *Alt* crystalized this prohibition in the eyes of legal commentators and its own judges.[314] Yet, reviewing the historical development and psychology of the BARD standard demonstrates that such a rule negates any factual proof function of the BARD standard while preserving its moral comfort function.[315] With the Seventh Circuit thus benefitting from the legitimacy derived from the BARD standard's purported protections for defendants while rendering those protections insufficient for due process, the Constitution demands a remedy be sought.[316]

A. THE *ALT* DECISION: SPOTLIGHTING A ONCE-MURKY PROHIBITION

In *Alt*, the Seventh Circuit sent up a clear signal that it forbids defining the BARD standard in its courts, cutting through decades of nebulous jurisprudence on the topic.[317] The decision, and Judge Thomas Kirsch's concurrence, affirmed what some court-watchers already saw as true: the Seventh Circuit prohibits defining "reasonable doubt."[318] This Section will first discuss the development of BARD-standard jurisprudence in the

312. United States v. Alt, 58 F.4th 910, 910, 919–20 (7th Cir. 2023) (solidifying the Seventh Circuit's prohibition against defining the BARD standard in a case decided on January 25, 2023).

313. *Compare, e.g.*, United States v. Lawson, 507 F.2d 433, 443 (7th Cir. 1974), *cert. denied*, 420 U.S. 1004 (1975) (explaining that the "better practice is not to attempt" defining the BARD standard), *with* United States v. Glass, 846 F.2d 386, 387 (7th Cir. 1988) (stating forcefully that counsel "*may not attempt to define 'reasonable doubt*'"), *and* United States v. Bruce, 109 F.3d 323, 329 (7th Cir. 1997) (emphasizing that neither counsel nor judges "should attempt to define 'reasonable doubt' for the jury").

314. Bernie Pazanowski, *Circuit Splits Reported in U.S. Law Week—January* 2023, BLOOMBERG L. (Feb. 3, 2023), https://news.bloomberglaw.com/us-law-week/circuit-splits-reported-in-u-s-law-week-january-2023 [https://perma.cc/ZA5P-R462] (describing the *Alt* decision as reflecting the Seventh Circuit's "absolute rule" that the BARD standard cannot be defined for a jury); *Alt*, 58 F.4th at 920–21 (Kirsch, J., concurring) (discussing his understanding of the Seventh Circuit's "rigid rule . . . that strictly prohibits district judges and the parties from ever defining reasonable doubt for a jury").

315. *See infra* Part II.B.

316. *See infra* Part II.B.

317. *See infra* Parts II.A.1–A.2.

318. *See infra* Parts II.A.1–A.2.

Seventh Circuit leading up to *Alt* and then explore the *Alt* decision in depth.[319]

1. Before *Alt*: The Seventh Circuit's Chimeric BARD Rule

By the time the Supreme Court established the modern era of BARD jurisprudence with *Winship* in 1970,[320] the Seventh Circuit definitively sat amongst the circuits that discouraged, yet nevertheless allowed, judges and lawyers to define "reasonable doubt."[321] The judges of the Seventh Circuit insisted that the term was "self-defining," and that the "better practice is not to attempt the definition" on the assumption that it would confuse jurors.[322] The circuit still offered its judges a model definition of the phrase in its pattern instructions while cautioning against its use.[323] Its judges spoke in a unified voice that while courts ought not to define the BARD standard, even if requested to do so by a party, Seventh Circuit judges still had "the option" to define the phrase.[324]

However, starting in the late 1980s, this harmonious choir started to mutate into a dissonant cacophony—all because one singer missed a note. In 1988, the Seventh Circuit handed down *United States v. Glass*, in which Barney Glass appealed his counterfeiting conviction by arguing that the district court erred by refusing the jury's request for a "reasonable doubt" definition.[325] The court of appeals rejected this argument, reasoning via

319. *See infra* Parts II.A.1–A.2.

320. *In re* Winship, 397 U.S. 358, 368 (1970).

321. United States v. Lawson, 507 F.2d 433, 442 (7th Cir. 1974) ("Defining ['reasonable doubt'] should be at the option of the trial judge even though a defining instruction is tendered."), *cert. denied*, 420 U.S. 1004 (1975); United States v. Shaffner, 524 F.2d 1021, 1023 (7th Cir. 1975) (explaining that attempting to define the BARD standard is "equivalent to playing with fire"); United States v. Loman, 551 F.2d 164, 167 (7th Cir. 1977) ("[T]his Court has never held and it does not now hold that giving instructions defining reasonable doubt per se constitutes reversible error."), *cert. denied*, 433 U.S. 912 (1977).

322. *Lawson*, 507 F.2d at 443; *see also Shaffner*, 524 F.2d at 1024 (quoting this language from *Lawson* and describing it as an "excellent and exhaustive analysis of the inherent difficulties in trying to define reasonable doubt").

323. United States v. Alt, 58 F.4th 910, 921 (7th Cir. 2023) (Kirsch, J., concurring) (explaining that the Seventh Circuit offered a pattern definition of "reasonable doubt" in 1963 (citing SEVENTH CIRCUIT JUDICIAL CONFERENCE COMMITTEE ON JURY INSTRUCTIONS, MANUAL ON JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES § 6.01–.03 (1963))).

324. *Lawson*, 507 F.2d at 442.

325. 846 F.2d 386, 386 (7th Cir. 1988).

familiar assumption that such an instruction would only add to the jury's confusion.[326] Curtly, the court states that it is "inappropriate" for judges or attorneys to offer a definition of "reasonable doubt," and literally emphasizes that "[t]rial counsel . . . *may not attempt to define 'reasonable doubt.*'"[327] For support, *Glass* asserts that the Seventh Circuit's then-current pattern instructions "forbid" defining the phrase.[328] To the Seventh Circuit's judges, *Glass* was going much further than the circuit had gone before by attempting to establish a flat-out "prohibition" on defining the BARD standard.[329]

But, *Glass*'s prohibition both overextended and misunderstood Seventh Circuit law on the BARD standard.[330] *Glass* is incorrect that the Seventh Circuit's contemporaneous jury instructions "forbid" defining "reasonable doubt," as the instruction rather "recommends" against defining it.[331] The caselaw *Glass* cites in support of its assertion that it is "inappropriate" for judges or lawyers to define the BARD standard, *United States v. Dominguez*, makes the same mistake.[332] The only other authority *Glass* cites in support of its argument, *Holland v. United*

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326. *See id.* at 386–87.

327. This quote reads in full:

> It is, therefore, inappropriate for judges to give an instruction defining "reasonable doubt," and it is equally inappropriate for trial counsel to provide their own definition. *See, e.g.*, *United States v. Dominguez*, 835 F.2d 694, 701 (7th Cir.1987). Trial counsel may argue that the government has the burden of proving the defendant's guilt "beyond a reasonable doubt," but *they may not attempt to define "reasonable doubt."*

Id. at 387.

328. *Id.*

329. United States v. Hall, 854 F.2d 1036, 1039 (7th Cir. 1988) (citing *Glass*, 846 F.2d at 387, for the assertions that "no attempt should be made to define reasonable doubt," and that the Circuit has established a "prohibition" on such definitions).

330. *See generally Hall*, 854 F.2d at 1043 (Posner, J., concurring) (explaining the multiple ways in which *Glass* mishandles its authorities).

331. *Id.* ("*Glass* also relied on instruction 2.07 of our pattern instructions, but said that the instruction 'forbids' attempts to explain reasonable doubt to the jury; the actual word in the instruction, however, is not 'forbids' but 'recommends [against].'").

332. 835 F.2d 694, 701 (7th Cir. 1987) ("[T]he criminal instructions adopted by this circuit forbid [defining 'reasonable doubt'].")*; see also Hall*, 854 F.2d at 1043 (Posner, J., concurring) ("*Glass* cited *United States v. Dominguez*, which contains a dictum similar to that in *Glass* and supports it by reference to the pattern instruction (again substituting 'forbids' for 'recommends') . . . ." (citation omitted)).

States, is familiar Supreme Court dicta that exemplifies the Seventh Circuit's cautionary approach in the language *Glass* quotes from it: "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."[333] In short, the *Glass* court had no real reason or authority to justify its prohibition on defining the BARD standard.

Nonetheless, the Seventh Circuit would attempt to force *Glass* into its BARD-standard jurisprudence, inviting confusion into this doctrine.[334] Instead of dispensing with the case as a misstep, its judges wrote their subsequent opinions to read as consistent with *Glass*'s hardline language while technically adhering to the circuit's pre-existing rule of merely discouraging definition.[335] To square this circle, the Seventh Circuit would opine on the issue with flashy rhetoric but equivocal holdings.[336] A judge may first bemoan how the "tortured attempts to define reasonable doubt have yet to produce anything which has been approved by this court," before reeling in their diction to rule that "no attempt *should* be made to define reasonable doubt"[337]—a far cry from the explicit "*may not"* language in

333. *Glass*, 846 F.2d at 387 (quoting Holland v. United States, 348 U.S. 121, 140 (1954)); *see also Hall*, 854 F.2d, at 1043 (Posner, J., concurring) (describing the language *Glass* quotes from *Holland* as "different from saying the judge should never make the attempt" to define the BARD standard).

334. *Hall*, 854 F.2d at 1039 (describing *Glass* as establishing a "prohibition" on defining the BARD standard); *Pattern Criminal Federal Jury Instructions for the Seventh Circuit*, COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR. § 2.04 (Nov. 30, 1998) [hereinafter *Seventh Circuit Instructions 1998*], https://www.ca7.uscourts.gov/pattern_jury_instr/pjury.pdf [https://perma.cc/25J9-ZFMN] ("[T]he Seventh Circuit has refused to adopt a per se rule against defining reasonable doubt . . . .").

335. *See supra* note 334.

336. *E.g.*, United States v. Blackburn, 992 F.2d 666, 668 (7th Cir. 1993) (stating that the Seventh Circuit has "reiterated time and again . . . that district courts *should* not attempt to define reasonable doubt" (emphasis added)); United States v. Bruce, 103 F.3d 323, 329 (7th Cir. 1997) (emphasizing that it has been "well established" by the Seventh Circuit that "neither trial courts nor counsel *should* attempt to define 'reasonable doubt' for the jury" (emphasis added)); United States v. Alex Janows & Co., 2 F.3d 716, 722–23 (7th Cir. 1993) (discussing the court's "incredulity" at the prosecutor's discussion of the BARD standard before stating that "he never *should have* broached the subject" (emphasis added)).

337. *Hall*, 854 F.2d at 1039 (emphasis added).

Glass.[338] With more time came more such cases and more dissonance.[339]

In 1998, the Seventh Circuit tried to bring this canon into unison and articulate its stance on defining the BARD standard with its Pattern Criminal Federal Jury Instructions, but the document only encapsulates the circuit's incongruity.[340] By this edition of the instructions, the Committee on Federal Criminal Jury Instructions for the Seventh Circuit refused to provide any definition of "reasonable doubt."[341] Instead, the Committee commented that it recommends that the phrase receive no instruction on the basis that it "is self-explanatory and is its own best definition."[342] Yet, the Committee is explicit that "the Seventh Circuit has refused to adopt a per se rule against defining reasonable doubt."[343] Furthermore, the Committee includes a lengthy paragraph surveying Seventh Circuit and Supreme Court cases rejecting certain phrases as BARD explanations, as if marking phrases to avoid for judges or attorneys attempting to define the standard.[344] Rather than putting out the flames of the Seventh Circuit's stance on defining the BARD standard, the 1998 pattern instructions added to the smoke.

From the Seventh Circuit's two voices emerged a chimeric rule that combined these disparate approaches to create a practical, but not technical, prohibition on defining the BARD standard.[345] On paper, the Seventh Circuit did not prohibit defining the BARD standard, in the sense that any attempt to define the phrase was not automatic grounds for reversal.[346] Yet, through a decade of disparaging any definition attempt and embarrassing any actor who tried to do so in their opinions, the Seventh

338. *Glass*, 846 F.2d at 387.

339. *See supra* note 336 (highlighting cases that have echoed the *Glass* court's stance on defining "reasonable doubt.").

340. *Seventh Circuit Instructions 1998*, *supra* note 334, § 2.04 (demonstrating the Seventh Circuit's refusal to create a per se rule surrounding attempts to define the BARD standard).

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *See id.* ("[T]he Seventh Circuit has refused to adopt a per se rule against defining reasonable doubt . . . ."); United States v. Hall, 854 F.2d 1036, 1038 (7th Cir. 1988) ("[D]efining reasonable doubt will constitute reversible error *only* where the instruction is misleading or confusing.").

346. *See supra* note 345.

Circuit cemented an internal understanding within its courts that explaining the BARD standard was verboten.[347]

Falling in step, Seventh Circuit judges and practitioners stamped out any discussion of the BARD standard from trial courts through motions in limine and objections. Seventh Circuit district judges began routinely granting motions in limine forbidding definition of the BARD standard, citing to *Glass* and company for support that "law on this point appears to be well settled in the Seventh Circuit and to prohibit definition of the term 'reasonable doubt' by either the parties or the Court."[348] Even if BARD definitions escaped a motion in limine, they existed as objection fodder to Seventh Circuit criminal practitioners, capable of preserving an easy issue to tack onto an appeal.[349] The Seventh Circuit declared open season on the BARD standard, and hair-triggered judges, prosecutors, and defense attorneys hunted it into practical extinction.[350]

From the 2000s onward, the Seventh Circuit would double down on *Glass*'s prohibition and send much stronger signals that the case stood for the Court's true rule,[351] but the realities of the circuit's practice continued to evade court watchers. The Seventh Circuit's 2012 pattern jury instructions canonized *Glass* as

347. *See supra* notes 334–39 and accompanying text (demonstrating that the Seventh Circuit set a precedent of forcefully discouraging any attempt to provide the jury with a definition of the BARD standard).

348. United States v. Powell, No. 18-CR-30042, 2020 WL 1272380, at *1 (S.D. Ill. Mar. 17, 2020); *see also, e.g.*, United States v. Edwards, No. 18-CR-162, 2020 WL 549288, at *6 (W.D. Wis. Feb. 4, 2020) ("As the government observes, the court may not include a definition of reasonable doubt in the jury instructions, *see* [*Glass*], so this motion is GRANTED."); United States v. Strowder, No. 17-CR-30120, 2018 U.S. Dist. LEXIS 10581, at *2 (S.D. Ill. Jan. 23, 2018) (granting a government motion in limine "to prevent either party from defining reasonable doubt" on the authority of *Glass*); United States v. Barron, No. 22 CR 500, 2024 WL 897986, at *7 (N.D. Ill. Mar. 1, 2024) ("In *Glass*, the court noted that this circuit's criminal jury instructions 'forbid' attempts to explain the term . . . . The parties are therefore precluded from offering, or attempting to offer, any definition of 'reasonable doubt.'").

349. *Cf., e.g.*, United States v. Alt, 58 F.4th 910, 922–23 (7th Cir. 2023) (Kirsch, J., concurring) (demonstrating with the trial transcript the defense attorney's swift objection to the prosecutor's attempt to explain the BARD standard).

350. *Cf.* Shealy, *supra* note 19, at 256 (noting that the Seventh Circuit has successfully rejected "all attempts to define 'reasonable doubt'").

351. *E.g.*, United States v. Hatfield, 591 F.3d 945, 949 (7th Cir. 2010) (explaining that the Seventh Circuit tells its "district judges not to try to explain to a jury the meaning of 'beyond a reasonable doubt'").

exemplifying its BARD rule by making exclusive reference to *Glass* and its progeny and quoting the decision at length in the Committee Comment.[352] This practice remained consistent through the 2015, 2017, 2018, and 2023 editions of the Seventh Circuit's pattern jury instructions.[353] However, commentators would continue to classify the Seventh Circuit as a circuit that discourages, but does not prohibit, defining the BARD standard into the 2020s[354]—a technically correct, but practically incorrect characterization.[355] But, in early 2023, *Alt* arrived to sound the alarm.[356]

2. *United States v. Alt*: An Unequivocal Prohibition on Defining the BARD Standard

In November of 2019, twenty-six-year-old Thomas Alt began messaging someone on the dating app Grindr who he thought was a fifteen-year-old boy and made plans with them to meet

352. *Pattern Criminal Jury Instructions of the Seventh Circuit (2012 Ed.)*, COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR. § 1.04 cmt. (2012), https://www.ca7.uscourts.gov/pattern_jury_instr/7th_criminal_jury_instr.pdf [https://perma.cc/8RFC-4JUZ] (offering no BARD definition, exclusively citing the *Glass* line of cases, and quoting *Glass* at length in the Committee Comment).

353. *Pattern Criminal Jury Instructions of the Seventh Circuit (2012 Ed.) (Plus 2015-2017 and 2018 Changes)*, COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR. § 1.04 (2018), https://www.ca7.uscourts.gov/pattern-jury-instructions/7th_criminal_jury_instr.pdf [https://perma.cc/JAE2-M964] (leaving the 2012 pattern instruction of "reasonable doubt" unchanged); *The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit (2023 Ed.)*, COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR. § 1.04 (2023) [hereinafter *Seventh Circuit Instructions 2023*], https://www.ca7.uscourts.gov/pattern-jury-instructions/Criminal_Jury_Instructions.pdf [https://perma.cc/TE4M-2P62] (same).

354. *E.g.*, Wang & Zhi, *supra* note 25, at 152–53 (describing the Seventh Circuit as an exemplar of courts that admonish against defining the BARD standard); Shealy, *supra* note 19, at 254–56 (grouping the Seventh and Fourth Circuits together as circuits that vigorously oppose but still occasionally permit definition of the BARD standard, while noting the Seventh Circuit's unforgiving posture on the BARD standard); Henry A. Diamond, Note, *Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716, 1719–20 (1990) (grouping the Seventh Circuit with the Fourth and Fifth Circuit as circuits that discourage definition of the BARD standard).

355. *See supra* note 345 (highlighting that the Seventh Circuit has not created a per se rule against allowing jury instructions on the BARD standard).

356. United States v. Alt, 58 F.4th 910 (7th Cir. 2023).

and engage in sexual conduct.[357] After traveling to what he believed was the boy's home, FBI agents sprung out and arrested Alt—he had been messaging an undercover agent.[358] Alt was charged in federal court with the attempted enticement of a minor in violation of 18 U.S.C. § 2422(b) and took his case to trial in May 2021.[359]

Alt did not have much of a defense.[360] The government had his Grindr chat logs and defeated Alt's suppression motion attempting to block inculpatory statements he made to an FBI agent while in custody from coming into evidence.[361] Alt called no witnesses, nor did he take the stand himself.[362] His entire trial strategy revolved around arguing that the government had failed to meet its burden of proving his guilt beyond a reasonable doubt.[363]

Then, during the government's closing arguments, the prosecutor began explaining the BARD standard to the jury, stating, "It is not beyond all doubt. It is not beyond any shadow of a doubt."[364] Alt's counsel objected "to defining a 'reasonable doubt,'" insisting that "[t]he jurors can do that for themselves."[365] The judge overruled the objection, stating that the prosecutor had not "gone out of bound[s] here," but emphasized to the jury that the court had "not instructed you as to any definition of 'beyond a reasonable doubt' or 'reasonable doubt,' so that is for you to ultimately determine what you believe to be reasonable doubt."[366] The defense persisted that they "still believe that it's improper argument," stressing that "[t]here's a reason that's not defined," but the court waved the prosecutor along.[367] At the

357. *Id.* at 913.

358. *Id.*

359. Brief for the Defendant-Appellant Thomas Alt at 1, United States v. Alt, 58 F.4th 910 (7th Cir. 2023) (No. 21-2724) [hereinafter Alt Brief].

360. *See id.* at 10 (describing Alt's "entire defense" as arguing that "the Government had not met its burden of proof").

361. *Alt*, 58 F.4th at 913–14, 919 (describing the government's use of the chat logs at trial and victory over a suppression motion).

362. Alt Brief, *supra* note 359, at 10.

363. *Id.* ("The Defendant's entire defense . . . had been that the Government had not met its burden of proof.").

364. *Id.* at 9.

365. *Id.*

366. *Id.*

367. *Id.* at 10.

conclusion of this three-day trial, the jury found Alt guilty, and he was sentenced to ten years in prison followed by fifteen years of supervised release.[368]

On appeal, Alt argued that the prosecutor's comments on the BARD standard during closing arguments constituted reversible error.[369] Citing to *United States v. Glass*, Alt recited its infamous admonition that parties "may not attempt to define 'reasonable doubt.'"[370] On this authority, Alt argued that the prosecution's comments on the BARD standard illegally "undermined the entire defense of the Defendant, that defense being entirely that the Government had not met its burden of proof."[371] Alt further argued that the judge stating in front of the jury that the prosecutor had not "gone out of bound" and allowing the prosecutor to continue effectively endorsed this lower definition of the BARD standard.[372] This, concluded Alt, entitled him to a new trial.[373]

The Seventh Circuit Court of Appeals agreed with Alt's objection but found the prosecutor's actions nonprejudicial.[374] First, the appeals court was clear that the District Court erred in denying Alt's objection.[375] The appeals court reiterated the Seventh Circuit's "explicit" position on the "inappropriateness of defining 'reasonable doubt.'"[376] Creatively driving the point home, the court chastised the prosecution through quoting and altering an admonition contained in an earlier Seventh Circuit opinion: "[W]e [again] admonish counsel, do not define 'reasonable doubt' to a jury."[377] Yet, the court found the evidence against Alt "overwhelming," and held that the prosecutor's statements

368. *Id.* at 10, 12.

369. *Id.* at 26.

370. *Id.* at 26–27 (citing United States v. Glass, 846 F.2d 386, 387 (7th Cir. 1988)).

371. *Id.* at 27–28.

372. *Id.* at 28.

373. *Id.* at 29.

374. United States v. Alt, 58 F.4th 910, 918–20 (7th Cir. 2023) (accepting Alt's BARD standard arguments before ultimately affirming the district court).

375. *Id.* at 920 ("While denying the objection to the prosecutor's statements was in error, the error was harmless and does not warrant reversal.").

376. *Id.* at 919 (quoting United States v. Alex Janows & Co., 2 F.3d 716, 722 (7th Cir. 1993)).

377. *Id.* (alterations in original) (quoting United States v. Alex Janows & Co., 2 F.3d 716, 723 (7th Cir. 1993)).

could not have had any bearing on the case's outcome.[378] Furthermore, the court held that the judge's statement to the jury that they had not instructed them on the BARD standard and the defense's own reiteration to the jury that they are to determine what constitutes a "reasonable doubt" cured "any potential risk of prejudice."[379] Therefore, "the error was harmless and does not warrant reversal."[380]

What is remarkable about the *Alt* opinion is how strenuously insistent it is that it is doing nothing new. Almost all the language the opinion uses to articulate the Seventh Circuit's position on the BARD standard is quoted, and the quoted language itself comments on its own repetitiveness.[381] Some of the opinion's only original language remarks how the Seventh Circuit has "been so clear" about their rule.[382] And, arguably, this opinion does not do anything new—the case perpetuates the Seventh Circuit's shadow-ban on defining the BARD standard by railing against the practice without committing to a per se prohibition in writing.[383]

Yet, despite its armadillo-like insularity, the *Alt* opinion contains one crucial difference from almost all the Seventh Circuit's prior BARD definition cases that rests not in the words that it uses but in the word that it does not use: "should."[384] While the opinion speaks in pitched tones about the Seventh Circuit's distaste for attempting to define the BARD standard like so many cases before it, it does not fall back to the circuit's usual and ultimate refrain that parties "should not" do so.[385] Even the

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378. *Id.*

379. *Id.* at 919–20.

380. *Id.* at 920.

381. *E.g.*, *id.* at 919 ("Many times in the past, we have been explicit about the inappropriateness of defining 'reasonable doubt.'" (quoting *Janows*, 2 F.3d at 722)); *id.* ("[W]e [again] admonish counsel, do not define 'reasonable doubt' to a jury." (quoting *Janows*, 2 F.3d at 723)).

382. *Id.*

383. *See id.*; *see also supra* notes 346–49 and accompanying text (discussing *Alt's* prohibition against defining the BARD standard while holding that providing a definition did not always warrant reversal).

384. *See Alt*, 58 F.4th at 919–20 (discussing the Seventh Circuit's rule on defining the BARD standard without once using the word "should").

385. *Compare id.* at 919 ("[D]o not define 'reasonable doubt' to a jury." (quoting *Janows*, 2 F.3d at 723)), *with* United States v. Blackburn, 992 F.2d 666, 668 (7th Cir. 1993) ("[D]istrict courts *should* not attempt to define reasonable

case from which *Alt* quotes at length concludes its discussion on the BARD standard by stating that the offending party "never *should* have broached the subject" of reasonable doubt,[386] but *Alt* does not include this retreat amongst its borrowed language.[387] Instead, *Alt* gives no ground: "do not define 'reasonable doubt' to a jury."[388] While this may seem like quite the pedantic semantic, *Alt*'s refusal to equivocate completes a thirty-five-year project to establish *Glass*'s prohibition on defining the BARD standard as the Seventh Circuit's position.[389]

Additionally, Judge Thomas Kirsch called attention to the Seventh Circuit's prohibition in a concurrence to *Alt*, further spotlighting this issue.[390] In no uncertain terms, Judge Kirsch describes the Seventh Circuit as following a "rigid rule . . . that strictly prohibits district judges and the parties from ever defining reasonable doubt for a jury."[391] Judge Kirsch notes that this makes the Seventh Circuit "the only circuit that affords district judges no discretion to define the phrase."[392] However, Judge Kirsch argued that in certain cases, including the case at bar, permitting judges to define the BARD standard would benefit all parties by reducing juror confusion.[393] Therefore, concluded Judge Kirsch, the Seventh Circuit ought to offer a definition on the BARD standard in its pattern jury instructions and "give district judges at least some discretion to define reasonable doubt depending on the unique circumstances of the case."[394]

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doubt." (emphasis added)), *and* United States v. Bruce, 109 F.3d 323, 329 (7th Cir. 1997) ("[N]either trial courts nor counsel *should* attempt to define 'reasonable doubt' for the jury." (emphasis added)).

386. *Janows*, 2 F.3d at 723 (emphasis added).

387. *See Alt*, 58 F.4th at 919 (quoting from *Janows* at length but without including this phrase).

388. *Id.* (quoting *Janows*, 2 F.3d at 723).

389. *Compare id.* ("[W]e have been explicit about the inappropriateness of defining 'reasonable doubt' . . . do not define 'reasonable doubt' to a jury." (quoting *Janows*, 2 F.3d at 723)), *with* United States v. Glass, 846 F.2d 386, 387 (7th Cir. 1988) ("It is . . . inappropriate for judges to give an instruction defining 'reasonable doubt' . . . . Trial counsel . . . may not attempt to define 'reasonable doubt.'").

390. *Alt*, 58 F.4th at 920–23 (Kirsch, J., concurring).

391. *Id.* at 920.

392. *Id*.

393. *Id.* at 922–23.

394. *Id.* at 923.

Between the language change and Judge Kirsch's concurrence, *Alt* has seemingly broken through the Seventh Circuit's decades of pussyfooting around the BARD standard in the eyes of court watchers.[395] Whereas commentators previously described the Seventh Circuit as discouraging definition of the BARD standard, *Alt* made the circuit's unique rule against definition attempts visible to those aware of the case.[396] With *Alt* published, the Seventh Circuit's transition is complete and its mask is off: neither judges nor lawyers may define the BARD standard for a jury.[397]

B. *ALT*'S IMPLICATIONS: THE BARD STANDARD PROVIDES A MORAL COMFORT FUNCTION WITHOUT A FACTUAL PROOF FUNCTION

Marshalling an interdisciplinary understanding of the BARD standard reveals grave implications for what *Alt*'s prohibition on defining the standard means for criminal defendants. Without explanation, the standard exists as a misapplied heuristic incapable of performing its constitutionally demanded and celebrated role as a proof procedure function.[398] However, it will keep functioning in its overlooked moral comfort role, purchasing the Seventh Circuit unearned legitimacy through its

395. *See* Pazanowski, *supra* note 314 (describing *Alt* as firmly establishing the Seventh Circuit's position disallowing definitions of the BARD standard).

396. *Compare* Wang & Zhi, *supra* note 25, at 152–53 (describing the Seventh Circuit as an exemplar of courts that admonish against defining the BARD standard), *with* Pazanowski, *supra* note 314 (describing the Seventh Circuit as having a unique "absolute rule" against defining the BARD standard for a jury).

397. To reiterate, it is a perfectly valid interpretation of *Alt*, and perhaps the less sensational interpretation, to read the case as only continuing the Seventh Circuit's effectual prohibition on defining the BARD standard. *See supra* notes 381–83 and accompanying text. Yet, each of the harms identified in Part II.B *infra* as deriving from an explicit prohibition apply just as well to an effectual prohibition that is recognized as such by judges, commentators, and the public. *See infra* Parts II.B.1–B.4. This Note also presents a legal solution pegged to this weaker interpretation of *Alt*, *see infra* note 446, but in the interest of arguing against the most difficult formulation of the Seventh Circuit's rule, it focuses under the more stringent interpretation of *Alt* as making the Seventh Circuit's prohibition explicit.

398. *See infra* notes 402–07 and accompanying text (exploring the consequences of disregarding the research on leaving the BARD standard undefined).

supposed protections for defendants.[399] This is not just a failure of due process, an approaching threat to judicial legitimacy, and a blockade against legal development, but a hypocrisy that the Seventh Circuit is ethically compelled to rectify.[400]

1. The *Alt* Prohibition Violates Due Process

Alt's prohibition guarantees that the BARD standard will fail to fulfill its constitutionally mandated factual proof function in the Seventh Circuit.[401] The psychological research on the BARD standard eviscerates any claim that the phrase is "self-defining."[402] Even dating back to psychologists' earliest work on the BARD standard, their research suggests that juries hold the state to an insufficiently low burden of proof when the phrase is left undefined.[403] This finding has only become more consistent as research methods have improved over time.[404] The most rigorous and recent research demonstrates that uninstructed jurors will convict at identical levels of confidence to the preponderance of the evidence standard, including at sixty-five and even fifty percent confidence.[405] Accordingly, *Alt*'s demand that Seventh Circuit practitioners "do not define 'reasonable doubt' to a jury"

399. *See infra* Part III.B.2; *see also supra* notes 215–20 (discussing the *Winship* Court's recognition of the legitimizing effects of the BARD's moral comfort function).

400. *See infra* Part III.B.4 (arguing that prohibiting defining the BARD standard presents substantial ethical concerns).

401. *In re* Winship, 397 U.S. 358, 363 (1970) ("The reasonable-doubt standard . . . is a prime instrument for reducing the risk of convictions resting on factual error.").

402. *Compare* White & Cicchini, *supra* note 32, at 2 ("[T]here is now strong empirical support for a conclusion that reasonable doubt is *not* self-defining . . . ."), *with* United States v. Lawson, 507 F.2d 433, at 443 (7th Cir. 1974) ("[Reasonable doubt] is self-defining . . . there is no equivalent phrase more easily understood . . . ."), *cert. denied*, 420 U.S. 1004 (1975).

403. *See supra* note 282 and accompanying text (discussing research exploring what degree of certainty mock jurors estimated the BARD standard entailed).

404. *See supra* notes 290–301 and accompanying text (reviewing other studies showing the discrepancy between judges and jurors' estimations of certainty regarding the BARD standard).

405. *See supra* notes 290–301 and accompanying text; *see also* Legal Info. Inst., *Preponderance of the Evidence*, CORNELL L. SCH., https://www.law.cornell.edu/wex/preponderance_of_the_evidence [https://perma.cc/5NG3-ABYD] ("[U]nder [the preponderance] standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.").

does not just expose defendants to criminal conviction at lower levels of confidence than what judges understand the standard to represent[406]—it exposes them to conviction at a standard the *Winship* Court rejected as a denial of due process.[407]

Reviewing the development of the BARD standard unpacks these psychological findings by demonstrating that the phrase is misapplied in serving a proof procedure function.[408] The history of English juries reveals that the phrase developed to encourage jurors to convict defendants rather than grapple with the government's burden of proof.[409] To achieve its original purpose, the phrase cribbed then-familiar theological language that spoke to jurors' spiritual concerns.[410] This same theological language is now shoehorned into explaining complex procedural standards for a secular society removed from the phrase's philosophical context by hundreds of years.[411] The phrase "beyond a reasonable doubt" is an anachronism in a twenty-first-century American courtroom—no wonder it makes no sense to jurors.

Yet, despite the standard's misapplied and untimely language, its failures as a proof procedure function can largely be cured through jury instructions defining the phrase.[412] Further psychological research demonstrates that categorical or quantitative definitions of the BARD standard bring jurors much closer to operating on the standard of subjective certainty it tries to communicate.[413] Ironically, the effectiveness of these instructions may be in part because of jurors' pre-existing familiarity with the phrase.[414] Technicalities aside, the conclusion is clear: the BARD standard can fulfill its constitutionally demanded proof procedure function when it is given one of many effective

406. United States v. Alt, 58 F.4th 910, 919 (7th Cir. 2023); Pi et al., *supra* note 28, at 474 (stating that most judges quantify beyond a reasonable doubt at ninety percent).

407. *In re* Winship, 397 U.S. 358, 364 (1970).

408. *See supra* Part I.A (discussing the BARD standard's historical emergence to serve a moral comfort function).

409. *Supra* Part I.A.

410. *Supra* Part I.A.

411. *See supra* Part II.B (discussing the BARD standard's emergence within the American court system).

412. *See supra* Part I.C.2 (discussing recent research into jury instructions on the BARD standard and resulting juror comprehension).

413. *See supra* Part I.C.2.

414. *See* Lieberman & Sales, *supra* note 26 (arguing that most Americans are familiar with the phrase "beyond a reasonable doubt").

definitions.[415] Thus, until it permits defining the phrase, the Seventh Circuit is placing every criminal defendant in its courts, in the words of the *Winship* Court, at "a disadvantage amounting to a lack of fundamental fairness."[416]

2. The *Alt* Prohibition Poses a Looming Threat to Judicial Legitimacy

In the medium term, the *Alt* prohibition threatens judicial legitimacy in the Seventh Circuit as the existence and implications of its ban bleed into the public eye. Just as in the 1700s, the BARD standard is legitimizing the court systems in which it is used through encouraging societal buy-in.[417] Then, this was a function of making the English jury system and participation in it acceptable to a Christian populace.[418] Now, the BARD standard still lends some comfort to the secular jurors called upon to render judgement, but its main legitimizing effects come from its purported protections for those charged with a crime.[419] However, under the *Alt* rule, the Seventh Circuit may still project the righteousness and sophistication of a court system that uses the BARD standard despite neutralizing these protections.

It is only a matter of time before the Seventh Circuit is caught in this sleight of hand. While the circuit's wavering jurisprudence on the BARD standard concealed its effective prohibition for decades, the *Alt* opinion and Judge Kirsch's concurrence make this prohibition explicit and final.[420] As attention from legal commentators grows, so will the wider awareness of the Seventh Circuit's ban amongst lawyers and the public.[421] And as the consensus of modern psychological research on the undefined

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415. *See supra* Part I.C.2 (highlighting how modern research consistently supports defining the BARD standard).

416. *In re* Winship, 397 U.S. 358, 363 (1970) (quoting *In re* Winship, 247 N.E.2d 253, 259 (N.Y. 1969) (Fuld, J., dissenting)).

417. *See supra* Part I.A.4 (discussing the emergence of the BARD standard in early English juries to encourage the participation of spiritually cautious Christian jurors).

418. *See supra* Part I.A.4.

419. *In re* Winship, 397 U.S. 358, 364 (1970) (describing the BARD standard as "indispensable to command the respect and confidence of the community in applications of the criminal law"); *see also supra* Part I.B.2 (discussing the BARD standard's recognized moral comfort function in modern American courts).

420. *See supra* Part II.A.2 (discussing the *Alt* case and its outcome).

421. *See supra* Part II.A.2.

standard solidifies, the implications of the ban will spread as well.[422]

The reveal will cost the Seventh Circuit dearly in judicial legitimacy. Research into criminal defendants finds that a feeling of fair treatment in their proceedings is the most determinative factor in their support for the legal system—even more so than the actual outcome of their case.[423] When the façade concealing the undefined BARD standard crumbles and defendants realize the Seventh Circuit has denied them this "fundamental" procedural protection, it will lose the judicial legitimacy thought "indispensable to command[ing] the respect and confidence of the community."[424] With America's criminal legal system already undergoing a public legitimacy crisis,[425] the Seventh Circuit cannot afford to lose the BARD standard's incomparable caché.

3. The *Alt* Prohibition Obstructs Development of the Law

By foreclosing any discussion on the BARD standard within its courts, the Seventh Circuit's *Alt* prohibition is obstructing necessary development on an undertheorized area of the law. While states and their courts are commonly characterized "as

422. *See supra* Part I.C.2 (highlighting how modern research consistently supports defining the BARD standard).

423. Tom R. Tyler, *The Role of Perceived Injustice in Defendant's Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 70–71 (1984) (finding that, in a study of traffic court and misdemeanor defendants, "attitudes toward judges and courts are only weakly and indirectly linked to case dispositions" and a feeling of fair treatment is controlling); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 503–04 (1988) (repeating this result with felony defendants in response to criticisms that "procedural justice will only matter when the outcomes involved are trivial").

424. *In re* Winship, 397 U.S. 358, 364 (1970); *see also* Baker v. Carr, 369 U.S. 186, 267 (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.").

425. Deborah Tuerkheimer, *Criminal Justice for All*, 66 J. LEGAL EDUC. 24, 24 (2016) ("It is not hyperbolic to assert that our criminal justice system is very much in crisis. Just as important, this crisis is widely acknowledged outside of the legal academy . . . ."); *see also* Press Release, Am. C.L. Union, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017), https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds [https://perma.cc/5JB8-WR3S] (finding that ninety-one percent of Americans polled "say that the criminal justice system has problems that need fixing").

laboratories for devising solutions to difficult legal problems,"[426] federal-level actors occasionally have the opportunity to experiment as well.[427] BARD-standard jurisprudence is precisely such an area for the rare but meaningful experimentation that can occur within the federal courts. As the Supreme Court in *Victor* granted lower courts explicit permission to experiment with defining the BARD standard, a task that has posed consistent and insurmountable trouble to the Court and judiciary writ large, circuit courts have a valuable opportunity to attempt to solve this problem.[428] Diligently, every federal circuit—except one—has taken up the mantle post-*Victor* and offered its best attempt at defining the BARD standard.[429]

The *Alt* prohibition is barring the Seventh Circuit from making a meaningful contribution to the bedrock of American criminal law. Where there is currently an intentionally blank space in the Seventh Circuit's jury instructions, there could be the BARD-standard definition that ends courts' and researchers' centuries-long search for the right formulation—or, at least, one that provides another datapoint on the path to it.[430] Aside from

426. Oregon v. Ice, 555 U.S. 160, 171 (2009); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). For examples of such state experimentation in the criminal law context, see, for example, Thomas Ward Frampton & Brandon Charles Osowski, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 22–23 (2024) (discussing different states' approaches to protecting defendants and jurors against discriminatory peremptory strikes); Amy M. Cohen, Note, *From* Powell *to Present: Defining the Right to Counsel Beyond* Rothgery, 108 MINN. L. REV. 539, 598–602 (2023) (discussing different states' approaches to expanding the Sixth Amendment right to counsel).

427. *Cf.* Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 UC DAVIS L. REV. 1119, 1173 (2018) (explaining that under certain circumstances, federal agencies are able and better equipped to undertake policy experiments compared to state-level actors).

428. *See* Victor v. Nebraska, 511 U.S. 1, 5 (1994) (reviewing Supreme Court precedent allowing courts freedom both in deciding whether to instruct regarding the BARD standard and in the language used in such instruction).

429. *See supra* Part I.B.3 (discussing variations in federal jury instructions on the BARD standard).

430. *See Seventh Circuit Instructions 2023*, *supra* note 353, at 26; *supra* Part I.B (reviewing the American judiciary's struggle to define the term); *supra* Part I.C (reviewing researchers' continuing efforts to craft a procedurally sufficient BARD definition).

the definition itself, banning explanation of the standard in its courts prevents Seventh Circuit judges from substantively engaging with the standard in their opinions, and the Supreme Court from ever reviewing these opinions.[431] This will prolong the many uncertainties that still exist in the Supreme Court's BARD jurisprudence as a byproduct of its laissez faire approach to the standard.[432] Until the Seventh Circuit steps back from *Alt*'s prohibition, it is denying itself and the judiciary meaningful progression in the law.

4. The *Alt* Prohibition is Ethically Wrong

Finally, sustaining the *Alt* prohibition will drag the Seventh Circuit below the ethical standards expected of legal professionals. As Seventh Circuit judges grow aware of the hardening research consensus of the undefined BARD standard's ineptitude,[433] they will find themselves bound to knowingly enforce a dysfunctional rule. When this scienter requirement is met, upholding the *Alt* prohibition will require judges to compromise their ethics.

To be clear, there can be no argument that the Seventh Circuit adopted this prohibition, or its prior stance of strongly discouraging BARD definitions, with the intention or knowledge that it would shortchange defendants. Comparing the timeline between the court's BARD caselaw and psychologists' BARD research demonstrates this impossibility.[434] When the Supreme Court started handing down cases like *Miles* in the late 1800s that discouraged BARD definitions and influenced the Seventh Circuit's original posture, United States experimental psychology was in its infancy and without legal application.[435] And absent evidence to the contrary, it is a fair assumption that

431. *See supra* Parts II.A.1–A.2 (reviewing the Seventh Circuit's treatment of questions regarding the BARD standard).

432. *See supra* Part I.B (highlighting the Supreme Court's hesitancy to interfere with the development of the BARD standard in the American legal system).

433. *See supra* Part I.C (reviewing research exploring the consequences of leaving the BARD standard undefined).

434. *Compare supra* Part II.A (presenting a timeline of Seventh Circuit BARD jurisprudence), *with supra* Part I.C (presenting a timeline of psychological research into the BARD standard).

435. *Compare supra* Part I.B.1 (discussing early Supreme Court cases on the BARD standard), *with supra* Part I.C.1 (discussing the beginnings of American experimental psychology).

reasonable people know when a doubt is reasonable.[436] Even if the Seventh Circuit's judges were erudite psychology scholars in 1988 when they decided *Glass* and began shifting towards their prohibition, the research into BARD definitions at the time was inconclusive and would not have steered their reasoning any differently.[437] There was no way for the Seventh Circuit to know the implications of this foredoomed rule.

Now, however, it is only a matter of time before the Seventh Circuit learns of the undefined BARD standard's shortcomings and must uphold the *Alt* prohibition despite them.[438] At this point, stare decisis will steer these judges to enforce a rule they know to violate due process—a violation of the Model Code of Judicial Conduct.[439] Similarly, if these judges recognize the threat to judicial legitimacy the prohibition poses, continuing to enforce it will run afoul of other model rules.[440] Finally, until the public also understands the *Alt* prohibition's implications, Seventh Circuit judges will know they are reaping the legitimacy of the BARD standard through sewing a false promise of its protections for the accused.[441] Such deception cannot be aligned with the radical standards of honesty demanded of all lawyers in their dealings with third parties.[442] Out of respect for defendants and

436. *Cf., e.g.*, Holland v. United States, 348 U.S. 121, 140 (1954) ("Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." (quoting Miles v. United States, 103 U.S. 304, 312 (1880))).

437. *Compare supra* Part II.A (discussing the Seventh Circuit's *Glass* decision and following caselaw), *with supra* Part I.C.1 (describing the often-contradictory research on the BARD standard before the mid-1990s).

438. *See supra* Part I.C.2 (discussing the consistency of modern research on the BARD standard).

439. MODEL CODE OF JUD. CONDUCT r. 1.1 (AM. BAR ASS'N 2020) ("A judge shall comply with the law, including the Code of Judicial Conduct.").

440. MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS'N 2020) ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

441. *See supra* Part II.A.2 (showing that at least some judges in the Seventh Circuit recognize the benefits of defining the BARD standard); Part II.B.2 (discussing the threat posed by the *Alt* decision to the judicial legitimacy of the Seventh Circuit).

442. *See* MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2023) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."); *c.f.* MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 2023) (establishing a duty for lawyers to report rule

the legal profession, the Seventh Circuit has an ethical obligation to correct its course.

By eviscerating the BARD standard's proof procedure function while benefiting from its moral comfort function through the *Alt* rule, the Seventh Circuit is failing its constituents, both legally and morally. The rule must change to afford criminal defendants their constitutionally guaranteed due process rights and the citizens of the Seventh Circuit the protections of a criminal justice system that they already believe to exist.

III. SOLUTIONS TO, AND LESSONS FROM, *ALT*

While turning back on the *Alt* prohibition will be an uphill battle, the Seventh Circuit can restore the BARD standard's essential protections for defendants through a legal solution fueled by interdisciplinary understanding and a patchwork of practical stop-gap measures.[443] First, this Part will explain how the emerging argumentative strategy of genealogical critique provides the Seventh Circuit with the framework for a legal argument sufficient to overturn its precedent enshrining the *Alt* prohibition.[444] Second, this Part will suggest explaining the presumption of innocence as a work-around to mitigate *Alt*'s stifling effects and that attorneys in other jurisdictions should define BARD to effectuate the due process rights of criminal defendants.[445]

A. ENDING THE SEVENTH CIRCUIT'S *ALT* PROHIBITION THROUGH GENEALOGICAL CRITIQUE

Ending the *Alt* prohibition is not as straightforward as it may seem. While the Seventh Circuit's BARD jurisprudence reveals the prohibition is based upon erroneous caselaw, this alone is likely insufficient to warrant departure from the now-

violations when those violations raise "substantial question as to that lawyer's *honesty*, *trustworthiness* or fitness as a lawyer in other respects" (emphasis added)); MODEL RULES OF PRO. CONDUCT r. 4.1 (AM. BAR ASS'N 2023) (establishing an ethical duty to not knowingly make false statements of material fact during a representation).

443. *See infra* notes 446–73 and accompanying text.

444. *See infra* Part III.A.

445. *See infra* Part III.B.

canonized approach in *Glass*.[446] However, wielding the history and psychology behind the BARD standard to craft a genealogical critique of this precedent may convince the Seventh Circuit to turn away from the *Alt* prohibition.[447]

The issue for the Seventh Circuit is that while the development of its BARD prohibition relies on erroneous caselaw, exploiting this fact alone is unlikely to justify a shift away from the subsequent affirming precedent.[448] The journey to *Alt* began with 1988's *Glass*, which misuses its contemporaneous Seventh Circuit pattern jury instructions in a manner that completely departs from their actual text and overextends the circuit's prior BARD-standard holdings.[449] These missteps are significant arrows in the Seventh Circuit's quiver for turning back from this case and its progeny. So is the fact that it could do so through drawing upon an opinion criticizing *Glass* from its arguably most famous and influential jurist: Judge Richard Posner, the most-cited legal scholar of all time.[450] Yet, as the Seventh Circuit has since embraced *Glass* as the kernel of its modern BARD-

446. It is possible to argue that the Seventh Circuit's BARD jurisprudence is much more equivocal than as discussed in this Part. First, it can be argued that the Seventh Circuit has never fully embraced the *Glass* prohibition, as *Alt* and similar cases with staunch language remain anomalies in a canon focused on discouraging a defined BARD standard. *See supra* Part II.A.1 (discussing the Seventh Circuit's general approach pre-*Alt* of strongly discouraging defining the BARD standard). Second, *Alt*'s language itself leaves possibilities for the circuit to walk the decision back in future opinions, and the case relies extensively on cases that equivocate on defining the standard. *Cf.* United States v. Alt, 58 F.4th 910, 919–20 (7th Cir. 2023) (admonishing against defining the BARD standard in harsh but not ultimate language); *id.* at 919 (quoting from United States v. Alex Janows & Co., 2 F.3d 716 (7th Cir. 1993), which ultimately walks back from a complete prohibition of the BARD standard). While this argument may provide a feasible path to a rule-change, this Part focuses on the harsher interpretation of the Seventh Circuit's precedent in the interest of addressing the strongest possible arguments.

447. *See infra* notes 453–66 and accompanying text (discussing the utility offered by genealogical arguments in overcoming precedent).

448. *See supra* Part II.A.1 (explaining *Glass*'s various errors).

449. *See supra* Part II.A.1.

450. United States v. Hall, 854 F.2d 1036, 1043 (7th Cir. 1988) (Posner, J., concurring) (attacking the reasoning given in *Glass* for holding that it is inappropriate to define "reasonable doubt"); Fred R. Shapiro, *The Most-Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1602–03 (2021) (naming Judge Posner as the most-cited legal scholar of all time with 48,852 total citations to his books and articles—over 10,000 citations more than the second-ranking scholar).

standard jurisprudence and presented subsequent cases as affirming its ruling,[451] *Glass*'s erroneousness cannot "by itself justify scrapping settled precedent."[452] Thus, the Seventh Circuit needs a more powerful tool for this job.

The Seventh Circuit's solution lies in applying an interdisciplinary understanding of the BARD standard to form a genealogical critique of its undefined function. Genealogical arguments connect contemporary legal phenomenon to their historical origins to either criticize or validate their continued use.[453] Such an argument contains three components: first, the argument traces the history of a current legal practice.[454] Second, the argument makes a normative value judgment about the practice's past.[455] Third, the argument imputes this normative judgment to the present through the historical throughline.[456] When successful, genealogical arguments can thus unsettle legal authorities, including judicial precedent, by demonstrating their untrustworthiness.[457] The Supreme Court is increasingly utilizing this argumentative strategy to overturn positive law,[458]

451. *See* Part II.A.1 (discussing the Seventh Circuit's treatment of *Glass*).

452. Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015).

453. Tyler, *supra* note 45, at 9–11 (defining genealogical arguments).

454. *Id.* at 9–10.

455. *Id.* at 10.

456. *Id.* at 10–11. Tyler also offers an illustration of genealogical arguments based upon a hypothetical legislature that passes an overtly discriminatory statute but then quickly repeals and replaces it with a statute that is not overtly discriminatory but still discriminates in effect. *Id.* at 11. A genealogical argument would 1) trace the current statute to the repealed statute, 2) make the normative judgement that the past statute was enacted with discriminatory intent, and 3) impute this racist intent to the new statute to undermine its authority.

457. *Id.* at 30–31 (arguing that genealogy can undermine the assumption that traditions reflect accumulated wisdom when the tradition was derived from a shameful source).

458. Espinoza v. Mont. Dep't of Revenue, 591 U.S. 464, 497 (2020) (Alito, J., concurring) (drawing authority to invalidate a provision in the Montana state constitution prohibiting tax credits for students attending religious schools from the provision's "origin" in anti-Catholic and anti-immigrant prejudice); Ramos v. Louisiana, 590 U.S. 83, 87 (2020) (drawing authority to invalidate a Louisiana state-constitutional provision permitting nonunanimous criminal jury verdicts by tracing its roots to white supremacist projects); *see also id.* at 1410 (Sotomayor, J., concurring) (stating that the law's "history is worthy of this Court's attention").

longstanding doctrinal rules,[459] putative traditions,[460] and more.[461]

Within this framework, practitioners can put forward a genealogical critique of the Seventh Circuit's *Alt* prohibition by connecting the origins of the BARD standard as a moral comfort function to its continued operation as solely a moral comfort function when left undefined.[462] First, this argument would trace the "beyond a reasonable doubt" heuristic through its American, English, and medieval legal history to reveal its origins as serving a moral comfort function for early Christian jurors.[463] Second, this argument would make a normative evaluation based within the Due Process Clause that a heuristic providing a moral comfort function alone is inappropriate to apply as a factual proof function for criminal defendants.[464] Third and finally, by using the psychological research on the BARD standard to demonstrate that the phrase continues to only provide a moral comfort function when left undefined, the argument may impute the normative judgement about the undefined BARD standard's inappropriateness to its current use in the Seventh Circuit.[465]

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459. United States v. Vaello Madero, 596 U.S. 159, 183–84 (2022) (refusing to follow the Court's precedent in the *Insular Cases* due to their "fundamental" and "shameful" origins in "ugly racial stereotypes, and the theories of social Darwinists"); Haaland v. Brackeen, 599 U.S. 255, 327–28 (2023) (criticizing the Court's plenary power doctrine for its basis in decisions "baked in the prejudices of the day"); *see also* Gamble v. United States, 587 U.S. 678, 754–56 (2019) (Gorsuch, J., dissenting) (arguing the majority should justify departing from *stare decisis* by recognizing that the "real roots" of its dual-sovereignty doctrine in *Moore v. Illinois* "did violence to the Constitution in the name of protecting slavery and slaveowners").

460. City of Chicago v. Morales, 527 U.S. 41, 53 n.20 (1999) (plurality opinion) (arguing that while "antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality" considering their racist origins); *Espinoza*, 581 U.S. at 480–82 (refuting Montana's argument drawing support from their "tradition against state support for religious schools" by unpacking its anti-Catholic origins).

461. *Cf.* Tyler, *supra* note 45, at 12–24 (canvassing other Supreme Court opinions utilizing genealogical arguments).

462. *See supra* Part II.B.1 (arguing that leaving the BARD standard undefined removes its utility to the fact finder).

463. *See supra* Parts I.A–I.B (reviewing the history of the BARD standard).

464. *See supra* Part II.B.1 (arguing that leaving the BARD standard undefined removes its ability to serve a proof function).

465. *See supra* Part I.C.2 (reviewing psychological literature regarding the BARD standard); Part II.B.1 (exploring the BARD standard's lack of utility

Such an argument demonstrates that the Seventh Circuit's underlying assumptions about the efficacy and function of an undefined BARD standard cannot be trusted, giving it license to turn away from its precedent forbidding its definition.[466]

Thus, the emerging tactic of genealogical critique may suffice to end the *Alt* prohibition and lead the Seventh Circuit towards a new practice of encouraging, or even compelling, definition of the BARD standard.

B. PRACTICAL STOP-GAPS AND IMPLICATIONS

In the meantime, or if the circuit fails to act, criminal practitioners in the Seventh Circuit ought to try and alleviate the *Alt* rule's impact on criminal defendants by including robust discussions on the presumption of innocence in their opening and closing statements. While *Alt* forbids explanation of the BARD standard, the Seventh Circuit still permits definition and discussion of the accused's presumption of innocence.[467] While conceptually distinct, these mechanisms are interrelated and serve together to form the core due process protections for criminal defendants.[468] Given the interplay between these procedural features, Seventh Circuit practitioners may be able to compensate for *Alt*'s prohibition on defining the BARD standard by taking the opportunity to discuss the presumption of innocence; some of the psychological researchers studying the standard recommend doing so as part of an efficacious BARD instruction.[469] Such discussions could stress for the jury the characteristic difficulty of achieving convictions in our criminal legal system and encourage hesitancy in handing down a guilty verdict. However, this is nowhere near a perfect fix, as proceeding to any discussion of the

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when left undefined); *see also* Tyler, *supra* note 45, at 40–41 (discussing the importance in genealogical arguments of connecting the continuity of their subject's function across time).

466. *See supra* Part II.B.1 (highlighting reasons for doubting the efficacy of an undefined BARD standard).

467. *See Seventh Circuit Instructions 2023*, *supra* note 353, at 9 (providing a model instruction for the presumption of innocence and burden of proof); United States v. Covarrubias, 65 F.3d 1362, 1369 (7th Cir. 1995) ("Juries in federal criminal trials are instructed that the defendant is presumed innocent.").

468. *See In re* Winship, 397 U.S. 358, 363 (1970) (explaining how the BARD standard "provides concrete substance for the presumption of innocence").

469. White & Cicchini, *supra* note 32, at 24 (recommending that "instructions on reasonable doubt begin by describing the presumption of innocence").

confidence required to defeat this presumption of innocence will spur objections against defining the BARD standard.[470]

Finally, this study of the BARD standard and the *Alt* decision offers practical guidance for criminal lawyers in other jurisdictions. Understanding the BARD standard as a misapplied heuristic that only fulfills its proof procedure function when defined ought to encourage attorneys who have the discretion to define the standard to do so.[471] Such a discussion becomes especially important in the common situation for defense attorneys where the only defense available for their client is that the government cannot meet its burden of proof.[472] The astute lawyer also ought to incorporate the other points of guidance offered by psychological research into jury instructions to make their remarks as straightforward as possible and repeat them at different points in the trial if possible.[473] Doing so will help ensure that the jury evaluates the defendant's guilt at the standard due process requires.

Overall, the Seventh Circuit can and must reverse course and permit its judges and practitioners to define the BARD standard. Until that day comes, the *Alt* rule will serve as a rueful teaching tool for the criminal attorneys outside of its reach.

CONCLUSION

In 1970, the Supreme Court offered an empty promise to Samuel Winship that "the case against him must be proved beyond a reasonable doubt."[474] Today, the Seventh Circuit is making that same empty promise to every criminal defendant that enters one of its courtrooms through *Alt*'s prohibition on defining

470. *See supra* Part II.A.2 (explaining *Alt*'s prohibition on defining the BARD standard); United States v. DeJohn, 638 F.2d 1048, 1057–59 (7th Cir. 1981) (cautioning that an extensive discussion of the presumption of innocence may be impermissible).

471. *See supra* Part I.A (discussing the emergence of the BARD standard as a moral comfort function drawn from theological literature); Part I.C.2 (discussing the psychological research into the BARD standard demonstrating that it does not communicate to jurors to convict at a sufficient level of confidence unless defined).

472. *See, e.g.*, Alt Brief, *supra* note 359, at 10 (characterizing Alt's "entire defense" as arguing that the prosecution had not met its burden of proof to convict Alt).

473. *See supra* notes 277–81279 and accompanying text (discussing factors that render jury instructions more or less effective).

474. *In re* Winship, 397 U.S. 358, 368 (1970).

"beyond a reasonable doubt."[475] Until this injustice is rectified, the legacy of Winship, the person, rather than *Winship*, the case, will haunt the criminal proceedings of the Seventh Circuit.[476]

Contrary to common assumptions, the BARD standard did not emerge as an epistemological tool to guide jurors in their deliberations of criminal liability.[477] Investigating the phrase's history demonstrates that it emerged from a theological tradition to fill a vacuum of moral comfort procedures and assuage the spiritual concerns of early Christian jurors.[478] The phrase then underwent an organic yet unchecked spread throughout American lower courts before the Supreme Court elevated it to the constitutionally required standard of proof for criminal convictions while refusing to require courts to define the phrase.[479] Yet, decades of psychological research proves that the phrase fails to communicate such a level of confidence to jurors when undefined and certain definitions can cure for this shortcoming.[480]

This makes the Seventh Circuit's ruling in *Alt*, which completes its long-running shift towards prohibiting judges and lawyers from defining the phrase, legally and morally problematic.[481] Such a rule violates due process, threatens judicial legitimacy in the medium term, obstructs necessary development of the criminal law, and is ethically wrong.[482] Fortunately, the emerging argumentative schema of genealogical critique offers the Seventh Circuit an escape route out of its constrictive jurisprudence, and its practitioners may have a compensatory workaround through defining the presumption of innocence.[483] Finally, criminal attorneys outside of the Seventh Circuit armed

475. *See supra* Part II (exploring the consequences of the *Alt* decision).

476. *See supra* notes 24–31 and accompanying text (highlighting how the BARD standard did not provide meaningful protection for Winship).

477. *See supra* Part I.A (reviewing the origins of the BARD standard).

478. *See supra* Part I.A.

479. *See supra* Part I.B (reviewing the introduction of the BARD standard to the American legal system).

480. *See supra* Part I.C (reviewing research exploring the consequences of leaving the BARD standard undefined).

481. *See supra* Part II.A (exploring the hard rule against defining the BARD standard introduced by *Alt*).

482. *See supra* Part II.B (exploring the implications of the *Alt* prohibition).

483. *See supra* Part III (arguing for the use of genealogical arguments to overcome the precedent set by *Alt*).

with this multidisciplinary understanding ought to take heed of its implications and define the BARD standard for juries.[484]

484. *See supra* Part III.

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