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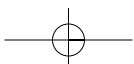
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Rethinking Criminal Law

Andrew Botterell

Critical Notice:

Truth, Error, and Criminal Law: An Essay in Legal Epistemology by Larry Laudan*

1. Laudan's Thesis

Imagine the following. You have been asked to critically evaluate the criminal process in your home jurisdiction. In particular, you have been asked to determine whether the criminal process currently in place appropriately balances the need to maximize the chances of getting things right—of acquitting the innocent and convicting the guilty—with the need to minimize the chances of getting things wrong—of acquitting the guilty and convicting the innocent. How would you proceed? What rules of evidence and procedure would you put in place? Would you exclude germane inculpatory evidence that has been obtained in violation of the accused's constitutional rights? Would you permit spouses to testify against each other, or allow the jury to draw adverse inferences from an accused's failure to testify on his or her behalf? These, in broad outlines, are the sorts of issues addressed by Larry Laudan in his superb *Truth, Error, and Criminal Law*.

Faced with this task, some—the optimists, perhaps—might point to the criminal process actually in place and say that that's the sort of process that *ought* to be in place. Perhaps there are some rules of procedure that need tweaking, some principles of evidence that need refinement. But in all important respects, continue the optimists, the basic structure of the current criminal process is sound: we have an appropriate burden and standard of proof, and when mistakes are made those mistakes tend to favour the accused. The optimists therefore conclude that we can have broad confidence in the truth-finding ability of the criminal process.

Laudan is no optimist, however, and arrives at a very different conclusion. In his view “many of the rules and procedures regulating criminal trials in the United States [...] are themselves the *cause* of many incorrect verdicts.” (4) Consequently, his goal is to “show that the criminal justice system now in place in the United States is not a system that anyone concerned principally with finding the truth would have deliberately designed.” (4)

Truth, Error, and Criminal Law deserves a wide audience. It is important and engaging. It is also challenging and sobering. It is true that Laudan made his name as a philosopher of science.¹ And it is also true that *Truth, Error, and Criminal Law* is devoted almost entirely to issues that arise in the context of the criminal process

*(Cambridge: Cambridge University Press, 2006) ISBN 0521861667. Unless otherwise noted, all references are to this book.

1. Among his many publications are *Progress and Its Problems* (Berkeley: University of California Press, 1977), *Science and Hypothesis* (Dordrecht: D. Reidel, 1981), *Science and Values* (Berkeley: University of California Press, 1984), and *Beyond Positivism and Relativism* (Boulder, CO: Westview Press, 1996).

in the United States. This might lead some to dismiss the book, either because it is thought that Laudan, as a philosopher of science, is ill-placed to discuss complex issues in criminal law, or because it is thought that, due to its focus on the criminal justice system in the United States, *Truth, Error, and Criminal Law* will be of questionable value to readers in other jurisdictions. Both thoughts would be mistaken. First, throughout his academic career Laudan has been concerned with questions related to the role played by evidence in the scientific enterprise. As a result, he is as capable as anyone of analyzing and assessing the way in which the criminal law deals with similar issues. And second, it is not as if the U.S. criminal justice system exists in a juristic bubble. To the contrary, its criminal justice system is based on the same fundamental principles as other common law ones. Consequently, readers in other common law jurisdictions will learn much from Laudan's rich discussion of the difference between principles of error reduction and principles of error distribution, the standard of proof beyond a reasonable doubt, and the presumption of innocence, among many others.

I have two goals in this review. First, I propose to describe the overall structure of Laudan's argument, focusing on some of his more interesting and controversial points. And second, I propose to consider the extent to which the Canadian criminal process is open to the sorts of criticisms leveled by Laudan against the U.S. system.

2. Laudan's Strategy

As its subtitle indicates, Laudan's enterprise in *Truth, Error, and Criminal Law* is an epistemological one. Epistemology is the study of knowledge. Epistemologists therefore ask questions about what counts as knowledge, about what the objects of knowledge are, and about what we can know. These are interesting and important questions. They are not, however, the focus of Laudan's inquiry. Rather, Laudan is interested in a particular kind of applied epistemology, namely *legal epistemology*. According to Laudan, applied epistemology "in general is the study of whether systems of investigation that purport to be seeking the truth are well engineered to lead to true beliefs about the world." (2) So legal epistemology is the study of whether those systems of *legal* investigation that purport to be seeking the truth about legal matters in fact lead to true beliefs about those matters. More particularly,

Legal epistemology, properly conceived, involves both a) the *descriptive* project of determining which existing rules promote and which thwart truth seeking and b) the *normative* one of proposing changes in existing rules to eliminate or modify those rules that turn out to be serious obstacles to finding the truth. (3)

Laudan's focus is on a particular branch of legal epistemology, the epistemology of the criminal justice system. In Laudan's view three basic principles animate the criminal justice system. The first two serve epistemic ends; the last, nonepistemic ones:

Error distribution Principle—where there are errors, we prefer that they be distributed so as to benefit the accused. Call this the *error distribution function* of the criminal law.

Error reduction Principle—other things being equal, we prefer that fewer innocent individuals be convicted, and that fewer guilty individuals be acquitted. Call this the *truth seeking function* of the criminal law.

Nonepistemic policy values Principle—we also believe in the availability of various policy-based bars to conviction, such as double jeopardy or the spousal incompetency rule. Because these values are not concerned with error reduction or with error distribution, this principle functions independently of the error distribution and truth seeking functions of the criminal law.

To assess how the criminal justice system gives practical effect to these principles Laudan adopts the following strategy: he asks his readers to engage in a thought experiment that focuses initially on error distribution and error reduction in an attempt to “figure out what sorts of rules of evidence and procedure we might put in place to meet those ends” and “identify when existing rules fail to promote epistemic ends.” (5) Having identified such rules, Laudan then proposes to turn to the nonepistemic policy values to determine how, if at all, they can be justified, and to see what consequences they might have on the truth seeking and error distribution functions of the criminal law.

The structure of *Truth, Error, and Criminal Law* reflects this basic argumentative strategy. The book is divided into two parts—three if we count the largely introductory Chapter 1, *Thinking about Error in the Law*—and has nine chapters. In the first part, comprising chapters 2-4, Laudan discusses the error distribution function of the criminal process, focusing among other things on the reasonable doubt standard of proof and the presumption of innocence. And in the second part of the book, comprising chapters 5-9, Laudan discusses the error reduction aspect of the criminal process, focusing on evidential and procedural rules having to do with confessions, the exclusion of illegally obtained evidence, and the rule against self-incrimination. This structure makes good sense, although it is not until Chapter 9 that Laudan talks in any detail about nonepistemic policy values and their influence on the choice of evidentiary and procedural rules. Although some of the material has been published before, the book is largely new.²

3. Terminology

To help make sense of the various different ways in which the criminal process can go wrong Laudan introduces a number of concepts. I’ll briefly describe two of the more important ones.

Consider first the concept of *error*. According to Laudan, the criminal justice system commits an error when a person who is innocent of the crime with which she is charged is found guilty of that crime, or when a person who is guilty of the

2. For example, Chapter 2 relies on Laudan’s “Is Reasonable Doubt Reasonable?” (2003) 9 *Legal Theory* 295 and Chapter 4 borrows from his “The Presumption of Innocence: Material or Probatory?” (2005) 11 *Legal Theory* 333.

crime with which she is charged is acquitted of that crime. But as Laudan points out, this familiar account discloses two very different notions of guilt, *material guilt* (guilt_m) and *probatory guilt* (guilt_p). An individual is said to be *materially guilty* if she in fact committed the crime with which she is charged. An individual is said to be *probatively guilty* if she is found guilty by the legal system of the crime with which she is charged.

Clearly, guilt_m and guilt_p are distinct concepts: neither implies the other, since one could be guilty_p without being guilty_m (Alice did not in fact rob the jewelry store, but because all the evidence points to her having done so she is found guilty of the crime), and one could be guilty_m without being guilty_p (Alice in fact robbed the jewelry store, but because none of the evidence points to her having done so she is acquitted of the crime). For simplicity, call a verdict a *true verdict* just in case guilt_m and guilt_p , or innocence_m and innocence_p , coincide. And call a verdict a *false verdict* if guilt_m and guilt_p , or innocence_m and innocence_p , do not coincide. Finally, call an error that occurs when a false verdict is rendered an *outcome error*.

Consider next the concept of the *validity of a verdict*. In brief, a verdict V is said to be *valid* if the legal rules were correctly followed in arriving at V ; if the legal rules appealed to in arriving at V were incorrectly followed, then V is said to be *invalid*. Note that verdict validity and verdict invalidity map imperfectly onto our distinction between guilt_m and guilt_p . It may be that somebody who is guilty_m is found guilty_p , even though the verdict is invalid—this because the relevant legal rules were improperly followed. Or it may be that somebody who is guilty_m is found not guilty_p even though the verdict is valid—the relevant legal rules were properly followed.

4. Issues of Error Distribution

A perfect criminal justice system would presumably have the following properties: it would generate only true verdicts, and every verdict generated by the system of criminal law would be validly generated.

Yet such an ideal is unattainable. Why? Because the structure of the criminal justice system *explicitly allows for false verdicts*. We have adopted something like the standard of proof beyond a reasonable doubt (which following Laudan I will call the BARD standard, or BARD for short) and we have done so in part because we want to be very sure that those found guilty_p are in fact guilty_m . This is no doubt an admirable aim. But its flipside is that some individuals who are guilty_m will inevitably be found not to be guilty_p .³ Thus, it is inescapable that the design of the criminal justice system is the cause of at least some outcome errors.

As I have noted, Laudan argues that many rules of evidence and procedure currently in place make it more likely that false verdicts will be rendered. For reasons of space I propose to focus on three such rules: the BARD standard, the presumption of innocence, and certain exclusionary rules of evidence. My reasons for doing

3. This is not a *logical* inevitability, since it might turn out that no guilty_m individual has ever been acquitted. But I think we can safely assume that this is not the case.

so are simple: while these are concepts or rules that most readers would agree are central to the criminal process they are also concepts or rules towards which Laudan casts a jaundiced eye.

4.1 BARD

Laudan's conclusion regarding BARD is short but less than sweet: "[s]hort of some form of radical surgery, BARD's day has come and gone." (62) Laudan argues that the standard explanations or definitions of BARD are either incoherent or, to the extent that they do make sense, have been rejected by the courts. He concludes that BARD is of dubious utility, at least as it is currently interpreted and employed.

The concept of reasonable doubt seems to have become entrenched in the law in 1798. May, in "Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases" says the following about reasonable doubt:

Its first appearance, so far as we have been able to determine, was in the high-treason cases tried in Dublin in 1798, as reported by Macnally [*Rules of Evidence on Pleas of the Crown*, p. 2, Dublin 1802], who was himself counsel for the defense. 'It may also,' [Macnally] says, 'at this day, be considered a rule of law, that, if the jury entertain a reasonable doubt upon the truth of the testimony of witnesses given upon the issue they are sworn well and truly to try, they are bound' to acquit.⁴

But what does it mean to entertain a reasonable doubt, or believe in an accused's guilt beyond a reasonable doubt? A familiar idea is that the concept of reasonable doubt should be tied to the concept of *moral certainty*. The concept of moral certainty is often associated with the thought of John Locke. Locke suggested that, because absolute certainty in matters concerning human affairs (or the 'moral' sciences, to be distinguished from mathematics or the 'natural' sciences) was impossible, the next best thing was moral certainty. While morally certain beliefs could not be proven to be true beyond all doubt, they were nonetheless settled beliefs supported by different and mutually supporting forms of evidence.

Three problems emerge with the idea that the concept of *reasonable doubt* should be understood by reference to the concept of *moral certainty*. The first problem is that it is not clear that the notion of a morally certain belief constitutes an *explanation* of BARD at all. This is because appeal to the notion of moral certainty does nothing more than restate the idea implicit in BARD that absolute certainty is not required in order to find an accused guilty of the crime with which she is charged. In other words, it is unclear that talk of moral certainty adds anything to our understanding of BARD.

The second problem is that it is unclear what counts as being morally certain about a belief, or about the truth of a given proposition. What is the evidential standard required of a morally certain belief? Do I need to be more or less certain? 70% certain? 95% certain? The concept of moral certainty is silent on this question.

4. (1876) 10 Am. L. Rev. 642 at 656-57. The high treason cases in question arose out of the Irish Rebellion.

Finally, the use of the notion of moral certainty to make sense of BARD has been criticized on the grounds that, as Justice Harry Blackmun put it in *Victor v. Nebraska*, 511 U.S. 1 at 38 (1994), there exists “the real possibility that such language would lead jurors reasonably to believe that they could base their decision to convict upon moral standards or emotion in addition to or instead of evidentiary standards.” Thus, the third worry is that undue emphasis on the *moral* nature of morally certain beliefs will distract jurors from the fact that moral certainty remains an evidential standard, not a normative one.

Other interpretations of BARD are available, however. Thus, consider the not implausible idea that a reasonable doubt is a doubt that has a high degree of probability. Somewhat surprisingly, this interpretation of BARD has also failed to find favour with the courts. One not very good reason why this has been the case appears to be related to the idea that ‘probability’ is a synonym of ‘possibility,’ together with the idea that possibility is an insufficient basis on which to found a criminal conviction.⁵ That this criticism is not to the point can be seen once it is noted that the claim is not that belief in the mere *possibility* of guilt will serve to convict; rather, the claim is that jurors must be convinced to a high degree of probability that the accused is guilty of the crime with which she is charged in order for her to be found guilty of that crime.

Another argument against the probability interpretation of BARD is the following: the reason why courts have rejected the idea that a reasonable doubt is a doubt that has a high degree of probability has to do with the worry that in defining BARD probabilistically we would be explicitly acknowledging that some innocent_m individuals will be found guilty_p, and that such an explicit acknowledgment of the possibility of outcome errors would deprive the law of much of its moral force. Laudan quotes Justice William Brennan in support of this view:

It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.⁶

I confess to finding Brennan’s argument puzzling, however, since it is unclear to me how making explicit what is at least an implicit consequence of the criminal process can be problematic. How could more transparency in this area of the law be a dangerous thing? Moreover, if “utmost certainty” means anything less than “complete certainty” Brennan is diluting the standard of proof just as surely as the proponent of the probabilistic interpretation of BARD is. And yet the probabilistic interpretation of BARD remains out of fashion.

In response to these concerns about definition, some jurists and academic commentators have suggested that “reasonable doubt” be left undefined. Thus the

5. See, for example, the remarks of Justices Harry Blackmun and David Souter in *Victor v. Nebraska*, 511 U.S. 1 (1994).

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

Model Penal Code declines to define “reasonable doubt” at all, this on the grounds that “definition can add nothing helpful to the phrase.” Somewhat incredibly, some U.S. courts have even gone so far as to say, not simply that defining ‘reasonable doubt’ is unhelpful, but that any attempt to define or explain the BARD standard constitutes grounds for appeal. So as Laudan notes, in Oklahoma any explanation of ‘reasonable doubt’ constitutes a reversible error.⁸ Or as the Seventh Circuit said in *U.S. v. Glass* 846 F.2d 386 at 387 (1988),

“Reasonable doubt” must speak for itself. Jurors know what is “reasonable” and are quite familiar with the meaning of “doubt.” Judges’ and lawyers’ attempts to inject other amorphous catch-phrases into the “reasonable doubt” standard, such as “matter of the highest importance,” only muddy the water [...] 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.

It hardly needs emphasis that this argument is unconvincing: if you understand the concept *F* and you understand the concept *G* it does not follow that you understand the concept *FG*. For example, I understand the concept *round* and I understand the concept *square*, but I have no understanding of the concept *round square*—I do not know how to apply it to objects, since the concept itself is incoherent.

I found myself generally disposed towards Laudan’s analysis and criticisms of BARD.⁹ There would seem to be little question that as it is currently deployed the BARD standard is poorly understood by judges and juries alike. On the other hand, it seems to me that Laudan is hasty in concluding that absent some form of radical surgery, BARD’s day has come and gone. For as he notes, there are several perfectly sensible interpretations of “reasonable doubt” available, interpretations that even he agrees makes good intuitive and theoretical sense.

One is the idea that a reasonable doubt is a doubt for which a reason can be given. It is true that this interpretation has not found much favour in the courts—largely on the grounds that a juror could have a reasonable doubt even if she is unable to articulate reasons for that doubt—but this, it seems to me, counts more against the reasoning of the courts than it does against the proposed definition of “reasonable doubt.”

The second is the idea that the BARD standard should be interpreted probabilistically, reflecting the idea that the criminal process should reflect some appropriate ratio of true to false convictions, or true to false acquittals, or false acquittals to false convictions. It is therefore somewhat odd to find Laudan effectively rejecting BARD when even by his own lights there would appear to be understandings of it that make good sense. Perhaps Laudan would reply that his argument in Chapter

7. MPC, Comment 2 on §1.12(1), p. 190.

8. See *Pannell v. Oklahoma*, 640 P.2d 568 (1982). Wyoming apparently has a similar practice: *Cosco v. Wyoming*, 521 P.2d 1345 (1974).

9. In addition to discussing the moral certainty and high probability interpretations, Laudan also discusses BARD as that security of belief appropriate to important decisions in one’s life (36); BARD as the sort of doubt that would make a prudent person hesitate to act (37); BARD as an abiding conviction of guilt (38); and reasonable doubt as a doubt for which a reason could be given (40).

3, “Fixing the Standard of Proof,” is not a reconstruction of BARD but rather an alternative to it. Fair enough. My point is simply that there are ways to understand the notion of a “reasonable doubt” that are coherent and that serve the ends of the BARD standard well enough.

Perhaps Laudan’s best point is the idea that BARD should not be understood as a mental state at all but should be understood instead in terms of *the process* giving rise to that mental state. As Laudan points out, it would be difficult to take seriously a mathematician who says that she has proved a new theorem, and whose evidence for that claim is that she subjectively believes, beyond a reasonable doubt, that the theorem is true. To the contrary, we would want to know about the mathematician’s *evidence* for her belief, or the *method of proof* she employed in arriving at her belief, not the presence or vivacity of the belief itself.

The idea that the notion of a reasonable doubt has an ineliminably public component is appealing. The problem is in articulating what this public component might look like. One suggestion is Laudan’s: we should focus on issues having to do with evidence in assessing the reasonableness of a given doubt. But other options are available. Take, for example, John Rawls’s idea of reasonableness as equality.¹⁰ According to Rawls, “persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards as fair terms of interaction and to abide by them willingly, given the assurance that others will likewise do so.”¹¹ The key idea for present purposes is that the reasonable person is prepared to articulate standards of conduct that she too agrees to be bound by. This concept of reasonableness is therefore ineliminably public and external. Working with this broadly Rawlsian conception of reasonableness, Arthur Ripstein concludes that

strange as it may sound, reasonable beliefs are not psychological states at all. Reasonableness is a description of the world from a particular perspective—the perspective of equality—and the requirement of belief is simply a further (and independent) requirement that those availing themselves of justifications know of the features of the situation that justify their acts.¹²

On such a view a doubt, which is presumably a propositional attitude not unlike a belief, would be reasonable if it makes sense from the perspective of equality. Consequently, the mere fact that a juror subjectively doubts with a high degree of certainty that the accused is guilty would not be itself sufficient to make the juror’s doubt a reasonable one. The doubt would also have to be vetted from the perspective of equality.

This proposal is admittedly skeletal. In particular, much more would have to be done to explain what it means for a *doubt* to make sense from the perspective of equality. Still, such a view would, if defensible, go some way towards justifying the idea that a reasonable belief is a belief that is tied to the availability of reasons,

10. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

11. *Ibid.* at 49.

12. Arthur Ripstein, “Self-Defence and Equal Protection” (1996) 57 U. Pitt. L. Rev. 685 at 695.

that those reasons have an essentially public character, and that those reasons must be capable of being articulated to, and understood by, others.¹³

Let me conclude this section by noting another observation that struck me as being of interest. As Laudan notes, it is typically assumed that (1) BARD is always appropriate for capital crimes; that (2) all crimes should have the same standard of proof; and hence, that (3) BARD is appropriate for all criminal charges. But why suppose (2) is true? Following the idea that the punishment should fit the crime, why not suppose instead that *the standard of proof* should fit the crime? Why not suppose that distinct standards of proof should be available for felonies and misdemeanors? If this idea were imported into the Canadian context it might make sense to hold those charged with a summary offence for which the only punishment is a fine to proof on the preponderance of evidence and to hold those charged with an indictable offence to the higher BARD standard. (For those charged with a hybrid offence, the standard of proof would depend on the Crown's election.) There is ample precedent for this sort of idea. For we employ a standard of proof on the balance of probabilities for civil suits, which suggests that there is room for the idea that different offences might demand different standards of proof. Of course, really thrashing out these issues would require, at a minimum, a re-evaluation of the error reduction and error distribution functions of the criminal law, and the way in which those epistemic functions interact with other nonepistemic values. Then again, that is precisely the task of legal epistemology.

4.2 *The Presumption of Innocence*

Let me turn briefly now to Laudan's discussion of the presumption of innocence (PI). PI, like BARD, is designed to ensure that any mistakes that are made will tend to favour the accused. It therefore counts as an error distribution tool.

The presumption of innocence has a special place in the criminal law. Viscount Sankey L.C., in *Woolmington v. DPP*, [1935] 1 A.C. 462 at 481, remarked that "[t]hroughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt [...]" Or as Cory J. put it in *R. v. Lifchus*, [1997] 3 S.C.R. 320 at para. 27: "If the presumption of innocence is the golden thread of criminal justice then proof beyond a reasonable doubt is the silver and these two threads are forever intertwined in the fabric of criminal law." It may therefore surprise readers to find Laudan arguing that PI should be done away with entirely.¹⁴

Laudan's reasons for thinking this are as follows. First, he points out that it is not clear what notion of innocence, innocence_m or innocence_p , is to be presumed. On the one hand, it is natural to suppose that juries must presume that the accused is innocent_m of the crime with which she is charged. But what the jury eventually

13. On the subject of the role played by objectivity in the standard of proof, see also Laudan's discussion at 81.

14. For a similar argument, see his "The Presumption of Innocence: Material or Probatory?" *supra* note 2.

passes judgment on is not innocence_m at all, but rather guilt_p or innocence_p, which makes it less than clear why a presumption about *material* innocence should enter into the deliberative process of the jury. Perhaps, then, it is innocence_p that is the object of the jury's presumptions. But if *that* is what is being presumed, then the presumption of innocence becomes empty: jurors are asked to presume, prior to the conclusion of the trial, that the accused has not yet been convicted of the crime with which she is charged. That is: before the accused has been convicted jurors are to presume that the accused has not been convicted. A weaker golden thread could hardly be imagined.

Second, Laudan points out what should be obvious, namely that innocence_m is *never* a focus of the criminal inquiry. For example, an accused is not entitled to plead her innocence; she is only entitled to plead guilty or not guilty, and no inference about an accused's innocence_m can be inferred from her being found not guilty_p. But if innocence_m does not figure in the criminal process neither, suggests Laudan, should the *presumption* of innocence_m.

Third, Laudan points out that innocence is *never* actually *presumed* during the course of the criminal process. At the Preliminary Inquiry stage, for example, it is not presumed that the accused is innocent_m; nor is it presumed at the bail hearing stage. To the contrary, the innocence of the accused is only presumed at the concluding verdict stage of the process, and then only by the jury or trier of fact.

And fourth, Laudan argues that if innocence were truly presumed from the outset and throughout the trial, there would be no point having the criminal trial in the first place. After all, if juries were required to presume the accused to be innocent even at the deliberation stage, the only outcome consistent with that presumption would be an acquittal, since harbouring any belief in the accused's guilt would be in direct conflict with the presumption in question. The upshot is that the PI is irrelevant to the criminal trial process and to its outcome, serves no useful epistemological purpose, and ought to be dispensed with entirely.

Laudan's discussion of PI is a model of clarity and good sense, and after reading it I found myself wondering what the presumption of innocence is, and to the extent that it is coherent, what it is supposed to guarantee. A natural thought is that the PI is designed to guarantee that the burden of proof rests on the state rather than on the accused; see again Viscount Sankey's comments in *Woolmington v. DPP*. But surely this could be done without requiring that jurors presume the accused to be innocent of the crime with which she is charged. Jurors could simply be told that the state bears the burden of presenting evidence that establishes the guilt of the accused BARD, and that a failure to do so must result in an acquittal. Jurors do not also need to assume from the outset that the accused is innocent. Or perhaps the PI is designed to emphasize to jurors that their belief that the accused is guilty BARD must be based on evidence presented at trial, and that if sufficient evidence is not presented they must find the accused not guilty of the crime with which she is charged. But again, such an instruction could clearly be given without requiring the jury to presume the accused's innocence. So one is left wondering what the point of the PI is supposed to be.

4.3 The Benefit of the Doubt and the Standard of Proof

To recap: Laudan is concerned to argue that absent some form of radical surgery BARD should be rejected, and that the presumption of innocence is unnecessary. So readers might be left wondering what, if anything, Laudan proposes to put in their place. To answer this question, Laudan turns to a reconsideration of the burden of doubt (BoD) and the standard of proof (SoP). The SoP has to do with the degree of evidence required in support of a proposition. The BoD is what we give to the accused because we are of the view that some mistakes are costlier than others. The SoP is therefore a function of the BoD: the more or higher the BoD we are prepared to give to the accused, the higher the SoP. How then are we to settle on an appropriate SoP? Laudan's interesting suggestion is that we consider, not the ratio of false acquittals to false convictions but rather the ratio of *true* acquittals to false convictions. Call that ratio m . The minimum standard of proof needed for conviction is then defined in terms of our success in acquitting the innocent rather than in terms of our failures in convicting the guilty. So suppose we settle on an SoP of 90%. Then we are saying that over the long run innocent defendants ought to be convicted no more than 10% of the time, and that 90% of those innocent individuals who come to trial ought to be acquitted. An SoP of 90% will therefore give us a ratio of 9:1 for m (9 true acquittals will be entered for every false conviction). But if we adjust the SoP ever so slightly to 91% we will achieve Blackstone's ratio of 10:1 for m (since 91 true acquittals will be entered for every nine false convictions, and $91/9 = 10.1$). This would allow us to have our Blackstonian cake and eat it too. To be sure, we could insist on a higher m . This would result in greater numbers of innocent defendants being acquitted for every innocent defendant found guilty. But this would also mean that more guilty defendants would be acquitted as well, and that might not be a cost that society would be willing to bear. Again, this illustrates the connection between the SoP, false acquittals, and false convictions: if the SoP is raised, fewer false convictions will be entered, but only at the cost of more false acquittals, whereas if the SoP is lowered, false acquittals will be reduced, but only at the cost of more false convictions.

As Laudan notes, however, this way of approaching the SoP is not entirely consequence neutral. In particular, it reflects the idea that once we have settled on an SoP we should be indifferent to the outcome in any particular case. Recall that m is supposed to reflect the socially acceptable ratio of true acquittals to false acquittals. And suppose for reductio that it is argued that other evidential or procedural rules ought to favour the accused, thereby making it more likely that defendants will be acquitted. Then we would in effect be saying that defendants are entitled to an SoP greater than m . But this violates the idea with which we began, namely that m is a socially acceptable SoP. Therefore, once m is settled on, no further questions having to do with the SoP or BoD ought to enter into our theorizing about the criminal process. While this idea—that we ought to be indifferent between acquittals and convictions—may strike some as harsh, it seems to me to be a

straightforward consequence of viewing the SoP as reflecting a societal consensus about the appropriate ratio of true acquittals to false convictions.¹⁵

5. Issues of Error Reduction

So far my focus has been on Laudan's arguments concerning the error distribution function of the criminal process. Let me now turn to some of his arguments concerning the error reduction function of the criminal law. This is the second of the three principles underlying the criminal law noted at the outset.

According to Laudan there are three ways of reducing the frequency of false convictions (119):

1. Put fewer innocent people on trial.
2. Increase the SoP.
3. Improve the discriminatory power of the evidence.

Laudan provides both negative and positive considerations in favour of (3). Negatively, Laudan rejects (1) because, as he says, it is impracticable: we can never be entirely sure prior to the commencement of a criminal trial who is truly guilty_m and who is truly innocent_m. And he rejects (2) for by now familiar reasons: increasing the SoP would result in more false acquittals and would tend to contradict our agreed-upon ratio m . So only option (3) remains.

Laudan's positive argument for (3) is straightforward. In Laudan's view, once we have set the SoP we will have done all we need to do to address issues of error distribution. As we have seen, Blackstone's ratio is viewed by Laudan as an error distribution tool: we should set the SoP so that 10 innocent individuals are acquitted for every innocent individual who is found guilty. A corollary of this, however, is that rules having to do with what evidence actually gets seen by the jury go to error reduction instead. Consequently, once an SoP has been settled on

all our subsequent deliberations should be driven by a concern with reducing errors rather than further distributing them. Having selected a SoP that should make us indifferent to whether someone is acquitted or convicted, we have no conceivable incentive for trying to reduce still further the frequency of false convictions, if the price we thereby pay is increasing the frequency of false acquittals. Indifferent to whether a trial ends in acquittal or conviction, our only remaining concern should be with error reduction, not with error distribution. (124)

So Laudan proposes the following meta-rule of evidence, which I will simply call *RULE*:

The triers of fact—whether jurors or judges in a bench trial—should see all (and only)

15. Does the foregoing contradict Laudan's tentative suggestion, discussed on 55ff and 86ff, that it may not make sense to use the same SoP for all crimes? I do not see that it does. The foregoing does suggest that we would have to have a different m for different sorts of crimes (felonies vs. misdemeanors, summary vs. indictable offences). But this would not be problematic so long as each m remains subject to a principle of indifference between acquittals and convictions.

the reliable, nonredundant evidence that is relevant to the events associated with the alleged crime. (121)¹⁶

Laudan takes *RULE* seriously. By way of illustration, consider the exclusionary rule that prohibits the use by the prosecution of relevant evidence that is obtained illegally or as a result of a violation of the defendant's constitutional rights. Several things about the exclusionary rule should be noted. First, and most obviously, it seems clear that such a rule will contribute to more outcome errors, since it will result in many guilty_m individuals being acquitted. As a result, such a rule will tend to inhibit rather than enhance the error reduction function of the criminal process. Second, the exclusionary rule in question is applied somewhat idiosyncratically. Thus, the only sort of illegality that will count involves illegal acts committed specifically against the defendant. If the evidence is obtained as a result of police illegality in general, the evidence is typically not excluded. And third, as Laudan points out, the exclusionary rule was not always the norm in the United States. Thus, until the Supreme Court decision in *Weeks v. U.S.*, 232 U.S. 383 (1914) courts were of the view that the admission of illegally obtained evidence was fully constitutional.

As Laudan notes, there may very well be good reasons for adopting such an exclusionary rule. But as he goes on to argue, whatever those reasons are, they will not be based exclusively on a concern for error reduction. Thus, exclusionary rules will tend to thwart the truth-seeking function of the criminal law, since such rules will operate to exclude germane inculpatory evidence. And this is the core of Laudan's complaint: to the extent that we want relevant evidence to be placed before the trier of fact, and to the extent that we want this in part because we are engaged in a search for the truth, "the requirement that evidence must be excluded if it was illegally obtained should be abandoned." (187) Or as Jeremy Bentham put it, "Evidence is the basis of justice: exclude evidence, you exclude justice."¹⁷ Concludes Laudan:

For the purposes of our thought experiment, it is sufficient to note that a sweeping rule of inadmissibility like this one could find no place in a set of evidence rules that were principally designed to promote truth seeking. The existence of such rules gives the lie to the claim that the current system of criminal justice seeks, above all, to find out the truth about a crime. (191)

There is much about this argument that makes sense. Why would we balk at putting before a jury germane inculpatory evidence if our goal is to seek the truth about the crime with which the accused is charged? But in other respects the argument is less than convincing. Take, for example, rules that exclude evidence on the grounds of its unduly prejudicial character. The worry to which such rules are

16. Laudan is prepared to add the following caveat, however: "Where there is compelling evidence that a certain type of relevant and reliable evidence is likely to be misconstrued by jurors and where there is likewise evidence that such misconstruals are not readily susceptible of correction by judge's instructions and the arguments of opposing counsel, such evidence should be excluded" (122).

17. Jeremy Bentham, *Rationale of Judicial Evidence*, Book IX, Part III, Ch. 1 at 1.

addressed is that such evidence, if put before a jury, would unfairly prejudice them and would therefore tend to generate a false verdict. But contrary to what Laudan suggests, this is not a concern that is *independent of* the truth seeking function of the criminal law. It could not be given that the primary focus of the exclusionary rule in question is on the fact that prejudicial evidence tends to contribute to more outcome errors. Thus, an argument can be made that such exclusionary rules enhance rather than thwart the truth seeking function of the criminal law.

That said, it should be noted that this objection may not apply to all kinds of evidence, since much evidence may not be unduly prejudicial. And it must be noted that Laudan himself addresses this concern by allowing that

[w]here there is compelling evidence that a certain type of relevant and reliable evidence is likely to be misconstrued by jurors and where there is likewise evidence that such misconstruals are not readily susceptible of correction by judge's instructions and the arguments of opposing counsel, such evidence should be excluded. (122)

The issue, as Laudan would be quick to point out, however, is an empirical one: is a trier of fact, when presented with relevant but inflammatory evidence, likely to misconstrue that evidence? Because of its empirical character, it is difficult to say what the appropriate answer to this question ought to be. But this does not affect my point, which is that relevant evidence is sometimes excluded out of a concern for the error reduction function of the criminal process, and not merely for nonepis-temic policy reasons.

6. The Canadian Criminal Process

To this point I have been concerned with Laudan's arguments regarding the error distribution and error reduction aspects of the criminal process in the United States. Let me turn now to the Canadian criminal process. I will focus on two issues: BARD and the exclusionary rule as it arises in the context of unreasonable searches and seizures. What I hope to show is that with respect to both issues the Canadian criminal process would seem to fare better than its U.S. counterpart.¹⁸

6.1 BARD

I begin with BARD. In my view, although Canadian jurists, criminal lawyers, and academics ought to pay careful attention to Laudan's criticisms of the BARD standard, there is reason to be cautiously optimistic about the concept of reasonable doubt as it is interpreted in the context of the Canadian criminal justice process.

Before turning to the reasons to be optimistic, however, let me consider some comments that might suggest that a pessimistic attitude might be more appropriate.

18. I should note that while there is a Federal Criminal Code (see Title 18 of the *U.S. Code*) every U.S. state has its own criminal code. Thus, there is no such thing as *the* U.S. counterpart of the Canadian criminal system.

John Kennedy, for example, in *Aids to Jury Charges: Criminal*¹⁹, provides the following model charge with respect to the concept of a reasonable doubt:

A question that may come to your minds is, what is meant by the words “reasonable doubt.” A reasonable doubt is an honest doubt, a real doubt, not an imaginary doubt conjured up by a juror to escape his responsibility. It must be a doubt which prevents a juror from saying “I am morally certain that the accused committed the offence with which he is charged.”

Similarly, like the Seventh Circuit in *U.S. v. Glass* Lord Goddard, in *Regina v. Summers* (1952), 36 Cr. App. R. 14, suggested that any attempt to explain what “reasonable doubt” means is bound to be problematic:

If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of Guilty, that is much better than using the expression “reasonable doubt” and I hope in the future that that will be done. I never use the expression when summing up. I always tell a jury that, before they convict, they must feel sure and must be satisfied that the prosecution have established the guilt of the prisoner.

Or consider Martin J.A.’s comment in *Regina v. Campbell* (1977), 38 C.C.C. (2d) 6 at 25 (Ont. C.A.) that

[t]he term “reasonable doubt” is, to a great extent, self-defining and its meaning is, I think, generally well understood by the average person. Attempts to further amplify its meaning have often proved unsuccessful and, as a general rule, it is both undesirable and unnecessary to elaborate upon its meaning by departing from the traditional and accepted formulations.

These quotes might be taken to suggest that in Canada a reasonable doubt has to do with the trier of fact’s state of mind; that the nature of such a doubt can be determined independently of the process giving rise to that state of mind; that the concept of a reasonable doubt should be understood in terms of the concept of a morally certain belief; and that it does little good to elaborate on the meaning of the phrase “reasonable doubt.” And the conclusion that one might draw from these suggestions is that that the Canadian situation with respect to BARD is no better than the U.S. situation as described by Laudan.

Nonetheless, such a conclusion would be unwarranted. This is because there is ample evidence that Canadian courts are of the view that it is important to explain what “reasonable doubt” means, that it is more than simply a settled state of mind, and that the process by which the doubt arises should be a focus of inquiry. So consider in this respect the following model jury instruction from *Canadian Criminal Jury Instructions*:²⁰ “A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and

19. 2nd ed. (Toronto: Canada Law Book, 1975).

20. G.A. Ferguson, M.R. Dambrot, & E.A. Bennett, *Canadian Criminal Jury Instructions*, 4th ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2005; 2007 Update) at 4.04-1.

common sense. It must logically come from the evidence or the absence of evidence.” Similarly, *Watts’ Manual of Criminal Jury Instructions*²¹ contains the following: “A reasonable doubt is *not* a far-fetched or frivolous doubt. It is *not* a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that logically arises from the evidence, or the lack of evidence.” (Part III, Final 13, p. 146) The important thing to note for our purposes is the emphasis on the idea that the doubt must arise logically from the evidence or lack of evidence. This suggests that the doubt’s connection to the evidence presented at trial is crucial in determining whether the doubt is, in fact, a reasonable one.

Both of these jury instructions on the meaning of “reasonable doubt” are based on *R. v. Lifchus*, [1997] 3 S.C.R. 320 at 336-37. Of similar importance is *R. v. Brydon*, [1995] 4 S.C.R. 253. *Brydon* establishes the proposition that jurors should be instructed on the meaning of “reasonable doubt” while *Lifchus* stands for the proposition that reasonable doubt should not be equated with moral certainty, and that the process or route by which the reasonable doubt is arrived at is crucial. Thus Cory J. remarks, at para. 33 of *Lifchus*, that

[i]n the United Kingdom juries are instructed that they may convict if they are “sure” or “certain” of the accused’s guilt. Yet, in my view that instruction standing alone is both insufficient and potentially misleading. Being “certain” is a conclusion which a juror may reach but, it does not indicate the route the juror should take in order to arrive at the conclusion.

What this suggests is that Canadian courts are well aware that there is a need to instruct juries on the meaning of “reasonable doubt,” that a reasonable doubt is a doubt that is inextricably tied to reasons, and that what is of fundamental importance is the relationship between the doubt and the evidence, or lack of evidence, presented at trial. The upshot is that there is reason to be cautiously optimistic about the Canadian situation with respect to BARD.

6.2 Excluding Evidence

Let me turn now to issues having to do with the exclusion of relevant inculpatory evidence.²² According to s. 24(2) of the *Canadian Charter of Rights and Freedoms*, evidence obtained in a manner that infringes or violates any rights set out in the *Charter* will be excluded “if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.” Where the evidence in question is obtained as a result of a search or seizure, the test for exclusion is based on *Collins*, as well as on *R. v. Stillman*, [1997] 1 S.C.R. 607.²³ The key concepts against which admissibility is

21. D. Watt, *Watts’ Manual of Criminal Jury Instructions* (Toronto, ON: Thomson Carswell: 2005) at 146.

22. A nice comparative analysis and summary of this issue can be found in Steven Penney, “Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence Under S. 24(2) of the *Charter*” (1994) 32 *Alta L. Rev.* 782.

23. For a more detailed analysis, see David Paciocco & Lee Stuesser, *The Law of Evidence* 4th ed. (Toronto, ON: Irwin Law, 2005).

measured are trial fairness, the seriousness of the *Charter* breach, and the repute of the administration of justice. The first step involves characterizing the evidence in question as conscriptive or non-conscriptive. Evidence is said to be conscriptive when an accused, “in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of body samples.” (para. 80) In addition, in order to be conscriptive there must be some element of compulsion involved. This requirement has been interpreted broadly. Thus, any evidence produced at the demand or under the direction of the police is deemed to be inherently coercive and therefore compulsive.²⁴

The next step has to do with the fairness of the trial process. Thus, the admission of conscriptive evidence obtained as a result of compulsion will not render a trial unfair where the evidence “would have been discovered in the absence of the unlawful conscription of the accused.” (para. 102) So where the evidence is not conscriptive, or where the evidence is conscriptive but probably would have been discovered in any event, its admission will not undermine the fairness of the trial.

However, evidence may still be excluded if it can be established that the *Charter* breach that yielded the evidence was so serious that admitting the evidence in light of the breach would outweigh the disrepute that would be caused by the administration of justice were the evidence to be excluded. This is the third step. Moreover, in assessing the seriousness of the *Charter* violation, attention must be paid to, among other things, to the nature of the violation (serious or technical), the mental state of the officer (flagrant or deliberate), and the availability of other means to discover the evidence.

Just how serious the *Charter* breach must be in order for the admission of evidence to bring the administration of justice into disrepute is a complicated question. Take, for example, the recent case of *R. v. Harrison*, 89 O.R. (3d) 161 (C.A.). The accused was driving a rented car with Alberta license plates when he was pulled over by a police officer near Kirkland Lake, ON for driving without a front license plate, although the officer later admitted that he knew that it was not an offence in Alberta to drive without a front license plate. The officer eventually determined that the accused was driving with a suspended license and when he searched the car discovered 77 pounds of cocaine. The accused was convicted of trafficking and appealed. The Ontario Court of Appeal, in a 2-1 holding, dismissed the appeal, holding that the admission of the physical evidence would not bring the administration of justice into disrepute. There was no question in *Harrison* that the police officer lacked reasonable and probable grounds for the search, that the violation was not a merely technical one, nor that the police officer’s actions in violation of the accused’s s. 8 rights were deliberate and intentional, since the police officer went ahead with the search knowing that reasonable and probable grounds were lacking. Nonetheless, the majority held that the seriousness of the *Charter* violations paled in comparison with the seriousness of the crime with which the accused was charged, and concluded that excluding the evidence would bring the administration of justice into more disrepute than would its inclusion.

24. See, for example, *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 (Man. C.A.).

Harrison is a case where the truth-seeking function of the criminal law predicts that the evidence ought to be admitted. The argument that the evidence should be excluded is based on nonepistemic policy values having to do with the integrity of the judicial process and the repute of the administration of justice. Cases like *Harrison* are interesting in part because they remind us that the *Charter*, for all its virtues, also has its drawbacks. This is because it makes it less likely that guilty_m individuals will be charged with crimes that they have committed, and less likely that they will be found guilty_p of crimes with which they have been charged. It is therefore inescapable that the *Charter* is the cause of some outcome errors. Moreover, where *Charter* jurisprudence does evince a concern for epistemic values, it appears to be concerned primarily with the error distribution function of the criminal law rather than with the law's truth seeking function. Thus, provisions such as s. 8 of the *Charter*, which recognizes a right to be free from unreasonable search and seizures, are best viewed as mechanisms for ensuring that where mistakes are made, those mistakes will tend to favour the accused. There is nothing unreasonable in deciding to focus on the error distribution function of the criminal law, but as Laudan would remind us, such a decision comes with a cost, and that is the ability of the criminal law to get things right.

With this in mind, I have no doubt that Laudan would look upon the *Charter* with some degree of skepticism, at least from the perspective of legal epistemology. And yet the balancing tests on which the s. 24(2) jurisprudence relies means that evidence that is obtained in violation of an accused's *Charter* rights will sometimes be admissible. Some have criticized the fact that the Canadian criminal process allows for the admission of such evidence on the grounds that "it may render individual Canadians more susceptible to invasions of their constitutional rights."²⁵ On the other hand, the fact that the Canadian criminal process makes room for the admissibility of such evidence would presumably be viewed by others as a virtue, since it makes it more likely that the criminal process will generate true verdicts. From the perspective of purely *epistemic* principles, then, the structure of the Canadian criminal process would again appear to improve on its U.S. counterpart.

7. Conclusion

What would the criminal process look like if Laudan were allowed to remake it? Presumably something quite different than what we have now. Among other things, if Laudan had his way germane inculpatory evidence, even if illegally obtained, would be placed before the jury. Different crimes would likely have different standards of proof. Juries would not be instructed on the presumption of innocence. And the standard of proof would be determined by a ratio between true acquittals and false convictions, rather than by reference to BARD. Whether this would be a better criminal process, and whether there exists the will to change it, are separate questions. Despite Laudan's trenchant criticisms of the current criminal process, my suspicion is that our commitment to the BARD standard and to the presumption

25. Penney, *supra* note 22 at 810.

of innocence—the silver and golden threads, respectively, of the criminal law, according to Cory J.—is so ingrained that they are unlikely to be done away with any time soon.²⁶

Laudan, of course, is not unaware of the practical barriers to his proposed changes, and concludes *Truth, Error, and Criminal Law* with the following remarks:

However limited the prospects for practical reform may be, it remains important to do the theoretical spadework that is necessary simply to grasp how well or badly the current system is working. That activity, the epistemology of the law, is inexplicably still a nascent subject. It deserves to be more than that, for any purported system of inquiry that does not bother to discuss candidly the legitimacy of its claims to truth and rationality is no system of inquiry at all. (233)

Laudan's assertion that the epistemology of the law is still a nascent subject may or may not be correct.²⁷ But his claim that legal epistemology deserves more attention surely is. Indeed, Laudan's remarks bring to mind a comment made over a century ago by Oliver Wendell Holmes in "The Path of the Law." The comment I have in mind relates to the study of legal history, but it is no less relevant for that. According to Holmes, the study of legal history must be part of the rational study of law

because it is the first step toward an enlightened scepticism, that is, toward a deliberate reconsideration of the worth of those [legal] rules. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.²⁸

Like the study of legal history, the purpose of legal epistemology is to identify legal rules, to get them "on to the plain and in the daylight," to assess them rationally, and, if necessary, to modify or replace them. Luckily for us, Laudan has done much of the ground clearing needed for additional study in this field. *Truth, Error, and Criminal Law* should go a long way towards convincing readers that the field of legal epistemology deserves more attention than it has so far received. The more and more widely *Truth, Error, and Criminal Law* is read, the more likely it is that legal epistemology will attract the attention of lawyers, legal academics, and philosophers, attention that can only contribute in a positive way to the important and ongoing task of rethinking criminal law.

26. Then again, given various recent Canadian miscarriages of justice—most notably those involving Thomas Sophonow, Donald Marshall, Stephen Truscott, Guy Paul Morin, David Milgaard, James Driskell, and Randy Druken, but also the recent Ontario case of Anthony Hanemaayer, who pled guilty in 1989 to a knife assault on a fifteen year-old girl, a crime to which Paul Bernardo later confessed—perhaps the political and judicial will is there for a reassessment of some rules of evidence and procedure.

27. Bentham was surely doing something like legal epistemology when he wrote *Rationale of Judicial Evidence* (1827), and Wigmore was undoubtedly doing legal epistemology when he published *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (1904) and "The Problem of Proof" (1913) 8 Ill. L. Rev. 77.

28. "The Path of the Law" (1897) 10 Harv. L. Rev. 457 at 469.

