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Quantifying the standard of proof beyond a reasonable doubt: a comment on three comments

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A trio of recent articles (Tillers & Gottfried, 2006 (T&G); Franklin, 2006 (Franklin); Weinstein & Dewsbury, 2006 (Weinstein)) in this journal concerning the quantification of the 'reasonable doubt' standard of criminal law has prompted me to express these brief comments.

From different perspectives, these authors have interestingly discussed the issues of whether the 'reasonable doubt' standard can be quantified and whether quantification, however expressed, should be presented to juries considering whether a defendant's guilt has been proven by the requisite standard. Without joining the debate on these issues, I write to suggest that all these distinguished authors have not brought sufficient clarity to exactly what it is they believe should be quantified and communicated to juries. Judge Weinstein says that he would like to tell a jury, 'Were I the trier of fact, I would require a *probability* of guilt of no less than 95%.' (Weinstein at 7, emphasis added). Professors Tillers and Gottfried refer to 'quantification of the reasonable doubt standard in terms of *odds*, *probabilities* or *chances*' and provide an example of an instruction that permits a juror to convict 'only if the juror believes that there is more than a 95% *chance* that the defendant is guilty.' (T & G at 9, emphases added). Professor Franklin suggests that 'any *probability* less than 0.8 should be declared less than proof beyond reasonable doubt in all circumstances.' (Franklin at 2, emphasis added).

My concern is that words such as 'probability', 'odds' and 'chances' are not clear to the average juror. Indeed, as used by these writers, they are not clear to me. Let me first explain why uncertainty arises in my mind, and, I suspect, may well arise in the minds of jurors, and then turn to a verbal formulation that I think might be preferable, regardless of the percentage selected.

For many people 'probability' will mean the degree of likelihood that a future event will occur. For example, a person considering whether the toss of a coin will come up heads or tails could be expected to say that the probability of heads is 50%, by which he or she might well understand that if the coin is tossed 100 times, it will come up heads 50 times. What is that person supposed to think if, serving as a juror, he is told, in the formulation of Judge Weinstein, that a probability of guilt must be 95%? What is the future event that will happen 95 times out of 100, comparable to the 50% probability that a tossed coin will come up heads? Of course, there is none. The verdict is a future event, and it has two possible outcomes—guilty and not guilty.[1] But there is much greater risk of uncertainty in understanding what 'probability' means in the context of a jury trial than if a person is told that there is a 50% probability that the next coin toss will come up heads.

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[1] In Scotland, there is a third option—'not proven'. The accused is freed, but he cannot say that he has been found not guilty.

Some jurors might understand '95% probability' to mean, by analogy to coin tosses, that if the accused were tried 100 times, the evidence is so persuasive that he would be found guilty 95 times. Others might think it means that if evidence of the persuasive force necessary to achieve '95% probability' of guilt were presented to 100 juries, the defendant would in fact have committed the crime in 95 of the cases. Still others might think it means that if evidence of the persuasive force needed to meet the 95% standard were presented to 100 juries and they all found the defendants in those cases guilty, the defendants would in fact have committed the crime in 95 instances.

Ultimately, I do not know what jurors would think when told that guilt requires a '95% probability'. But the fact that different understandings are possible indicates to me that if a numerical level is to be used, we better use language more likely to convey the meaning we intend. Using language that admits of different understandings, even if some or all are incorrect, creates the unacceptable risk that whatever percentage is used will be interpreted differently by different jurors, thereby undermining the goal of obliging all the jurors to apply a uniform standard.

I have no more confidence in use of terms such as 'odds' or 'chances'. Jurors who are bettors will surely have an understanding of the meaning of 'odds'. They will know that if the odds that a horse will win are 3 to 1, it means a $2 bet will return $6 profit (above the $2 stake) if the horse wins. They will also know that an 'odds-on' horse that goes off at 4–5 means a $2 bet will return $1.60 (above the $2 stake). But how are these jurors supposed to apply their knowledge of odds to the task of determining guilt? Some will understand a 95% probability of guilt to mean the evidence must be so strong that guilt is an odds-on favorite, but then what? I have no idea what they will think.

Same with 'chances'. There is a one in two chance that a coin toss will come up heads. How will a juror apply that awareness when hearing that he may convict only if there is a 95% chance that the defendant is guilty? Again, I do not know.

Well, enough hand-wringing. Can we do better? I think so.

I believe those who favor quantification of the reasonable doubt standard really mean something very simple when they advocate a 'probability' percentage. I think they have in mind a continuum of certainty in the mind of the juror that ranges from 0, when the juror is totally unconvinced of guilt, to 100, when the juror is absolutely certain of guilt, and what they want the juror to do is find the defendant guilty only when the juror believes that his or her degree of certainty along that continuum exceeds the recommended percentage. So if Judge Weinstein wants to use 95 as the percentage, I suggest he say to the jury something like this:

> Were I the trier of fact, I would think about my own degree of certainty about the defendant's guilt, and, with a scale of 0 to 100 in mind, not vote to convict unless my degree of certainty exceeded 95 on that scale.

No doubt this thought can be expressed in various ways, and my version is not necessarily the best. But I hope it at least captures the essential idea of what the proponents of quantification have in mind.

In suggesting that quantification of a reasonable doubt standard, if explained to a jury, should use words that convey a required degree of certainty, I am aware of Professor Wigmore's statement that 'no one has yet invented or discovered a mode of measurement for the intensity of human belief.' (9 JOHN H. WIGMORE, Evidence in Trials at Common Law §2497 (3d ed. 1940)) (*quoted in* T & G at 13). Three reasons persuade me not to be deterred by Wigmore's dictum. First, I am not suggesting a scale on which the 'intensity' of belief is assessed, although I concede that degree of 'intensity' is similar to degree of 'certainty'. Second, and more important, the type of formulation I suggest could

be used despite the absence of a 'mode of measurement'. The task is not to have others measure the juror's degree of certainty (or the juror's 'intensity' of belief). All we would be trying to do is provide the juror with some formulation that enables the juror to gauge his or her own degree of certainty. Third, and less important (if not totally unimportant!), I suspect that advances in brain research have reached the stage where intensity of belief can be measured.

People are not unfamiliar with the idea of rating their own reaction according to increments on a scale. Doctors often ask patients to rate their pain on a scale of 1–10. Surveys often ask respondents to assess their agreement (or disagreement) with a statement on a scale of 1–5. I think jurors can assess their degree of certainty about guilt on a scale of 0–100.

My ultimate point is very limited.[2] If a jury is to be told that the standard of proof beyond a reasonable doubt has a numerical component, judges should eschew words like 'probability', 'odds', and 'chances', and simply explain that jurors may not convict unless they are convinced of guilt to a degree of certainty that exceeds some selected number on a scale of 0–100.

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[2] For my extended views on the subject of the 'reasonable doubt' standard, especially the failure of appellate courts to take the standard seriously when reviewing the sufficiency of evidence, see JON O. NEWMAN, Beyond 'Reasonable Doubt,' 68 N.Y.U. L. Rev. 979 (1993).