Chance of Rain: Rethinking Circumstantial Evidence Jury Instructions

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The treatment of circumstantial evidence has undergone a dramatic change over time, from a high level of scrutiny to widespread acceptance. Similarly, our understanding of direct evidence has evolved, as wrongful convictions have exposed the potential unreliability of eyewitnesses and confessions. In accordance with the changing views of each type of evidence, this Note identifies two distinct policy goals of circumstantial and direct evidence jury instructions. The first is to establish an equality of import between the two types of evidence, to combat juror bias that leads to the under or overvaluing of one type over the other. The second, which seems to be in conflict with the first, is to promote a higher level of care during jury deliberations, so that jurors do not casually make incorrect or unfounded factual inferences. However, these goals can be reconciled if we acknowledge that all kinds of evidence are highly probative, and subject to similar dangers from inference. By evaluating three different states' circumstantial and direct evidence jury instructions for comprehensibility and effective advocacy of policy goals, this Note identifies what is done well and what diminishes the efficacy of the instruction, and then offers various solutions in the form of altered instructions. Ultimately, this Note concludes that the most effective solution is to create a new instruction that combats the dangers of inference, appeals to jurors' appreciation of a reasonable alternative narrative, and eliminates the unnecessary distinction between direct and circumstantial evidence.

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Introduction

Anyone who has encountered circumstantial evidence jury instructions is probably familiar with the ubiquitous rain example. While the particulars vary, it inevitably resembles the following:

> Suppose a man comes inside the building you are in and says to you, "I just saw that it is raining outside." This is direct evidence of the fact that it was raining when the man was outside. Now suppose that the man comes in and is holding a wet umbrella, and has water droplets on his clothes. This is circumstantial evidence that it was raining when the man was outside. It requires you to make an inference from the facts (the wet umbrella and the water on his coat) that it was raining.

The need for the continued use of this example is obvious: The terms "circumstantial" and "direct" evidence are difficult to define, especially to laypeople. Since juries are comprised of laypersons, this difficulty presents a real obstacle. Defining circumstantial and direct evidence has been a topic of extended legal discussion, but general definitions include the following concept of inference as a dividing line: Direct evidence is "based on personal knowledge or observation . . . that, if true, proves a fact without inference or presumption."[1] Conversely, circumstantial evidence is "based on inference and not on personal knowledge or observation."[2] Another way of phrasing this is that circumstantial evidence only points to the existence of other facts that are in question—as the wet umbrella points to the fact that it was raining.[3] Yet another distinction is based in consistency with certain conclusions: Direct evidence can only be consistent with a conclusion or a contradictory conclusion, but not both.[4] Circumstantial evidence, on the other hand, can be consistent with *both* the conclusion and a contradictory conclusion.[5] For example, when the man says that it is raining, his answer is consistent with the conclusion that it is raining, and necessarily inconsistent with the conclusion that it is not raining. His statement cannot support both conclusions simultaneously. On the other hand, the existence of a wet umbrella is consistent with both the conclusion that it is raining, and therefore the umbrella became wet in the rain, as well as the conclusion that it is not raining, and the umbrella became wet by some other means (perhaps he had just washed it).

The line between direct and circumstantial evidence is far from clear, as the same evidence may be direct evidence of one fact, but only circumstantial evidence of another.[6] Simple categorization is elusive as courts continue to consider how to treat different kinds of evidence, such as DNA.[7] New theories undermine this distinction even more, finding the two types of evidence to be substantially the same.[8] The conflicts between long-standing concerns over the dangers of circumstantial evidence and the emerging view that there is, in fact, no particularized

1. BLACK'S LAW DICTIONARY 636 (9th ed. 2009).

2. *Id.*

3. PA. SUPREME COURT COMM. FOR PROPOSED STANDARD JURY INSTRUCTIONS, PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS 7.02A (2d ed. 2005).

4. Lyman Ray Patterson, *The Types of Evidence: An Analysis*, 19 VAND. L. REV. 1, 4–5 (1965).

5. *Id.* at 5.

6. Hampton v. State, 961 N.E.2d 480, 489–90 (Ind. 2012).

7. *Id*. at 492 n.9 (showing that DNA has been accepted as circumstantial evidence, being both probabilistic in nature and only indicating presence rather than another fact in question).

8. *See generally* Richard K. Greenstein, *Determining Facts: The Myth of Direct Evidence*, 45 HOUS. L. REV. 1801 (2009) (arguing that "[a]ll facts are a function of interpretation," whether evidence is direct or circumstantial).

danger, serve to inform the language of our jury instructions, making them unclear, inconsistent, and ineffective.

This Note attempts to reconcile the primary policies associated with circumstantial evidence instructions. Part I of this Note will look to the history and case law regarding circumstantial evidence. Part II will consider modern analysis of circumstantial and direct evidence and highlight two distinct policy goals for an instruction: the goals of equality and of heightened care in deliberations. Part III will analyze three modern state instructions on circumstantial evidence and consider what each instruction does effectively and what could benefit from improvement. Finally, Part IV will propose four possible solutions for addressing the difficulties of circumstantial evidence jury instructions, largely in the form of amended instructions, and recommend the creation of a new evidence instruction focused on a "hypothesis of innocence" that would replace the current instructions on direct and circumstantial evidence.

I. HISTORY

Long before it befuddled law students in evidence classes, the direct-circumstantial dichotomy garnered significant legal attention. Some examples of the conflict surrounding the use of circumstantial evidence are well-worn with use, but are still so illustrative as to warrant continued description. One such example is the Talmudic rule barring all circumstantial evidence in criminal cases, without exception.[9] The Sanhedrin, a tractate in the Babylonian Talmud regarding the courts of law in Ancient Jerusalem,[10] offers this example: "He (the judge) says to them: Perhaps ye saw him running after his fellow into a ruin, ye pursued him, and found him sword in hand with blood dripping from it, whilst the murdered man was writhing (in agony): If this is what ye saw, ye saw nothing."[11]

To a student of the American judicial system, this may be an incredible statement. Prospective prosecutors would see an open and shut case. However, for a system of justice that demands the scales be tipped dramatically in favor of the accused, and in which the wrongdoers will ultimately be punished by a higher power,[12] such a bar may be completely reasonable. Maimonides, a renowned 12th-century Jewish philosopher,[13] described this prioritization of protecting innocence by saying:

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9. Irene Merker Rosenberg & Yale L. Rosenberg, *"Perhaps What Ye Say Is Based Only on Conjecture"—Circumstantial Evidence, Then and Now*, 31 HOUS. L. REV. 1371, 1375 (1995).

10. Jacob Shachter & H. Freedman, *Sanhedrin, Introduction*, COME AND HEAR, http://www.come-and-hear.com/sanhedrin/sanhedrin_0.html (last visited Dec. 7, 2012).

11. *Id.* at 37b, http://www.come-and-hear.com/sanhedrin/sanhedrin_37.html.

12. Rosenberg & Rosenberg, *supra* note 9, at 1380.

13. *Maimonides*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, http://plato.stanford.edu/entries/maimonides (last revised Jan. 11, 2010).

> [T]he worst that can happen is that the sinner will be acquitted; but if we punish on the strength of presumptions . . . it may be that one day we shall put to death an innocent person; and it is better . . . to acquit a thousand guilty persons than to put a single innocent man to death . . . .[14]

The early Judaic rule is not the dominant rule in the American legal system, which has undergone a gradual shift toward the acceptance of circumstantial evidence. Early on, American courts began to accept that circumstantial evidence could be highly probative, but should still be used warily.[15] The U.S. Supreme Court held in 1821 that circumstantial evidence that "cannot well consist with the innocence of the party" should not be ignored.[16] William Wills[17] wrote in 1853 that to infer guilt from circumstantial evidence, the "facts must be absolutely incompatible with . . . innocence . . . and incapable of explanation upon any other reasonable hypothesis than that of . . . guilt."[18] Wills was clearly attempting to require that circumstantial evidence be on a level footing with direct evidence before it could be used. If the inference of guilt was so strong as to be conclusive, then the only true issue was reliability.

Consistent with the idea espoused by Wills was *Commonwealth v. Webster* in 1850.[19] John Webster, a chemistry professor at the Cambridge University medical college in Boston, was tried for the murder of Dr. George Parkman.[20] The evidence introduced included fragments of human bone and gold teeth melted in Webster's laboratory, the fact that Webster owed Parkman money, that Webster had said he would pay Parkman on the day Parkman disappeared but had no money to do so, and handwriting testimony stating that Webster had written anonymous tips that were meant to lead investigation away from the laboratory.[21] Chief Justice Shaw explained the benefits of circumstantial evidence, but followed by detailing the dangers: Inferences drawn by the jury may be based in prejudice, or influenced by a lack of "due deliberation and sobriety of judgment," leading to "hasty and false deductions."[22] To guard against these dangers, the court laid down a mandate: Circumstantial

14. 2 THE COMMANDMENTS 270 (Charles B. Chavel trans., 1967).

15. Julie Schmidt Chauvin, Comment, *"For It Must Seem Their Guilt": Diluting Reasonable Doubt by Rejecting the Reasonable Hypothesis of Innocence Standard*, 53 LOY. L. REV. 217, 223–24 (2007).

16. The Robert Edwards, 19 U.S. 187, 190 (1821).

17. Williams Wills' treatise on circumstantial evidence was one of the best-known specialized evidence treatises of its time. BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT" AND "PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 235 (1991).

18. WILLIAM WILLS, AN ESSAY ON THE PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE: ILLUSTRATED BY NUMEROUS CASES 171 (1853).

19. 59 Mass. 295 (1850).

20. *Id.* at 296.

21. *Id.* at 299–300.

22. *Id.* at 312.

evidence cannot merely present a probability of guilt, even a strong one.[23] Taken as a whole, it should "to a moral certainty exclude every other hypothesis" besides guilt.[24]

The rule set out in the *Webster* case, also known as the Webster Charge, controlled instructions on circumstantial evidence until 1954,[25] when the U.S. Supreme Court decided *Holland v. United States*.[26] In *Holland*, a married couple was convicted of attempting to evade and defeat their income taxes.[27] To prove its case, the government used a theory of proof called the "net worth method," which established guilt through circumstantial evidence of the couples' finances.[28] The couple claimed that they were entitled to a circumstantial evidence instruction including *Webster*-like language: namely, that the Government's circumstantial evidence must exclude every reasonable hypothesis other than that of guilt.[29] Reversing a century's worth of doctrine on circumstantial evidence instructions, the Court held that such an instruction is not only unnecessary, but "confusing and incorrect" when a proper instruction on reasonable doubt has already been given.[30] The Court's opinion demonstrated a modern understanding of the direct-circumstantial dichotomy when it stated that circumstantial evidence is "intrinsically no different from testimonial evidence" in that both may yield incorrect results.[31] Ignoring the inferential step that had concerned so many theorists before, the Court said that the jury is asked to determine accuracy and reliability—and to weigh probability—for both types of evidence.[32] Just a few years later, the Court added that circumstantial evidence may be "more certain, satisfying and persuasive than direct evidence," further erasing the need for a distinction.[33] Referring to the reason for treating the evidence types alike as "clear and deep rooted," the Court reapproved this language in 2003 in the context of employment discrimination.[34]

Surveying this brief overview of circumstantial evidence doctrine, it is easy to see how the clarity of instruction might suffer from mixed messages. Drafters of jury instructions must grapple with deciding whether to embrace earlier language designed to create safeguards against

23. *Id.* at 319.
24. *Id.*
25. Chauvin, *supra* note 15, at 225.
26. 348 U.S. 121 (1954).
27. *Id.* at 124.
28. *Id.*
29. *Id.* at 139.
30. *Id.* at 139–40.
31. *Id.* at 140.
32. *Id.*
33. Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957).
34. Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003).

unreliable evidence, or to join the federal courts and many states in abolishing the additional precaution and embracing the *Holland* viewpoint.[35]

II. Goals of Circumstantial Evidence Instructions

Any attempt to evaluate instructions on circumstantial and direct evidence requires a consideration of the proper goals of such instructions. The policy and doctrine embodied in the instructions will be a critical consideration in determining the most effective form and language. Between the foregoing history and modern legal theory on circumstantial evidence, two primary policy goals emerge: establishing an equality of value between direct and circumstantial evidence, and establishing a high level of care in jury deliberation.[36]

A. Establishing an Equality of Value Between Direct and Circumstantial Evidence

After *Holland*, current legal scholarship supports two conclusions. First, circumstantial evidence is as probative as direct evidence—and may even be more probative. Second, circumstantial and direct evidence face similar challenges of reliability and accuracy and are therefore similarly situated with respect to concerns regarding jurors' interpretation of such evidence.

1. Probative Value

Circumstantial evidence includes such juror favorites as DNA and fingerprint evidence. DNA evidence has an error rate of less than 1%,[37] compared to the 58% (though values vary by study) error rate of eyewitness identifications (an oft-relied upon form of direct evidence).[38] Between false confessions and mistaken eyewitness accounts, forensic circumstantial evidence is arguably dramatically more probative and reliable than its direct evidentiary counterparts.[39] William Paley, an influential 18th-century Utilitarian philosopher,[40] made that exact

35. Chauvin, *supra* note 15, at 227.

36. Comprehensibility is an additional, vital consideration when writing or analyzing a jury instruction. However, comprehensibility is not necessarily a policy, and will apply to any instruction regardless of the message in the instruction.

37. Jonathan J. Koehler, *When Do Courts Think Base Rate Statistics Are Relevant?*, 42 Jurimetrics J. 373, 394 (2002).

38. Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 13 (1995).

39. Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 Mich. L. Rev. 241, 244 (2006).

40. *William Paley*, Encyclopædia Britannica, http://www.britannica.com/EBchecked/topic/439805/William-Paley (last visited Dec. 7, 2012).

argument when he said a "concurrence of well-authenticated circumstances" is stronger evidence than "positive testimony, unconfirmed by circumstances," adding "[c]ircumstances cannot lie."[41] John Wigmore[42] said that, as a general matter, one cannot be granted greater weight than the other.[43] In *Commonwealth v. Harman*, the Pennsylvania Supreme Court stated that circumstantial evidence in the abstract is nearly as strong as direct evidence, and may be infinitely stronger in the concrete.[44] Finally, purportedly direct evidence may not be probative at all, such as a videotape that fails to demonstrate crucial exculpatory or inculpatory facts. In sum, the probative value of circumstantial evidence appears indisputable.

2. Reliability and Inferences

As we saw in *Holland*, there is a burgeoning understanding that direct and circumstantial evidence are not even particularly different in spite of the fundamental dividing line: the inference. The Court in *Holland* made clear that both types of evidence were subject to similar analyses by jurors, particularly regarding balancing probative value of guilt against accuracy and reliability.[45] The same *Harman* Court that commented on the probative value of the two types of evidence also said that all "evidence is more or less circumstantial, the difference being only in the degree."[46]

This last point is taken up extensively by Professor Richard K. Greenstein. He states that all "facts are a function of interpretation," direct and circumstantial alike.[47] All evidence is mediated by some inferential judgment which cannot be separated from the facts.[48] He gives an example: A woman enters a room and sees the back of a man. She believes it is her husband and goes to embrace him. The person turns out to be her husband's brother. At the time that the woman enters the room, she has already undergone two inferential judgments: that the person is a man (based on personal experiences) and that the man is her husband (based on experiences and expectations). While she is right on the first account and wrong on the second, it does not change either the

41. Heller, *supra* note 39, at 244 (quoting William Paley).

42. John Henry Wigmore is recognized as one of the great U.S. jurists, and is the author of Treatise on the Anglo-American System of Evidence in Trials at Common Law. *See John Henry Wigmore*, ENCYCLOPÆDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/643421/John-Henry-Wigmore (last visited Dec. 7, 2012).

43. Heller, *supra* note 39, at 243.

44. 4 Pa. 269, 271–73 (1846).

45. Holland v. United States, 348 U.S. 121, 140 (1954).

46. *Harman*, 4 Pa. at 271–73.

47. Greenstein, *supra* note 8, at 1804.

48. *Id.* at 1808.

fact that she applied these inferences to her "direct" observations, or that she may have truthfully asserted her beliefs at a later time if she had not found out through further action that she was mistaken. Furthermore, her very credibility (as with any witness) will be based on circumstantial evidence.[49]

Employing the framework presented by the courts and Professor Greenstein, we can begin to break down the dividing line between the two types of evidence. One might say that the inferences found in direct evidence go more to credibility or reliability, which have always been considered at issue with direct evidence. But this might miss the larger point: If inferences in themselves are dangerous, then direct evidence presents the same dangers as circumstantial evidence.

3. Jury Bias

Accepting that circumstantial and direct evidence may be as reliable and probative as direct evidence, a very serious issue emerges: Juries really dislike circumstantial evidence. Jurors consistently and "dramatically *overvalue* direct evidence" and "*undervalue* circumstantial evidence."[50] We can see this in the extreme influence direct evidence, such as eyewitness identifications and confessions, has on verdicts, even when indicators of poor reliability are present. This disproportionate consideration of the evidence has two general outcomes: higher rates of false convictions and false acquittals.[51] Unreliable but convincing direct evidence has led to many wrongful convictions.[52] Alternatively, jurors are hesitant to convict on reliable but circumstantial evidence.[53] There are several explanations for why jurors may dislike circumstantial evidence.

First, there is a concept referred to as "responsibility-laundering."[54] It is easier to convict on direct evidence that may be unreliable than on reliable circumstantial evidence because, in the case of wrongful conviction based on the former, blame can be transferred to the mistaken or lying witness. In the case of wrongful conviction based on the latter, blame would fall squarely on the shoulders of the juror who determined the inference was sufficient to find guilt beyond a reasonable doubt because circumstantial evidence relies more on probability than credibility.

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49. *Id.* at 1812.

50. Heller, *supra* note 39, at 244.

51. *Id.* at 299.

52. Seventy-two percent of post-conviction DNA exonerations involved mistaken eyewitness identification, 27% involved false confessions, and 18% involved informant testimony. *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Dec. 7, 2012).

53. Heller, *supra* note 39, at 244.

54. *Id.* at 287.

The second explanation is that jurors assign mistaken values to circumstantial evidence. The "traditional" explanation for this attributes this problem to simple juror confusion.[55] The idea is that jurors will convict once they believe the probability of guilt passes some threshold that they have established as being "beyond reasonable doubt." Because jurors fail to understand the real values associated with each type of evidence, they undervalue circumstantial evidence. Therefore, highly probative and reliable circumstantial evidence will fail to meet that threshold of probability.

The third reason is argued by Professor Kevin Jon Heller. He claims that decisions to convict or acquit are not made primarily on simple statistical probability, but on the ease of simulating scenarios.[56] Direct evidence is normally narrative: A witness, a confession, or a video tells a story. Jurors hear that story and are transported into the narrative. If it makes sense, they will attempt to fit other facts into that narrative.[57] The easier it is to imagine the scenario described by the evidence, the more the juror is prone to believe it. Circumstantial evidence, on the other hand, tends to be drier and explained in terms of likely explanations and probability because, inherently, circumstantial evidence can be consistent with contradictory scenarios.[58] Without more, such evidence fails to engage and capture the juror in the way that direct evidence does, and leaves him or her primed to accept the missing narrative from the opposing side. The ease of imagining the hypothetical scenario presented by each side, inculpatory and exculpatory, determines the persuasiveness of the evidence. If this model is true, then a purely circumstantial case will garner much less certainty of guilt than a case with direct evidence.

Bias against circumstantial evidence is problematic when dealing with either direct or circumstantial evidence. The high probative value of circumstantial evidence coupled with the fact that both types of evidence suffer from similar underlying issues of reliability serves to undermine any justification for attributing different levels of worth to circumstantial and direct evidence. Although jurors do not see the two types of evidence as equally persuasive, courts have a responsibility to clarify the value of circumstantial evidence. Jury instructions are a potent means of

55. *Id.* at 245.

56. *Id.* at 263.

57. *Id.* at 264.

58. *Id. See supra* notes 1–5 and accompanying text. For example, instead of an eyewitness proclaiming, "I saw the defendant smash the window, take the necklace, and run," we may have a picture of a broken window, a witness seeing someone who looks like the defendant in the area at the time, and an unexplained $200 in the defendant's possession. Obviously this simplifies the situation, and an attorney will help the jury connect the dots and tell a convincing story. However, with the circumstantial evidence, we are left putting pieces together into a likely explanation and determining how likely that explanation is, rather than simply following the eyewitness's narrative account.

doing just that. Emphasizing the reality of equal value—and thereby overcoming juror bias—should be an important goal of instructions on the evidence.

B. Establishing a High Level of Care in Deliberation

The second policy goal is essentially the main goal of circumstantial evidence instructions written prior to *Holland*: increasing the level of care exercised by jurors during deliberations. Though originally justified by a concern that jurors would make false inferences based on circumstantial evidence, the policy goal of establishing a heightened level of care during deliberations is even more relevant and crucial in a system that grants equal value to direct and circumstantial evidence. By demonstrating that direct evidence suffers from inferences, we have simultaneously supported the conclusion that the concern with "hasty and false deductions" applies to the entire spectrum of evidence. The historical approach to dealing with this fear, as detailed in Part I, has been to include some form of cautionary language in an instruction, such as the Webster Charge. The purpose of the cautionary language, also explained in Part I, was to encourage jurors to engage in careful deliberation. Phrased another way, the cautionary language attempted to establish a higher level of care in jury deliberation than jurors might exercise otherwise.

The most compelling cautionary language is the "reasonable hypothesis of innocence" standard. A particularly clear version of this standard is seen in the Mississippi cautionary instruction regarding cases based solely on circumstantial evidence:

> [B]efore you are warranted in convicting . . . on the evidence in this case you must exclude every reasonable hypothesis consistent with his innocence; and that if there is a reasonable hypothesis consistent with his innocence then it is your sworn duty to find the Defendant not guilty.[59]

The reasonable hypothesis instruction may look and sound fairly familiar, besides reflecting language from the decisions previously mentioned. It noticeably invokes the concept of reasonable doubt. In this context, "reasonable hypothesis consistent with innocence" is just another way of saying a reasonable doubt of guilt. This overlap between reasonable doubt and reasonable hypothesis of innocence is clearly what the *Holland* Court was referencing when it stated that a reasonable hypothesis of innocence instruction is not only unnecessary, but incorrect and confusing.[60]

However, Heller's theory on the ease of simulation, described in Part II.A, allows the two instructions to begin to take on discrete, though still intricately related, purposes. The normal reasonable doubt instruction

59. Franklin v. State, 23 So. 3d 507, 516 (Miss. Ct. App. 2009).

60. *See* Holland v. United States, 348 U.S. 121, 137 (1954).

reflects a desire for a "quantum of proof."[61] Like the traditional model discussed in Part II.A, the reasonable doubt requirement goes to sufficiency: Is the evidence sufficient to meet the juror's threshold of "enough" to overcome reasonable doubt? The reasonable hypothesis inconsistent with guilt standard goes more to the analytical or narrative process of the juror.[62] It reminds the jury—indeed, forces them—not simply to think in terms of "most likely," but to engage in imagining an alternative exculpatory scenario. Heller tells us that these two processes, determining bare sufficiency and imagining an alternative exculpatory scenario, can conflict and disassociate, so that a juror can believe that the minimum threshold has been reached and yet not convict because of a reasonable alternative scenario.[63] This is referred to as the Wells Effect.[64] When the two processes do conflict, the narrative analytical process (that is, the reasonable alternative scenario) tends to win.[65]

Considering the underlying difference between the reasonable doubt and reasonable hypothesis of innocence instructions, what we truly have in a jury instruction that uses the reasonable hypothesis of innocence is a sort of "reasonable doubt plus" instruction, where the "plus" attempts to force jurors to go out of their way to imagine two stories, one of guilt and one of innocence, rather than merely weighing the evidence. An evidence instruction that requires jurors to envision a scenario of innocence works to counteract the fact that jurors are unlikely to do so on their own, particularly in light of narrative evidence of guilt. Language demanding a higher level of diligence leans more heavily in favor of the defendant than a standard reasonable doubt instruction. Including the reasonable hypothesis of innocence standard therefore works to remedy the problems with juror bias discussed above, especially when jurors are given a mix of direct evidence of guilt and circumstantial evidence of an exculpatory scenario. Such a situation presents an even greater danger of false convictions because jurors are easily persuaded to give circumstantial evidence of innocence very little weight, while giving excessive weight to potentially unreliable direct evidence.[66]

While not quite as extreme as the Talmudic approach to protecting innocence, our legal system still staunchly (in theory) supports keeping a

61. Carl N. Hammarskjold, Comment, *Smokes, Candy, and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather than Circumstantial, Evidence Contributes to Wrongful Convictions*, 45 U.S.F. L. REV. 1103, 1133 (2011).

62. *Id.*

63. Heller, *supra* note 39, at 256, 259 (stating that jurors are more willing to excuse unreliability than a lower probability of probative value, with circumstantial evidence always being less than 100% likely to be probative).

64. *Id.*

65. *Id.*

66. *Id.* at 244.

thumb on the scale in the defendant's favor.[67] If this is true, a reasonable hypothesis of innocence instruction can only improve, rather than confuse, our system of protecting the innocent, even if the guilty occasionally go free. Of course, a reasonable hypothesis instruction can only work in conjunction with a reasonable doubt instruction, because the reasonable hypothesis of innocence language does not truly address the quantum of evidence requirement, mentioned above, which is independently crucial.

Looking to these arguments, the policy goals of equalizing the value of direct and circumstantial evidence and establishing a higher level of care in jury deliberation come through as clear and central to an effective instruction. Direct and circumstantial evidence share similar probative value and are based on similarly unreliable foundations and inferences, yet only circumstantial evidence suffers from jurors' enhanced bias. Emphasizing equality must be part of an ideal instruction. Furthermore, evidence must appeal to jurors' narrative preferences in order to ensure that the reasonable doubt standard is faithfully adhered to. Since circumstantial evidence is less likely to supply a narrative on its own, it is imperative that the evidence instructions fulfill this role by incorporating "reasonable hypothesis of innocence" language.

III. Comparing the Instructions

Having attempted to parse out the underlying history, doctrine, and goals of circumstantial evidence instructions, we turn now to the instructions themselves. Looking to the instructions for three different states (Pennsylvania, New York, and California), this Note considers which goals each instruction works to achieve, evaluates psycholinguistic effectiveness, and ultimately proposes solutions for making a more effective instruction. Though the instructions are somewhat lengthy, it is important to reproduce them as part of the full analysis, because this Note attempts to address the word choice, context, and overall comprehensibility in addition to the policy goals. Experiencing the length may even acquaint the reader with the experience of the juror who must sit through many such instructions.

Each instruction analyzed here presents a distinct style of discussing circumstantial and direct evidence. Pennsylvania's instruction demonstrates a comprehensible instruction that does not convey the policy goals of equality in value and heightened care in deliberation. New York's instruction, in contrast, addresses the policy goals in a less comprehensible manner. California's instructions achieve a balance, clearly advocating the

67. As Justice Harlan eloquently wrote, it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re* Winship, 397 U.S. 357, 372 (1970) (Harlan, J., concurring).

policy goals. It is important to remember that, in the end, all jury instructions should balance accuracy, clarity, and effectiveness.

A. The Pennsylvania Instruction

The Pennsylvania instruction is presented in three primary sections, with one additional, optional section for use when the case is solely supported with circumstantial evidence.[68] The first two sections set out definitions of direct and circumstantial evidence:

> (1) The evidence in this case is of two different types. On the one hand, there is direct evidence, which is testimony by a witness from his or her own personal knowledge, such as something that he or she saw or heard himself or herself. An example of this is [give example].
>
> (2) The other type is circumstantial evidence, which is testimony about facts that point to the existence of other facts that are in question. An example of this is [give example]. Whether or not circumstantial evidence is proof of the other facts in question depends in part on the application of common sense and human experience. You should recognize that it is sometimes necessary to rely upon circumstantial evidence in criminal cases, particularly where the crime was committed in secret.[69]

The third section sets out the procedure for jurors to follow in evaluating circumstantial evidence:

> (3) In deciding whether or not to accept circumstantial evidence as proof of the facts in question, you must be satisfied, first, that the testimony of the witness is truthful and accurate and, second, that the existence of the facts the witness testifies to leads to the conclusion that the facts in question also happened.[70]

Finally, section four is the optional instruction for cases entirely based on circumstantial evidence:

> (4) Circumstantial evidence alone may be sufficient to prove the defendant's guilt. If there are several separate pieces of circumstantial evidence, it is not necessary that each piece standing separately convince you of the defendant's guilt beyond a reasonable doubt. Instead, before you may find the defendant guilty all the pieces of circumstantial evidence, when considered together, must reasonably and naturally lead to the conclusion that the defendant is guilty and must convince you of the defendant's guilt beyond a reasonable doubt. In other words you may find the defendant guilty based on circumstantial evidence alone, but only if the total amount and quality of that evidence convince you of the defendant's guilt beyond a reasonable doubt.[71]

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68. Pa. Supreme Court Comm. for Proposed Standard Jury Instructions, *supra* note 3, at 7.02A.
69. *Id.*
70. *Id.*
71. *Id.*

1. Policy

This instruction is notable because it fails to effectively advance either of the two policy goals identified in Part II. There is no evidence of the equality goal[72] in this instruction. Not only does the language fail to address the value of circumstantial evidence, it seems to actively undermine it. The instruction begins by rigidly separating the two types of evidence by definition. Beginning a sentence with "[w]hether or not circumstantial evidence is proof"[73] sounds like the jury is being asked to make a decision as to the evidentiary nature of the facts, rather than simply to decide the strength of the inference. The jury, of course, does not decide whether circumstantial evidence is evidence, and implying that circumstantial evidence may or may not be evidence at all undermines its value in comparison with direct evidence. This effect is magnified by the language in part three: "whether or not to accept circumstantial evidence as proof."[74] Again, juries determine the weight to be given evidence, not whether circumstantial evidence is in fact evidence, and repeating the implication that the jury has discretion to consider whether circumstantial evidence is evidence further undermines the equality goal. This language reflects the already prevalent tendency to undervalue circumstantial evidence rather than increase juror appreciation for it.

Furthermore, the Pennsylvania instruction applies the mandate of credibility only to circumstantial evidence.[75] The first step in the procedural paragraph of part three is to determine truth and accuracy. A credibility determination is equally as important when deciding the value of direct evidence, yet direct evidence is addressed in the first section of the instruction without any such precautionary language.[76] Again, this reinforces the sense of inferiority when dealing with circumstantial evidence, as if it is not only inherently flawed, but inherently unreliable as well. This instruction gives short shrift to circumstantial evidence in spite of *Commonwealth v. Harman*, a Pennsylvania Supreme Court decision finding that "in the concrete," circumstantial evidence may be

72. As described in Part II.A, the equality goal attempts to communicate to jurors that direct and circumstantial evidence are equally reliable and probative and should therefore be given equal value.

73. "Whether or not circumstantial evidence is proof of the other facts in question depends in part on the application of common sense and human experience." PA. SUPREME COURT COMM. FOR PROPOSED STANDARD JURY INSTRUCTIONS, *supra* note 3, at 7.02A.

74. *Id.* ("In deciding whether or not to accept circumstantial evidence as proof of the facts in question, you must be satisfied, first, that the testimony of the witness is truthful and accurate and, second, that the existence of the facts the witness testifies to leads to the conclusion that the facts in question also happened.").

75. *Id.*

76. "On the one hand, there is direct evidence, which is testimony by a witness from his or her own personal knowledge, such as something that he or she saw or heard himself or herself." *Id.*

"infinitely stronger" than "positive evidence," and that all evidence is more or less circumstantial.[77]

Similarly, there is very little content that advances the heightened care policy goal, though there is a hint of this goal in the optional fourth section of the instruction. As this portion of the instruction is only given when the case *entirely* consists of circumstantial evidence, the actual use of this section is necessarily less frequent than the use of circumstantial evidence generally. In this section, the instruction reminds the jurors that "all the pieces of circumstantial evidence, when considered together, must reasonably and naturally lead to the conclusion that the defendant is guilty . . . beyond a reasonable doubt."[78] Effectively, this language is a mere reiteration of the reasonable doubt standard, which they will undoubtedly receive separately.[79] The reasonable doubt instruction for Pennsylvania does not include any reference to, or variation of, the reasonable hypothesis language.[80] The comments to the circumstantial evidence instruction acknowledge that the Pennsylvania Supreme Court has required that language similar to the reasonable hypothesis language be included in the optional fourth section.[81] In *Commonwealth v. Giovanetti*, the Pennsylvania Supreme Court found that a proper circumstantial evidence instruction should mandate that, to convict, "[t]he evidence must be such as to exclude to a moral certainty every hypothesis but that of guilt," and that "the facts and circumstances . . . must be inconsistent with innocence."[82] However, the drafters found that later cases did not consistently require this language, and left it out of the instruction.[83]

2. Comprehensibility

In terms of comprehensibility, the Pennsylvania instruction fares much better. In analyzing comprehensibility, this Note will apply a list of psycholinguistic factors that correspond with clear and effective communication. Positive factors include use of strong language, use of the second person, use of examples, use of explanations, hierarchical

77. 4 Pa. 269, 272–73 (1846).

78. "Instead, before you may find the defendant guilty, all the pieces of circumstantial evidence, when considered together, must reasonably and naturally lead to the conclusion that the defendant is guilty and must convince you of the defendant's guilt beyond a reasonable doubt." PA. SUPREME COURT COMM. FOR PROPOSED STANDARD JURY INSTRUCTIONS, *supra* note 3, at 7.02A.

79. *Id.*

80. As explained in Part II.B, this Note argues that the reasonable hypothesis of innocence language is necessary and valuable in addition to the standard reasonable doubt instruction, and demands that the jury envision a reasonable alternative scenario of innocence. *See supra* Part II.B.

81. PA. SUPREME COURT COMM. FOR PROPOSED STANDARD JURY INSTRUCTIONS, *supra* note 3, at 7.02A (advisory committee note).

82. 19 A.2d 119, 126 (Pa. 1941).

83. PA. SUPREME COURT COMM. FOR PROPOSED STANDARD JURY INSTRUCTIONS, *supra* note 3, at 7.02A (advisory committee note).

structure, and use of simple, clear language. Negative factors are overuse of strong language resulting in reactance (a phenomenon that occurs when overbearing language is used and results in a contrary desire to ignore the instruction), use of complex language or "legalese," and use of passive voice.[84]

With only three exceptions, the command "must" is used. "Must" is unequivocal and is applied to the procedural requirements (finding accuracy and existence of an inference),[85] the strength of the inference, and the burden of proof (beyond reasonable doubt).[86] However, it is not so overused as to considerably raise a concern of reactance. The permissive "may" is appropriately applied to finding guilt based on circumstantial evidence, a matter clearly at the discretion of the jury. The instruction also consistently uses the second person "you," and avoids overly complicated words or legalese. Unfortunately, the instruction consistently uses the word "circumstantial," which this Note argues is problematic because of the bias it evokes in jurors.[87] As for length, even including the optional section four, the instruction is not particularly long, though significant length may be added by poorly chosen examples inserted into the appropriate places in the instruction.[88] The relatively simple language and powerful style of the Pennsylvania instruction may be a reflection of *Commonwealth v. Petrillo*, another Pennsylvania Supreme Court case suggesting that the evidence instruction should be in the language of laymen, not legal experts.[89]

Additionally, the Pennsylvania instruction makes excellent use of explanation and example. Explanation appeals to the jurors' sense of reason, offering justification for the instruction that will increase the likelihood that jurors will follow the directive. Section two[90] explains the

84. Additional negative factors include nominalization, use of "as to," multiple negatives, complement deletion (removing "that is" and "which is"), long word lists, and words with different stems. Edward J. Imwinkelried & Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 CRIM. L. BULL. 135, 138–47 (1987).

85. PA. SUPREME COURT COMM. FOR PROPOSED STANDARD JURY INSTRUCTIONS, *supra* note 3, at 7.02A ("In deciding whether or not to accept circumstantial evidence as proof of the facts in question, you must be satisfied, first, that the testimony of the witness is truthful and accurate and, second, that the existence of the facts the witness testifies to leads to the conclusion that the facts in question also happened.").

86. *Id.* ("Instead, before you may find the defendant guilty, all the pieces of circumstantial evidence, when considered together, must reasonably and naturally lead to the conclusion that the defendant is guilty and must convince you of the defendant's guilt beyond a reasonable doubt.").

87. *See infra* Part IV.B.

88. Both sections defining direct and circumstantial evidence contain a sentence indicating the judge should give an example of that type of evidence: "An example of this is [give example]." PA. SUPREME COURT COMM. FOR PROPOSED STANDARD JURY INSTRUCTIONS, *supra* note 3, at 7.02A.

89. 338 Pa. 65, 93 (1940).

90. "You should recognize that it is sometimes necessary to rely upon circumstantial evidence in criminal cases, particularly where the crime was committed in secret." PA. SUPREME COURT COMM. FOR

need to use circumstantial evidence, something jurors are disinclined to do, and appeals to the reasonable (or obedient) juror to overcome that bias.[91] Sections one and two further require examples of direct and circumstantial evidence.[92] The comments specify that these examples should be drawn from the trial itself.[93] While the ubiquitous "rain" example is offered as an alternative, examples drawing on concrete facts from the case are preferable and make the instruction more comprehensible in application. Of course, judicial discretion may result in even more confusing language, and it places an additional and probably unwelcome burden on judges.

Despite all of the positive factors present, the instruction does suffer from some unclear phrasing, superfluous language, and passive voice. The definition of circumstantial evidence is particularly hard to follow: "testimony about facts that point to the existence of other facts that are in question."[94] The multiple clauses in this one sentence beginning with "about," "that," and "to" quickly make the definition unclear. Additionally, the section explaining the steps to follow when considering circumstantial evidence[95] could easily be broken into two shorter and more manageable pieces, steps one and two. Finally, the optional section four[96] features long, complex sentences that could easily be simplified or separated.

As a complete instruction, the Pennsylvania instruction is generally successful in avoiding many of the psycholinguistic pitfalls mentioned previously. The structure itself does an excellent job of creating an ordered hierarchy that begins with general definitions of the types of

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PROPOSED STANDARD JURY INSTRUCTIONS, *supra* note 3, at 7.02A.

91. *Id.* Note that the instruction does not ask the jury to give circumstantial evidence weight equal to direct evidence, and so does not really achieve the equality goal discussed previously. Instead, the instruction asks the jury to give circumstantial evidence some credence, rather than dismissing it entirely. *Id.*

92. *See infra* Part IV.B.

93. PA. SUPREME COURT COMM. FOR PROPOSED STANDARD JURY INSTRUCTIONS, *supra* note 3, at 7.02A (advisory committee note).

94. "The other type is circumstantial evidence, which is testimony about facts that point to the existence of other facts that are in question." *Id.* at 7.02A.

95. *Id.* ("In deciding whether or not to accept circumstantial evidence as proof of the facts in question, you must be satisfied, first, that the testimony of the witness is truthful and accurate and, second, that the existence of the facts the witness testifies to leads to the conclusion that the facts in question also happened.").

96. *Id*. ("If there are several separate pieces of circumstantial evidence, it is not necessary that each piece standing separately convince you of the defendant's guilt beyond a reasonable doubt. Instead, before you may find the defendant guilty, all the pieces of circumstantial evidence, when considered together, must reasonably and naturally lead to the conclusion that the defendant is guilty and must convince you of the defendant's guilt beyond a reasonable doubt. In other words, you may find the defendant guilty based on circumstantial evidence alone, but only if the total amount and quality of that evidence convince you of the defendant's guilt beyond a reasonable doubt.").

evidence and then moves to more specific procedural and substantive commands, including a clear-cut, two-step evaluative method.

While the Pennsylvania instruction does not meet substantive policy goals, it is quite comprehensible. The next instruction, from New York, presents the opposite scenario, advocating both policy goals in an unclear manner.

B. The New York Instruction

The New York Instruction is quite lengthy and breaks down into four parts: definition, procedure, goals, and an optional instruction for an entirely circumstantial case. The definitional section unfortunately incorporates a detailed version of the rain example described above:

> You have heard reference during this charge to the fact that both direct evidence and circumstantial evidence have been presented. I will now instruct you as to what these terms mean.
>
> *Direct evidence* is either physical evidence or testimony given by People as to what they actually saw, heard, smelled, tasted, or touched, tending to prove that an act or occurrence took place. In other words, unless there is an eyewitness or there are photographs or moving pictures of the alleged event you must rely on other evidence to reach conclusions.[97]
>
> Here, there is no eyewitness who testified as to the [name of defendant], and, of course, there are no photographs of the alleged event. Thus, you are required to consider what is known as circumstantial evidence. What *is* circumstantial evidence?
>
> Let me give you an example. Suppose that in a hypothetical trial one of the parties must prove that it was raining on a certain morning in order to win his case. To do this he calls a witness who testifies that on the morning in question he, the witness, walked to the subway and that while walking he *saw* rain falling from the sky and *felt* it striking his face and his clothes and *heard* it splashing on the sidewalk. This would be *direct* evidence *heard*, *seen*, and *felt* by the witness that it was raining that morning. The only question for the jury would be whether or not that witness was telling the truth or whether he was honestly mistaken.
>
> Suppose instead, the witness testified that it was *not* raining when he *entered* the subway but that *later*, while he was on the train, he saw passengers enter at various stations with wet umbrellas and wet clothing. In this situation it would be reasonable to infer that it had rained while he was on the subway.
>
> In other words, circumstantial evidence is evidence of other facts which are inferred or deduced or which flow from direct evidence. It is *direct evidence* for the man to say that on the way to the subway it was not raining and it is *direct evidence* for him to say that after he entered the subway, he saw people with wet clothes.

97. Howard G. Leventhal, Charges to the Jury and Requests to Charge in a Criminal Case: New York, § 4:30 (rev. ed. Supp. 1996).

> Now . . . circumstantial evidence would be the inference which you could draw from the direct evidence, the inference that it had rained *after* the witness entered the subway.[98]

After those extensive definitions, the instruction improves somewhat with fairly clear procedural steps:

> Where there is circumstantial evidence the jury must perform two functions:
>
> First, it must apply the usual tests of credibility to determine whether the witness told the truth about what he saw, felt, and heard. If the jury accepts those facts, then the jury must use its powers of reasoning and logic to determine whether those facts support the inference or the conclusion of the main issue which was, in our hypothesis, that it was raining.
>
> In other words, does the fact that the passengers entered the subway in the manner described lead to the conclusion that those passengers came in out of the rain?[99]

Having outlined the procedure, the instruction moves on to policy goals:

> All of us, without realizing it, make important decisions every day solely on the basis of circumstantial evidence. Circumstantial evidence can have the same value as direct evidence, or it can have less value or more value, depending upon the facts and circumstances of each case and the credibility of each witness. The value of the inference or the conclusion that one draws depends upon the particular case. It may be a very strong inference or it may be an inference which, although logical, is no more valid than a number of other inferences which could reasonably be drawn from the facts.
>
> It is up to you, the jurors, using your good common sense to say how strong the inference is. The necessity of resorting to circumstantial evidence in a criminal case is obvious. By their very nature, crimes are often performed in secrecy, thus rendering the direct evidence of the commission of those crimes impossible.
>
> Circumstantial evidence may be used in *any* case. The inference or conclusion that is to be drawn must flow naturally from the proven facts and be consistent with those facts and must point to the guilt of the defendant.
>
> If an inference of innocence can also reasonably be drawn from those facts or if the inference which can be drawn is not inconsistent with innocence, then you must draw the inference of innocence and not the inference of guilt.[100]

Finally, tired as both the reader and the juror must be at this point, the instruction concludes with a small admonishment to be used in an entirely circumstantial case:

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98. *Id.*
99. *Id.*
100. *Id.*

> Proof of guilt resting exclusively on circumstantial evidence is legally sufficient where the inference of guilt flows naturally from the facts proved, and is consistent with them, and the facts proved exclude to a moral certainty every reasonable inference of innocence.
>
> The facts proved must exclude to a moral certainty every *reasonable* inference of innocence with respect to *[cite appropriate facts]*.[101]

1. Policy

This instruction thoroughly presents both the equality policy goal and the heightened care policy goal. Looking to the first part of the policy goal section,[102] we can see clear attempts to protect against jurors undervaluing circumstantial evidence. The instruction states that circumstantial evidence may be as valuable, less valuable, or more valuable than direct evidence. While the language suffers from lack of clarity—and arguably undermines the message by placing less valuable in front of more valuable—it makes a strong effort to limit juror bias by stating that circumstantial evidence can be equally or more valuable than direct evidence. The instruction also refers to the tests of credibility as "usual,"[103] indicating that both types of evidence require considerations of credibility. Of course, it mistakenly follows this up by equating reliability with truthfulness, rather than accuracy. Obviously, witnesses may be honestly mistaken and therefore honest but unreliable, a problem with both direct and circumstantial evidence witnesses.

The New York instruction is even stronger in advocating for heightened care in deliberation. The instruction informs jurors that an inference may be only one of many possible inferences,[104] thereby reminding jurors that alternative scenarios may exist. Unfortunately, the beginning of the same sentence undermines the effectiveness of this warning. By contrasting the situation where an inference is "very strong" with the situation where an inference is logical, but not the only inference available ("It may be a very strong inference *or* it may be an inference which, although logical, is no more valid than a number of

101. *Id.* (alteration in original) (footnote omitted).

102. *Id.* ("All of us, without realizing it, make important decisions every day solely on the basis of circumstantial evidence. Circumstantial evidence can have the same value as direct evidence, or it can have less value or more value, depending upon the facts and circumstances of each case and the credibility of each witness. The value of the inference or the conclusion that one draws depends upon the particular case. It may be a very strong inference or it may be an inference which, although logical, is no more valid than a number of other inferences which could reasonably be drawn from the facts.").

103. *Id.* ("Where there is circumstantial evidence the jury must perform two functions: First, it must apply the usual tests of credibility to determine whether the witness told the truth about what he saw, felt, and heard.").

104. *Id.* ("It may be a very strong inference or it may be an inference which, although logical, is no more valid than a number of other inferences which could reasonably be drawn from the facts.").

other inferences . . . ."),[105] the instruction implies that very strong inferences per se exclude alternatives. This is not necessarily true. A fact may "strongly" imply the existence of another fact, and an alternative inference may not be as "valid," but it may nonetheless be reasonable, especially in light of other evidence.[106] We must remember that the reasonable doubt standard is not the same as a preponderance standard, and the competing inference of innocence need not be as likely as the inference of guilt for the jury to acquit.

The real strength of the New York instruction comes from the last sentences.[107] This language is almost as powerful as a clear statement of the reasonable hypothesis admonition. It reminds the juror that if a reasonable inference consistent with innocence can be drawn, that inference must control.[108] Furthermore, the portion of the instruction that is reserved for entirely circumstantial cases states that the facts must "exclude to a moral certainty every reasonable inference of innocence," not once, but twice.[109] This mandate falls somewhere between the threshold-based reasonable doubt language and the narrative-inducing reasonable hypothesis language. It is unfortunate that this mandate is not given to the jury in a normal case that is based on a mixture of evidence types, but the instruction as a whole still makes a strong effort to give the juror pause before convicting. These efforts are particularly desirable because, like Pennsylvania, New York's reasonable doubt instruction does not contain reasonable hypothesis language.[110]

2. *Comprehensibility*

While the New York instruction makes admirable headway in advancing the two policy goals, it misses the mark in comprehensibility.

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105. *Id.* (emphasis added).

106. For example, a man holding a stolen wallet would strongly appear to be the thief. An alternative scenario, that someone else stole the wallet and then tossed it after realizing there was no money, whereupon the current possessor found it and picked it up, is probably less likely, but still valid and reasonable.

107. "If an inference of innocence can also reasonably be drawn from those facts or if the inference which can be drawn is not inconsistent with innocence, then you must draw the inference of innocence and not the inference of guilt." LEVENTHAL, *supra* note 97, § 4:30. The portion of the instruction that is used in cases that are entirely based on circumstantial evidence is:

> Proof of guilt resting exclusively on circumstantial evidence is legally sufficient where the inference of guilt flows naturally from the facts proved, and is consistent with them, and the facts proved exclude to a moral certainty every reasonable inference of innocence.
>
> The facts proved must exclude to a moral certainty every *reasonable* inference of innocence with respect to *[cite appropriate facts]*.

Id. (alteration in original) (footnote omitted).

108. *Id.*

109. *Id.*

110. *Id.* § 4:66.

First, as stated, the instruction is very long, longer than either of the other instructions this Note considers. It risks losing the juror's attention and thus becoming completely ineffective. The example not only uses the well-worn rain example—which has no applicability to the facts at hand—but also belabors it with extraneous sensory words. The sentence structure tends to be long and complex. Additionally, the word choice is somewhat advanced. Words like "inferred," "deduced," "hypothesis,"[111] "resorting," and "consistent" are not everyday lay terms and may be a barrier to clear understanding.

Further undermining comprehensibility, the instruction seems to contradict itself immediately. The first sentence states, "You have heard reference during this charge to the fact that both direct evidence and circumstantial evidence have been presented."[112] Yet the beginning of the next paragraph states, "Here, there is no eyewitness who testified as to the [name of defendant], and, of course, there are no photographs of the alleged event. Thus, you are required to consider what is known as circumstantial evidence."[113] Assuming that the instruction is accurate and is referring to direct observations that will be used as circumstantial evidence of the defendant's guilt, the instruction's language has set itself up as confusing at best.

The New York instruction also contains several psycholinguistic traps. Rather than using the second person "you" consistently throughout the instruction, it refers to the jury as the subject, as though the jury in the instruction is separate from the jury receiving the instruction. For example, the instruction says "it" (the jury) must apply credibility tests.[114] "As to" is used immediately—in defining direct evidence—and again in stating that there are no eyewitnesses.[115] The last sentence of the third section,[116] one of the more important sentences as it is the only part of the main instruction addressing inferences of innocence, contains a double

111. I recognize that hypothesis is included in the "reasonable hypothesis" language recommended by this Note. I will address what I believe to be better language that still fulfills the reasonable hypothesis ideology. Essentially, the desirability of the reasonable hypothesis instruction is not reliant on the use of the word hypothesis. *See* Hampton v. State, 961 N.E.2d 480, 483 (Ind. 2012) (finding "theory" is more understandable to jurors than "hypothesis").

112. LEVENTHAL, *supra* note 97, § 4:30.

113. *Id.*

114. *Id.* ("Where there is circumstantial evidence the jury must perform two functions: First, it must apply the usual tests of credibility to determine whether the witness told the truth about what he saw, felt, and heard. If the jury accepts those facts, then the jury must use its powers of reasoning and logic to determine whether those facts support the inference or the conclusion of the main issue which was, in our hypothesis, that it was raining.").

115. "I will now instruct you as to what these terms mean." *Id.* "Here, there is no eyewitness as to the [name of defendant], and, of course, there are no photographs of the alleged event." *Id.*

116. "If an inference of innocence can also reasonably be drawn from those facts or if the inference which can be drawn is not inconsistent with innocence, then you must draw the inference of innocence and not the inference of guilt." *Id.*

negative ("not inconsistent"), and is overly long and complex. Double negatives can cause the listener or reader to read the opposite of the intended meaning, or simply reduce comprehensibility.

There are, however, two stylistic elements in the instruction's favor. First, it makes a minimal effort to offer an explanation about the need to use circumstantial evidence that may improve adherence and reduce reactance. Second, the verbatim repetition in the final section[117] is a little stark, almost seeming to be a typo, but the repetition likely improves the jury's cognizance of the sentence's importance.

Having seen an example of a comprehensible but weak instruction (Pennsylvania), and a confusing instruction with strong policy (New York), this Note now turns to the California instruction. The California instruction makes admirable attempts at both policy and comprehensibility.

C. The California Instruction

For the sake of continuity, this Part looks at two California instructions. CALCRIM 223 defines direct and circumstantial evidence, while CALCRIM 224 describes the sufficiency of circumstantial evidence. Combined, these instructions cover similar topics to the previous two examples and effectively constitute the "whole" evidence instruction.[118]

CALCRIM 223 contains two sections. The first section defines both types of evidence:

> Facts may be proved by direct or circumstantial evidence or by a combination of both. *Direct evidence* can prove a fact by itself. For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining. *Circumstantial evidence* also may be called indirect evidence. Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question. For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside.[119]

The second section of CALCRIM 223 addresses the equality goal, a particularly apt place to do so since the first part essentially separates the two types of evidence. Having the difference emphasized plays to juror

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117. "[A]nd the facts proved exclude to a moral certainty every reasonable inference of innocence. The facts proved must exclude to a moral certainty every reasonable inference of innocence with respect to *[cite appropriate facts]*." *Id.* (alteration in original) (footnote omitted).

118. There is a third instruction in California for circumstantial evidence as evidence of intent or mental state, but it is unnecessary to include for this analysis. *See* Advisory Comm. on Criminal Jury Instructions, Judicial Council of California Criminal Jury Instructions 225 (rev. 2011).

119. Advisory Comm. on Criminal Jury Instructions, Judicial Council of California Criminal Jury Instructions 223 (rev. 2007).

bias, so the immediate attempt to reconcile them more effectively serves to counteract that bias:

> Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other. You must decide whether a fact in issue has been proved based on all the evidence.[120]

CALCRIM 224 essentially addresses the heightened care goal by discussing what is sufficient for a finding of guilt:

> Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.
>
> Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.121

These two California instructions cover a lot of ground quickly, and provide an excellent example of form plus function.

1. Policy

CALCRIM 223 effectively advocates the equality goal. It clearly explains that direct and circumstantial evidence are equal for purposes of proving or disproving facts[122] and draws attention to the totality of the evidence.[123] The only issue is the first paragraph of CALCRIM 224, which states that circumstantial evidence supporting guilt must be proved beyond a reasonable doubt.[124] While this mandate appears to address the danger of inference by insisting that the facts leading to the inference be

120. *Id.*

121. ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, JUDICIAL COUNCIL OF CALIFORNIA CRIMINAL JURY INSTRUCTIONS 224 (rev. 2006).

122. "Both direct and circumstantial evidence are acceptable types of evidence to prove or disprove the elements of a charge, including intent and mental state and acts necessary to a conviction, and neither is necessarily more reliable than the other. Neither is entitled to any greater weight than the other." ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, *supra* note 119, at 223.

123. *Id.* ("You must decide whether a fact in issue has been proved based on all the evidence.").

124. "Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt." ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, *supra* note 121, at 224.

proved beyond a reasonable doubt themselves, it could also be interpreted to mean that convicting on circumstantial evidence merely requires the elements of the charge to be proved beyond reasonable doubt. This would obviously be true for direct evidence as well, so an implication that this mandate is somehow more important with circumstantial evidence reinforces juror bias against circumstantial evidence.

The California instruction is a great example of presenting the heightened care goal.[125] This instruction takes the best of the New York instruction and makes it markedly clearer and easier to read. Like the New York instruction, the only real downside is that it focuses on an alternative *conclusion* of innocence, but fails to appeal to the narrative nature of an alternative *scenario*. As discussed previously, being able to imagine an alternative scenario is an influential factor in counteracting a scenario of guilt. Therefore, an ideal instruction makes the narrative process, not simply the conclusion, the focus, as the narrative is the more powerful analytical tool. The first paragraph of CALCRIM 224 does not remedy this problem, because it simply restates the reasonable doubt standard.[126] As with New York and Pennsylvania, California's reasonable doubt instruction does not include reasonable hypothesis language.[127] Finally, in an unfortunate finish, the final sentence of CALCRIM 224 admonishes the jury that it need only accept reasonable conclusions, and that it should reject unreasonable ones.[128] While this is absolutely accurate, it leaves the jury with a final message that is at odds with the overall message of diligence in considering innocence alternatives. The principle of recency,[129] or the idea that people are more likely to remember the last thing that they hear, makes the last sentence all the more important as a place to dedicate to the heightened care policy. A sentence that limits jury considerations to reasonable conclusions would be better located elsewhere.

Furthermore, in some cases the jury will not hear either of the circumstantial evidence instructions, even if circumstantial evidence is present. While California courts have a sua sponte duty to present both instructions when the prosecution "substantially relies" on circumstantial

125. *Id.* ("Also, before you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.").

126. *Id.* ("Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.").

127. *Id.* at 220.

128. *Id.* at 224 ("However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.").

129. STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS & PRACTICE 16–17 (3d ed. 2000).

evidence to establish any element, it is in the court's discretion to present the instructions if circumstantial evidence is not "substantially" relied upon.[130] This includes situations in which the circumstantial evidence is incidental or corroborative of direct evidence,[131] even if the evidence is essential to the case for some other reason.[132]

2. Comprehensibility

Linguistically, the California instructions are very clear. They use the second person, and use "must" in all instances, except when referring to the jury's discretionary choice to rely on circumstantial evidence. While the example does not draw on the facts of the individual case, it gives a highly truncated version of the rain example,[133] resulting in pleasingly concise instructions. With few exceptions, the sentences are not particularly long or complex. The sentence defining circumstantial evidence in CALCRIM 223 is an exception,[134] as is the first sentence in CALCRIM 224.[135] The word choice is very simple and straightforward. The repeated "musts" without any explanation regarding the merit of circumstantial evidence may cause a reactance response, but the gains in clarity may outweigh this concern.

Overall, the California instructions combine to make a powerful and clear message to jurors, when the jurors are allowed to hear it. Such a successful instruction is a valuable tool in considering ways to further improve circumstantial evidence jury instructions.

IV. SOLUTIONS

Having looked at three very different versions of circumstantial evidence instructions, this Note offers several alternative approaches to the instruction and makes a recommendation on which of these approaches is preferable. There are essentially four possibilities: eliminating the instruction altogether, combining it with the reasonable

130. People v. Yrigoyen, 45 Cal. 2d 46, 49 (1955).

131. People v. Malbrough, 55 Cal. 2d 249, 250–51 (1961).

132. For instance, the use of accomplice testimony requiring corroboration. *See* People v. Williams, 162 Cal. App. 3d 869, 874 (1984).

133. "For example, if a witness testifies he saw it raining outside before he came into the courthouse, that testimony is direct evidence that it was raining." ADVISORY COMM. ON CRIMINAL JURY INSTRUCTIONS, *supra* note 118, at 223. "For example, if a witness testifies that he saw someone come inside wearing a raincoat covered with drops of water, that testimony is circumstantial evidence because it may support a conclusion that it was raining outside." *Id*.

134. *Id.* ("Circumstantial evidence does not directly prove the fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question.").

135. *Id.* at 224 ("Before you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.").

doubt instruction, maintaining the current distinction with improved comprehensibility, or creating a new, general inference instruction. Balancing the pros and cons of each solution in light of the policy goals discussed in this Note, and paying attention to comprehensibility, the best approach appears to be creating a new instruction that focuses on the reasonable hypothesis of innocence.

A. Eliminate the Instruction

The first approach is to take the Supreme Court's cases seriously and find that circumstantial evidence instructions are unnecessary and potentially confusing. All evidence requires consideration of reliability, accuracy, and sufficiency. One way to help eliminate juror bias against circumstantial evidence is to stop drawing such marked attention to the difference between direct and circumstantial evidence to begin with. This is the approach that Texas has taken.[136]

Though this solution enjoys simplicity, it seems to "solve" the problem by simply ignoring it. By choosing to not address the issue at all, the lack of instruction does little to overcome inherent juror bias by increasing respect for circumstantial evidence or explaining its import. It also completely fails to address the reasonable theory of innocence mandate—the desire for which will be discussed more in Part V.C—or any other message of heightened care during deliberations. This is an issue particularly if we accept the rational concerns raised by the courts that jurors engage in lazy reasoning, jump logical gaps, and ultimately arrive at unwarranted conclusions.[137] Such concerns led the *Hampton* court to find it unwise to discard a reasonable theory of innocence instruction.[138]

B. Alter the Circumstantial Evidence Instructions to Improve Clarity and Effectiveness

The second option is to leave the dichotomy intact, but to apply the equality and heightened care goals more effectively while increasing comprehensibility. This option is particularly attractive if we continue to entertain the *Hampton* concerns just mentioned. These concerns are echoed in *People v. Cleague*, a New York Court of Appeals decision.[139] The *Cleague* court found that the danger of logical gaps is that mere coincidence and suspicion may become permissible inference for a juror.[140]

136. Elizabeth Berry et al., Texas Criminal Jury Charges § 3:510 (2008).
137. *See generally* Hampton v. State, 961 N.E.2d 480, 486 (Ind. 2012).
138. *Id.*
139. People v. Cleague, 239 N.E.2d 617, 619 (1968).
140. *Id.*

Ideally, any such instruction should have three parts: a short definitional section, a short equality section, and a short reasonable hypothesis section. Combined, these three parts would encourage careful reasoning in the face of evidence that supports incriminating inferences. Such an instruction may look like this:

> Section 1: There are two types of evidence: direct and indirect. Direct evidence may prove that a fact of the crime is true or false by itself; for example, the testimony of an eyewitness to the crime. Indirect evidence requires you to decide if a fact of the crime is more likely to be true or false.

With this presentation, we get a short instruction with simple structure and wording. Replacing "circumstantial" with "indirect" keeps the word "circumstantial" out of the jury's consideration, which should help diminish the bias associated with such evidence.[141] The word "circumstantial" is likely to be influential. Using words such as "true" and "false," rather than "true" and "untrue," provides greater comprehensibility by not utilizing words with the same root. With direct and indirect, however, the similar root helps emphasize the similarity of the evidence.

> Section 2: Both types of evidence are acceptable. Neither is more reliable or important than the other. For both types, you must consider whether the evidence is reliable and accurate.

Here, the instruction avoids assigning special value or concern to either type of evidence, and emphasizes the need to carefully assess credibility for all evidence.

> Section 3: Before you may find [name of defendant] guilty beyond a reasonable doubt, you must decide that the evidence is conclusive. If the facts you find reliable can support any reasonable theory of innocence, you must acquit, even if the facts also strongly support guilt.

This final section takes care to use the name of the defendant, rather than the sterile title "defendant." It reiterates the proof beyond reasonable doubt standard briefly, and emphasizes the need for the evidence to be conclusive, thus addressing the dangers of inference. It ends with the most important part of the instruction, the reasonable hypothesis mandate. This phrasing attempts to make clear that only facts found credible should be considered in the final determination, and that the existence of any story that could point to innocence and is not completely implausible mandates acquittal. It further emphasizes that this mandate is required even when a guilty inference is present, or when the inference of guilt is stronger than the inference of innocence. In one study involving cases relying on circumstantial evidence, 23% of jurors

141. Consider the common derogatory comment, "That case is nothing but a bunch of circumstantial evidence!"

believed that if there are two equally reasonable constructions, one of guilt and one of innocence, the defendant should be convicted.[142] This instruction reminds juries that innocence does not have to be equally persuasive or even reasonable to control.

This instruction is very appealing, particularly because it would fit in the existing mold of many circumstantial/direct instructions. It addresses the concerns of those who would generally abolish the distinction, as well as of those who still find special concern. The only downside is the continued obvious dichotomy presented at the outset. While the word indirect is arguably much less problematic than the word circumstantial, it would not be a huge leap for many jurors to understand the relationship between the two terms. Considering jurors' overwhelming tendency to attribute disproportionately high value to direct evidence over more reliable circumstantial evidence, this continued distinction may very well harm more than it helps.

C. Create a New, General Evidence Instruction

In addition to the substantial bias addressed elsewhere in this Note, the difficulty distinguishing between the two types of evidence has been recognized by courts and legal academics.[143] As stated earlier, both types of evidence suffer from issues of reliability, particularly since direct evidence relies on circumstantial evidence for a finding of credibility.[144] If all evidence suffers from this ambiguity, it may be better to err on the side of caution by eliminating the distinction and insisting on heightened care in deliberation for all evidence. Under this theory, the equality goal is achieved by refusing to acknowledge the distinction altogether, while instructing that all evidence must be considered equally. The heightened care goal is necessarily emphasized because it is essentially the entirety of the instruction.

Having an instruction focused on the reasonable hypothesis of innocence does not duplicate the reasonable doubt instruction. The reasonable hypothesis instruction gives "'sharpened clarity' to the meaning of reasonable doubt."[145] Furthermore, reasonable doubt instructions do not always communicate to jurors the concept of excluding any reasonable hypothesis of innocence.[146] This is apparent when looking at the statistical

142. David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478, 481 (1976).

143. *See generally* Hampton v. State, 961 N.E.2d 480, 490 n.8 (Ind. 2012); *see also id.* at 489–90 (explaining that fingerprints of the defendant at the scene of the crime may be direct or circumstantial, depending on the fact to be proven).

144. Paul Bergman, *A Bunch of Circumstantial Evidence*, 30 U.S.F. L. Rev. 985, 989 (1996).

145. State v. Nelson, 731 P.2d 788, 794 (Idaho Ct. App. 1986) (quoting State v. Holman, 707 P.2d 493, 501 (Idaho Ct. App. 1985)).

146. Rosenberg & Rosenberg, *supra* note 9, at 1408.

evidence that shows 23% of jurors would break a tie in favor of conviction.[147] While reasonable doubt instructions may not satisfy the need for a reasonable hypothesis instruction, the reasonable hypothesis instruction can only enhance and reiterate the reasonable doubt standard.[148] In a system that abhors the idea of convicting the innocent and demands such a high standard of proof, any effective attempt to help jurors apply that standard more accurately is positive.

An instruction under this approach may look something like the following:

> When making your decision, you should look at all the facts that you have found to be true and reliable. If you find that those facts all together can support a reasonable scenario of innocence, you must find [the defendant] not guilty, even if the facts also strongly support guilt.

This instruction is very short, which will increase comprehensibility and make courts more receptive to adding it to the lexicon of instructions. It reminds the jury to look at the totality of the evidence, regardless of type. It clearly emphasizes the mandatory nature of acquittal when any reasonable narrative of innocence exists, and it encourages jurors to go out of their way to imagine such a scenario rather than merely weighing the evidence. Again, the instruction ends with a reminder that a scenario of innocence does not mean that no inference of guilt exists, and it does not require that the innocence scenario be as strong as the guilt scenario.

The main critiques of this instruction are that it does not sufficiently warn against the dangers of inference and that it may seem to put a burden on the defendant to demonstrate innocence. It does warn against dangerous inferences, however, by insisting that any reasonable inference of innocence mandates acquittal. This necessarily requires the jury to consider the strength of the guilty inference. Furthermore, this instruction is meant to be given in conjunction with the reasonable doubt instruction. The reasonable doubt instruction should properly place the burden on the prosecution and describe the burden of proof as beyond a reasonable doubt.

D. Combine Reasonable Hypothesis with Reasonable Doubt Instructions

This last solution considers the relationship between the reasonable hypothesis language and traditional reasonable doubt instructions, if such a thing could be said to exist.[149] *Winship* created a floor, not a

147. Strawn & Buchanan, *supra* note 142, at 481. Of course, this also indicates failure to convey reasonable doubt generally.

148. *Hampton*, 961 N.E.2d at 486–87.

149. Rosenberg & Rosenberg, *supra* note 9, at 1408 (demonstrating the varied language used in reasonable doubt instructions).

ceiling, of constitutional protection.[150] While the reasonable hypothesis language can be interpreted as clarification of the reasonable doubt standard, it may also be interpreted as an enhancement. As stated in the discussion of the previous solution, it should be considered desirable either way.[151]

Combining reasonable hypothesis language with the reasonable doubt instruction generally achieves what the independent reasonable hypothesis instruction would, but simplifies it by combining it with a highly used and already-existing instruction. Combining the two, however, deprives the reasonable hypothesis language of its force. Reasonable doubt instructions tend to be quite lengthy. This makes sense, because they are a critical constitutional safeguard against unjust convictions, and courts want jurors to understand the burden of proof. Simply tacking another sentence or two onto an already complicated instruction may disserve both instructions by making the reasonable doubt instruction even longer and relegating the reasonable hypothesis language to the status of one more belabored attempt to define reasonable doubt. Knowing what we do about the importance of searching for an innocence narrative before convicting, we should tread lightly before possibly undermining the effectiveness of such critical instructions.

E. Recommended Solution

Having looked to four different solutions to the circumstantial evidence jury instruction problem, this Note concludes that the independent reasonable hypothesis instruction that abolishes the distinction between circumstantial and direct, as described above in Part IV.C, best serves the relevant policy interests. These policies include the equality goal and the heightened care in deliberations goal, as well as the underlying policies of comprehensibility, justice, and protections against wrongful conviction.

The independent instruction acknowledges the movement away from distinguishing between direct and circumstantial evidence, and refuses to emphasize any particular danger inherent to one type of evidence substantially more than the other. It provides the jury with the necessary language to encourage them to actively envision alternative narratives consistent with innocence, not simply to weigh the evidence. It also emphasizes the crucial narrative evaluation procedure by making it

150. *Id.* at 1397; *see In re* Winship, 397 U.S. 358, 364 (holding that the Due Process Clause requires proof beyond reasonable doubt of every fact necessary to constitute the charged crime).

151. This exact solution is proposed in a Comment by Julie Chauvin. Chauvin argues that the reasonable hypothesis of innocence standard is an important cautionary measure to protect against unjust conviction. *See* Chauvin, *supra* note 15, at 218–19. In effect, it lends structure to the jury's application of the reasonable doubt standard. *Id.* at 243.

distinct from already tedious reasonable doubt instructions. While the altered circumstantial evidence instruction and the combination of reasonable hypothesis with reasonable doubt are effective solutions as well, for all the reasons stated above, the independent instruction seems to more effectively achieve the desired policy goals.

CONCLUSION

The history of circumstantial evidence doctrine is fraught with competing interests. Courts recognize that circumstantial evidence is necessary, valuable, and reliable, while simultaneously acknowledging that it risks unfounded conclusions. Though jurors seem to favor certain kinds of circumstantial evidence, such as DNA and fingerprints, they mistrust circumstantial evidence and shy away from convicting on it. Considering that the leading causes for wrongful conviction include direct evidence failures such as faulty identification, jurors must be instructed in a way that prevents massive overvaluation of faulty direct evidence and undervaluation of reliable circumstantial evidence. The supposedly impenetrable distinction between the two types of evidence simply does not hold up under scrutiny. Simultaneously, by focusing on jurors' negative treatment of circumstantial evidence, we can see the critical nature of the narrative in jury decisions. Because of the importance of narrative to jurors, instructing the jury to imagine reasonable scenarios of innocence is imperative to an effective application of the reasonable doubt standard.

Looking to multiple jury instructions, it is evident that state approaches vary dramatically in terms of addressing policy and comprehensibility. Analyzing what instructions get right—and, arguably, wrong—serves as a useful starting point in rethinking the way we should approach such instructions. While multiple solutions have promise, and would potentially be more effective than what the courts currently utilize, an independent instruction on the reasonable hypothesis of innocence analysis would most effectively achieve the desired balance of accuracy, effectiveness, and comprehensibility.

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