Different Strokes for Different Folks:
Fixing the Error Pattern in Criminal Prosecutions by "Empiricizing" the Rules of Criminal Law and Taking False Acquittals and Serial Offenders Seriously

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> "Acquittals are the mystery disposition of the criminal justice system."
> —Daniel Givelber[1]

> "Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accused is first suspected to the time the decision on guilt or innocence is made. Our criminal justice system is designed [sic] to enable the trier of fact to discover the truth according to the law."
> —Justice Lewis Powell[2]

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[1] Daniel Givelber, *Lost Innocence: Speculation and Data about the Acquitted*, 42 AM. CRIM. L. REV. 1176 (2005).

[2] Bullington v. Missouri, 451 U.S. 430, 450 (1981) (Powell, J., dissenting).

> "Trial by jury is not an instrument for getting at the truth; it is a process designed to make it as sure as possible that no innocent man is convicted."
> —Lord Patrick Devlin[3]

> "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."
> — J. S. Mill's "Harm Principle"[4]

I. INTRODUCTION

I am going to be propounding to this group what I think is a modest proposal, but I daresay it probably won't be heard that way. I'm going to be talking chiefly about acquittals, especially false ones. (And, I might add, it is a topic very close to our colleague Daniel Givelber.) I should make clear from the outset that when I refer to "acquittals", I am not limiting my concerns to what happens at trials. We all know that fewer than 10% of cases the prosecutor deals with go to trial. I shall include under my use of the term "acquittals" not merely cases that the prosecutor loses at trial, but also all those cases where the prosecutor drops charges that have been made against arrested defendants.

My proposal, in rough form, is simply this: (1) the false acquittal of a truly guilty serial offender is vastly more costly in terms of the harms it produces than is the false acquittal of a truly guilty first-time offender. After I document why I believe that to be correct, (2) I shall suggest that the striking differences in the two sorts of cases—that of a first-time offender and that of a serial offender—warrant the implementation of a lower standard of proof than beyond a reasonable doubt ("BARD") for dealing with serial felons charged with a crime. By seriously reducing the frequency of false acquittals, my proposal would allow us to do more to reduce harm from erroneous verdicts than we now can, thereby increasing both the number of true convictions (and increasing the number of false convictions while) reducing drastically the number of false acquittals. As we shall see, from a harm-reduction perspective, the false acquittal of a first-time offender does little to cause harms to innocent citizens, since first-time offenders have very low recidivism rates compared to the likelihood of recidivism by frequent offenders on trial. That entails, of course, that the cost of the error of

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[3] Lord Devlin, The Criminal Trial and Appeal in England, Address delivered at the University of Chicago for the Third Dedicatory Conference (Jan. 1960), *in* HARRY KALVEN & HANS ZEISEL, THE AMERICAN JURY 190 (1966).

[4] JOHN STUART MILL, ON LIBERTY 21–22. (Oxford Univ. Press 1859).

acquitting a guilty first-time offender is comparatively modest, which it is. By contrast, (3) the lower standard I am proposing for serial offenders does much more to keep them off the streets than the BARD standard of proof (SoP) does. Bear in mind that all arrestees with a likelihood of guilt of 80% or 70% are almost certain to win an acquittal, even though the numbers tell us that it quite likely that they committed the crime. Under current rules, the serial offenders who fall into this class are highly likely to be acquitted, whether guilty or innocent under current rules.

We need to remember that if, as most of us probably believe, the false conviction rate under BARD is about 3%, that tells us that the ratio of truly guilty defendants to truly innocent defendants who fall in the 90%+ range is about 32-to-1. As one imagines reducing the standard of proof by moving it a tad to the left, then there will be a significant range of truly guilty defendants (indeed, far more guilty persons than innocent ones) being convicted if their apparent guilt falls somewhere between (say) 75% and 90%. Nowadays, everyone falling in that range is acquitted, even though most of them are factually guilty, given their obvious likelihood of culpability. So, I believe, and have substantial data to support, the hypothesis that BARD is producing a vast number of false acquittals. That in turn, as we shall see, is creating a situation in which, in aggregate, false acquittals are doing much more harm to innocent citizens than false convictions are. I propose to at least partially remedy the situation by keeping the BARD SoP for trials of non-serial felons (since the risk they pose to the rest of us from recidivism is very low) and by implementing a different SoP for serial offenders—the natural one being clear-and-convincing evidence (more or less in the 70% range)—which will drastically shrink the current class of false acquittals and many of the harms now wrought by those tried and acquitted by the BARD verdict.

II. RECIDIVISM VARIATIONS BETWEEN SERIAL AND FIRST-TIME OFFENDERS

The first step in my argument will involve reviewing the existing data we have about the striking differences in recidivism rates between serial offenders and first-time offenders, when each set is released on the streets, either by finishing a prison term or by being acquitted. (Where the data are concerned, most of my examples will come from studies—chiefly from the Bureau of Justice Statistics (BJS)—of those accused of violent crimes.)

Current data, when subjected to rational analysis, show that false acquittals are much more frequent than false convictions. After all, if a defendant's probable guilt falls in the range from 70% to 90%, he will generally be acquitted, even though it is clearly more likely that he committed the crime than that he did not. There are several data sources that

bear out this hypothesis. One is the classic study of Kalen & Zeisel in *The American Jury*. It reports a sizeable number of cases where the jury acquitted defendants in cases that the judges rated as "close cases". If a case is close in this sense, that means it is near the line between guilty and not guilty. That entails that the defendants in such cases are probably factually guilt (*prob(guilt) > 50%*) even if the level of apparent guilt is insufficient to satisfy BARD. A more telling example can be found in the study of Scottish jury verdicts. As you all know, Scotland (which uses the BARD SoP), has three criminal verdicts: guilty, acquitted not-guilty, and acquitted not-proven. In recent studies there, 84% of those who were acquitted got an acquitted not-guilty verdict (meaning probably innocent) and 15% got an acquitted not-proven verdict (meaning probably guilty). That means that about one-fifth of those acquitted (meaning guilt not proven) in Scottish courts were regarded by the jury as more likely to be guilty than innocent.[5] That would appear to make the false negative rate almost a magnitude higher than the usually presumed false positive rate (3%). Blackstone would love it!
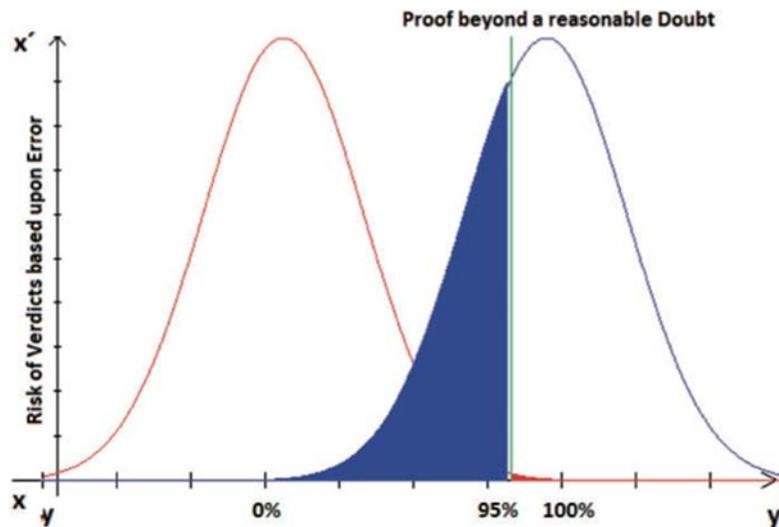
(The red line is the distribution of apparent guilt among the innocent. The blue line is the distribution of apparent guilt among the guilty.)

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[5]   Scottish Government, *Not Proven Verdicts Delivered From 2011 to 2016: FOI Release* (Oct. 23, 2017), https://beta.gov.scot/publications/foi-17-02213/.

III. KEY ASSUMPTIONS OF THE FOLLOWING ARGUMENT

1. The average serial felon who is falsely acquitted is likely to commit more than 1.2 serious crimes when on the street during the time when he would usually be incarcerated if convicted (average time served if convicted = 3 years).
2. The average first-time offender has a recidivism rate that is only a third of the recidivism rate of serious serial felons.
3. Putting the two together means that the cost of the false acquittal of a guilty serial offender is 300% more harmful than the cost of a false acquittal of a first-time felon.
4. So, there are prima facie grounds for using different standards of proof for the two categories.

To begin with, we should remind ourselves that, among those charged with violent crimes, there are vastly more recidivists arrested than first-time offenders. One large study of those arrested for federal crimes conducted by the United States Sentencing Commission (in 2004), reports that 29.8% of arrestees had no prior arrests and 8.4% of them had prior arrests but no prior convictions. The remaining two-thirds of arrestees for violent crimes had a stock of prior offenses.[6]

In a study by the BJS among those released from state prisons, among 272,000 prisoners released from prison in 1994, 93.1% had prior arrests and 81.4% had prior convictions. After their release, 29.9% were rearrested within 6 months, 44.1% within 1 year, 59.2% within two years, and 67.4% within 3 years.[7] I will take this profile to be typical of the recidivism pattern of serial felons.

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[6] U.S. SENTENCING COMM'N, RESEARCH SERIES ON THE RECIDIVISM OF FEDERAL GUIDELINE OFFENDERS: RECIDIVISM AND THE "FIRST OFFENDER" 4 (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf.

[7] PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 3 tbl.2 (June 2002), https://www.bjs.gov/content/pub/pdf/rpr94.pdf.

Table 12. Rearrest rates of State prisoners released in 1994, by number of prior arrests

Number of arrests prior to release	Percent of all releases	Percent of releases who were rearrested within —	
		3 years	1 year
All released prisoners	100%	67.5%	44.2%
1 prior arrest	6.9	40.6	20.6
2	7.4	47.5	26.2
3	7.8	55.2	32.2
4	7.7	59.6	35.1
5	7.7	64.2	39.7
6	7.4	67.4	43.2
7-10	20.9	70.3	45.5
11-15	16.2	79.1	54.5
16 or more	18.0	82.1	61.0

Note: Percents are based on 272,111 released prisoners. By definition, all 272,111 had at least one arrest prior to their release. Consequently, "0 prior arrests" does not apply.

Here is a picture of what the recidivism patterns differences look like from a different source:[8]

> (1) recidivism rates of convicted felons for those with no prior arrests and no convictions6.8%
>
> (2) recidivism rates of convicted felons for those with 1 prior arrest and no convictions13.2%
>
> (3) recidivism rates of convicted felons for those with 2 or more prior arrests and no convictions23.2%
>
> (4) recidivism rates of convicted felons for those with $\geqq$ 5 or more prior arrests36%[9]

Mean recidivism rates of categories (2) to (4): 22%

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[8]   U.S. SENTENCING COMM'N, *supra* note 6, at 28 exhibit 8.

[9]   U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 7 (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf.

RECIDIVISM FIGURES AMONG RELEASED VIOLENT OFFENDERS[10]

Cumulative Percent of Released Violent Prisoners Arrested for a New Crime Within:

6 months	1 year	2 years	3 years	4 years	5 years
25.2%	38.9%	54.4%	62.3%	67.9%	72.3%

As the *United States Sentencing Guidelines Manual* put it: "[In order] to protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered."[11]

There is a repeating pattern in these sets of data that will take us to the next step of my argument about the SoP. In the majority of recidivism studies, those defendants with no priors or only one prior show a frequency of re-arrest (during three or five years after their release) at a rate that is about one-third of that shown by the already established serial felons, who often already have an abundance of prior arrests and/or convictions.

The inference I draw from this pattern in the recidivism studies is that the release of first-time offenders imposes much less harm on the community than does the release of seriously serial offenders. That becomes the key to my argument that frequent serial offenders are more dangerous and more likely to do harm (often violent) than their non-serial counterparts.

If we can assess the magnitude of the respective harms done by released first-time offenders and those done by released serial offenders, we can figure out what the standards of proof appropriate to those two groups should be.

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[10]   MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, U.S. DEP'T OF JUST. BUREAU OF JUST. STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010 (Apr. 2014), https://www.bjs.gov/content/pub/pdf/rprts05p05 10.pdf. This includes only those recidivists who were actually arrested and does not include those non-arrested.

[11]   U.S. SENTENCING COMM'N, GUIDELINES MANUAL 374–76 § 3E1.1 (Nov. 2015), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf.

Case I SoP for All Defendants Who Are Known Serial Offenders

Using Kaplan's decision-theoretic formula for generating a rational SoP, we can see that the overall harms from verdict errors will be minimized when:

$$SoP = 1/[1 + (harm_{F-}/harm_{F+})$$
$$SoP = 1/[1 + (1.2/2.2)] = 1/1.55 = 65\%^{[12]}$$

This figure closely approximates what we understand by the clear and convincing evidence standard.[13] As Laurence Tribe[14] and John Kaplan[15] show, a standard that obeys the calculation above will minimize the overall harms ensuing from erroneous verdicts in cases involving serial felons. But, you might be inclined to think that, by lowering the SoP in this fashion, we would be producing far more false convictions than the system now tolerates. That there will be more false convictions under my proposal than now occur is certainly to be expected. But equally to be expected is a strikingly sharp drop in the frequency of false acquittals of serial felons.

We already mete out to those serial felons convicted of a crime much longer sentences than those given to non-serial offenders. Clearly, we no longer stick to the age-old idea that "the punishment should fit the crime"; the operative sentencing principle now in place is more like "the punishment should fit both the crime and the criminal's history." I am proposing that we should add to that the notion that "the standard of proof utilized should reflect the accused's criminal history *and* the danger he poses to the community".

Case II SoP for All First-Time Offenders

$$SoP = 1/[1 + (.4/2.2)] = 1/1.18 = 85\%$$

This SoP comes close enough to BARD that we can keep that standard in place for all non-serial offenders on trial. The reason why the numerator dropped here from 1.2 harms to 0.4 harms is that we have good reason to

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[12]   The 1.2 victims figure identifies the average number of serious felonies known to be committed by those released violent felons in 2008 during the ensuing three years. I assume that the falsely acquitted but guilty serial felon will (at the least) commit a comparable number. The 2.2 denominator includes the harms done to the falsely convicted arrestee (1 victim) and the crimes (~1.2) probably committed by the true perpetrator who escaped conviction.

[13]   Note that it also turns out to vindicate Voltaire's guess at the Blackstone ratio: 2-to-1.

[14]   Tribe takes into account both utilities and disutilities of the four outcomes: true convictions and acquittals and false convictions and acquittals. *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1383 (1971).

[15]   *See* John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065 (1968).

believe that the average serial felon has a recidivism rate 300% higher than the average non-serial felon.

As I hope you can see, my proposal for a pair of SoPs would do several things:

- It would continue to make it difficult to convict first-time offenders unless the evidence against them was daunting.
- At the same time, it would make it easier to convict serial offenders, thereby cutting down drastically the immediate release of guilty but falsely acquitted persons who are very likely to commit several offenses during what should have been be the time of their incarceration.

Does this policy of putting in place two different standards of proof violate due process, as the Supreme Court insisted that any standard of proof besides BARD would do (in the classic case *In re Winship*[16])? I think not; after all, we give longer sentences to serial offenders than to first-time offenders who commit the same crimes precisely because the former are much more dangerous on the streets than the latter. Few argue that such a policy is unfair or in violation of due process. Nor are many people disturbed by the fact that in many states in the United States (though not at the federal level), a defendant who presents a so-called affirmative defense can be rebutted and then convicted provided the state can show by a preponderance of the evidence that the defendant's exculpatory excuse is probably false. We should also remind ourselves that in *civil* trials in the United States, we use not one SoP but two: the preponderance of evidence and clear and convincing evidence. There are sound reasons for doing so—explicitly formulated in Mill's harm principle—in criminal trials just as there are in civil ones.[17] It is also perhaps likewise worth pointing out that in most countries of the world, there is but one standard of proof (akin to proof beyond a reasonable doubt) used in *all* trials, whether civil or criminal. More than two centuries ago, English-speaking countries broke ranks with that approach, introducing the preponderance of the evidence SoP in civil trials and, more recently, civil cases introduced a second standard for certain civil trials: clear and convincing evidence.[18] My suggestion here of a second

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

[17] The clear and convincing standard in civil trials is generally used in cases that include:
Claims involving wills and inheritances;
Cases involving important family decisions such as withdrawing life support from a relative;
Claims involving fraud; and
Substantial amounts of money.

[18] For the early history of the clear and convincing evidence rule, see ZEPHANIAH SWIFT,

standard for criminal trials is not heresy but a continuation of the Anglo-Saxon tradition of re-thinking from time to time whether a single SoP is ideal for all criminal trials. It is also worth reminding ourselves that in the case *In re Winship* that established BARD as the constitutionally-dictated SoP, its core rationale for BARD was that false convictions were "more costly" than false acquittals and that the SoP must honor that fact. As I have already noted in passing, the standard of clear and convincing evidence fully honors that rank-ordering of errors. The more one thinks about the idea that that due process requires BARD in all criminal trials, the more preposterous it becomes. In the *Winship* ruling, the court insisted, and properly, that a false conviction is more costly and harmful than a false acquittal. That is sound, and I do not contest it. But its next move was to say that the cost difference in errors required BARD and BARD alone. It manifestly does not. *Any* SoP significantly greater than 50% would instantiate the principle that false convictions are more costly than false acquittals.

One final point before I close. The recidivism rates that I have assembled here almost certainly *vastly* understate the degree of recidivism of serial felons. We have to remind ourselves of two features of the data collection system that guarantees that we miss many recidivist acts. I refer, of course, to the fact that, where violent crimes are concerned, (a) only about 45% of crimes are reported to the police; and (b) the police arrest and charge only about 30% of the violent offenders. That all means that (c) there are some 1.2 million violent crimes committed every year in which the police never identify the culprit. It is inconceivable that most of those unsolved crimes were not perpetrated by serial felons who escaped arrest or conviction.[19] If that is so (and I cannot imagine otherwise), we have to recognize that the recidivist harms caused by serial felons are much greater still than I have described them. But I conjecture that the true ratio of the recidivism of serial felons to the recidivism for first-time offenders (3-to-1) for unsolved crimes is probably akin to the recidivism rates for all violent crimes.

A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES 151 (1810).

[19] These data all come from the BJS and National Victimization Studies sources about violent crime in 2008. *See* U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES: NATIONAL CRIME VICTIMIZATION SURVEY (Mar. 2010), https://www.bjs.gov/content/pub/pdf/cvus08.pdf.

APPENDIX[20]

VIOLENT CRIMES IN THE UNITED STATES, 2008

Victims of completed violent crimes	1,360,000
Violent crimes reported to the police	797,000
Suspects arrested & charged	542,000
Charges dropped (acquittals)	179,000
Confessions (in plea deals convictions)	333,000
Tried & convicted	30,000
Tried & acquitted	1,500
Estimated number of false +s (3%)	10,900
Estimated number of false -s	80,000
Harms from false -s (1.2 victims each)	96,000 victims of violence
Harms from false +s (2.2 victims each)	24,000 victims
Risk of citizen being violently victimized by a false -	1 in 2,200
Risk of citizen being falsely convicted of a violent crime	1 in 1,900
Cost in dollars of recidivism events ensuing from these false	$11,328,400,000[21]

PRIOR CRIMINAL HISTORY OF THOSE CONVICTED IN 2008

≤ 2 prior arrests	11.3%
3-4 prior arrests	14.2%
5-9 prior arrests	31.1%
≥ 10 prior arrests	43.2%
Number of arrestees with prior convictions	411,000 (76% of arrestees)
Number of priors of average releasee in 2008	4.9 convictions and 10.6 arrests

I identify the sources for most of these figures in my book, *The Law's Flaws*.[22]

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[20]   *Id.*

[21]   The Illinois Sentencing Policy Advisory Council estimated in 2015 that "[t]he average cost associated with one recidivism event is $118,746." ILLINOIS SENTENCING POLICY ADVISORY COUNCIL, ILLINOIS RESULTS FIRST: THE HIGH COST OF RECIDIVISM (2015), http://www.icjia.state.il.us/spac/pdf/Illinois_Results_First_1015.pdf.

[22]   LARRY LAUDAN, THE LAW'S FLAWS: RETHINKING TRIALS AND ERRORS? 48 (2016).