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Instructing Illinois Juries on the Definition of “Reasonable Doubt”: The Need for Reform

Timothy P. O’Neill

It is difficult to find a plainer or more explicit definition of reasonable doubt than the words themselves, and efforts to do so usually result merely in an elaboration of language without any corresponding amplification of the idea.¹

I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.²

I. INTRODUCTION

The jury empaneled to decide whether Terry Williams aided and abetted the man who killed Ricky Lee Moore faced a difficult task.³ Ricky Lee Moore was shot in the head while he was talking to a friend on a pay phone.⁴ At trial, the state presented witnesses who testified that a man fitting Terry Williams’s general description was seen running from the murder scene.⁵ Another witness, Dion Lowe, testified that Terry Williams was the “right hand man” to the leader of a large Chicago street gang.⁶ Lowe further testified that Williams approached Robert Hawkins, a fellow gang member, gave him a gun, and told him to kill Moore.⁷ When Robert Hawkins was arrested, he told the authorities that Terry Williams told him that the leader of their gang

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1. *People v. Leggio*, 161 N.E. 60, 62 (Ill. 1928) (quoting *People v. Johnson*, 148 N.E. 255, 258 (Ill. 1925)).

2. Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. REV. 979, 984 (1993). Justice Newman is the Chief Judge of the United States Court of Appeals for the Second Circuit. *Id.* at 979.

3. *See People v. Williams*, 625 N.E.2d 144, 150 (Ill. App. 1st Dist. 1993) (describing the question the jury sent to the judge during deliberations).

4. *Id.* at 146.

5. *See id.* at 146-47 (discussing the observations of eyewitness Michael Clark and police officer James Ochoa).

6. *Id.* at 146. The gang in question was the Gangster Disciples, which was led by a man named “Santana.” *Id.*

7. *Id.* Williams’s instruction to kill Moore was apparently in retaliation for an earlier ambush upon Dion Lowe and fellow members of the Gangster Disciples by the Vice Lords, a rival gang. *Id.*

wanted Hawkins to kill the victim.⁸ Hawkins further indicated that Williams had accompanied him during the shooting.⁹

Robert Hawkins's story changed, however, when he took the stand in Terry Williams's case.¹⁰ Hawkins testified that Dion Lowe, a fellow gang member who had testified against Williams, was his true accomplice, and that Lowe, not Williams, had given him the gun and accompanied him to the shooting.¹¹ Hawkins further asserted that the only reason he had named Williams as his accomplice in the first place was to satisfy the authorities who offered him a plea agreement.¹²

Shortly after it commenced deliberations, the *Williams* jury sent a note to the judge requesting a definition of "reasonable doubt."¹³ Given the complexity of the evidence they had to evaluate, it was not surprising that they should make such a request. The trial judge, however, expressly refused to answer the jury's inquiry regarding the meaning of reasonable doubt, explaining that the Illinois "Supreme Court recommends that no [such] instruction be given . . ."¹⁴ Left to define "reasonable doubt" on its own, the jury convicted Terry Williams of first degree murder.¹⁵ The appellate court affirmed without a specific analysis of the judge's refusal to define "reasonable doubt."¹⁶

In every criminal trial the prosecution has the burden of proving all the elements of the offense charged.¹⁷ Moreover, the prosecution must

8. *Id.* at 147.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* Hawkins received 29 years for killing Ricky Lee Moore. *Id.*

13. *Id.* at 150 (quoting the list the jury sent to the judge). The jury also requested clarification of the phrase "aiding and abetting," an element the state had to prove beyond a reasonable doubt. *Id.* The Illinois statute which describes the crime of accountability reads in pertinent part:

A person is legally accountable for the conduct of another when . . .

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense.

ILL. COMP. STAT. ANN. ch. 720, § 5/5-2(c) (West 1992).

Applying the above language to the *Williams* case, it is little wonder the jury asked the judge to define "aiding and abetting." Robert Hawkins, the admitted killer, directly contradicted Dion Lowe's testimony establishing Williams's accountability. *Williams*, 625 N.E.2d at 147. If the jury had believed Hawkins rather than Lowe, there would have remained very little evidence pointing to Williams's accountability.

14. *Williams*, 625 N.E.2d at 151.

15. *Id.* at 146. Williams eventually received a forty-year sentence. *Id.*

16. *Id.* at 151.

17. *See, e.g., Patterson v. New York*, 432 U.S. 197, 210 (1977).

prove each of these elements "beyond a reasonable doubt."¹⁸ Although every criminal jury in the United States must employ this standard, there currently exists a division among state and federal courts over whether a definition of "reasonable doubt" should be given in criminal jury instructions.¹⁹

Illinois is among a minority of American jurisdictions that refuses to instruct juries on the definition of this standard.²⁰ The Illinois Pattern Jury Instructions refuse to provide a definition of "reasonable doubt."²¹ The Illinois Committee on Jury Instructions in Criminal Cases justifies this decision by referring to several Illinois Supreme Court decisions which intimate that attempting a definition is futile.²² In addition, the Seventh Circuit has held that "[a]n attempt to define reasonable doubt presents a risk without any real benefit."²³ What do

18. *In re Winship*, 397 U.S. 358, 364 (1970). In *Winship*, the Court stated the following in support of the reasonable doubt standard:

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

Id. at 364.

19. See *infra* part III.

20. See *infra* part III.

21. ILLINOIS PATTERN JURY INSTRUCTIONS (CRIMINAL) No. 2.05 (3d ed. 1992). Specifically, the Committee Note states the following:

The committee recommends that no instruction be given defining the term "reasonable doubt." In *People v. Malmenato*, 14 Ill. 2d 52, 61, 150 N.E.2d 806, 811 (1958), the Illinois Supreme Court stated:

"Reasonable doubt is a term which needs no elaboration and we have so frequently discussed the futility of attempting to define it that we might expect the practice to be discontinued."

Id. (citations omitted).

22. See *id.* (quoting text of Committee Note to Illinois Pattern Jury Instruction No. 2.05, citing *People v. Malmenato*, 150 N.E.2d 806 (Ill.), *cert. denied*, 358 U.S. 899 (1958), and referring to *People v. Schuele*, 157 N.E. 215 (Ill. 1927), and *People v. Rogers*, 154 N.E. 909 (Ill. 1926), and *People v. Bowlby*, 201 N.E.2d 136 (Ill. App. 4th Dist. 1964)).

23. *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988). The court explained:

The tortured attempts to define reasonable doubt have yet to produce anything which has been approved by this court. Moreover, we have recently indicated that no attempt should be made to define reasonable doubt. The reason for the prohibition is not that all attempted definitions of reasonable doubt infringe upon the constitutional rights of a defendant [A]t best, definitions of reasonable doubt are unhelpful to a jury, and, at worst, they have the potential to impair a defendant's constitutional right to have the government prove each element beyond a reasonable doubt.

jurisdictions such as Illinois fear?

This Article contends that Illinois courts are short-changing defendants by not instructing juries on the definition of the term "reasonable doubt." This Article first reviews three recent United States Supreme Court decisions concerning "reasonable doubt" jury instructions and illustrates the key role such instructions serve at criminal trials.²⁴ Next, this Article surveys state and federal jurisdictions and describes the split which currently exists.²⁵ This Article then reviews over a century of Illinois case law on the propriety of jury instructions defining "reasonable doubt."²⁶ It shows that while Illinois courts pretend to forbid all parties from defining "reasonable doubt" for the jury, the reality is quite different. When faced with prosecutorial attempts to define "reasonable doubt" during closing argument, appellate courts are not only prone to find "harmless error," indeed, they often expressly approve the pro-prosecution definitions.²⁷ In addition, this Article presents empirical evidence suggesting that "reasonable doubt" is not a self-defining concept and that, without an instruction, jurors may underestimate the quantum of evidence needed for a criminal conviction.²⁸ Finally, this Article contends that Illinois should provide a pattern instruction on "reasonable doubt," and that its use in any case should be left to the discretion of the individual defendant.²⁹

II. REASONABLE DOUBT INSTRUCTIONS AND THE UNITED STATES SUPREME COURT

Although it is not clear when the standard of proof of beyond a reasonable doubt first emerged in Anglo-American jurisprudence,³⁰

Id. at 1039 (footnote omitted) (citation omitted).

24. *See infra* part II.

25. *See infra* part III.

26. *See infra* part IV.

27. *See infra* part IV.B.

28. *See infra* part V.

29. *See infra* part VI.

30. The origin of this standard is somewhat of a mystery. *See, e.g., Winship*, 397 U.S. at 361 (noting that the standard can be traced at least as far back as the time around the founding of the nation). There are at least three explanations of the standard's emergence which, though they conflict in part, reveal how proof beyond a reasonable doubt sprang from the core principles of our judicial system.

Judge May of Boston provided an explanation of the emergence of the reasonable doubt standard that became the traditionally accepted view. Hon. John W. May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642, 651-55 (1876); *see also* Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 508 (1975) (considering Judge May's article to be the source of Dean Wigmore and Dean McCormick's view of this subject). According to Judge May, the beyond a reasonable doubt standard of proof developed as a

there is no question that this rule has tightly wrapped itself around the core principles of the American criminal justice system.³¹ While the United States Supreme Court has recognized this fact by requiring the use of the reasonable doubt test in every criminal conviction,³² it has refused to require that juries receive instructions concerning what this

result of a repulsion to the "fearfully bloody [penal] code" of England. May, *supra*, at 651. This repulsion prompted judges to require greater amounts of proof for convictions. *Id.* at 652. Judge May attributes this to the ancient maxim that "it is better to err on the side of mercy than on the side of justice." *Id.* at 653. From that ancient maxim, Sir Matthew Hale invented the phrase: "It is better that five guilty persons should escape unpunished than one innocent person should die." *Id.* Sir William Blackstone doubled the proportion by stating: "The law holds that it is better that ten guilty persons escape than that one innocent suffer." *Id.* By 1824, the ratio had risen to 99 to 1. *Id.* at 654. The doctrine of reasonable doubt, according to Judge May, was an undue application of the preference for setting the guilty free over convicting the innocent. *Id.* at 656. Judge May further asserts that the reasonable doubt doctrine first emerged in 1798 in high treason cases tried in Dublin, Ireland. *Id.*

Another commentator, Professor Anthony Morano, provides a less critical explanation of the emergence of the reasonable doubt standard. Morano, *supra*, at 509-27. According to Professor Morano, the reasonable doubt doctrine actually made prosecutions easier. *Id.* at 511. Before the emergence of this doctrine, the presumption of innocence and the oath requiring jurors to discover and act upon the truth set a high standard of proof. *Id.* at 510-11. Around the seventeenth century, the "satisfied conscience test" emerged. *Id.* at 511. During the eighteenth century, the standard became more consistently articulated as "any doubt." *Id.* at 512. The *reasonable* doubt standard, which gave jurors fewer ways to acquit than the preceding "any articulable doubts" test, was introduced by a prosecutor in 1770 in the celebrated cases surrounding the Boston Massacre. *Id.* at 516-17.

Yet another commentator has traced the phrase "beyond a reasonable doubt" to late seventeenth century religious and philosophical ideas. See Barbara J. Shapiro, *The Trial Jury and the Evolution of the Doctrine of "Beyond Reasonable Doubt,"* in BEYOND "REASONABLE DOUBT" AND "PROBABLE CAUSE" (1991). Barbara J. Shapiro contends that English thinkers of that era began to divide human knowledge into two realms. *Id.* at 6-12. In one realm, absolute certainty was a possibility—e.g., in mathematics. In the other realm—the empirical realm of events—absolute certainty could never be achieved. *Id.* at 8-9. The highest level of certainty in this realm was called "moral certainty"—a certainty which there was not reason to doubt. *Id.* at 8. Thus, in law, the most man could aspire to would be proof to a "moral certainty"—i.e., proof beyond a reasonable doubt. *Id.*

31. See, e.g., *Winship*, 397 U.S. at 363:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

Id. (quoting *W. v. Family Court*, 247 N.E.2d 253, 259 (N.Y. 1969) (Fuld, C.J., dissenting), *rev'd*, *Winship*, 397 U.S. at 358).

32. See, e.g., *Winship*, 397 U.S. at 363 (asserting that a conviction without proof beyond a reasonable doubt is tantamount to "a lack of fundamental fairness") (quoting the dissenting opinion in *W. v. Family Court*, 247 N.E.2d at 259) (Fuld, C.J., dissenting)).

important standard of proof means.³³ This Part will examine the way the Supreme Court has dealt with the reasonable doubt test.

In 1954, in *Holland v. United States*,³⁴ the Court considered a jury instruction defining reasonable doubt which was used in a federal criminal trial.³⁵ In *Holland*, the Court negatively commented that “[a]ttempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.”³⁶ The Court, nevertheless, approved of the instruction.³⁷ Lower courts subsequently began to seize upon the disapproving dictum to support decisions not to define the term at all.³⁸

The role of reasonable doubt at a criminal trial took on added significance in 1970 when the Court, in *In re Winship*,³⁹ explicitly held that the “beyond a reasonable doubt” standard was constitutionally required.⁴⁰ Even after *Winship*, however, courts still divided on whether a jury instruction defining reasonable doubt was required.⁴¹

In the 1990 case of *Cage v. Louisiana*,⁴² the Court, in a *per curiam* decision, for the first time found a jury instruction defining reasonable doubt to be a violation of the Due Process Clause.⁴³ In *Cage*, defendant Tommy Cage was convicted of first degree murder and sentenced to death following a jury trial in a Louisiana state court.⁴⁴ He con-

33. *Victor v. Nebraska*, No. 92-8894, and *Sandoval v. California*, No. 92-9049, consolidated as *Victor v. Nebraska*, 114 S. Ct. 1239, 1243, *reh'g denied*, *Sandoval v. California*, 114 S. Ct. 1872 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 440-41 (1887)). “The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them.” *Hopt*, 120 U.S. at 440-41.

34. 348 U.S. 121 (1954), *reh'g denied*, 348 U.S. 932 (1955).

35. *Holland*, 348 U.S. at 140. The trial judge in the *Holland* case explained to the jury that reasonable doubt is “the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon.” *Id.* The Supreme Court noted that it preferred reasonable doubt to be defined as the “kind of doubt that would make a person hesitate to act,” but the trial judge’s version was nonetheless acceptable. *Id.*

36. *Id.* (quoting *Miles v. United States*, 103 U.S. 304, 312 (1880)).

37. *Id.*

38. Henry A. Diamond, Note, *Reasonable Doubt: To Define, Or Not To Define*, 90 COLUM. L. REV. 1716, 1724 (1990). Diamond also explains that “courts have developed widely varying opinions as to whether jurors are enlightened” by reasonable doubt instructions. *Id.* at 1717.

39. 397 U.S. 358 (1970).

40. *Id.* at 362 (affirming a long line of cases in which the Court expresses the assumption that the beyond a reasonable doubt standard is constitutionally required).

41. See *infra* part III.

42. 498 U.S. 39 (1990), *overruled in part on other grounds by Estelle v. McGuire*, 502 U.S. 62, 73 n.4 (1991).

43. *Cage*, 498 U.S. at 41.

44. *State v. Cage*, 554 So. 2d 39, 40 (La. 1989), *rev'd sub nom. Cage v. Louisiana*,

tended that the jury instruction which defined reasonable doubt was defective.⁴⁵ The instruction, in pertinent part, stated:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.⁴⁶

The Supreme Court granted certiorari and summarily reversed.⁴⁷ The Court focused on the phrases "grave uncertainty" and "actual substantial doubt," which the instruction equated with a "reasonable doubt."⁴⁸ The Court found the instruction erroneous because it suggested a "higher degree of doubt than is required for acquittal under the reasonable-doubt standard."⁴⁹ The Court also criticized the use of the term "moral certainty"⁵⁰ and suggested that it should be "evidentiary certainty."⁵¹

498 U.S. 39 (1990).

45. *Cage*, 554 So. 2d at 41.

46. *Id.* (emphasis added).

47. *Cage*, 498 U.S. at 41.

48. *Id.*

49. *Id.*

50. The phrase "moral certainty" was first employed in 1824 in an attempt to elucidate the phrase "beyond a reasonable doubt." May, *supra* note 30, at 658. Judge May considered "moral certainty" to be just as ambiguous as the phrase it attempted to explain. *Id.* See also Shapiro, *supra* note 30 (discussing "moral certainty").

51. *Cage*, 498 U.S. at 41. In a short, three-page opinion, the Court stated:

It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

Id. (footnote omitted). On remand, the Louisiana Supreme Court held that the erroneous jury instruction was subject to the harmless error standard, and that the error was harmless. *State v. Cage*, 583 So. 2d 1125, 1127-29 (La. 1991).

Three years later, in *Sullivan v. Louisiana*,⁵² the Supreme Court decided whether a deficient reasonable doubt instruction could be harmless error.⁵³ The trial court in *Sullivan* gave a reasonable doubt jury instruction very similar to the one in *Cage*.⁵⁴ The Supreme Court unanimously held that such an error is always prejudicial.⁵⁵ The Court held that two different constitutional values were implicated in such a defective instruction: the Due Process right to proof beyond a reasonable doubt⁵⁶ and the Sixth Amendment guarantee of a trial by jury.⁵⁷ A constitutionally defective reasonable doubt instruction, the Court reasoned, essentially results in no real jury verdict within the meaning of the Sixth Amendment.⁵⁸ Thus, this type of error can, in the par-

52. 113 S. Ct. 2078 (1993).

53. *Id.* at 2080.

54. The following is the instruction given in the *Sullivan* case:

If you entertain any reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your sworn duty to give him the benefit of that doubt and return a verdict of acquittal. Even where the evidence demonstrates a probability of guilt, yet if it does not establish it beyond a reasonable doubt, you must acquit the accused. This doubt must be a reasonable one; that is, one founded upon a real, tangible, substantial basis, and not upon mere caprice, fancy or conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your minds by reason of the unsatisfactory character of the evidence; one that would make you feel that you had not an abiding conviction to a *moral certainty* of the defendant's guilt. If, after giving a fair and impartial consideration to all of the facts in the case, you find the evidence unsatisfactory upon any single point indispensably necessary to constitute the defendant's guilt, this would give rise to such a reasonable doubt as would justify you in rendering a verdict of not guilty.

A reasonable doubt is not a mere possible doubt. It should be an actual or *substantial doubt*. It is such a doubt as a reasonable person would seriously entertain. It is a serious doubt for which you could give good reason.

State v. Sullivan, 596 So. 2d 177, 185 (La. 1992) (alteration in original) (quoting trial transcript at 566-68).

55. *Sullivan*, 113 S. Ct. at 2082-83. In *Jackson v. Virginia*, 443 U.S. 307, *reh'g denied*, 444 U.S. 890 (1979), the Supreme Court recognized that failure to instruct on reasonable doubt (as opposed to defining reasonable doubt) is never subject to harmless error. *Id.* at 320 n.14.

56. *Id.* at 2080 (citing *Winship*, 397 U.S. at 364 and *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam)).

57. *Id.* at 2080-81. The Court reasoned that:

[T]he Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Id. at 2081.

58. *Id.* at 2081.

lance of *Arizona v. Fulminante*,⁵⁹ be considered a "structural defect" not susceptible to harmless error review.⁶⁰

Finally, in 1994, the Court consolidated two cases under the name *Victor v. Nebraska*⁶¹ in order to examine the constitutional propriety of the reasonable doubt instructions used by Nebraska and California state courts.⁶² In the course of holding that both instructions correctly conveyed the concept of reasonable doubt, the court reflected on the general idea of reasonable doubt jury instructions.⁶³

While Justice O'Connor's opinion for the Court stated that "the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course,"⁶⁴ Justice

59. 499 U.S. 279, *reh'g denied*, 500 U.S. 938 (1991).

60. *Sullivan*, 113 S. Ct. at 2083 (Rehnquist, C.J., concurring). In *Fulminante*, the Court reasoned that structural defects affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310.

61. *Victor v. Nebraska*, No. 92-8894, and *Sandoval v. California*, No. 92-9049, consolidated as *Victor v. Nebraska*, 114 S. Ct. 1239, *reh'g denied*, *Sandoval v. California*, 114 S. Ct. 1872 (1994).

62. *Victor*, 114 S. Ct. at 1242.

63. *Id.* at 1247-51. The Court accepted *Sandoval's* "premise that 'moral certainty,' standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt.'" *Id.* at 1247. But because the jurors in *Sandoval* were also told "they must have 'an abiding conviction, to a moral certainty, of the truth of the charge,'" the instruction was not unconstitutional because the abiding conviction language "correctly states the government's burden of proof." *Id.* (citations omitted). Although the Court did not condone the use of the phrase, it concluded that it was not "reasonably likely that the jury understood the words moral certainty either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof." *Id.* at 1248.

In *Victor* the defendant's contention was that "equating a reasonable doubt with a 'substantial doubt' overstated the degree of doubt necessary for acquittal." *Id.* at 1250. The Supreme Court rejected the argument because in the context of the instructions, "'actual and substantial doubt'" was "'distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.'" *Id.* (citation omitted) (alteration in original). The instruction in *Victor* also contained "an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act." *Id.* Here, too, the Court did "not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one." *Id.* The Court recognized that "[t]he Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires." *Id.* at 1251. The Court held that taken as a whole the instructions in these cases "'correctly conveyed the concept of reasonable doubt to the jury,'" and there was no "reasonable likelihood" that jurors "applied the instruction in a way that violated the Constitution." *Id.* (citation omitted).

64. *Victor*, 114 S. Ct. at 1243 (citing *Hopt v. Utah*, 120 U.S. 430, 440-41 (1887)). "The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them." *Id.*

Ginsburg's concurrence provided a strong endorsement of courts trying to define the concept for juries:

[W]e have never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition. Nor, contrary to the Court's suggestion, [citation omitted] have we ever held that the Constitution does not require trial courts to define reasonable doubt.

Because the trial judges in fact defined reasonable doubt in both jury charges we review, we need not decide whether the Constitution required them to do so.⁶⁵

Thus, although the Court's recent "trilogy" of *Cage*, *Sullivan*, and *Victor* makes it clear that a court does not *per se* violate the Constitution by failing to define "beyond a reasonable doubt," there is no constitutional reason why it should not be defined.⁶⁶ Indeed, at least according to Justice Ginsburg, there are strong reasons for requiring courts to do so.⁶⁷

III. THE SPLIT AMONG COURTS OVER WHETHER TO DEFINE "REASONABLE DOUBT"

Illinois is in a distinct minority of jurisdictions which refuse to allow trial courts to define "reasonable doubt" for a jury. Among the jurisdictions which appear to make such an instruction mandatory are the Eighth Circuit,⁶⁸ Idaho,⁶⁹ Missouri,⁷⁰ Montana,⁷¹ New Hampshire,⁷²

65. *Id.* at 1253 (Ginsburg, J., concurring).

66. See *supra* notes 42-65 and accompanying text.

67. See *Victor*, 114 S. Ct. at 1253 (Ginsburg, J., concurring). In *Victor*, Justice Ginsburg suggested the following:

[T]he argument for defining the concept is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self-defining for jurors. Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt," when that term is left undefined. Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative—refusing to define the concept at all—is obviously not preferable.

Id. (Ginsburg, J., concurring) (citation omitted).

68. *United States v. Harris*, 974 F.2d 84, 85 (8th Cir. 1992) (using "hesitate to act" language, the *Harris* court cited the proper and preferred instruction, Model Criminal Jury Instruction for the District Court of the Eighth Circuit, No. 3.11 (1984)); *United States v. Jensen*, 561 F.2d 1297, 1300 (8th Cir. 1977) ("This circuit has repeatedly stated that the definition of reasonable doubt should be phrased in terms of hesitation to act."); *Friedman v. United States*, 381 F.2d 155, 160 (8th Cir. 1967) ("In the first place, it was the court's duty to instruct on the meaning of 'reasonable doubt' and failure to do so upon request would constitute error.").

69. *State v. Rhoades*, 822 P.2d 960, 979 (Idaho 1991), *cert. denied*, 113 S. Ct. 962 (1993). The Idaho rule is as follows: "When the term 'reasonable doubt' appears in a jury instruction, and when the jurors must understand it and apply it, 'the term *should be*

Pennsylvania,⁷³ Rhode Island,⁷⁴ South Dakota,⁷⁵ and Washington.⁷⁶

defined more precisely so that there is no question in the jurors' minds with respect to the concept.'" *Rhoades*, 822 P.2d at 979 (citing *State v. Holm*, 478 P.2d 284, 288 (Idaho 1970)) (emphasis added); *State v. Holm*, 478 P.2d 284, 288 (Idaho 1970) ("Hereafter whenever the concept of reasonable doubt is at issue, *i.e.*, in all criminal cases, the defendant is entitled to such instruction." (emphasis added)).

The only instruction defining reasonable doubt which the Idaho court deems "appropriate" is the California Jury Instruction. *Rhoades*, 822 P.2d at 979 (citing *State v. Cotton*, 602 P.2d 71, 75 (Idaho 1979)). The Idaho courts review a deviation from that instruction to determine whether the given instruction misstated the law or was so confusing and argumentative as to mislead the jury. *Id.*

70. MO. ANN. STAT. § 546.070(4) (Vernon 1992). The applicable Missouri statute reads: "In every trial for a criminal offense the court shall instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving the verdict, which instructions shall include a definition of the term reasonable doubt . . ." *Id.* (emphasis added).

71. *State v. Flesch*, 839 P.2d 1270, 1274 (Mont. 1992). The Montana Supreme Court found a reasonable doubt instruction patterned after Model Montana Criminal Instruction No. 1-004 proper. *Flesch*, 839 P.2d at 1274. The state supreme court has held that the reasonable doubt instruction patterned after Model Montana Criminal Jury Instruction No. 1-004 should be used in criminal cases and that no further elaboration would be needed because more complicated instructions have a greater tendency to confuse the jury than to clarify the burden of proof. *State v. Goodwin*, 813 P.2d 953, 961 (Mont. 1991) (citing *State v. Lucero*, 693 P.2d 511, 516 (Mont. 1984)), *overruled on other grounds by State v. Turner*, 864 P.2d 235, 241 (Mont. 1993).

The court has also suggested the use of the following instruction: "Proof beyond a reasonable doubt is proof of such a convincing character that a reasonable person would rely and act upon it in the most important of his own affairs. Beyond a reasonable doubt does not mean beyond any doubt or beyond a shadow of a doubt." *State v. Lucero*, 693 P.2d 511, 516 (Mont. 1984) (citing pattern instruction No. 1-004 and reversing as erroneous a reasonable doubt instruction which deprived the defendant of due process).

72. *State v. Aubert*, 421 A.2d 124, 127 (N.H. 1980). The New Hampshire Supreme Court held:

Though we acknowledge the difficulty inherent in the task, this court feels strongly that a jury *must* be given some assistance in understanding the concept. We feel that there is merit in the belief that the definition of reasonable doubt is perhaps the most important aspect of the closing instruction to a jury in a criminal trial.

Id. (emphasis added) (advising judges to use the model instruction defined in *State v. Wentworth*, 395 A.2d 858 (N.H. 1978) without adding anything to it).

73. *Commonwealth v. Young*, 317 A.2d 258, 262-63 (Pa. 1974) (reversing for denial of due process where full and adequate charge on reasonable doubt was not given). The Pennsylvania Supreme Court asserted: "[o]ur cases *require* that the jury be given a positive instruction fully and accurately defining reasonable doubt In the absence of a proper reasonable doubt charge, an accused is denied his right to a fair trial." *Id.* (emphasis added).

74. *State v. Desrosiers*, 559 A.2d 641, 645 (R.I. 1989). In *Desrosiers*, the Rhode Island Supreme Court held that "[i]n charging the jury, a trial justice *must* explain the definition of proof beyond a reasonable doubt." *Id.* (emphasis added).

75. Two cases by the state supreme court set down the rule for South Dakota. In *State v. Bult*, 351 N.W.2d 731 (S.D. 1984), the court held that the "[defendant] was entitled to a definition of reasonable doubt." *Id.* at 736. After expressing dismay at the usage of

In addition, several jurisdictions, including Arizona,⁷⁷ California,⁷⁸ Nevada,⁷⁹ and Ohio,⁸⁰ have a statutorily defined instruction for

“moral certainty” language in defining reasonable doubt, the court in *State v. Olson*, 408 N.W.2d 748 (S.D. 1987) admonished: “[T]he trial courts are reminded to either annotate their old pattern instruction sets or utilize the new pattern instructions which properly set forth the applicable law.” *Id.* at 754 n.2.

76. *State v. Coe*, 684 P.2d 668, 677 (Wash. 1984) (reversing due to combination of errors and noting that an instruction which equates reasonable doubt with substantial doubt should not be given). Washington law provides in pertinent part:

In every criminal case, there are indispensable functions that must be performed by the court’s instructions to the jury: (1) To declare that each element of the crime must be proven beyond a reasonable doubt, and *define* the standard of reasonable doubt The function of informing the jury of the reasonable doubt standard can only be achieved by a specific instruction.

Id. (emphasis added).

77. *State v. Portillo*, 898 P.2d 970, 973-74 (Ariz. 1995). The Arizona Supreme Court recently mandated that beginning January 1, 1996, Arizona trial courts must give the definition of reasonable doubt promulgated by the Federal Judicial Center. *Id.* See *infra* notes 234-35 and accompanying text for discussion of the federal instruction.

78. CAL. PENAL CODE § 1096 (West 1992). The California law provides:

It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Id.

79. NEV. REV. STAT. § 175.211 (1991). In Nevada, a statutory definition is given and trial courts are forbidden to use any other definition:

1. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If in the minds of jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation. 2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this state.

Id.

80. OHIO REV. CODE ANN. § 2901.05 (Anderson 1991). The applicable Ohio law reads:

(B) As part of its charge to the jury in a criminal case, the court shall read the definitions of “reasonable doubt” and “proof beyond a reasonable doubt,” contained in division (D) of this section.

.....
(D) “Reasonable doubt” is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. “Proof beyond a reasonable doubt” is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs.

"reasonable doubt."

Another group of jurisdictions allows "reasonable doubt" to be defined only when requested by the defendant. These include the Third Circuit,⁸¹ Tenth Circuit,⁸² District of Columbia Circuit,⁸³ Florida,⁸⁴ Maryland,⁸⁵ New Jersey,⁸⁶ and North Carolina.⁸⁷

Id.

81. *Blatt v. United States*, 60 F.2d 481, 481 (3d Cir. 1932) (finding failure to instruct following a defense request prejudicial, reversible error).

82. *United States v. Lutchfield*, 959 F.2d 1514, 1521 (10th Cir. 1992) (preferring the "hesitate to act" form of definition of reasonable doubt). *See also Monk v. United States*, 901 F.2d 885, 890 (10th Cir. 1990) (finding "substantial doubt" and "willing to act" language constitutionally defective); *United States v. Pepe*, 501 F.2d 1142, 1143 (10th Cir. 1974). In *Pepe*, the court stated:

At the outset, we recognize that the reasonable doubt standard is a constitutional cornerstone of the criminal justice system. A defendant is entitled to have his jury apprised of this standard and its corollary, the presumption of innocence, and is entitled to have the meaning of reasonable doubt explained to the jury.

Id. at 1143. Additionally, in *Holland v. United States*, 209 F.2d 516 (10th Cir.), *aff'd*, 348 U.S. 121 (1954), the Tenth Circuit held: "the accused is entitled to a definition of the term 'reasonable doubt,' and failure to instruct upon request has been held to constitute error." *Id.* at 523.

83. *Mundy v. United States*, 176 F.2d 32, 33 (D.C. Cir. 1949). After noting that "[the defendant's] silence at the bench was a waiver of the court's omission of a definition of reasonable doubt[.]" the *Mundy* Court added that it "regard[ed] it as better practice to define the term in each case no matter how experienced the jurors may be." *Id.* at 33.

In *Schencks v. United States*, 2 F.2d 185 (D.C. Cir. 1924), where the defendant requested a definition of reasonable doubt and the court did not so charge the jury, the court held that "[t]he instruction asked for or its equivalent should in our opinion have been given." *Id.* at 187.

84. *Barwicks v. State*, 82 So. 2d 356, 358 (Fla. 1955) (giving no instruction defining reasonable doubt where defendant's requested instruction was not proper). The Florida Supreme Court held that: "a failure to define the term 'reasonable doubt' does not constitute reversible error unless a definition thereof is requested by a proper instruction." *Id.* at 358.

85. *Williams v. State*, 585 A.2d 209, 213 (Md. 1991). The Maryland Supreme Court set down the rule as follows: "Because the reasonable doubt standard is an indispensable constitutionally mandated component of every criminal proceeding, a requested instruction explaining its import is applicable within the meaning of Md. Rule 757(b) [Now Rule 4-325, entitled 'Instructions to the Jury']." *Id.* at 213 (citing *Lansdowne v. State*, 412 A.2d 88 (Md. 1980)).

In *Lansdowne v. State*, 412 A.2d 88 (Md. 1980), the Maryland Supreme Court held "under Md. Rule 757(b), a trial judge in a criminal case, *must* give an instruction correctly explaining 'reasonable doubt' if requested by the accused." *Id.* at 93 (emphasis added). The *Lansdowne* court noted that "[e]ven judges . . . have difficulty construing the meaning of 'reasonable doubt.'" *Id.*

Under Md. Rule 4-325(c), the trial court, when asked, "shall instruct the jury as to the applicable law and the extent to which the instructions are binding." *Henry v. State*, 596 A.2d 1024, 1040-41 (Md. 1991), *cert. denied*, 503 U.S. 972 (1992) (referencing Maryland Rule 4-325 in a case not dealing with a reasonable doubt instruction). Failure

There are jurisdictions which leave the decision of whether or not to instruct to the discretion of the trial court. This group includes the First Circuit,⁸⁸ Sixth Circuit,⁸⁹ Ninth Circuit,⁹⁰ Eleventh Circuit,⁹¹

to do so shall result in error. *Henry*, 596 A.2d at 1041.

86. *State v. Linker*, 111 A. 35, 36 (N.J. 1920). The New Jersey Supreme Court held that if a judge receives a request to define reasonable doubt, "he . . . undoubtedly [is] required to define it." *Id.* at 36.

87. *State v. Montgomery*, 417 S.E.2d 742, 748 (N.C. 1992). In *Montgomery*, the North Carolina Supreme Court held: "The trial court has the *duty* to define the term 'reasonable doubt' when requested to give such an instruction to the jury." *Id.* at 748 (emphasis added) (citing *State v. Shaw*, 200 S.E.2d 585 (N.C. 1973)). This duty, however, is not activated until a request for definition is made: "The trial judge need not define reasonable doubt unless requested to do so, and if he undertakes the definition he is not limited to the use of an exact formula." *State v. Shaw*, 200 S.E.2d 585, 590 (N.C. 1973); *accord* *State v. Watson*, 240 S.E.2d 440, 446 (N.C. 1978).

88. *United States v. Littlefield*, 840 F.2d 143, 147 (1st Cir.), *cert. denied*, 488 U.S. 860 (1988). The First Circuit gives considerable discretion to the trial judge:

We do not wish to be interpreted as prescribing a preferred approach for instructing on reasonable doubt, suitable for all juries in all cases. Specifically, we do not mean that judges should not provide proper explanations of 'beyond a reasonable doubt' *if and to the degree they are so inclined*.

Id. at 147 (emphasis added). However, Judge Torruella, dissenting in *Littlefield*, stated that: "I am of the opinion that the failure to grant an instruction explaining the term 'proof beyond a reasonable doubt' is an error of constitutional dimension, striking at the very heart of the presumption of innocence." *Id.* at 151 (Torruella, J., dissenting).

89. *Whiteside v. Parke*, 705 F.2d 869 (6th Cir.) (holding that the failure to instruct on reasonable doubt was not constitutional error), *cert. denied*, 464 U.S. 843 (1983).

90. *United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2979 (1993). The court in *Velasquez* stated the Ninth Circuit's position: "[S]ome Ninth Circuit opinions have expressed a preference for the 'hesitate to act' language, failure to use that language does not necessarily constitute reversible error. Other definitions of reasonable doubt are permissible." *Id.* at 1278 (citations omitted).

The Ninth Circuit's resolution of the question of defining the reasonable doubt standard has undergone recent change. For example, in *United States v. Nolasco*, 926 F.2d 869 (9th Cir.) (en banc), *cert. denied*, 502 U.S. 833 (1991), the court stated: "Upon reconsideration, we overrule *Wosepka's* distinction between simple and complex cases, reaffirm *Witt*, and return the decision to define reasonable doubt to the sound discretion of the trial court." *Id.* at 872. In addition, in *United States v. Witt*, 648 F.2d 608 (9th Cir. 1981), even though the defendant requested an instruction defining reasonable doubt, the court held that "the district court was not required to define reasonable doubt Although a proper definition is always appropriate, the decision whether to define reasonable doubt should be left to the court's discretion." *Id.* at 610-11.

91. *United States v. Daniels*, 986 F.2d 451, 456-57 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1615 (1994). In reviewing a reasonable doubt definition tracking the Eleventh Circuit's pattern jury instructions, the *Daniels* court "recognize[d] the broad discretion of the trial judge in formulating a jury instruction." and expressly upheld the challenged portion of the charge as proper. *Id.* at 456-57 (citing UNITED STATES ELEVENTH CIRCUIT DISTRICT JUDGES ASS'N PATTERN JURY INSTRUCTIONS: CRIMINAL CASES, BASIC INSTRUCTION 3 (1985)).

Louisiana,⁹² and Minnesota.⁹³

Some jurisdictions have implied that a "reasonable doubt" instruction should be given. These jurisdictions include the Second Circuit,⁹⁴ Alaska,⁹⁵ Indiana,⁹⁶ Iowa,⁹⁷ Maine,⁹⁸ Nebraska,⁹⁹ and Connecticut.¹⁰⁰

92. LA. CODE CRIM. PROC. ANN. art. 804A(3) (West 1992). The Louisiana Code of Criminal Procedure provides in pertinent part: "The court *may, but is not required to*, define 'the presumption of innocence' or 'reasonable doubt' or give any other or further charge upon the same than that contained in this article." *Id.* (emphasis added). See also *State v. Gaines*, 354 So. 2d 548, 552 (La. 1978) (holding that the trial court is not required by statute to define reasonable doubt).

93. *State v. Olkon*, 299 N.W.2d 89, 105 (Minn. 1980), *cert. denied*, 449 U.S. 1132 (1981). The Minnesota Supreme Court held: "Defining the term should be at the *option of the trial judge* even though a defining instruction is tendered. Lack of definition would not appear to be prejudicial." *Id.* at 105 (emphasis added).

94. *United States v. Torres*, 901 F.2d 205, 242 (2d Cir.), *cert. denied*, *Cruz v. United States*, 498 U.S. 906 (1990). In *Torres*, the court "cautioned against departures from the traditional formulations of the reasonable doubt [definition]." *Id.* at 242 (citing *United States v. Ivic*, 700 F.2d 51, 69-70 (2d Cir. 1983)). In *Ivic*, the Second Circuit asserted:

We cannot see what is wrong with the instruction recommended in 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.14 (3d ed. 1977) At least in the absence of an indication that a jury is having trouble in applying the standard instruction, trial judges would be exceedingly well advised to use that instruction rather than improvise variations upon it.

That model instruction reads, in pertinent part, as follows:

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs. The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

Ivic, 700 F.2d at 69 (quoting 1 DEVITT & BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.14 (3d ed. 1977)).

95. *Avery v. State*, 514 P.2d 637, 642-43 (Alaska 1973) (condemning usage of "moral certainty" language). In *Avery*, the Alaska Supreme Court held: "In our view the instruction suggested by the Supreme Court in *Holland v. United States* is *preferable*: a doubt that would cause prudent men to hesitate before acting in matters of importance to themselves." *Id.* at 642-43 (emphasis added).

The Alaska court preferred the *Holland* version of the definition stating that "[w]hile we do not wish to be read as setting down an invariable standard form of instruction, we will in the future *require greater clarity in instructions defining reasonable doubt.*" *Rivett v. State*, 578 P.2d 946, 950 (Alaska 1978) (emphasis added).

96. *McKinley v. State*, 379 N.E.2d 968, 969 (Ind. 1978). Upon noting that jury instructions on reasonable doubt *should* address "both the doubt and the degree of certainty needed to find reasonable doubt," the Indiana Supreme Court stated that "we believe that the trial courts would better serve the administration of justice if they would address themselves to a consideration of the pattern of criminal instructions which are available to all courts and thereby minimize the discussion of semantics which is present in this type of appeal." *Id.* at 969 (emphasis added).

97. *State v. Bishop*, 387 N.W.2d 554, 560 (Iowa 1986). The Iowa Supreme Court

On the other hand, there are jurisdictions which, similar to Illinois, refuse to define "reasonable doubt." These include the Fourth Circuit,¹⁰¹ Seventh Circuit,¹⁰² Kentucky,¹⁰³ Mississippi,¹⁰⁴ Oklahoma,¹⁰⁵

"approved [Iowa Uniform Jury Instruction No. 108] defining reasonable doubt." *Id.* at 560.

98. *State v. Uffelman*, 626 A.2d 340, 342 (Me. 1993), *cert. denied*, *Uffelman v. Maine*, 114 S. Ct. 699 (1994). The Maine Supreme Court affirmed its "previously stated preference concerning a reasonable doubt instruction that the trial court must convey to the jurors the knowledge that before they may convict a defendant of a criminal offense the evidence must be sufficient to convince them of the defendant's guilt and that the degree of conviction which they must have is a conscientious belief that the charge is almost certainly true." *Id.* at 342 (emphasis added).

99. *State v. Beard*, 381 N.W.2d 170, 174 (Neb. 1986). The Nebraska Supreme Court noted *specific approval* of Nebraska Jury Instruction 14.08 and "[rejected] an argument that it is confusing, contradictory, and a misstatement of the traditional understanding of a reasonable doubt." *Id.* at 174. The court also acknowledged that "while there is authority suggesting it is perhaps better not to attempt to define reasonable doubt at all, some of that authority nonetheless rejects a *per se* rule that such an attempt requires reversal of a conviction." *Id.*

100. *State v. Tucker*, 629 A.2d 1067, 1084 (Conn. 1993). The *Tucker* court found that the jury instructions given were "the same or similar to jury instructions that previously have been approved by this court." *Id.* at 1084 (citing *State v. Leecan*, 504 A.2d 480 (Conn. 1986)) (emphasis added). The *Leecan* court held that "an instruction that a reasonable doubt is 'one for which you can, in your own mind, conscientiously give a reason' does not violate any constitutional right of a defendant." *State v. Leecan*, 504 A.2d 480, 492 (Conn.), *cert. denied*, 476 U.S. 1184 (1986).

101. *United States v. Adkins*, 937 F.2d 947, 950 (4th Cir. 1991). The Fourth Circuit's position is as follows:

[This Circuit] has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof. Even where the defendant requests that reasonable doubt be defined, a district court need not do so. The only exception to our categorical disdain for definition is when the jury specifically requests it.

Id. at 950 (citations omitted). In *Murphy v. Holland*, 776 F.2d 470 (4th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986), the Fourth Circuit confirmed its stance: "[W]e remain unwavering in our belief that trial courts should refrain from charging the jury on reasonable doubt unless such guidance is made unavoidable by a specific request from a confused jury." *Id.* at 479.

102. *United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988). In the Seventh Circuit it is "inappropriate for judges to give an instruction defining 'reasonable doubt,' and it is equally inappropriate for trial counsel to provide their own definition." *Id.* at 387. According to the Seventh Circuit, "[t]he tortured attempts to define reasonable doubt have yet to produce anything which has been approved by this court." *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988).

103. KENTUCKY CODE OF CRIMINAL PROCEDURE 9.56 (1994). The Kentucky Code of Criminal Procedure provides in pertinent part:

Rule 9.56. Reasonable Doubt. (1) In every case the jury shall be instructed substantially as follows: "The law presumes a defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty,

Texas,¹⁰⁶ and Wyoming.¹⁰⁷ A related group of jurisdictions expresses a preference against defining the term. This group includes the Fifth Circuit,¹⁰⁸ Oregon,¹⁰⁹ South Carolina,¹¹⁰ Vermont,¹¹¹ Virginia,¹¹² and

you shall find him not guilty." (2) The instruction should *not* attempt to define the term 'reasonable doubt.'

Id. (emphasis added).

104. *Barnes v. State*, 532 So. 2d 1231, 1235 (Miss. 1988). The Mississippi Supreme Court asserts that "reasonable doubt defines itself; it therefore needs no definition by the court." *Id.* at 1235 (citing *Pittman v. State*, 350 So. 2d 67, 71 (Miss. 1977)).

In *Pittman v. State*, 350 So. 2d 67 (Miss. 1977), the state supreme court found that error in defining reasonable doubt was not prejudicial, and the court held: "[T]he word 'reasonable' sufficiently modifies and restricts the word 'doubt' [A]n instruction attempting to define the words 'reasonable doubt' *should not be given*, either for the prosecution or defense." *Id.* at 71 (emphasis added).

105. *Grant v. State*, 703 P.2d 943, 946 (Okla. Crim. App. 1985). In *Grant*, the court upheld the trial judge's refusal to tender an instruction upon the request of the defendant and stated that "the long standing rule in this jurisdiction is that trial judges *should not define* [reasonable doubt]." *Id.* at 946 (emphasis added).

Oklahoma courts clearly hold that it is error for the trial court or prosecution to attempt to define reasonable doubt to the jury. *Williams v. State*, 658 P.2d 499, 500 (Okla. Crim. App. 1983) (citation omitted) (holding that the cumulative effect of arguments of prosecutor, including attempt to define reasonable doubt to jury, denied defendant a fair trial and justified reversal); *Pannel v. State*, 640 P.2d 568, 570 (Okla. Crim. App. 1982) (holding that commands of judge during voir dire did not require reversal and stating that "[a]n attempt to define 'reasonable doubt' by a trial judge is reversible error," and citing *Jones v. State*, 554 P.2d 830 (Okla. Crim. App. 1976)). *But cf. Jones*, 554 P.2d at 835 (stating that reasonable doubt definitions have been "condemned" by Oklahoma courts "from the territorial days to the present," and holding that the error was harmless due to the total weight of the evidence against the defendant). The court in *Jones* stated that "'if it should appear that the effect of such instruction is not one of injury to the defendant, we will not reverse the cause solely on the basis of such instruction.'" *Id.* at 835 (quoting *Young v. State*, 373 P.2d 273, 278 (Okla. Crim. App. 1962)).

106. *Lackey v. State*, 819 S.W.2d 111, 118 (Tex. Crim. App. 1989). In Texas, the "legislature has not defined the term 'reasonable doubt.' Because the term has not been defined by statute, the term is to be understood in its usual acceptance in common language and need not be defined in the charge to the jury." *Id.* at 118. *See also* TEX. CODE CRIM. PROC. ANN. art. 3.01 (West 1992). The Texas Criminal Code provides in pertinent part: "All words, phrases and terms used in this Code are to be taken and understood in their usual acceptation in common language, except where specially defined." *Id.*

107. *Blakely v. State*, 542 P.2d 857, 861-62 (Wyo. 1975). In Wyoming "a proper jury instruction on reasonable doubt within the scope of *Holland* is by use of the words 'reasonable doubt' themselves *without further definition*. The phrase 'reasonable doubt' is considered self-explanatory." *Id.* at 861-62 (emphasis added).

108. *Thompson v. Lynaugh*, 821 F.2d 1054, 1060-61 (5th Cir.), *cert. denied*, 483 U.S. 1035 (1987). The *Thompson* court held:

[T]he failure to include a definition of 'reasonable doubt' does not deprive a defendant of due process. Although the jury must be instructed that the state bears the burden of proving the defendant's guilt beyond a reasonable doubt, attempts by trial courts to define 'reasonable doubt' have been *disfavored* by

West Virginia.¹¹³

Thus, Illinois finds itself in a shrinking group of jurisdictions which categorically refuse to allow reasonable doubt to be defined for the jury. The recent attention the United States Supreme Court has given this issue in *Victor v. Nebraska*¹¹⁴ may very well result in even more jurisdictions deciding to mandate the use of such an instruction.¹¹⁵

this court. Such attempts often result in using the term itself in the definition and serve only to confuse the concept in the minds of jurors.

Id. at 1060-61 (emphasis added) (footnotes omitted).

109. *State v. Castrejon*, 856 P.2d 616, 619 (Or. 1993). The Oregon Supreme Court has "voiced agreement with [the] proposition [that the phrase "reasonable doubt" is its own best explanation]." *Id.* at 619 (quoting *State v. Williams*, 828 P.2d 1006, 1019 (Or. 1992)). However, an instruction shall not constitute error unless it misleads the jury to believe that it can convict on a lesser degree of proof than that required. *Id.*

110. *State v. Manning*, 409 S.E.2d 372, 375 (S.C. 1991), *cert. denied*, 503 U.S. 914 (1992). In *Manning*, the South Carolina Supreme Court concluded:

[T]he term 'reasonable doubt' may be best understood when the jury is simply instructed to give its plain and ordinary meaning. In an abundance of caution, we suggest the trial bench give no further definition than that approved by the United States Supreme Court in *Holland*:

A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act.

Id. at 375 (citation omitted) (paraphrasing *Holland v. United States*, 348 U.S. 121, 140 (1954)). In an earlier decision the South Carolina Supreme Court held: "mere attempts to define reasonable doubt do not constitute reversible error *per se*." *State v. Johnson*, 410 S.E.2d 547, 553-54 (S.C. 1991), *cert. denied*, 503 U.S. 993 (1992) (citations omitted) (emphasis added). Subsequent to the *Johnson* decision, however, the court held that the following instruction deprived the defendant of his due process rights and warranted reversal: "A reasonable doubt is a doubt for which you can assign a reason. *It is a doubt arising from the evidence presented or lack of evidence that created a strong uncertainty in your minds as to the defendant's guilty* [sic]." *State v. Baker*, 424 S.E.2d 492, 493 (S.C. 1992).

111. *State v. McMahon*, 603 A.2d 1128, 1129 (Vt. 1992) (discussing problems inherent in attempts to define reasonable doubt and implying that not defining it is preferred). In *McMahon*, the Vermont Supreme Court noted it had "never held that a defendant is entitled to an explanation of 'reasonable doubt' and the court did not err in declining to offer a definition of that phrase once it had correctly stated the rule." *Id.* at 1129.

112. *Cooper v. Commonwealth*, 345 S.E.2d 775, 777 (Va. 1986). In *Cooper*, the Virginia Supreme Court held: "[Although the] instruction as given has been approved by this court . . . instructions attempting to define reasonable doubt should be *discouraged* as it is highly probable that any definition devised would be less illuminating than the expression itself." *Id.* at 777 (quoting *Strawderman v. Commonwealth*, 108 S.E.2d 376, 379 (Va. 1959)) (emphasis added).

113. *Means v. Sidiropolis*, 401 S.E.2d 447, 451 n.1 (W.Va. 1990). The West Virginia Supreme Court has "always *discouraged* jury instructions attempting to define reasonable doubt." *Id.* at 451 n.1 (emphasis added).

114. 114 S. Ct. 1239, *reh'g denied*, *Sandoval v. California*, 114 S. Ct. 1872 (1994). See also *supra* notes 61-67 and accompanying text (discussing *Victor*).

115. See, e.g., *supra* note 77 (describing Arizona's recent decision to mandate use of such an instruction in all criminal cases).

Since the Supreme Court's decision in *Victor*, however, the Fourth District of the Illinois Appellate Court has refused to reconsider the issue.¹¹⁶ Illinois courts need to understand the state's tortuous history on the issue of defining reasonable doubt before deciding what course to take in the future. The next Part addresses this history.

IV. THE HISTORY, MYTH, AND REALITY OF DEFINING REASONABLE DOUBT IN ILLINOIS

Throughout most of the nineteenth century, the Illinois Supreme Court consistently approved attempts to define the phrase "reasonable doubt."¹¹⁷ Around the turn of the century, however, the court began to doubt the efficacy of such definitions.¹¹⁸ This doubt progressed to a proscription of any attempt to define the standard.¹¹⁹ The myth that the phrase "beyond a reasonable doubt" is self-defining has precipitated the court's aversion to defining these very important words.¹²⁰ This Part will trace the history of the Illinois Supreme Court's various approaches to the issue of defining reasonable doubt.¹²¹ This Part will also establish that while the court prevents defense attorneys and judges from instructing juries about the meaning of reasonable doubt, it often refuses to reverse cases in which prosecutors offer their own definitions during trial.¹²²

A. *The Illinois History*

One of the earliest Illinois cases approving an instruction on reasonable doubt is *Pate v. People*,¹²³ decided in 1846. In *Pate*, the Illinois Supreme Court, without citation, approved a reasonable doubt instruction which informed the jury that "[t]here should be more than a bare probability of the defendant's innocence."¹²⁴ Two dissenters

116. *People v. Failor*, 649 N.E.2d 1342 (Ill. App. 4th Dist.), *cert. denied*, 657 N.E.2d 629 (Ill. 1995).

117. See *infra* notes 123-37 and accompanying text.

118. See *infra* notes 138-42 and accompanying text.

119. See *infra* notes 143-53 and accompanying text.

120. See *infra* notes 154-66 and accompanying text.

121. See *infra* part IV.A.

122. See *infra* part IV.B.

123. 8 Ill. (3 Gilm.) 644 (1846).

124. *Id.* at 661, 664. Specifically, the instruction read:

That there should be more than a bare probability of the defendant's innocence; that they should have a reasonable doubt of his guilt, growing out of the unsatisfactory nature of the evidence; such a doubt as would induce a reasonable man to say, I am not satisfied that the defendant is guilty.

Id. at 661. The trial court erroneously used the word "probability" instead of "possibility." *Id.* The court found, however, that this error could not have affected the

found this to be reversible error, stating that “[i]f there is a probability of innocence, every reasonable man must doubt of guilt.”¹²⁵

In 1866, the Illinois Supreme Court, in *Miller v. People*,¹²⁶ approved a more elaborate jury instruction defining reasonable doubt.¹²⁷ The court, citing *Pate*, approved the following jury instruction:

In considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.¹²⁸

After the *Miller* decision, the Illinois Supreme Court began to cite an abridged version of the *Miller* instruction to define a standard reasonable doubt instruction.¹²⁹

Eventually, an apparent conflict arose over which version—the *Miller* or the abridged—correctly defined reasonable doubt. For example, in 1884 the Illinois Supreme Court cited *Miller* approvingly, but applied the abridged version of the reasonable doubt jury instruction.¹³⁰ Three years later in the “Haymarket Riot” case,¹³¹ however,

jury’s decision. *Id.* at 662.

125. *Id.* at 665 (Purple, J., and Wilson, C.J., dissenting).

126. 39 Ill. 457 (1866), *overruled by* State v. Cagle, 244 N.E.2d 200, 204 (Ill. 1969).

127. *Id.* at 463-64.

128. *Id.* The court reasoned:

It is a familiar doctrine of the law in criminal cases, that if a reasonable doubt of the guilt of the prisoner is entertained, the jury have no discretion, but must acquit. Where there is an abiding conviction of the truth of the charge resting in the minds of the jury, there cannot be, at the same time, in the same mind, a reasonable doubt.

Id. at 464 (citations omitted).

129. *See, e.g.*, *Connaghan v. People*, 88 Ill. 460 (1878); *May v. People*, 60 Ill. 119 (1871). In *May*, the court, citing *Miller*, stated that “[a] reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause.” *May*, 60 Ill. at 120. Subsequently, the *Connaghan* court cited the *May* instruction with approval. *Connaghan*, 88 Ill. at 462.

130. *Dunn v. People*, 109 Ill. 635, 645 (1884). In *Dunn*, the court “condemned” the following jury instruction:

That the guilt of the defendant must be proved beyond a reasonable doubt, as used in the instructions in this case, means, not a possible doubt, not a

the court once again approved the unabridged *Miller* instruction.¹³²

The Illinois Supreme Court alluded to this conflict between the complete and shortened *Miller* instruction in *Wacaser v. People*¹³³ in 1890. There, the court appeared to approve of both instructions, but characterized the longer version as being more "full and accurate."¹³⁴ The court held, however, that as long as the defendant submits a correct jury instruction, he is entitled to have the jury so instructed.¹³⁵ This acceptance of both versions was illustrated when a defendant, in

conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs, and depending upon moral evidence, is open to conjectural or imaginary doubt, and because absolute certainty is not required by law. A reasonable doubt exists in that state of the case which, after considering and comparing all the evidence in the case, leaves the minds of the jury in that condition that they can not say they feel an abiding conviction of the truth of the charge; but where the evidence in this case establishes the truth of the charge to a reasonable and moral certainty, that convinces the understanding and satisfies the reason and judgment of the jury of the truth of the charge, then, in law, there exists no reasonable doubt.

Id. at 644-45. The court opined that the instruction quoted did not define reasonable doubt as a matter of law, but rather was "more in the nature of an argument." *Id.* at 645.

131. *Spies v. People*, 12 N.E. 865, 986 (Ill. 1887), 17 N.E. 898 (Ill. 1887) (Mulkey, J., concurring) (concurring opinion filed by Judge Mulkey later than majority opinion because of illness). *Spies* became known as the "Haymarket Riot" case. The Haymarket Riot occurred in 1886 during a labor demonstration in Chicago's Haymarket Square. Max Boot, *Fighting Terrorism, Then and Now*, WALL ST. J., May 8, 1995, at A14. See also Jim Ritter, *City Unions Won Clout—But Not Without a Fight*, CHI. SUN-TIMES, Sept. 4, 1994, at 16. One reporter has commented on the facts of the occurrence:

On May 4, 1886, police moved to break up a workers meeting in Haymarket Square on the Near West Side. Someone threw a bomb; police and workers opened fire. Seven cops and two civilians were killed.

Although the bomb thrower was never positively identified, eight anarchists were convicted. Four were hung and one committed suicide. Gov. John Peter Altgeld pardoned the other three on the grounds that they didn't receive a fair trial.

Ritter, *supra*.

132. *Spies*, 12 N.E. at 986.

133. 25 N.E. 564 (Ill. 1890).

134. *Id.* at 565. The *Wacaser* decision involved a murder trial and a claim of self-defense. *Wacaser*, 25 N.E. at 564. The trial court refused to give the jury instruction submitted by the defendant, and instead read the following instruction to the jury:

If a man kills another, and the killing be proven, or admitted, and then sets up self-defense as a defense to the indictment, the jury ought always [to] be satisfied, from the evidence, that the killing was done under an honest belief, on the part of the defendant, that it was necessary, to save himself from death, or great bodily harm

Id. at 565.

135. *Id.*

1893, challenged a *Miller*-type instruction in *Painter v. People*.¹³⁶ The Illinois Supreme Court, without offering a single citation, and without reservation, approved of the instruction given by the trial court.¹³⁷

Gradually, however, the court's confidence in providing a definition for reasonable doubt began to erode. In 1895, for example, the court expressed one of its first doubts about the propriety of defining "reasonable doubt." In *Little v. People*,¹³⁸ the court stated in *dicta* that a *Miller*-type instruction would have been proper had a party asked for such a definition.¹³⁹ While this statement paralleled a statement the court made in *Wacaser*, the court in *Little* noted that attempts to define reasonable doubt may actually do more to confuse jurors about the meaning of the term.¹⁴⁰

Finally, the Illinois Supreme Court, in 1914, sustained the trial court's refusal of a complicated definition of reasonable doubt and noted that the meaning of the term is easily understood and needs no definition.¹⁴¹ In several subsequent cases, the court stated that there was no better definition of reasonable doubt than the words themselves.¹⁴²

Throughout the 1920s the Illinois Supreme Court became even more critical of reasonable doubt instructions. The court increasingly found

136. 35 N.E. 64 (Ill. 1893).

137. *Id.* at 72. The court noted that "[i]nstructions in this precise language have been so frequently given in criminal trials, and have been so many times approved by this court, that we are somewhat at a loss to comprehend the criticism." *Id.*

138. 42 N.E. 389 (Ill. 1895).

139. *Little*, 42 N.E. at 391.

140. *Id.* The court noted:

It has been doubted by many eminent judges and text writers whether attempts to explain the meaning of the term "reasonable doubt" do not lead to confusion and misunderstanding in the minds of the jury, rather than to clear comprehension; the term itself being easily and readily understood as any definition of it.

Id. (citations omitted); *see also* *People v. Barkas*, 99 N.E. 698, 702-03 (Ill. 1912). In the course of approving of what it characterized as a "stock instruction" on reasonable doubt, the *Barkas* Court, without citation, stated:

[I]t is very questionable whether any good purpose is ever served by giving involved and labored definitions of the words "reasonable doubt" in stating the law to juries in criminal cases. The term "reasonable doubt" has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves.

Id. *See also* *People v. Fox*, 110 N.E. 26, 32 (Ill. 1915) (quoting *Barkas* for this proposition).

141. *People v. Hansen*, 104 N.E. 1069, 1072 (Ill. 1914).

142. *See, e.g.,* *People v. Moses*, 123 N.E. 634, 636 (Ill. 1919) (citations omitted); *People v. Parker*, 120 N.E. 14, 18 (Ill. 1918).

specific reasonable doubt instructions to be erroneous,¹⁴³ and the court continued to criticize the entire concept of offering a jury instruction defining reasonable doubt.¹⁴⁴ In *People v. Leggio*,¹⁴⁵ for example, the court stated that an instruction on reasonable doubt was never needed, and that the words, essentially, define themselves.¹⁴⁶

Despite this line of authority, the Illinois Supreme Court did not speak with one voice on the issue. In several cases the court disapproved of instructions defining reasonable doubt.¹⁴⁷ In *People v. Schuele*,¹⁴⁸ for example, the court held that the term reasonable doubt needs no definition, and that it was erroneous to provide any definition.¹⁴⁹ In at least one other case, however, the court found no error in giving reasonable doubt jury instructions.¹⁵⁰ In addition, in *People v. Provo*¹⁵¹ the court responded to the defendant's complaint that all his instructions on reasonable doubt were refused and stated: "[l]engthy instructions on reasonable doubt are not approved, but we are of the opinion that properly worded instructions may call the jury's attention to the rule that a defendant must be proved guilty beyond a reasonable doubt."¹⁵² These cases make it questionable whether the court was trying to forbid all reasonable doubt instructions or merely trying to prohibit complicated instructions.¹⁵³

143. See, e.g., *People v. Haskins*, 169 N.E. 18, 22 (Ill. 1929) (finding an instruction erroneous but not reversible error); *People v. Cassler*, 163 N.E. 430, 436 (Ill. 1928) (same); *People v. Schuele*, 157 N.E. 215, 217-18 (Ill. 1927) (holding that reasonable doubt needs no definition and that it is erroneous to give one); *People v. Rogers*, 154 N.E. 909, 913 (Ill. 1926) (same); cf. *People v. Johnson*, 148 N.E. 255, 257-58 (Ill. 1925) (finding an instruction defining reasonable doubt as it applies to specific elements of the crime to be erroneous); *People v. Prall*, 145 N.E. 610, 613 (Ill. 1924) (finding an instruction defining reasonable doubt as it applies to specific elements of the crime to be erroneous).

144. Cases discouraging the use of such instructions include *People v. Schuele*, 157 N.E. 215, 217-18 (Ill. 1927); *People v. Rogers*, 154 N.E. 909, 913 (Ill. 1926); *People v. Klein*, 137 N.E. 145, 149-50 (Ill. 1922).

145. 161 N.E. 60 (Ill. 1928).

146. *Id.* at 62 (quoting *People v. Johnson*, 148 N.E. 255, 258 (Ill. 1925)). The court stated that "[i]t is difficult to find a plainer or more explicit definition of reasonable doubt than the words themselves, and efforts to do so usually result merely in an elaboration of language without any corresponding amplification of the idea." *Id.*

147. *Schuele*, 157 N.E. at 217-18; *Rogers*, 154 N.E. at 913; *Johnson*, 148 N.E. at 257-58.

148. 157 N.E. 215 (Ill. 1927).

149. *Schuele*, 157 N.E. at 217-18 (quoting *Johnson*, 148 N.E. at 255).

150. See *People v. Hartwell*, 173 N.E. 112, 113-14 (Ill. 1930) (discussing the need for an instruction establishing the reasonable doubt standard for each element of the crime).

151. 97 N.E.2d 802 (Ill. 1951).

152. *Provo*, 97 N.E.2d at 807.

153. *People v. Klein*, 137 N.E. 145, 149-50 (Ill. 1922). But see *Leggio*, 161 N.E. at

This vacillation between condemning all instructions attempting to define reasonable doubt and then occasionally suggesting that such an instruction may be proper continued during the following decades.¹⁵⁴ In cases such as *People v. Malmenato*¹⁵⁵ in the 1950s, *People v. Cagle*¹⁵⁶ in the 1960s, and *People v. Edwards*¹⁵⁷ in the 1970s, the court continued to suggest that instructions defining reasonable doubt should never be used.¹⁵⁸ Yet, just when the issue appeared to be settled, in 1986 the Illinois Supreme Court decided *People v. Bryant*.¹⁵⁹ The *Bryant* court held that, in cases containing circumstantial evidence, the "reasonable theory of innocence" charge should not be used.¹⁶⁰ In the course of deciding this issue, the court stated:

62 (holding that no reasonable doubt instruction was ever needed *and* that the condemned instruction was not long nor did it use language as objectionable as other instructions).

154. *Compare* *People v. Maffioli*, 94 N.E.2d 191, 195 (Ill. 1950) (holding that an instruction on reasonable doubt should not have been given but did not result in prejudicial error) *and* *People v. Davis*, 92 N.E.2d 649, 651-52 (Ill. 1950) (same) *and* *People v. Flynn*, 38 N.E.2d 49, 51-52 (Ill. 1941) (same) *and* *People v. Baker*, 6 N.E.2d 665, 670 (Ill. 1936) (same) *and* *People v. Casey*, 183 N.E. 616, 621 (Ill. 1932) (stating that reasonable doubt needs no definition and may constitute prejudicial error) *with* *People v. Provo*, 97 N.E.2d 802, 807 (Ill. 1951) (holding that although lengthy instructions on reasonable doubt are improper, properly worded instructions are allowable) *and* *People v. Shapiro*, 20 N.E.2d 284, 286 (Ill. 1939) (explaining that reasonable doubt instructions have been criticized but have not provided the basis for reversal) *and* *People v. Lee*, 14 N.E.2d 498, 499 (Ill. 1938) (stating merely that "reasonable doubt" need not be defined).

155. 150 N.E.2d 806 (Ill.), *cert. denied*, *Malmenato v. Illinois*, 358 U.S. 899 (1958).

156. 244 N.E.2d 200 (Ill. 1969).

157. 302 N.E.2d 306 (Ill. 1973), *cert. denied*, *Edwards v. Illinois*, 415 U.S. 928 (1974).

158. In *Malmenato*, while the court believed any definition of reasonable doubt was futile, the court held that the instruction proffered by the prosecutor was not prejudicial. *Malmenato*, 150 N.E.2d at 811. In *Cagle*, the court stated the following: "This court has repeatedly held that the legal concept of 'reasonable doubt' needs no definition, and that where an involved instruction on that concept is given it may be deemed prejudicial error." *Cagle*, 244 N.E.2d at 204 (citations omitted). It is significant to note that the *Cagle* court overruled that part of *Miller v. People*, 39 Ill. 457 (1866), "which gives approbation of any . . . complicated instructions [defining reasonable doubt]." *Id.* In *Edwards*, the court simply stated that it is "better practice not to attempt to define the term 'reasonable doubt' either in voir dire or closing argument." *Edwards*, 302 N.E.2d at 311.

159. 499 N.E.2d 413 (Ill. 1986).

160. *Id.* at 419. The "reasonable theory of innocence" charge is defined in Illinois Pattern Jury Instructions for criminal cases, section 3.02. ILLINOIS PATTERN JURY INSTRUCTIONS (CRIMINAL), No. 3.02 (1981). The instruction reads as follows:

Circumstantial evidence is the proof of facts or circumstances which give rise to a reasonable inference of other facts which tend to show the guilt or innocence of the defendant. Circumstantial evidence should be considered by you together with all the other evidence in the case in arriving at your verdict.

The question whether the ["reasonable theory of innocence"] instruction should be retained is, we believe, distinct from the question whether reasonable doubt must be defined. *We do not consider here whether an instruction defining reasonable doubt is necessary*; if one were required, we see no reason why the same definitional instructions would not be used in all cases¹⁶¹

The Illinois bar noticed this suggestion that the court might consider some type of reasonable doubt instruction to be proper.¹⁶² Yet, perhaps predictably, the court in 1992 again veered back to stating "[t]he law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury."¹⁶³

Undoubtedly, the decrease in the number of reasonable doubt instructions given in criminal cases can also be attributed to the influence of the Illinois Pattern Jury Instructions.¹⁶⁴ Starting with the publication of the first edition of the Pattern Instructions in 1968, each of the three editions have stated that an instruction is not recommended.¹⁶⁵ In addition, since *Bryant* held that courts may no longer

You should not find the defendant guilty unless the facts or circumstances proved exclude every reasonable theory of innocence.

Id. The court held that this instruction should no longer be used, reasoning that the "reasonable theory of innocence" charge essentially attempts to define reasonable doubt. *Bryant*, 499 N.E.2d at 419.

161. *Bryant*, 499 N.E.2d at 419-20 (emphasis added).

162. *See, e.g.*, *People v. Barnett*, 527 N.E.2d 1071, 1078 (Ill. App. 2d Dist. 1988). The defendant, relying on *Bryant*, argued that the issue of whether the court may find a definition of reasonable doubt to be proper remained an open question. *Barnett*, 527 N.E.2d at 1078. The court, however, did not agree with the defendant's argument. *Id.*

163. *People v. Speight*, 606 N.E.2d 1174, 1177 (Ill. 1992) (citations omitted). It is important to note, however, that while the prosecutor attempted to define reasonable doubt by stating the doubt "has to be substantial," the court held that this error was not prejudicial to the defendant. *Id.* at 1177 (emphasis omitted).

164. *See People v. Failor*, 649 N.E.2d 1342, 1343 (Ill. App. 4th Dist. 1995) (stating that the Illinois Supreme Court's clear mandate against reasonable doubt instructions is found in the Illinois Pattern Jury Instructions); *People v. Barnett*, 527 N.E.2d 1071, 1078 (Ill. App. 2d Dist. 1988) (stating that Illinois Pattern Jury Instruction No. 2.05 recommends that no jury instruction on reasonable doubt be given); *In re Estate of Casey*, 507 N.E.2d 962, 966-67 (Ill. App. 4th Dist. 1987) (noting that Illinois Pattern Jury Instruction No. 2.05 states that the term reasonable doubt is best left undefined); *People v. Phillips*, 263 N.E.2d 353, 356 (Ill. App. 3d Dist. 1970) (holding that due to Illinois Pattern Jury Instruction No. 2.05, it is the rule that a definition of reasonable doubt should not be given).

165. ILLINOIS PATTERN JURY INSTRUCTIONS (CRIMINAL), No. 2.05 (1968); ILLINOIS PATTERN JURY INSTRUCTIONS (CRIMINAL), No. 2.05 (2d ed. 1981); ILLINOIS PATTERN JURY INSTRUCTIONS (CRIMINAL), No. 2.05 (3d ed. 1992). *See supra* note 21 for the text of the instruction. The only difference between the three versions is that the Second and Third Editions titled these comments "Committee Note."

use the "reasonable theory of innocence" charge, another attempt at clarification of reasonable doubt has been foreclosed.¹⁶⁶

B. Defining Reasonable Doubt: The Illinois Myth and the Illinois Reality

One could argue that the "black-letter law" of Illinois, as reflected in the Illinois Supreme Court's 1992 opinion in *People v. Speight*¹⁶⁷ and the Illinois Pattern Jury Instructions,¹⁶⁸ confirms that it is improper to define the term "reasonable doubt."¹⁶⁹ As the Illinois Supreme Court has said, "[i]t is doubtful whether any better definition of the term can be found than the words themselves."¹⁷⁰ The rule is neat and simple; it is also a myth. If the phrase "reasonable doubt" were truly self-defining, Illinois courts would not be faced with the endless procession of cases in which both attorneys and judges offer definitions of these two words.¹⁷¹

Even more troubling is the fact that Illinois courts do not consistently follow their own rule. Illinois courts hold that defense lawyers may not attempt to define reasonable doubt.¹⁷² Yet Illinois courts have actually *approved* attempts by the prosecution to define reasonable doubt. For example, in 1983 the Illinois Supreme Court in *People v. Bryant*¹⁷³ approved of a prosecutor's closing argument that characterized the state's burden as being one which is "not unreasonable" and "met each and every day in the courts."¹⁷⁴ In addition, the *Bryant*

166. See *supra* note 160 and accompanying text. See also *People v. Pintos*, 549 N.E.2d 344, 347-48 (Ill. 1989) (Miller, J., specially concurring) (recognizing that Illinois Pattern Jury Instruction 3.02 may no longer be used); *People v. Cole*, 550 N.E.2d 723, 728 (Ill. App. 4th Dist. 1990) (Steigmann, J., concurring) (same).

167. 606 N.E.2d 1174 (Ill. 1992).

168. See *supra* note 21 for some of the reasons, outlined in the Illinois Pattern Jury Instructions, for not providing a definition of the term "reasonable doubt."

169. *Speight*, 606 N.E.2d at 1177 ("The law in Illinois is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury."); see also *supra* notes 21-22 and accompanying text (discussing Illinois courts' refusal to define reasonable doubt).

170. *People v. Barkas*, 99 N.E. 698, 703 (Ill. 1912); see also *supra* notes 52-60 and accompanying text for a discussion of whether a constitutionally deficient reasonable doubt instruction could ever be merely harmless error.

171. See *supra* notes 173-80 and accompanying text.

172. See, e.g., *People v. Wendt*, 539 N.E.2d 768, 775 (Ill. App. 2d Dist. 1989) (holding that instruction requested not allowed); *People v. Barnett*, 527 N.E.2d 1071, 1078 (Ill. App. 2d Dist. 1988) (finding request for defendant's definition of reasonable doubt properly denied); *People v. Garcia*, 431 N.E.2d 1234, 1239 (Ill. App. 1st Dist. 1981) (holding that trial judge properly denied defense counsel's attempt to define reasonable doubt in his closing argument).

173. 447 N.E.2d 301 (Ill. 1983).

174. *Id.* at 306.

court did *not* characterize the prosecutor's attempt to define "reasonable doubt" as harmless error; rather, it was found to be *proper argument*.¹⁷⁵ As a consequence, lower courts have relied on *Bryant* to approve prosecutorial comments concerning reasonable doubt.¹⁷⁶

The Illinois Supreme Court has since approved other prosecutorial arguments defining reasonable doubt.¹⁷⁷ Two years after the *Bryant* decision, the court found the following comments *proper* in *People v. Collins*:¹⁷⁸

The state's burden is the same burden of proof in every case that is tried in this courtroom, every case that is tried in this county, and every case that is tried in this country. It is beyond a reasonable doubt. The penitentiary is full of people like Collins and Bracey who have been proved guilty beyond a reasonable doubt.¹⁷⁹

Then, four years later, the Illinois Supreme Court expressly relied on *Collins* to *approve* the following statement by the prosecutor:

175. *Id.*

176. *See, e.g.,* *People v. Lybarger*, 555 N.E.2d 1264, 1266 (Ill. App. 3d Dist. 1990) (relying on *People v. Wade*, 522 N.E.2d 285, 287-88 (Ill. App. 3d Dist. 1988), and approving prosecutor's comment that "[b]eyond a reasonable doubt does not mean beyond all doubt, shadow of a doubt, or a doubt created by the imagination of counsel"); *People v. Williams*, 542 N.E.2d 93, 98-99 (Ill. App. 1st Dist. 1989) (relying on *Bryant* and approving prosecutor's comment that reasonable doubt is "[c]ertainly not an impossible burden"); *People v. Woods*, 527 N.E.2d 485, 488 (Ill. App. 1st Dist. 1988) (relying on *Bryant* and approving prosecutor's comment that it is proper to say that beyond a reasonable doubt is met "every day, all year, all the time"); *People v. Thomas*, 526 N.E.2d 467, 473 (Ill. App. 1st Dist. 1988) (relying on *Bryant* and approving of prosecutor telling jury that "there is nothing magical about the State's burden of proof and that such standard is applied daily in all criminal cases"); *People v. Wade*, 522 N.E.2d 285, 287-88 (Ill. App. 3d Dist. 1988), *rev'd on other grounds*, 546 N.E.2d 553 (Ill. 1989) (relying on *Bryant* and approving of prosecutor's "comment[ing] on the burden of proof if the prosecutor's comments do not distort that burden"); *People v. Hughes*, 521 N.E.2d 240, 242 (Ill. App. 3d Dist. 1988) (quoting *Bryant*); *People v. Hicks*, 516 N.E.2d 807, 812 (Ill. App. 2d Dist. 1987) (relying on *Bryant* and approving prosecutor's comment that "[t]here is no magic involved. It's up to you to decide what reasonable doubt is"); *People v. Seals*, 505 N.E.2d 1107, 1113 (Ill. App. 1st Dist. 1987) (relying on *Bryant* and approving of "prosecutor's characterization of burden of proof as not overwhelming and the same in every jurisdiction"); *People v. Calhoun*, 494 N.E.2d 498, 501-02 (Ill. App. 1st Dist. 1986) (relying on *Bryant* and approving of a prosecutor telling a jury that "reasonable doubt happens ever[y] single day in this County. It is proved in every single case, hundreds of times a week, thousands of times a month."); *People v. Trass*, 483 N.E.2d 567, 576-77 (Ill. App. 1st Dist. 1985) (relying on *Bryant* and approving a prosecutor's comment that "[t]he defense would have you believe that it is an insurmountable burden, some mystical thing" and that "[i]t is a burden that is met by juries all over the country").

177. *See infra* notes 178-81 and accompanying text.

178. 478 N.E.2d 267 (Ill. 1985).

179. *Id.* at 284.

[The standard of reasonable doubt is the] same standard that's been used in this court room, in all the court rooms in this country, throughout the county, throughout the state, throughout the country, through our entire history. It's nothing new. There is nothing different about that standard of proof. That standard of proof does not require perfection.¹⁸⁰

As these cases indicate, the "rule" that counsel may not define "reasonable doubt" is a *myth*. The supreme court held these examples to constitute *proper argument*, not harmless error. Thus, offering definitions of the meaning of "beyond a reasonable doubt" is a one-way street: it is improper for the judge to offer an instruction; it is improper for the defense to define it; but Illinois courts have often approved of a prosecutor's "definition" delivered in the course of closing argument.¹⁸¹

V. EMPIRICAL EVIDENCE SUGGESTS THAT "REASONABLE DOUBT" IS NOT A SELF-DEFINING CONCEPT AND THAT JURIES NEED INSTRUCTION

The previous Part showed that the widely-held belief that Illinois juries are not instructed on the definition of "reasonable doubt" is actually a myth.¹⁸² It is true that the judge may not formally instruct

180. *People v. Harris*, 544 N.E.2d 357, 373 (Ill. 1989), *cert. denied*, 494 U.S. 1018 (1990); *See also* *People v. Batson*, 587 N.E.2d 549, 556 (Ill. App. 1st Dist. 1992) (following *Harris*).

181. *See* 2 F. LEE BAILEY AND KENNETH J. FISHMAN, *CRIMINAL TRIAL TECHNIQUES*, § 48:6 (1994) (stressing that an attorney "should make the jury aware of the rule of reasonable doubt at all times"). Illinois courts refuse to permit defense counsel, during closing argument, to offer his or her own comments on the meaning of reasonable doubt. *See* *People v. Boyd*, 410 N.E.2d 931, 955 (Ill. App. 1st Dist. 1980), *cert. denied*, 454 U.S. 1080 (1981) (restricting defense counsel from saying: "This is reasonable doubt number one, this is reasonable doubt number two."); *People v. Malone*, 261 N.E.2d 776, 778 (Ill. App. 1st Dist. 1970) (holding that reasonable doubt needs no elaboration). On the other hand, Illinois courts allow the prosecution to comment on the meaning of reasonable doubt during closing argument. *See, e.g.,* *People v. Gacho*, 522 N.E.2d 1146, 1162 (Ill.), *cert. denied*, 488 U.S. 910 (1988) (allowing the prosecution to state as follows in closing argument: "Reasonable Doubt. There's nothing magical about proving somebody guilty beyond a reasonable doubt."); *People v. Collins*, 478 N.E.2d 267, 285 (Ill.), *cert. denied*, 474 U.S. 935 (1985) (allowing prosecution to state in the closing argument that the burden of proof "is the same burden of proof in every case that is tried in this courtroom, every case that is tried in this county, and every case that is tried in this country"); *People v. Bryant*, 447 N.E.2d 301, 306-07 (Ill. 1983) (holding that the "prosecutor's characterization of the State's burden as one which is 'not unreasonable' and 'met each and every day in the courts' reduced that burden"); *People v. Lybarger*, 555 N.E.2d 1264, 1266 (Ill. App. 3d Dist. 1990) (holding that "a prosecutor must not be severely limited in his closing and it is therefore proper for a prosecutor to comment on the burden if his comments do not distort that burden").

182. *See supra* notes 167-81 and accompanying text.

the jury on this point.¹⁸³ It is also true that the defense is forbidden to offer a definition during closing argument, although in practice the degree the defense will be able to address this in closing argument will perhaps depend on the discretion of the individual trial judge.¹⁸⁴ However, as shown above, appellate opinions often approve the pro-conviction definitions offered by prosecutors during closing argument.¹⁸⁵

One might expect Illinois defense counsel to be outraged by this inequity. One might expect them to shower trial courts with alternative definitions of "reasonable doubt," rather than ceding that area to the prosecution. It is surprising, therefore, that case reports and the literature show no such ferment. One reason might be that some defense counsel are content to have no definition of "reasonable doubt" given to the jury.¹⁸⁶ There may exist a feeling that an undefined "reasonable doubt" is the "wild card," the "ace in the hole" in the defense case; there may be a feeling that the defense has an advantage by leaving the definition of "reasonable doubt" to the imagination of the jury.¹⁸⁷ Every defense attorney seems to have at least one anecdote where (she

183. See *supra* notes 167-70 and accompanying text.

184. See *supra* notes 173-81 and accompanying text.

185. See *supra* notes 173-81 and accompanying text. In addition, one commentator has noted how appellate courts treat "reasonable doubt":

[I]t is interesting to compare how differently federal appellate courts review "reasonable doubt" rulings when the context shifts from whether evidence is sufficient to support a conviction to whether a constitutional error is harmless. Appellate courts rarely reverse a trial court's ruling that the evidence is sufficient to permit a finding of guilt beyond a reasonable doubt. However, when trial courts apply the harmless error doctrine to constitutional violations and rule that the prosecution has not sustained its burden of showing that a constitutional error was harmless beyond a reasonable doubt, they are frequently reversed.

If appellate courts were taking seriously the legal standard of proof that persuades beyond a reasonable doubt, we should expect to see at least a modest number of cases in which a reviewing court says, "the evidence perhaps suffices to persuade a reasonable trier by the 'preponderance' standard but it does not suffice to persuade beyond a reasonable doubt." It is astonishing how rarely we see a federal appellate court using anything like that language.

Newman, *supra* note 2, at 989-90.

186. Walter W. Steele, Jr. and Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 98-99 (1988) ("Many lawyers and judges simply do not believe that juror confusion is a serious problem. Since they understand the instructions, they believe that jurors understand them as well.")

187. Note, *Reasonable Doubt: An Argument Against Definition*, 108 HARV. L. REV. 1955, 1970 (1995) ("Responsibility for determining the precise meaning of [reasonable doubt] is better located within the criminal jury because jurors, as community representatives, have the collective capacity legitimately to make the value judgment required to interpret the reasonable doubt standard and impose the criminal sanction.") (citation omitted).

believes) the undefined, amorphous concept of "reasonable doubt" resulted in a jury acquittal. Some criminal defense attorneys appear to believe that a jury instruction defining "reasonable doubt" would somehow sap the term of its talismanic power.¹⁸⁸

The supposed magic of an undefined "reasonable doubt" is yet another myth. Reid Hastie of the University of Colorado has produced empirical evidence indicating that the term "reasonable doubt"—undefined and standing by itself—has far less power over juries than criminal defense lawyers often believe.¹⁸⁹

First, consider the defense lawyer's paradigm criminal trial. This paradigm states that a defendant is clothed with a "presumption of innocence" and that he can be convicted only if the prosecution proves him guilty "beyond a reasonable doubt."¹⁹⁰ Thus, on a continuum of "0 to 100," the prosecution begins its case at point "0." Under the civil standard of "preponderance of the evidence," for example, the plaintiff would have to get to "51" to sustain his burden.¹⁹¹ But in a criminal case, according to the defense, the prosecution has to introduce sufficient evidence to get to a rather high point (98? 99? 100?) on the continuum before we can say the defendant is guilty "beyond a reasonable doubt."¹⁹²

Empirical studies indicate that this idealized view contains more fiction than fact. Consider the concept of "presumption of innocence." Professor Hastie has reviewed the literature on this issue and has

188. As one commentator has argued, "[T]he phrase, standing alone, invites deliberation. It focuses juror attention on a concept rather than on words; it requires jurors to struggle with the meaning of the concept and to incorporate their thoughts and community values into the standard they apply." Newman, *supra* note 2, at 1970-71 (citation omitted).

189. Reid Hastie, *Algebraic Models of Juror Decision Processes*, in *INSIDE THE JUROR* 84, 100-08 (Reid Hastie, ed., 1993). In his article, Professor Hastie explains the algebraic method:

The basic image of the decision maker according to the algebraic modeling approach is a "judgmental accountant" who converts all information relevant to a judgment into numbers representing the implications of each piece of evidence and the importance that should be accorded to each of them and then calculates a weighted sum to provide a "bottom line" evaluation.

Id. at 84.

190. *See id.* at 99.

191. *Id.* at 106. Professor Hastie notes that studies indicate a range for the preponderance of the evidence standard from .48 to .82. *Id.*

192. *See id.* at 101. When determining the numerical equivalent of "reasonable doubt," Professor Hastie notes that "[d]ifferent studies and different methods elicited a variety of average ratings from the subjects; for example, estimates of the beyond-reasonable-doubt standard in criminal cases ranged from .51 to .92." *Id.*

found that the majority of studies concluded that people do not begin considering a hypothetical guilt-innocence option at Point "0":¹⁹³

Most of the empirical studies provide evidence for subjects' initial inclination to distribute uncertainty approximately in a 50-50 manner between guilt-innocent options, at least as expressed in marks near the midpoint of a judgment rating scale or by assigning guilt-innocent initial odds in a 1:1 ratio at the beginning of the decision process.¹⁹⁴

In other words, people begin at "Point 50" instead of "Point 0." Hastie found this to be true even though two of the studies explicitly provided the participants with an instruction defining "presumption of innocence."¹⁹⁵ Thus, the reality is not that the prosecution starts at "Point 0"; in fact, in the minds of jurors, the prosecution begins at a point over half-way to proof "beyond a reasonable doubt."¹⁹⁶

What, then, constitutes proof "beyond a reasonable doubt?" Over the last twenty-five years, social scientists have used two types of surveys to discover people's perceptions. The first type is known as the "direct rating method."¹⁹⁷ Here a subject is provided with some version of a "beyond a reasonable doubt" instruction.¹⁹⁸ She is then asked what likelihood or probability that a defendant committed an act she would require before finding that defendant guilty.¹⁹⁹ The subject is asked to express this on a "0 to 10" scale, with 10 being the highest degree of proof.²⁰⁰ Hastie collected these surveys, conducted by vari-

193. *Id.* at 98.

194. *Id.* (citations omitted).

195. *Id.* (citing Vicki S. Helgeson & Kelly G. Shaver, *Presumption of Innocence: Congruence Bias Induced and Overcome*, 20 *JOURNAL OF APPLIED SOCIAL PSYCHOLOGY* 276 (1990) and Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 1877 (1979)).

196. Hastie, *supra* note 189, at 106. Professor Hastie states that:

[T]he typical finding that the presumption of innocence is manifested in an even-handed 50-50 initial attitude toward guilt suggests an intriguing speculation. Perhaps the "quantity" of evidence required to convict a defendant of most criminal charges is less than expert and juror intuitions . . . imply. Rather than requiring "enough" evidence to move a juror from disbelief (close to 0%) to near certainty (over 90%), perhaps the typical "winning" prosecution case moves a juror from equivocal (50) to a strong, but not overwhelming, preponderance (about 65%).

Id. Professor Hastie suggests, however, that this conclusion must be regarded as speculative, as most studies have not used complex trial situations. *Id.*

197. *Id.* at 101-06.

198. *Id.* at 101-02.

199. *Id.*

200. *Id.*

ous researchers over several decades, and found responses in the 8 to 9 range to be common.²⁰¹

This method, however, has attracted scholarly criticism. Stuart Nagel of the University of Illinois faulted this method on two grounds.²⁰² First, it is not obvious that two subjects who say they require a probability of 8 out of 10 are saying the same thing; two people may have very different ideas of what a .8 probability means.²⁰³ There is a second reason as well:

Respondents tend to give answers which they consider socially proper, rather than responses that reflect their true values. Thus, respondents who are aware that the law expects a high guilt probability before a conviction will report that they personally require a high probability before they will vote to convict. That is not true of respondents who think the law expects a lower probability.²⁰⁴

In order to control for this phenomenon, a new method was developed known as the "indirect method."²⁰⁵ The subject of the survey is told that a juror can make four possible decisions: (a) he can convict a defendant who is truly guilty; (b) he can convict a defendant who is actually innocent; (c) he can acquit a defendant who is actually guilty; or (d) he can acquit a defendant who is truly innocent.²⁰⁶ Of these four choices, the subject is then asked which ones are undesirable. The subject usually chooses choices (b) and (c).²⁰⁷ When asked which is the more undesirable of the two, the subject usually chooses (b)—convicting an innocent man.²⁰⁸ The subject is then told to imagine that this option is placed at Point 100 on a continuum marking degrees of undesirability from 0 to 100.²⁰⁹ He is then asked where on this continuum he would place the other undesirable option—acquitting a guilty man.²¹⁰ As an example, let us assume the subject agrees with Blackstone that it is better that ten guilty men go free than to convict one innocent man.²¹¹ Thus, that person would believe that convicting

201. *Id.*

202. Stuart Nagel, *Bringing the Values of Jurors in Line With the Law*, 63 JUDICATURE 189, 191 (1979).

203. *Id.* at 191.

204. *Id.*

205. *Id.* at 191-92.

206. *Id.* at 191.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Hastie, *supra* note 189, at 102 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 358).

an innocent man is ten times worse than acquitting a guilty man. Therefore, he would position "acquitting a guilty man" merely at Point 10, as opposed to "convicting an innocent man" at Point 100.²¹²

Armed with this information, one can calculate a potential juror's "threshold probability for convicting."²¹³ The formula is $100/(100 + X)$, with "X" representing the value placed on the less undesirable option.²¹⁴ In our Blackstone hypothetical "X" equals "10."²¹⁵ Thus, $100/(100 + 10)$ is equal to $100/110$.²¹⁶ This equals .91.²¹⁷ In other words, a juror who agrees with Blackstone would need a probability of guilt greater than .91 before he could convict.²¹⁸

Hastie shows that studies utilizing this "indirect method" reflect a *much lower* "threshold probability for convicting" than the "direct method."²¹⁹ As Hastie's table indicates, the indirect method generally produces a "threshold probability for convicting" in the mid-50s, as opposed to the 80s usually found with the direct method.²²⁰ As noted above, a threshold probability of .91 means that a subject found the possibility of convicting an innocent man to be *ten times worse* than the possibility of acquitting a guilty man; that is, if convicting an innocent man is Point 100, then acquitting a guilty man is only Point 10.²²¹ Conversely, a potential juror with a "threshold probability for convicting" of .55—which is roughly the average in the studies cited by Hastie—would place "acquitting a guilty man" at approximately Point 82, while "convicting an innocent man" is at Point 100.²²² Thus, this latter potential juror sees "acquitting a guilty man" as being *almost as bad* as "convicting an innocent man." In other words, while Blackstone would let ten guilty men go free before convicting one innocent man, the average potential juror *would not even let two guilty men free* in this situation.

The "indirect method" thus indicates that, with a "threshold probability for convicting" of roughly .55, the average juror may indeed see "proof beyond a reasonable doubt" as being not much more than a

212. Nagel, *supra* note 202, at 191-93.

213. *Id.* at 191.

214. *Id.*

215. *Id.* at 191-92.

216. *Id.*

217. *Id.*

218. *Id.* at 192.

219. Hastie, *supra* note 189, at 106.

220. *Id.* at 102, 105.

221. *See supra*, notes 205-12 and accompanying text.

222. *See* Hastie, *supra* note 189, at 106.

criminal lawyer would call merely "preponderance of the evidence."²²³ Hastie summarizes the studies in this area by stating that "[r]ather than requiring 'enough' evidence to move a juror from disbelief (close to 0%) to near certainty (over 90%), perhaps the typical 'winning' prosecution case moves a juror from equivocal (50%) to a strong, but not overwhelming, preponderance (about 65%)."²²⁴

The criminal defense lawyer may wish to re-think her belief that the undefined phrase "beyond a reasonable doubt" means the same to her as it does to the jurors in her case. Faced with a growing body of empirical evidence, it would appear at best risky, and at worst foolish, to entrust the definition of "beyond a reasonable doubt" to the gut reactions of lay people. The empirical record shows why Illinois finds itself in the company of a dwindling number of jurisdictions that refuse to define reasonable doubt for the jury.

VI. ILLINOIS NEEDS TO ADOPT AN INSTRUCTION WHICH DEFINES THE CONCEPT OF "BEYOND A REASONABLE DOUBT"

As shown above, the phrase "beyond a reasonable doubt" is hardly a self-defining term.²²⁵ It cannot be properly understood without a jury instruction. It is time for the Illinois criminal justice system to accept the challenge of formulating such an instruction.

Although the literature is not unanimous on the utility of a reasonable doubt instruction,²²⁶ a study conducted by Stuart Nagel²²⁷ is very revealing. Nagel worked with a group of men and women simulating work as jurors on a rape case.²²⁸ He divided these mock jurors into four groups: (1) a group which received no instruction on the meaning

223. *Id.*

224. *Id.* at 106-07.

225. Indeed, one commentator has noted:

Probably the clearest illustration of how American courts obfuscate the law, for better or for worse, is in how they define the phrase "beyond a reasonable doubt." It is thought to be one of those terms of art. In a recent trial, jurors went home, looked the term up in a dictionary, and discussed its definition during deliberations the next day. For that, the jury's verdict was reversed by an appeals court.

SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 153 (1988).

226. Hastie, *supra* note 189, at 107-08. Research has shown that verbal instructions on the preponderance and reasonable doubt instruction have "surprisingly small effects on the decision criterion." *Id.* at 108. However, "instructions that refer to a numerical standard (e.g., an instruction to convict only if the probability of guilt is greater than .90) have substantial effects." *Id.*

227. Nagel, *supra* note 202, at 191.

228. *Id.* at 190 n.2.

of "beyond a reasonable doubt;" (2) a group which received a purely verbal instruction which simply used the words "beyond a reasonable doubt;" (3) a group which received an instruction that talked in terms of a .90 probability as the level of guilt required; and (4) a group which received a Blackstone-like instruction stressing that convicting an innocent person is ten times worse than acquitting a guilty person.²²⁹ Nagel's results showed that the more stringent the instruction was, the higher the "threshold probability for guilt" was for each group.²³⁰ Thus, the level of the instruction had a directly proportionate effect on how much evidence each juror required before returning a verdict of guilty.²³¹

A wide selection of possible "reasonable doubt" definitions is available.²³² Justice Ginsburg, in her concurring opinion in *Victor v. Nebraska*,²³³ cited a reasonable doubt instruction from the Federal Judicial Center which she characterized as "clear, straightforward, and accurate."²³⁴ That instruction reads:

[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.²³⁵

This same instruction was also recently endorsed by Judge Jon O. Newman, Chief Judge of the United States Court of Appeals for the Second Circuit.²³⁶

229. *Id.* at 194-95.

230. *Id.* at 195.

231. *Id.*

232. See, e.g., Diamond, *supra* note 38, at 1726 nn. 86-88.

233. 114 S. Ct. 1252 (1994) (Ginsburg, J., concurring).

234. *Victor*, 114 S. Ct. at 1253 (Ginsburg, J., concurring).

235. *Id.* (citing FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 17-18 (1987) (Instruction 21)).

236. Newman, *supra* note 2, at 991 n.55.

Such an instruction need not be mandatory in every criminal case. Illinois might choose to join those jurisdictions that leave the final choice of whether to define with the defense.²³⁷ Illinois should, however, at least allow each criminal defendant the option of having the jury instructed on this all-important, frequently misunderstood concept.

VII. CONCLUSION

No reasonable doubt instruction is perfect, but that does not mean that no attempt should be made to define it. Empirical evidence establishes that the failure to define reasonable doubt hurts only the defendant.²³⁸ In a nation where most citizens are more afraid of being victims of a crime rather than being unjustly accused of one,²³⁹ “proof beyond a reasonable doubt” does not possess the magical power many defense lawyers would like it to have.

There will never be a ground swell in Illinois to create a jury instruction defining reasonable doubt. Most trial judges are probably content with the current system of refusing to define it. They know they are safe from appellate scrutiny when, like the trial judge in the *Williams*²⁴⁰ case described in the Introduction,²⁴¹ they simply refuse to respond to a deliberating jury’s request for a definition of the term.²⁴² Prosecutors are also happy. The appellate courts in Illinois have found many pro-conviction, anti-defendant definitions of reasonable doubt used in prosecutors’ closing arguments to be either proper or, at worst, harmless error.²⁴³

The change will have to come from the defense bar in Illinois. Even though Illinois is one of the relatively few American jurisdictions which do not define reasonable doubt, the complacency surrounding this issue harms only one person in the courtroom—the defendant. The apparent willingness of the Illinois defense bar to rely on anecdotal, rather than empirical, evidence on this issue is disturbing. Reid Hastie has noted this general tendency among lawyers and law professors and has remarked: “It seems parochial to reject the findings from a sophisticated tradition of empirical analysis, to rely exclusively

237. See *supra* notes 81-87 and accompanying text for a list of jurisdictions that allow the defense the option of having the jury instructed on reasonable doubt.

238. See *supra* notes 223-24 and accompanying text.

239. See Nagel, *supra* note 202, at 192.

240. *People v. Williams*, 625 N.E.2d 144 (Ill. App. 1st Dist. 1994).

241. See *supra* notes 3-16 and accompanying text for a discussion of *Williams*.

242. *Williams*, 625 N.E.2d at 151.

243. See *supra* notes 172-81 and accompanying text.

on . . . intuitions . . . to reach conclusions about how jurors . . . perform."²⁴⁴ Change will come only when the Illinois defense bar begins to formulate reasonable doubt instructions and to ask trial courts to use them. The time to start is now.

244. Hastie, *supra* note 189, at 97.

