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**COMPARISONS OF THE SOUL:  
A FOUCAULDIAN ANALYSIS OF REASONABLE DOUBT**

by

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### **Abstract**

The purpose of this paper is to uncover a new level of thinking regarding the discourse and debate around the standard of reasonable doubt and how it is used in our court rooms. The current argument surrounding the reasonable doubt standard has become circular and reached an impasse. By introducing the lens of social control and using the writings of notable French philosopher Michel Foucault, this paper looks at the origins and development of the reasonable doubt standard and links it with the increasing methods of social control present in punishment as well as evaluating the cultural narrative around its origin and assessing why this standard was permitted to continue to be a cornerstone of the Anglo-American judicial system.

## Comparisons of the Soul

Imagine you're on trial for murder. Cases have been made, closing arguments have ceased, and the only thing standing between you and life in prison is the jury and the words 'beyond a reasonable doubt'. In the Anglo-American judicial system, there are several standards of proof that help judges and juries to decide on the guilt of the accused. The most stringent, the one used in criminal cases, is the standard of reasonable doubt. The thought is that unless the jury is convinced the accused committed the crime beyond a reasonable doubt, then they must find him not guilty. Though never officially attached to any percentage, this standard translates to about 92% certain.<sup>1</sup> This means that the jury must be at least 92% certain that the defendant committed the crime in order to convict. This standard is stricter than preponderance of the evidence, a standard traditionally used to determine liability in civil cases, that is translated to more than fifty percent certain, or as traditionally stated, more likely than not.<sup>2</sup> Beyond a reasonable doubt means if any doubts remain that a reasonable man would find compelling, then the jury cannot, under law, find the defendant guilty. At first glance, this standard sounds ideal. Only those who are truly guilty will get sent to prison. However, there has been much debate in recent years as to whether the reasonable doubt standard is serving its purpose and whether the current standard should undergo revision. Current arguments regarding the validity of the reasonable doubt standard and its use in Anglo-American court rooms have reached an impasse due to conflicting normative frameworks and an

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<sup>1</sup> Woody, William Douglas, and Edie Greene. 2012. "Jurors' Use of Standards of Proof in Decisions about Punitive Damages." *Behavioral Sciences & the Law* 30 (6): 856–72. doi:10.1002/bsl.2027.

<sup>2</sup> Woody. "Jurors' Use of Standards of Proof in Decisions about Punitive Damages," 858

unwillingness to acknowledge reasons beyond the scope of the justice system. In this paper I will argue that by looking at the reasonable doubt standard through a Foucauldian lens and showing that the standard originated and developed in conjuncture with other methods of social control, we can see that the reasonable doubt standard is operating as a means to serve state interest, thereby rendering current arguments about the standard moot by showing that the purpose of reasonable doubt is not to ensure justice but rather to ensure the narrative of the state.

In this paper I will first recount the most popular reasoning and arguments that make up the current debate of the reasonable doubt standard. Then I will analyze these arguments and show how they have stagnated as well as failed to consider different solutions to their problems. Next, I will examine how systems of trial, mirroring systems of punishment, shift their focus from body to soul. I will do this by examining how the shift from trial by ordeal to trial by jury and the exclusion of torture as a judicial practice led to the implementation of the reasonable doubt standard. I will then discuss the reasons for this change as well as its continued usage while outlining the benefits this standard gives to the state. --

## **CURRENT ARGUMENT**

To understand the workings of the reasonable doubt standard, one must first understand the current debate and where it falls. Those familiar with the standard of proving guilt beyond a reasonable doubt may find it hard to imagine that there are agents who would rather see the standard changed, despite how fully entrenched the standard has become in the Anglo-American court room. Many who argue against the continued use of the reasonable doubt standard do so from a consequentialist standpoint.

Consequentialism, as the name suggests, is more concerned with the consequences of any given action rather than the action themselves. Actions must be judged based on their consequences. Therefore, they judge the reasonable doubt standard based on the consequences of using that standard. The standard of beyond a reasonable doubt is considered to be the highest level of proof under certainty, and as we can never be certain about many of the cases that come through the courts, we must settle for proof beyond a reasonable doubt.<sup>3</sup> Opponents of the reasonable doubt standard object to it partially due to this. They assert that because the standard of proof is so high, that many people who are actually guilty are being falsely acquitted. As the high rates of recidivism have shown, those who have committed crimes are most likely to commit crimes again. Some research even indicates that for every false acquittal, thirty-six new crimes are committed, seven of which are violent.<sup>4</sup> From those arguing from a consequentialist standpoint, those consequences are not worth the cost. The trade-off being that if the standard of proof is lowered, while the rate of false acquittals might go down, it is likely that the rate of false convictions would rise. Opponents face this trade off and state that it is better one person suffer though a false conviction than multiple people suffer at the hands of criminals who have gone free.<sup>5</sup>

There are still those who firmly believe that the reasonable doubt standard should remain the standard of proof used when deciding the outcome of criminal trials. Unlike

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<sup>3</sup> Barbara J. Shapiro, *Beyond Reasonable Doubt and Probable Cause* (Berkeley, CA: University of California Press, 1991). 35-36

<sup>4</sup> Federico Picinali, "Can the Reasonable Doubt Standard Be Justified? A Reconstructed Dialogue," *Canadian Journal of Law & Jurisprudence* 31, no. 02 (August 3, 2018), 369

<sup>5</sup> Picinali, "Can the Reasonable Doubt Standard Be Justified? A Reconstructed Dialogue," 368-370

opponents of the reasonable doubt standard who speak from a consequentialist viewpoint, proponents argue instead from a deontological one. This is not to say that one's philosophical views automatically determine their stance on reasonable doubt, but rather to show the origins and reasoning that fuel the current debate surrounding the issue. Those who agree with deontological theory believe that rather than judge actions by the good or bad consequences associated with them, actions are deemed good or bad due to a strict series of rules. They disagree with the arguments brought up by their opponents in several ways. First, those who support the continuance of the reasonable doubt standard stand firmly with Blackstone's maxim, that it better for ten guilty men to go free than one innocent man to suffer.<sup>6</sup> They stand by this maxim and believe that the standard of proof beyond a reasonable doubt is the ideal way to meet it. They disagree with the research presented by their opponents and believe that the amount of harm caused by false acquittals is not that great and is less relevant than the harm caused by false convictions. They argue that lowering the standard of proof would most likely cause more false convictions to occur. False convictions, unlike false acquittals cause direct harm to an individual. Those arguing from a deontological perspective believe there is a difference between statistical lives, i.e. the lives that would be harmed by those released by false acquittals, and identified lives, the life of the person being falsely convicted. Furthermore, they believe there is a difference between our actions, or rather the actions we can control, and the actions of others. This being said, those who believe the standards

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<sup>6</sup> William Blackstone, *Commentaries on the Laws of England*, vol 4 (University of Chicago Press, 1979), 352.

should remain how it stands do so due to a mixture of beliefs revolving around not causing direct harm rather than evaluating consequences.<sup>7</sup>

While both sides of the current debate make decent points, each side fails to realize some very important notions. First, each side is incapable of looking past their own normative framework. This essentially creates a conversation where the parties are talking past each other. This weakens their arguments partially because they cannot lend credence to other views and partially because this is preventing their arguments from going any further. Second, even with the high risk of victimization, wouldn't a false conviction result in the same number of crimes as a false acquittal? Someone guilty is still roaming free and is likely to commit crime again. If we fail to catch the criminals that have caused harm to society, we are still failing in our duty to society, whether or not we are preventing false convictions. Third, the notion that the harm caused by crime is greater than that of the harm cause by false conviction is absurd. While this is perhaps true for violent crimes, such as serial rape or murder, is destroying someone's life, and most likely their family's life, through incarceration really equivalent to theft or drug crimes? Is it better than having a car stolen or having an adult getting high of their own volition? The stigma attached to those who have been in prison makes any sentence a life sentence, regardless of the time spent in custody. Neither side has a full grasp of the implications of their arguments and fails to think of the ramifications of the standard outside of the courtroom.

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<sup>7</sup>Picinali, "Can the Reasonable Doubt Standard Be Justified? A Reconstructed Dialogue," 371, 373,



Currently, both sides of the debate have a goal that they believe can be helped by either lowering or maintaining the reasonable doubt standard. These goals are in the form of decreasing either false convictions, or false acquittals. Each of these goals can be worked towards by alternate means. For false convictions increasing juror numbers, imposing unanimity in jury deliberations, instating judicial review of every guilty verdict, and excluding confessions and eyewitness testimony due to unreliability, would all increase the likelihood of accurate convictions. Regarding false acquittals, increasing police resources, investing more in the development of forensic science, improving surveillance systems, and generally improving evidence would also make convictions more accurate. Ultimately, it seems like the goal for both sides is to increase accurate convictions and ultimately make our court system more efficient in pursuing justice. Furthermore, studies have shown that “adults had significant difficulty understanding what the standard of proof meant” and when researchers “asked mock jurors in a negligence case about the standard of proof, only approximately half the jurors knew what percentage of evidence equals a preponderance”.<sup>8</sup> This suggests that changing the standard would not lead to more accurate convictions as it is clear that jurors fail to apply these standards correctly when making a decision. Ultimately, both sides have a similar goal, but utterly fail to see the Anglo-American legal system as anything other than what it is on the surface. They see the court system as a way of punishing those who commit crimes and reasonable doubt as the standard we use to judge them. However, the biggest

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<sup>8</sup>Woody. “Jurors’ Use of Standards of Proof in Decisions about Punitive Damages,” 859

impact made by the system, supported by the reasonable doubt standard, is not in the area of justice, but rather in the area of social control.

## **SOCIAL CONTROL**

Social control is the way that society uses things like law, normality, and the structures built into our society to regulate the behavior of people. There are many forms and methods of social control, such as media, educational systems, and the penal system. Michel Foucault, a French philosopher who dealt heavily with the concept of social control stated

“We must first rid ourselves of the illusion that penalty is above all (if not exclusively) a means of reducing crime and ... we must analyze rather the concrete systems of punishment, study them as social phenomena that cannot be accounted for the juridical structure of society alone, nor by its fundamental ethical choices; we must situate them in their field of operation, in which the punishment of crime is not the sole element”<sup>9</sup>

As he suggests, it is only by ceasing to think of the criminal justice system as one that is only made for crime and punishment that we can leave the circular debate of reasonable doubt. The criminal justice system is a means of social control. By looking at the reasonable doubt standard as a means of control rather than justice, we can gain a new perspective on its origins and continued presence in our court rooms.

A key element of social control is the use of narrative. Therefore, if we wish to analyze the use of reasonable doubt, we must look at how narrative impacts the legal

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<sup>9</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1977), 24.

system. In a criminal trial, the burden of proof rests upon the prosecution, however, both sides have the opportunity to share their version of events with the jury. What a criminal trial comes down to is who can tell the better story. Which side can spin the most compelling tale. Of course, evidentiary support and the testimony of expert witnesses can tilt the scale of justice in one side's favor, but that will only lend so much support when the delivery of the facts is lacking. When the jury members cast their ballots, they are voting for the side that has convinced them, and so often, being convinced of something has less to do with the facts, and more to do with the confidence of the informant. Due to the very structure of the trial, narrative is an integral part of the Anglo-American legal system. Furthermore, the narrative surrounding the legal system as a whole is just as important as the individual narratives within the criminal trial. This overarching narrative often paints the system as one of justice. Those who have committed crimes will face the courts and eventually be sent to prison for their crimes. However, when looking at the legal system with social control in mind, it is easy to see that justice is not the focus of the system, rather the focus is punishing deviance and difference. The system doesn't care who is innocent or guilty or who has been wronged or who truly deserves justice. The system is concerned with eliminating deviance from society. However, a narrative concerning itself with truth and justice is necessary for the system to function. Society needs some form of punishment or correction in order to uphold the social contract its citizens have engaged in.<sup>10</sup> In order for this system to work, it must be seen as fair and valid. Criminal justice systems that do neither of those things often result in having a lack

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<sup>10</sup> John Locke and Peter Laslett, *Two Treatise of Government* (Cambridge: Cambridge Univ. Press, 1993).

of authority and ability to punish or are torn down as a result of some greater revolution. Citizens will only submit willingly to the system of punishment if they believe it to be a fair and impartial judge. The reasonable doubt standard is an essential part of maintaining the validity of that narrative. Though we know that juries often base their verdicts on other factors, legally speaking, they are only permitted to find the defendant guilty if that guilt has been proven 'beyond a reasonable doubt'. The reasonable doubt standard is necessary to ensure that criminal trials are seen as fair and valid, whether or not they actually are. The reasonable doubt standard is doing exactly what is what meant to do as an element of social control. To prove this, we must look at the development of both social control and the reasonable doubt standard.

First, we can look at the similarities between the development of standards of proof in criminal trials and its similarities with emerging forms of social control. It would be nearly impossible to mark the true beginning of social control. Methods of social control have been present as long as society has. However, with the rise of personal freedoms it became increasingly necessary for new methods of social control to develop. In his book, *Discipline and Punish*, Michel Foucault details a shift in systems of punishment, body to soul. His book opens with a vivid description of what can only be described as torture. A man condemned for the killing of his parents in 1757 was made to face justice,

“where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four

horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.”<sup>11</sup>

In the same opening, Foucault goes on to repeat a schedule of 1837 “rules for the House of Young Prisoners in Paris” which detailed the strict structure those imprisoned must abide by, including various working hours, schooling, and a strict regimen sleep and meals<sup>12</sup>. These two different descriptions were separated by a difference of eighty years. This drastic change in punishment reflects the shift in focus from the body to the soul.

### **HISTORICAL ACCOUNT**

This shift from punishing the body to punishing the soul is mirrored in the criminal trial. Long before our punishments shifted, our court proceedings began to undergo a pattern of change that would last hundreds of years. The notion that there must be a certain level of proof or evidence to convict and punish individuals has been around for centuries, even before the reasonable doubt standard. Before the development of the jury trial, there was trial by ordeal<sup>13</sup>. This process was both evaluative and punitive. The accused would be forced to undergo a painful, and often dangerous experience designed to test them, overseen by priests and other religious leaders of the time. The test was one of guilt, and it was thought that those who were guilty would perish during the ordeal and those who were innocent would live. There were variations of this formula across various communities, but the semantics were roughly the same – only pain and torture can reveal truth. Trial by ordeal was officially prohibited in 1215 by Pope Innocent III, however,

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<sup>11</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 3

<sup>12</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 6-7

<sup>13</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 3

similar practices continued to occur, albeit rarely, into the 17<sup>th</sup> century, most notably regarding the witch hunts that were prevalent during that period.<sup>14</sup> Trial by ordeal automatically linked the body and the soul. It was a way of judging the soul by torturing the body. If the body failed, giving out under the extreme pain and stress of the ordeal, then it was clear that the soul was guilty. There was no distinction made between the virtue of the body and that of the soul.

After trial by ordeal was dismissed as an inappropriate way of determining guilt, England began the development of the jury trial. These early trials only bare a slight resemblance to the trials of today. In the 13<sup>th</sup> and 14<sup>th</sup> centuries, juries were made up of “men of the neighborhood” and “were assumed to know the fact and to incorporate their own knowledge in their verdict... guided by common sense and common knowledge”.<sup>15</sup> Witnesses were uncommon occurrences during the early centuries of trial and it was the men of the jury who were expected to investigate for themselves the events leading up to whatever illegal activity they’ve been called to evaluate. It wasn’t until the 16<sup>th</sup> century that trials became something easily likened to the courts of today. In 1523 Sir Thomas More argued that no evidence should be given to jurors outside of a court room. In 1563 legislation was passed that required witnesses to appear in court when summoned and also made perjury illegal.<sup>16</sup> The identity of the jury also began to change. Jurors were no longer pulled directly from the area where the crime was committed, but rather from

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<sup>14</sup> Halsall, Paul. "Medieval Sourcebook: Twelfth Ecumenical Council: Lateran IV 1215." Internet History Sourcebooks. March 1996. Accessed February 26, 2019. <https://sourcebooks.fordham.edu/basis/lateran4.asp>.

<sup>15</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 3-4

<sup>16</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 5-6

surrounding residential areas. Furthermore, jurors were no longer tasked with investigating the crime themselves, but were reassigned to be the impartial party we recognize them as today. Jury members were asked to listen and evaluate based on the evidence presented in court, not based on their own experiences or common knowledge. With these changes, witnesses became a more necessary part of trial as jurors could no longer interview witnesses outside of court. However, with the rise of witnesses came the question of credibility. How to know who is telling the truth? Who is being honest?

The question of credibility was not one that was easily solved by the jury trial. After trial by ordeal ended, while England turned towards trial by jury, the rest of Europe used the Inquisition process to uncover illegal activity. It was a system designed to obtain ‘full-proof’ in which proof was calculated based on the number of witnesses plus confession. The question of credibility was more easily solved by this process through the use of torture. The inquisition process partially revolved around torture and the use of torture to gain partial proof. The accused was often tortured repeatedly in order to get a confession, thereby rendering the credibility of any witness moot.<sup>17</sup> In England, torture was illegal and technically never had a part in the official due process of the courts. However, torture was still commonly used in England to solicit guilty pleas from those accused. The difference between the two systems of torture, is that “Torture was in England an instrument of state and not of law. It was performed only under a warrant of

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<sup>17</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 3

the King, with his sign manual.”<sup>18</sup> This was not an act that was rarely performed, on the contrary,

“Guy Fawkes, for instance, and other participants in the Gun Powder Conspiracy were tortured under a warrant signed by King James. The Tudor kings and queens had a fondness for it, and Hallam, the historian, says that "the rack seldom stood idle in the Tower, for all the latter part of Elizabeth's reign.”<sup>19</sup>

So, while not an official step in the judicial process, torture had its own place and purpose in England to help clear up the question of credibility. Trial by ordeal directly linked the body and the soul. While the jury trial formed in a way that could not directly act upon the body, the body, through the torture officiated by the state, was directly used to answer questions of guilt and credibility well into the 18<sup>th</sup> century, the last incident of traditional torture having been recorded in 1741, with less drastic methods having been used in the years following. It was not until 1828 that torture was finally removed from the judicial process all together.<sup>20</sup> Over this ninety-year period, the state went from the frequent torture of those accused of crimes to the abolition of that means of control. This period of time strikingly overlaps the time period given between the two scenes of punishment in the opening of *Discipline and Punish*.<sup>21</sup> This is not a coincidence, but rather an indication of shifting methods of social control. When the state was unable to retain the use of torture in order to exert its control on the legal system, another method of control had to

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<sup>18</sup> Ernest G. Black, "Torture under English Law," *University of Pennsylvania Law Review and American Law Register* 75, no. 4 (1927), 344

<sup>19</sup> Black, "Torture under English Law," 344

<sup>20</sup> Black, "Torture under English Law," 347

<sup>21</sup> Foucault, *Discipline and Punish: The Birth of the Prison*, 6



be formed, in this case, the reasonable doubt standard fills the gap caused by the discontinuation of torture.

The question of witness credibility while partially answered by the state-controlled torture, was also addressed by other means. Torture was still technically illegal within the courtroom, and not every criminal stood accused of crimes serious enough to be tortured by the crown. Therefore, it became necessary for other methods of credibility to be developed within the courtroom, where torture wasn't an option. This led to the development of the satisfied conscience test. This test forms the basis for what would later become the reasonable doubt standard. In the early 17<sup>th</sup> century, Francis Bacon stated that "the supply of testimony and the discerning and credit of testimony" should be left entirely "to the jury's consciences and understanding"<sup>22</sup> This is to say, that it is the responsibility of the jury to determine whether or not a witness is credible based on their own conscience. Bacon's words would later be used in a proclamation in 1607 regarding criminal trials. This is the foundation of the satisfied conscience test. The notion that a jury should judge each and every witness and only determine them to be credible if their own conscience is satisfied. Sir Matthew Hale expanded on this premise in the late 17<sup>th</sup> century, stating that if a jury has "just cause to disbelieve what a witness swears, they are not bound to give their verdict according to the evidence, or testimony of that witness." He also firmly believed that "evidence might be of such high credibility that no reasonable man can without any just reason deny it."<sup>23</sup> Neither of these men used the

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<sup>22</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 11

<sup>23</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 12

term reasonable doubt, but there is no uncertainty that our current standard developed from these early concepts.

The satisfied conscience test arose as a means to determine witness credibility without the use of torture and also to placate jurors who were otherwise reluctant to convict. England was, after all, a Christian nation. Here once again we see the divergence from the body towards the soul. The satisfied conscience test was partially created to reassure jurors that they would not be sent to hell by the lord should they offer an incorrect verdict. Many jurors were frightened that they would be doomed to an eternity of damnation if they were to return an incorrect verdict, for the lord said, 'judge not lest ye be judged.' These fears were taken quite seriously in the 17<sup>th</sup> and 18<sup>th</sup> criminal trials. This test arose partially to convince jurors to convict with more frequency.<sup>24</sup> This way, when the jurors were judged by God, they could honestly say they judged only what they believed to be truth, they only passed down convictions when their conscience was fully satisfied. This test was as entwined with the soul as torture is the body. The satisfied conscience test was firmly in place in the late 17<sup>th</sup> century, and in the 18<sup>th</sup> century when torture fell out of practice, it was the satisfied conscience test that the state fell back on. By the late 18<sup>th</sup> century, the body had no place in the criminal trial. Only the soul continued to make itself relevant to the judicial process.

The satisfied conscience test was only around a few centuries before reasonable doubt began to take the place of satisfied conscience. The first recorded use of the phrase 'beyond a reasonable doubt' was during the Boston Massacre trials of 1770. These words

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<sup>24</sup> James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2016), 3.

were spoken by the prosecuting attorney who asserted that they had proved their case beyond a reasonable doubt and that the jury must therefore convict. While the judge in that case instructed the jury according to the satisfied conscience test, there was no suggestion in the records that the standard stated by the prosecution was out of line or even uncommon<sup>25</sup>. The terms reasonable doubt and satisfied conscience were used sometimes interchangeably during the Irish Treason trials that took place towards the end of the century. The records of these trials between 1795-1796 indicate that it was not a new emerging standard, but rather a rebranding of the one that already existed.<sup>26</sup> The phrase reasonable doubt was also found in some of the U.S. trials at the turn of the century. In 1798 when Matthew Lyon was on trial for seditious libel, the judge instructed the jury “you must be satisfied beyond all reasonable substantial doubt” and in 1800 for a trial of insurgents, the jury was advised “if you doubt it... you must acquit.”<sup>27</sup> The question becomes why was this shift being made? Certainly, the notion of satisfied conscience achieved the same goals as the new phrasing of reasonable doubt, and it can be argued that if explained to a jury member, satisfied conscience is easier to understand than reasonable doubt. So why did the standard change? Some scholars believe that the shift was introduced by prosecuting attorneys to increase their chances for a conviction.<sup>28</sup> There are those who believed that satisfied conscience was too broad of a standard. They believed that the satisfied conscience test made it seem like any doubt could halt a rightful conviction, even doubts that have no rational basis in fact. The argument then

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<sup>25</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 22

<sup>26</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 23

<sup>27</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 24

<sup>28</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 21

follows that it is impossible to absolutely certain how a series of events occurred without being present for their occurrence. If being certain is an impossibility, then there must be some room left for doubt, which the satisfied conscience test does not allow. Therefore, the reasonable doubt standard is a better test for conviction because it prevents foolish doubts from interfering with justice. Regardless of the reason for the shift, satisfied conscience and reasonable doubt were firmly linked by the early 19<sup>th</sup> century. The language used in describing the standard was common among the educated classes of England and America at the time and these terms were used in several other disciplines such as philosophy, history, and theology.<sup>29</sup> The shift from satisfied conscience to reasonable doubt took place and was mostly complete during the eighty-year period pointed out by Foucault as a time of tremendous change.

### **REASONABLE DOUBT**

Other than some minor theories of emergence, such as the one discussed above, there are no clear-cut historical answers for why reasonable doubt eclipsed the satisfied conscience test nor are there any for why the standard continues to exist today. The reason for this is the same reason the current debate regarding reasonable doubt has become circular – failure to look at the development of the standard as a form of social control. The reason the standards shifted from satisfied conscience to reasonable doubt is because reasonable doubt further the interest of the state. The use of the term ‘reasonable’ is very telling. Unlike the phrase ‘satisfied conscience’ which holds basically the same meaning today as it did in the 17<sup>th</sup> century, the term ‘reasonable’ changes widely over

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<sup>29</sup> Shapiro, *Beyond Reasonable Doubt and Probable Cause*, 25

time and place. What can be considered reasonable today, according to modern standards, probably was considered irrational or perverse according to the standards held by those who lived centuries ago. So why continue to use the term reasonable? Its because it furthers the interest of the state. The state can control the definition of the term 'reasonable' much more than it can control the phrase 'satisfied conscience'. The legal system loves the term reasonable. Terms like 'reasonable man' or 'reasonable steps' are present in the wording of many laws that are currently on the books. For example, professional negligence is defined under a particular U.S. State as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care," the important phrase there being "reasonable care."<sup>30</sup> This ties back in with the importance of narrative within the legal system. The state, by using and controlling the term 'reasonable,' and make those who disagree with their interests unreasonable, allowing the state to further tighten their control over society.

Who is the state controlling by the continued endorsement of this standard? Juries, who would have otherwise failed to convict are now reassured by oaths and the reasonable doubt standard. They are given leave to convict with the understanding that their souls are safe. Those who stand accused are being controlled. Convicted persons are much more likely to come to peace with their sentence if the trial process is seen as fair.<sup>31</sup>

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<sup>30</sup> NRS 41A.015, Nevada Revised Statutes (2019)  
<https://www.leg.state.nv.us/NRS/NRS-041A.html#NRS041ASec015>

<sup>31</sup> Wrightsman, Lawrence S., Edie Greene, and Kirk Heilbrun. *Psychology and the Legal System*. 8th ed. Sydney: Thompson Wadsworth, 2014.

The general populace is being controlled. They are made to believe that the judicial system is truly one of justice rather than simply punishment, or process rather than torture. When looking at the narrative, it is easy to believe that reasonable doubt arose as an advancement of the people's power, but this is not the true purpose of the standard. This would only be the case if the standard did what it claims to do, ensure justice and accurate convictions. However, we know that juries don't understand standards of proof or how to correctly apply them.<sup>32</sup> Yet we are still made to embrace this standard as a pillar of equality under the law. This is not the purpose of this standard.

## CONCLUSION

In the Anglo-American legal system, the state once held an enormous amount of power, first through trial by ordeal and then later by the use of torture. When it became clear that torture, both as a punishment and as a means to gain confessions, was no longer going to be an option the reasonable doubt standard began to rise. The state chose reasonable doubt as its replacement. It not only ensures a narrative of truth and justice, but it acts as a standard so vague, the state can easily bend the definition to suit its needs, hence the shift from 'satisfied conscience' to 'reasonable doubt'. Foucault, in his book *Discipline and Punish*, describes the shift from punishment of the body to punishment of the soul, that takes place roughly over a span of eighty-years. During this brief period, many instruments of social control were being developed and implemented, such as the penal institution. During the same span of eighty-years, the focus of the criminal trial shifted, much like punishment, from the body to the soul, exchanging torture and

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<sup>32</sup> Woody. "Jurors' Use of Standards of Proof in Decisions about Punitive Damages," 859

uncertainty for what appear to be clear tests of credibility and evidentiary support, when in reality it is a phantom standard, only serving to validate state narrative. The prison is a clear method of social control, one that the state has a vested interest in. It logically follows that the state also has an interest in controlling the barrier between freedom and incarceration, the criminal trial. The state cannot allow the criminal trial to operate in such a way that is contrary to the desires of the state. The answer lies in the standard of beyond a reasonable doubt. This standard is not only easily controlled by the state but is also one that most jurors fail to grasp. They make their decision based on how the defendant looks, or how well the prosecuting attorney speaks, or maybe they just flip a coin and hope to be done before lunch. Anyone would say that this standard is clearly ineffective, but that is incorrect. The standard is not ineffective, because justice was never its purpose. The standard of beyond a reasonable doubt was designed, kept purposely vague, and has been a staple of the Anglo-American legal system for the past three hundred years because reasonable doubt serves state interest. So, let's go back to the beginning. You're on trial for murder. Cases have been made, closing arguments have ceased, and the only thing standing between you and life in prison is the jury and the words 'beyond a reasonable doubt'.