Reasonable and Other Doubts: The Problem of Jury Instructions

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REASONABLE AND OTHER DOUBTS: THE PROBLEM OF JURY INSTRUCTIONS

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The reasonable doubt standard is the central feature of our criminal justice system.1 This standard represents society's belief that no person should be convicted of a crime unless the factfinder is nearly certain of that person's guilt.2 It applies in all federal and state prosecutions as part of constitutional due process.3 Trial by jury is another key aspect of criminal cases.4 The same era that saw the reasonable doubt standard read into the due process clauses witnessed the federal jury trial guarantee of the Sixth Amendment applied to state criminal cases through the due process clause of the Fourteenth Amendment.5 Today, both the reasonable doubt standard and trial by jury are fashioned into the language of rights: a defendant's right to acquittal on evidence that leaves a reasonable doubt of guilt and a defendant's right to a trial by jury.

There is another, less obvious connection between these rights: the jury applies the reasonable doubt requirement.6 Thus, the jury—rather than the judge, the prosecutor, or the police officer—is the state actor charged with the duty of providing the right to acquittal on evidence that leaves reasonable

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1. All criminal cases are subject to the reasonable doubt requirement. In re Winship, 397 U.S. 358, 364 (1970). Numerous other decisions refer to the standard as a defining feature of criminal law. See Smith v. Butler, 696 F. Supp. 748, 751-52 (D. Mass. 1988) (explaining that its "importance . . . cannot be overemphasized"); Lansdowne v. State, 412 A.2d 88, 92 (Md. 1980) (stating that the standard is an "indispensable component of every criminal proceeding"). In Jackson v. Virginia, 443 U.S. 307 (1979), the Court described the reasonable doubt standard as "the decisive difference between criminal culpability and civil liability." Id. at 315. Other features of the criminal justice system, such as the right to a jury or incarceration as a penalty, are more limited in application. See, e.g., Baldwin v. New York, 399 U.S. 66, 68 (1970) (requiring no jury trial for petty criminal offense); New York Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 494-96 (1909) (applying criminal law principles to corporations even though imprisonment is not possible).
2. Winship, 397 U.S. at 363-64; see infra text accompanying notes 19-30.
3. Id. at 362.
5. Id. at 149-50; see infra text accompanying notes 38-41.
6. Although most cases do not even go to trial, concerns about meeting the reasonable doubt standard play a major role in prosecutorial decisions regarding dismissals or plea offers. Even under the heightened standard, these concerns affect defense decisions to plead guilty or otherwise resolve the matter without a trial.
doubt of guilt. Therefore, the two rights can be merged into one: due process guarantees that a defendant must be acquitted by the jury whenever the evidence leaves a reasonable doubt of guilt.

This merger is where the trouble begins. Most constitutional guarantees are enforced by judges who apply the law to pertinent facts, subject to appellate review. Judges, not juries, rule on questions of Fourth Amendment reasonableness, Sixth Amendment right to counsel, and Eighth Amendment cruel and unusual punishment. Relatively few factual questions considered by juries involve constitutional rights. When juries do consider such questions in civil cases, the stakes are rarely very high. However, in criminal prosecutions juries must use the reasonable doubt standard as a filter to sift the evidence and determine whether to acquit or convict.

The jury learns of the reasonable doubt standard through instructions from the judge. This learning method would not be problematic if the instructions effectively informed the jury of the meaning of reasonable doubt and the mechanics of its application. Jury instructions fail, however, for two reasons. First, in spite of a national constitutional standard that is theoretically uniform, there is an enormous range of instructions on reasonable doubt. Juries are given so many different and inconsistent explanations of reasonable doubt that anything resembling coherent application is simply inconceivable. When one jurisdiction takes an approach to explaining reasonable doubt that differs substantially from that taken by neighboring states, juries in that jurisdiction necessarily will evaluate the evidence from a different perspective than that used by juries in those surrounding states. In this area of law, there is not just a split among the circuits, there is a nationwide crazy quilt two layers deep—with state courts as well as federal circuits in profound disagreement.

The second reason jury instructions fail, according to studies of jury decision-making, is that the most commonly used instructions are poor

7. There are, of course, exceptions. For example, in civil rights suits, the effectiveness of juries has been controversial. "It has been suggested that plaintiffs in §1983 cases frequently do not want a jury trial because of a supposed jury bias in favor of public officials, and that defendants typically do want one for that very reason." 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION §1:16, at 24 & n.134 (1979) (citing Van Ermen v. Schmidt, 374 F. Supp. 1070, 1075 (W.D. Wis. 1974)); see also Robert J. Brookhiser, Comment, Monetary Claims Under Section 1983: The Right to Trial by Jury, 8 HARV. C.R.-C.L. L. REV. 613 (1973)). Civil suits, in general, present judges with more control over the fact-finding process through vehicles such as summary judgment and special verdicts. Another area in which juries are likely to consider the application of constitutional rights is in First Amendment defenses to defamation suits. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) (recognizing first amendment limits on libel actions by government officials); Herbert v. Lando, 441 U.S. 153, 169-77 (1979) (applying discovery rules to civil litigation applying the New York Times test); Milkovich v. Lorain Journal Co., 497 U.S. 1, 14-23 (1990) (describing constitutional aspects of libel law in remanding for trial).
vehicles for communicating with juries. Translating legal concepts into language a layperson can understand is more difficult than most judges or lawyers recognize. This statement is especially true of the reasonable doubt standard. Whatever discrepancies exist as a result of the different instructions on reasonable doubt increase exponentially because of the virtually universal problem of jury misunderstanding.

Experience with the reasonable doubt standard, as well as common sense, support the realist criticism that judges and academics overstate the importance of legal doctrine. Our modern and somewhat jaded “realistic” view is that jurors generally disregard the judge’s instructions and just do what they want to do. Judge Wald writes that “the reasonable doubt standard is essentially irrelevant to the everyday workings of the criminal justice system.” This irrelevance results not only from the use of guilty pleas and prosecutorial discretion, but also because juries do not apply the standard. For example, “few judges … believe that every jury slavishly and precisely follows the beyond-a-reasonable-doubt standard in deciding guilt or innocence.” Judge Wald’s connection to the realist view is cemented by her affirmation of Judge Frank’s comment that “were the full truth declared [sic] [as to what goes on in the jury room] it is doubtful whether more than one percent of verdicts could stand.”

One would expect that the legal community would be greatly concerned with the jury’s application of the reasonable doubt standard. However, the reaction has been something else entirely: only casual interest in the problem until recent years; poor leadership by the Supreme Court; a startling level of disagreement among lower courts, even on core issues; and a serious failure

8. Part IV.A addresses many of these jury studies. See infra notes 302-18 and accompanying text.


11. See id. at 102.

12. Id. at 111. This is intentionally ironic. The context establishes that Judge Wald is suggesting that juries rarely understand or try to apply reasonable doubt instructions.

13. Id. (quoting United States v. Farina, 184 F.2d 18, 21 (2d Cir. 1950) (Frank, J., dissenting)).
by courts or scholars to take the jury process seriously. In the law and the literature, there is a sense of numbness as courts throw up their hands at the intractability of the problem, and commentators deplore the law's response, which treats the reasonable doubt standard as an empty formality.

It is, however, one thing to recognize that translations of the standard for jurors will never be perfect and that juries will necessarily apply a range of standards to the evidence. It is another thing simply to surrender to incoherence about reasonable doubt. At a minimum, the legal system should work to lessen the inconsistency by seeking to reconcile the law of jury instructions with the reality of jury deliberations. This can best be done by identifying flaws in existing practices and by working to make instructions more conducive to jury understanding. After all, despite his unhappy belief in the inevitability that juries will disregard the law, Judge Frank railed against the hypocrisy of tolerating or praising jury lawlessness.

This Article attempts to isolate the elements of the reasonable doubt

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14. There have been several recent articles on the reasonable doubt standard. Many of them apparently were spurred by the Supreme Court's Cage-Sullivan-Victor trilogy of the early 1990s. See infra Part II.B. It may be significant that only one of the articles that I found to be particularly helpful was by a full-time law professor, see H. Richard Uviller, Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof, 2 CRIM. L.F. 1 (1990), and that article was nontraditional. Other articles have been written by judges, see e.g., Stephen J. Fortunato, Jr., Instructing on Reasonable Doubt After Victor v. Nebraska: A Trial Judge's Certain Thoughts on Certainty, 41 VILL. L. REV. 365, 368 n.18 (1996) (noting scholarly works on this issue); Jon O. Newman, Beyond "Reasonable Doubt," 68 N.Y.U. L. REV. 979 (1993); others by practitioners, e.g., Jessica N. Cohen, The Reasonable Doubt Jury Instruction: Giving Meaning to a Critical Concept, 22 AM. J. CRIM. L. 677 (1995); George M. Dery III, The Atrophying of the Reasonable Doubt Standard: The United States Supreme Court's Missed Opportunity in Victor v. Nebraska And its Implications in the Courtroom, 99 DICK. L. REV. 613 (1995); and still others by students, e.g., Henry A. Diamond, Note, Reasonable Doubt: To Define, or Not to Define, 90 COLUM. L. REV. 1716 (1990); Shelagh Kenney, Supreme Court Review, 85 J. CRIM. L. & CRIMINOLOGY 989 (1995); Thomas V. Mulrine, Comment, Reasonable Doubt: How in the World is it Defined?, 12 AM. U. INT'L L. & POL'Y 195 (1997); Matt Nichols, Note, Victor v. Nebraska: The "Reasonable Doubt" Dilemma, 73 N.C. L. REV. 1709 (1995). There are also many articles analyzing jury studies. See infra Part IV.A.

15. This is best evidenced by courts that have given up trying to explain reasonable doubt to juries. See infra Part III.D. It is also revealed in many judicial comments expressing dismay at the difficulty of explaining the concept of reasonable doubt.

16. See, e.g., Dery, supra note 14, at 620 (asserting that the standard has become a "thoughtless ritual"); Newman, supra note 14, at 980 (expressing concern that the standard is not taken seriously and that instructions have become "a mere incantation"); see also Jackson v. Virginia, 443 U.S. 307, 316-17 (1979) (stating that the standard is "more than . . . a trial ritual").

17. See FRANK, COURTS, supra note 9, at 132-35 (criticizing the acceptance of jury lawlessness); FRANK, MODERN MIND, supra note 9, at 170-85 (setting out the judge's theory of the jury).
dilemma and to suggest several changes to the instruction process. Part I lays out the problem, summarizing the basic principles of the reasonable doubt standard and the jury trial right and then describing the jury instruction process. Part II examines how the U.S. Supreme Court has addressed reasonable doubt instructions, both as a federal appellate court of review and as the primary interpreter of the Constitution. Part III organizes jury instructions into five categories that reflect the major approaches of reasonable doubt instructions. This lengthy section sets out the history, present use, and justification of each mode of instruction. While the intent is to let each approach make its best case, the effect is to underscore the profound differences among these approaches. These differences demonstrate the notion that juries are not applying the same reasonable doubt standard, despite uniform doctrine and superficial similarities.\(^{18}\)

Part IV suggests a process of rebuilding a better system of reasonable doubt instruction. Subpart IV.A. breaks from traditional sources of law to focus on jury studies in an attempt to understand the linguistic and procedural problems of the instruction process. Subpart IV.B. then addresses structural impediments to reform, focusing on the reasons for the legal system’s reluctance to improve instructions. Part V reexamines empirical and legal materials in an attempt to discover solutions. This section suggests a variety of ways to ameliorate the easier problems, such as language and procedures, but finds substantial difficulty in correcting the systemic problems. Part V concludes by recommending that the legal system repudiate the use of jury instructions to manipulate jurors or to serve mystical notions of “commonsense justice.” Furthermore, this section argues that we should acknowledge that juries need guidance concerning the meaning of the reasonable doubt standard. If we reach consensus on these matters, it should not be difficult to develop instructions that help secure the interdependent rights to a trial by a jury that rationally applies the reasonable doubt standard. Only by doing so can we avoid treating a set of jury instructions as a drive-by lecture of little lasting significance.

I. REASONABLE DOUBT AND JURIES

A. The Constitutional Status of the Reasonable Doubt Standard

The reasonable doubt standard has been a due process requirement since the Supreme Court decided *In re Winship*\(^ {19}\) in 1970. This decision arose from a juvenile delinquency proceeding in which the trial judge determined

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\(^{18}\) See Dery, *supra* note 14, at 615 (“A nebulous rule of law is problematic when applied by attorneys and jurists, trained legal professionals. When applied by those unschooled in the intricacies of criminal procedure, unclear legal principals [sic] may become complete nullities.”).

Winship’s guilt under a statutory scheme that used a preponderance of the evidence standard. Justice Brennan’s majority opinion touched on three themes in recognizing a due process right to the reasonable doubt standard of proof in all criminal cases: a long tradition of use among the states, a general assumption over time that the standard applies in criminal cases, and the important role that the standard plays in distributing the risks between the parties. The fact that the Court first considered this issue in a juvenile case attests to the dominance of the reasonable doubt standard: there was simply no opportunity for the Court to consider the issue in a traditional criminal case because both federal and state courts had adhered to the standard for many years. Justice Harlan’s concurring opinion provided the most cogent functional analysis:

The standard of proof influences the relative frequency of [the] two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent.

20. Id. at 360. Winship was charged as a juvenile delinquent under the New York Family Court Act. Id. at 359-60. That statute provided in pertinent part that delinquency determinations “must be based on a preponderance of the evidence.” Id. at 360 (citing N.Y. Family Court Act § 744(b) (1963)). The issue of the appropriate standard of proof was neatly before the Court because the trial judge’s conclusion suggested that the case was proven by a preponderance but not beyond a reasonable doubt. Id. at 360 & n.2.

21. Id. at 361.

22. Id. at 362-64.

23. Id. at 364; see also Addington v. Texas, 441 U.S. 418, 423-24 (1979) (explaining that almost all risk of error is on the prosecution in criminal cases); Patterson v. New York, 432 U.S. 197, 211 (1977) (“Long before Winship, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt.”).

24. Even though there was no specific bill of rights provision to incorporate, Winship stands as a standard selective incorporation decision. The common law tradition was elevated to constitutional status by the Court’s recognition of the value of the reasonable doubt standard for ensuring the fairness required by the due process clauses. Winship, 397 U.S. at 364. As this type of analysis would suggest, Justice Harlan concurred, id. at 368, while Justice Black dissented, id. at 377. Justice Black’s dissent contained his standard argument against constitutionalizing nontextual rights. See id. at 377-86. Justice Harlan’s concurring opinion emphasized the policies that make the reasonable doubt standard appropriate in criminal cases. See id. at 368-75. Chief Justice Burger and Justice Stewart both dissented for reasons that relate to the juvenile justice system rather than to the propriety of the reasonable doubt standard generally. See id. at 375-76.

This risk analysis long pre-dates Winship. In 1895 the Court relied on Blackstone's statement that "the law holds that it is better that ten guilty persons escape than that one innocent suffer."26 A modern version is Justice Harlan's assertion of a "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."27

As in most other constitutional criminal procedure cases of the period, the question before the Winship Court was straightforward: does the Constitution compel the use of the reasonable doubt standard?28 If it does, then New York's juvenile justice system was unconstitutional. If it does not, then the system would stand. Thus, the Court had no need to elaborate on the meaning of reasonable doubt.29 To the extent the Court addressed this matter, it reasoned that the standard prevents the government from finding a person guilty "without convincing a proper factfinder . . . with utmost certainty."30

The Court again addressed the reasonable doubt standard nine years later when it decided Jackson v. Virginia.31 The Court expanded on Winship by requiring that the evidence at trial be sufficient to support a verdict under the reasonable doubt standard.32 The rationale of the Jackson decision is logical:

27. Winship, 397 U.S. at 372 (Harlan, J., concurring); see also Patterson, 432 U.S. at 208 (describing the same concept).
28. Many of the Court's cases of this era addressed whether a particular Bill of Rights provision should apply to the states. The basic trial by jury case, Duncan v. Louisiana, 391 U.S. 145 (1968), was one such case. See infra notes 38-41 and accompanying text. Later cases presented more difficult problems of interpretation and application. See generally Robert C. Power, Affirmative Action and Judicial Incoherence, 55 OHIO ST. L.J. 79 (1994) (explaining the transition from simple to complex criminal procedure cases). In one sense Winship ushered in the new era; it presented a straightforward "yes/no" question, but required the Court to delve below the surface of the right to a criminal trial to decide how such a trial differs from other hearings.
29. See Winship, 397 U.S. at 359.
30. Id. at 364. The Court also quoted a description of the standard as "a subjective state of certitude." Id. (citing Norman Dorsen & Daniel A. Resnick, In Re Gault and the Future of Juvenile Law, 1 FAM. L.Q. 1, 26 (1967)). Similarly, Judge Fortunato concludes that the reasonable doubt standard has three component parts: a subjective mental state, of near certainty, based on the evidence. Fortunato, supra note 14, at 407. He characterizes reasonable doubt as "an internal disposition," a result rather than a cause. Id. at 417. Professor Uviller describes the standard as requiring certainty, discounted by the fact that "few things are absolutely certain to everyone." Uviller, supra note 14, at 34. Therefore the standard allows conviction despite the sort of doubt that reflects a "sense of incompleteness." Id.
31. 443 U.S. 307 (1979). Jackson challenged the sufficiency of the evidence after he was found guilty of murder in a bench trial. Id. at 311-12. The question before the Court was the appropriate standard for habeas corpus review of the sufficiency of the evidence. Id. at 312-13. Therefore, the Court had to determine "whether there was sufficient evidence to justify a rational trier of the facts to find guilt beyond a reasonable doubt." Id. at 313.
32. Id. at 318.
unless the Winship principle is to be a legal fiction, it must include a right not to be convicted in the absence of a rational application of the reasonable doubt standard to the evidence presented at trial. Other decisions have confirmed this basic concept: due process is violated unless the prosecution proves each element of the offense beyond a reasonable doubt. The Jackson decision made this concept enforceable by establishing meaningful appellate review of the evidence introduced at trial. The Jackson court also made a minor adjustment in the meaning of the standard, requiring that the factfinder have "a subjective state of near certitude" to return a guilty verdict. This understanding has prevailed.

B. The Right to Trial by Jury

The Sixth Amendment guarantees criminal defendants a right to trial by jury. The Supreme Court recognized that this right extended to defendants in state criminal cases in Duncan v. Louisiana. Duncan was a straightforward selective incorporation decision in which the Court relied on historical practices and fairness concerns to determine that states must offer jury trials as part of due process. Jury trials were provided as part of the constitutional scheme "to prevent oppression by the Government." The community, not the legal profession, was to be responsible for determining the facts in criminal cases.

The Court has been somewhat more forthcoming about the parameters of the jury trial right than it has concerning reasonable doubt. This disparity

34. Jackson, 443 U.S. at 318-19. The standard is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Id. at 318.
35. Id. at 315. In both Winship and Jackson the explanation of the reasonable doubt standard's meaning is unnecessary to the holding.
37. U.S. CONST. amend. VI.
39. Id. at 151-58. Duncan was perhaps the classic incorporation decision. It is commonly used in criminal procedure casebooks to illustrate the several theories by which Bill of Rights provisions are deemed applicable to the states. See, e.g., RONALD J. ALLEN & RICHARD B. KUHNS, CONSTITUTIONAL CRIMINAL PROCEDURE 79-93 (2d ed. 1991); STEPHEN A. SALTBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 8-14 (5th ed. 1996); see also Power, supra note 28, at 143 & n.236 (describing the theories and opinions).
40. Duncan, 391 U.S. at 155 & n.23.
41. Notably, the Court held that the right to a jury trial may be waived. Patton v. United States, 281 U.S. 276, 298 (1930).
results from state experiments with the jury system that have involved reducing the size of juries, dropping unanimity requirements for verdicts, and limiting the scope of the right to a jury trial. These experiments have provided the Court with ample opportunity to examine the requirements of the jury trial right. In a series of cases, the Court determined that a jury trial means a deliberative process by a group selected from the community, exercising their common sense.

If judges served as factfinders at all criminal trials, it would be their understanding of the reasonable doubt standard that mattered. But the right to a jury trial means that juries, not judges, are the factfinders in many cases that go to trial. The combination of the two rights means that a defendant must have a right to a jury that applies the reasonable doubt standard in finding the facts. The circle is completed when Jackson is considered: a defendant is entitled to a jury that applies the reasonable doubt standard in a rational fashion, fairly and responsibly reviewing the evidence and returning a guilty verdict only if convinced to a near certainty of the defendant's guilt.

C. Jury Instructions

Jury instructions are central to criminal and civil jury trials. Jurors can weigh the evidence and find the facts. But in order to render a decision based on that evidence and those facts, they must first apply the law. They learn the law through the judge's instructions. A common example of a jury charge is found in Federal Jury Practice and Instructions (Devitt & Blackmar), a collection of jury instructions.


43. E.g., Ballew v. Georgia, 435 U.S. 223, 229 (1978); Williams, 399 U.S. at 100.

44. In fiscal year 1996, 801 federal defendants received bench trials and 4,175 received jury trials. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1996, 468 tbl.5:48 (1997). In calendar year 1994, there were 51,860 state criminal jury trials and 46,973 state criminal bench trials. Id. at 471 tbl.5:52. The previous year, 949 federal criminal defendants had bench trials, compared to 3,816 jury trials. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, 495 tbl.5:43 (1996). Also that year, there were 35,376 state criminal bench trials and 37,543 state criminal jury trials. Id. at 498 tbl.5:47.

45. EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS (4th ed. 1992) [hereinafter DEVITT & BLACKMAR]. Although there are additional collections and many states and circuits publish their own instructions, this collection and its earlier versions have been routinely cited for decades in almost all courts.
Members of the Jury:

Now that you have heard all of the evidence to be received in this trial and each of the arguments of counsel it becomes my duty to give you the final instructions of the Court as to the law that is applicable to this case and which will guide you in your decisions.

All of the instructions of law given to you by the Court—those given to you at the beginning of the trial, those given to you during the trial, and these final instructions—must guide and govern your deliberations.

It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them from the evidence received during the trial. 46

At one time judges "told the jury about the law in frank, natural language," 47 apparently using their own words and understanding. In theory, both the law and the instructions were sufficiently clear to prevent jury misunderstanding from becoming a serious problem. Over time, however, the adversary process created new problems as each side prepared and requested specific instructions, and trial judges, like diners at a buffet table, selected "correct" descriptions of the law from the requests. 48 One consequence was that juries were given longer, less understandable instructions. Another was the infusion of issues for appeal. Reformers called for "pre-endorsed pattern instructions," which would be mandated or recommended for use in all cases. 49 Presumably, these instructions would be immune from appellate challenge and would help trial judges avoid having to select from the self-serving and potentially erroneous instructions submitted by attorneys. Today, such pattern instructions dominate the legal landscape. 50

Meeting the rational jury verdict requirement logically depends on jury instructions that accurately communicate the meaning of the reasonable doubt standard. Presumably, if that were achieved by a judge mouthing nonsensical incantations to the jury, the requirement would be satisfied, even if the lawyers knew that the judge's instructions were legally flawed. On the other hand, if a totally accurate, seamless, coherent, and grammatically correct instruction had no impact on the jury, the standard would not be satisfied. Of course, common

46. Id. § 12.01, at 324-25.
47. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 399 (2d ed. 1985).
48. Id.; see also AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 7 (1982).
49. Id. at 7-8; see J. Clark Kelso, Final Report of the Blue Ribbon Commission on Jury System Improvement, 47 HASTINGS L.J. 1433, 1511-12 (1996). See generally ROBERT G. NIELAND, PATTERN JURY INSTRUCTIONS (1979) (analyzing the modern changes in the jury system). The terms "pattern" and "model" are used interchangeably in this Article.
50. See J. Alexander Tanford, The Law and Psychology of Jury Instructions, 69 NEB. L. REV. 71, 74 (1990) ("In almost every jurisdiction, charging instructions now come exclusively from books of approved pattern jury instructions."). As of 1980, pattern jury instructions were available in 43 states. Id. at 74 n.15 (citing NIELAND, supra note 49, at 10). Several federal circuits also have their own pattern instructions. See infra notes 101, 179, 182-83, 185, 187.
sense tells us that juries are probably more likely to reach the right result if instructions include accurate advice about the law. Pattern instructions and appellate case law ideally should represent consensus on how to translate “beyond a reasonable doubt” into a form suitable for jury understanding.

In reality, pattern reasonable doubt instructions are not effective in communicating with juries. There are a number of different patterns and each communicates a different message about reasonable doubt. Moreover, since many pattern instructions are only recommended, many judges continue to give individualized instructions.

Perhaps of most significance is the enormous skepticism about jury instructions in general. For example, H. Richard Uviller argues:

[T]he judge fills the jurors' heads with a host of aphorisms so familiar they issue from the bench without much fresh judicial thought and pass without notice by the lawyers. Many of these instructions, however, sound strange to jurors. Some are contrary to that “common sense” they were advised to consult.51

Similarly, Jeffrey Abramson explains:

[M]odern jury procedures mask a charade: we have judges go through the motions of instructing jurors on the law and tell them they must abide by the instructions, but we suspect that jurors do not fathom the instructions and fall back on their own gut reactions or common sense in deciding how the case should come out.52

In short, instructions often are meaningless and are likely to be treated as such by juries.

Inadequate reasonable doubt jury instructions present a constitutional dilemma. Guilty verdicts that result from jury misunderstanding of the reasonable doubt standard are unconstitutional. Criminal defendants are entitled to a rational application of that standard to the evidence presented at trial. If the instructions do not coherently explain the concept of the heightened standard of proof, there is no way to know whether the defendant has received a fair trial.

II. REASONABLE DOUBT INSTRUCTIONS IN THE SUPREME COURT

A. The Federal History

Before Winship, the Supreme Court upheld a variety of instructions on reasonable doubt, often without extensive or even helpful analysis.53
Court recognized two longstanding approaches to explaining reasonable doubt—the analogy approach and the “moral certainty” approach. However, the two cases commonly cited today, *Hopt v. Utah* and *Holland v. United States*, support only the analogy approach.

In *Hopt*, the trial court had stressed reasonableness and impartial consideration of the evidence as it instructed the jury. The instructions ended with a two-part mandate: the jury should not convict in the absence of “an abiding conviction of the defendant’s guilt, such as [the members of the jury] would be willing to act upon in the more weighty and important matters relating to [their] own affairs.” On review, the Supreme Court was unenthusiastic about the trial court’s explaining the concept reasonable doubt at all; nevertheless, it interpreted the words “abiding conviction” in this context to mean “settled and fixed” but noted the impossibility of total certainty about guilt. The Court was more approving of the analogy portion of the charge, noting that illustrations are more helpful than definitions. Through this discussion, the Court validated the use of analogy in the reasonable doubt instructions in the federal courts.

The same viewpoint again prevailed when the Supreme Court decided *Holland* in 1954. In this case, the trial court judge had instructed the jury that a *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.” In commenting on the garbled presentation by the trial judge, the Court restated its view that explanations of reasonable doubt are rarely helpful. Nonetheless, it upheld the conviction, concluding that reasonable

218 U.S. 245, 253-54 (1910); Miles v. United States, 103 U.S. 304, 312 (1880).
54. See, e.g., *Wilson*, 232 U.S. at 569-70 (discussing both analogy and moral certainty);
55. *Holt*, 218 U.S. at 253-54 (analogy); *Miles*, 103 U.S. at 312 (moral certainty).
56. 120 U.S. 430 (1887). This was an appeal of a murder conviction from the Utah territory. *Id.* at 431-32.
57. *Hopt*, 120 U.S. at 439. Many instructions include similar language. Such comments are rarely controversial, usually meaningless, and not the focus of this Article.
58. *Id.*
59. *Id.* One commentator argues that *Hopt* reveals the Court’s “internal inconsistency” regarding reasonable doubt, pointing out the Court’s suggestion that the standard is simple and straightforward to jurors yet confusing once judges try to explain it. Dery, supra note 14, at 617-18. This problem perplexes courts today and leads to the inconsistent views that fairness is served both by requiring and by prohibiting explanatory instructions.
60. 120 U.S. at 441.
61. 348 U.S. at 140. The issue concerning the analogy instruction had not even been raised below.
62. *Id.*
63. *Id.*
doubt instructions generally are appropriate.\textsuperscript{64}

While these cases focus on the analogy approach, other largely forgotten cases address the moral certainty approach. For example, in a federal bigamy case several years before \textit{Hopt}, the Supreme Court upheld the then-common instruction that "[p]roof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists."\textsuperscript{65} Although the Court noted its concern about definitions of reasonable doubt, it refused to find error, describing the moral certainty formulation as "certainly very favorable to the accused, and \ldots sustained by respectable authority."\textsuperscript{66} Still, the Court has never been comfortable with the moral certainty approach. In \textit{Hopt}, the Court found that "the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt;' one may require explanation as much as the other."\textsuperscript{67} But this approach was never held to be error. It was used in instructions later upheld by the Court and has a long history in state criminal cases.\textsuperscript{68} Because the Court's approval of the analogy approach came in a territorial appeal (\textit{Hopt}) and a one-paragraph comment on a side issue (\textit{Holland}), it is not surprising that the federal courts have not developed a uniform approach to explaining reasonable doubt.

**B. Implementing the Constitutional Requirement**

\textit{Winship} did not trigger an explosion of due process cases examining the contours of reasonable doubt; all of the states already used the standard in criminal cases.\textsuperscript{69} Occasionally a related issue would arise, such as whether due process requires an instruction on presumption of innocence.\textsuperscript{70} However, in 1990 the Court began considering a series of cases that immersed it in the technical details of lengthy reasonable doubt instructions.

The first case, \textit{Cage v. Louisiana},\textsuperscript{71} ended in a deceptively straightforward

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} Miles v. United States, 103 U.S. 304, 309 (1880).

\textsuperscript{66} \textit{Id.} at 312 (citing Commonwealth v. Webster, 5 Mass. 295, 319-20 (1850) and cases from five other jurisdictions); \textit{see infra} text accompanying note 104. Later decisions also accept the moral certainty approach, finding it to be pro-defendant. \textit{E.g.}, Wilson v. United States, 232 U.S. 563, 570 (1914); Perovich v. United States, 205 U.S. 86, 92 (1907); Agnew v. United States, 165 U.S. 36, 51 (1897).

\textsuperscript{67} \textit{Hopt v. Utah}, 120 U.S. 430, 440 (1887).

\textsuperscript{68} \textit{See infra} Part III.A.

\textsuperscript{69} The direct effect of the decision was to force those states, such as New York, with an inconsistent juvenile justice system, to adopt the higher standard of proof. Notably, there is no role for jury instructions in juvenile cases because juvenile cases are tried by judges rather than by juries.


\textsuperscript{71} 498 U.S. 39 (1990) (per curiam).
decision. Without full briefing or oral argument, the Court overturned a criminal conviction on the basis of the reasonable doubt instruction. The opinion set out the language of the instructions, emphasizing three of the lower court’s statements: “It must be such doubt as would give rise to a grave uncertainty, ... It is an actual substantial doubt ... What is required is ... a moral certainty.”

Convinced that the first two phrases overstated reasonable doubt and that “moral certainty” differed from the required “evidentiary certainty,” the Court struck down the conviction.

The decision in Cage opened the door to a raft of challenges to reasonable doubt jury instructions. This trend accelerated after 1993, when the Supreme Court decided Sullivan v. Louisiana. In this case, the Court considered whether instructions similar to those struck down in Cage could be deemed harmless error. Distinguishing between this and other jury instruction issues, Justice Scalia’s majority opinion reasoned that a burden of proof instruction permitting conviction on less than proof beyond a reasonable doubt denies the constitutional right to a jury trial. Such an error is a basic structural defect in the underlying criminal case and therefore cannot be deemed harmless. This reasoning underscores the relationship between the constitutional rights to the reasonable doubt standard and to a trial by jury.

Less than a year after Sullivan, the Court retreated in substance, but perhaps not in form, when it decided Victor v. Nebraska. In this decision,
the Court confronted two cases, one from Nebraska and another from California, dealing with jury instructions on reasonable doubt. The California instructions had warned jurors not to acquit on "a mere possible doubt" but had permitted conviction if the jurors "feel[It] an abiding conviction, to a moral certainty" of guilt. The Nebraska instructions had used the "moral certainty" language, as well as language similar to that struck down in Cage: "A reasonable doubt is an actual and substantial doubt." The Court began its opinion by noting the requirements and limits of Winship: "[T]he Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course." Justice O'Connor's painstaking opinion separately analyzed each alleged defect. Thebulk of her moral certainty analysis traced the history and meaning of the phrase, ultimately concluding that it retained enough of its original meaning not to understate the prosecution's burden of proof. After analyzing its use in the California case and its connection with "abiding conviction," the Court concluded that the moral certainty language is consistent with due process but would not "condone" its use. Justice O'Connor emphasized other failings of the instructions in her discussion of the Nebraska case. She deemed the use of "substantial" doubt to be acceptable because of its context within the instructions; the trial court had used the phrase to distinguish reasonable doubt "from mere possibility, from bare imagination, or from fanciful conjecture." Thus, Justice O'Connor treated "substantial" as a reference to a doubt's existence rather than to its size.

Many aspects of the Victor opinion have been challenged. Most commentators have harshly criticized the Court's attempt to distinguish Cage

81. Victor, 511 U.S. at 7 (quoting Sandoval App. No. 92-9049 at 49) (emphasis added by the Court).
82. Id. at 18 (quoting Victor App. No. 92-8894 at 11) (emphasis added by the Court).
83. Id. at 5. Citing Jackson, Taylor and Holland, the Court explained that the jury must learn of the reasonable doubt standard, but no "particular form of words" is required, and that instructions will be evaluated as a whole. Id.
84. See generally id. Arguably, the Court limited the guidance the case provides by structuring the opinion as a series of reactions to individual statements in the instructions. See Dery, supra note 14, at 627.
86. Id. at 16. One ramification of this approach is that, in light of the changing meaning of the phrase over time, the Court could change its direction and find the use of moral certainty to be reversible error in all cases.
87. Id. at 17-23.
88. Id. at 20.
89. Id. at 20 (Nebraska portion).
90. Id. at 20-21. The Court similarly treated the trial court's use of "strong probabilities" in the reasonable doubt instructions. Id. at 22. The moral certainty discussion in Victor largely follows the Sandoval portion of the opinion—the use of moral certainty in the context of an abiding conviction prevents it from being misinterpreted by the jury. Id. at 21-22.
on the "substantial doubt" issue. Scholars also have questioned the Court's tolerance of the moral certainty language and its treatment of the troublesome phrase "abiding conviction" as a talisman for upholding convictions. The message and method of Victor were oddly inconsistent. The language of the decision emphasized contextual review, but the Court examined individual words and phrases in isolation, without considering the jurors who must understand and apply them. As a result, the Victor opinion not only is unconvincing on its own terms, but also is inadequately distinguished from Cage.

Justice Ginsburg's concurring opinion provides an important analysis. First, it criticized the analogy formulation that had been widely used after Holland. Second, it recommended the use of the Federal Judicial Center's pattern instruction on reasonable doubt. This instruction, which was ignored by the majority throughout the Cage-Sullivan-Victor trilogy, now plays a larger role in reasonable doubt case law.

Such is the landscape of the Supreme Court's discussion of reasonable doubt instructions: a handful of opinions, decided over a period of nearly a hundred years, with remarkably little analysis of the specifics of reasonable doubt instructions or their effects on juries. From these decisions, the most

91. E.g., Fortunato, supra note 14, at 382-83 (finding no "articulable and principled bases" for this conclusion); Kenney, supra note 14, at 1017 & n.230 (noting that the Court merely assumes that the jury understands the distinction drawn by the Court).

92. E.g., Kenney, supra note 14, at 1013-14 (stating that insufficient weight was given to the change in meaning of the phrases over time); Mulrine, supra note 14, at 207-08 & n.91 (asserting that, although legally acceptable, such "instructions may be incomprehensible to the average juror").

93. Fortunato, supra note 14, at 383-84. "Abiding" may be too old-fashioned of a term to effectively communicate with the jury, and "conviction" may be misconstrued as a reference to a finding of guilt. Judge Fortunato implies that the Court intentionally manipulated the reasonable doubt doctrine to support anti-crime concerns. Id. at 400.


95. See generally id.

96. See Dery, supra note 14, at 616 (explaining how Victor "deepened the existing disorder with an opinion that fragmented issues and provided only reactive reasoning"); Kenney, supra note 14, at 990 (concluding that Victor limited Cage to its facts); Nichols, supra note 14, at 1734-36 (arguing that Victor provides a contextual paradox by looking to language as a whole, but ignoring jury understanding).


98. Id. at 24-26; see supra text accompanying notes 61-62; see also infra Part III.B. for a general discussion of the analogy approach.

99. Victor, 511 U.S. at 26-27; see Federal Judicial Center, Pattern Criminal Jury Instructions 28-29 (1988) (instruction 21) [hereinafter FJC INSTRUCTION]. There were two other opinions: Justice Kennedy issued a concurring opinion, Victor, 511 U.S. at 23, and Justice Blackmun, joined by Justice Souter, concurred with the majority's analysis in Sandoval, but disagreed with its analysis in Victor, id. at 28-38.

100. See infra Part III.C.
noteworthy themes are a preference for the analogy approach and hesitation about moral certainty. Overall, the Court has been remarkably tentative in its oversight of what theoretically is a uniform national minimum standard.

III. REASONABLE DOUBT INSTRUCTIONS IN STATE AND LOWER FEDERAL COURTS

Trial courts have used reasonable doubt instructions that vary widely in length. Short instructions add little, if anything, to a statement that the prosecution has the burden of proving its case beyond a reasonable doubt. Conversely, lengthy instructions often contain a hodgepodge of descriptive approaches and are sometimes encrusted with repetitious or meaningless surplus phrases, most of which are noncontroversial.101

This Part identifies five categories of reasonable doubt instructions that reflect the prevailing views of trial and appellate courts today. The categories are (1) moral certainty, (2) analogy to private life, (3) the Federal Judicial Center model, (4) “say nothing,” and (5) “say everything.”

A. The Lingering Death of the Moral Certainty Approach

1. The History and Problematic Meaning of Moral Certainty

The Supreme Court did not reject the “moral certainty” approach in Cage.102 However, Cage represents the long-term decline in the use of moral certainty instructions.103 Yet moral certainty was probably the dominant

101. If all of the fairly meaningless or noncontroversial phrases were analyzed, the categories of reasonable doubt instructions would grow to more than a dozen. Here are three examples of such instructions. First, a "reasonable doubt . . . is a doubt for which you can give a reason." State v. Moss, 456 A.2d 274, 276 (Conn. 1983); see also 1 CRIMINAL JURY INSTRUCTIONS (NY) § 3.07 (1983). This instruction was upheld in dicta in Jackson v. Virginia, 443 U.S. 307, 317 & n.9 (1979). Second, "[t]he presumption of innocence alone may be sufficient to raise a reasonable doubt and to require the acquittal of a defendant." FIRST CIRCUIT COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, PATTERN JURY INSTRUCTIONS 3.02 (1998). Finally, "[i]f the jury views the evidence in the case as reasonably permitting either of two conclusions—one of innocence, the other of guilt—the jury should of course adopt the conclusion of innocence." EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 11.14 at 311 (3d ed. 1977) [hereinafter DEVITT & BLACKMAR (3d ed.). This Article only addresses such instructions to the extent they are considered by courts in the course of evaluating one or more of the five categories of instructions.

102. See supra text accompanying notes 71-74.

103. See also Victor, 511 U.S. at 10-17, 21-22 (offering less-than-faint praise for the moral certainty approach). The moral certainty approach is barely mentioned in some of the recent law review articles on reasonable doubt. For example, Cohen, supra note 14, Newman, supra note 14, and a Note, Reasonable Doubt: An Argument Against Definition, 108 HARV. L. REV.
approach in the states until recently.

The classic statement of the moral certainty approach is found in a jury charge by Massachusetts Supreme Judicial Court Chief Justice Lemuel Shaw:

[W]hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing 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 jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt.104

This elegant but somewhat obscure description was not always given in its entirety. However, the language relating to “moral certainty” was widely adopted.105

The history of the moral certainty instruction is not entirely clear. Barbara J. Shapiro, a scholar of rhetoric, asserts that Chief Justice Shaw used well-established principles of the mid-nineteenth century philosophy of knowledge in his Webster charge.106 The reasonable doubt standard had been evolving at least since the late 1700s, as the common understanding of knowledge slowly shifted from faith-based certainty to more modern conceptions of fact and proof.107 Thus, even if the 1850 Webster charge was

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1955 (1995), all make only passing reference to the moral certainty approach. This omission is particularly noteworthy because all were published close in time to Victor.

105. See, e.g., infra notes 109-14 (citing cases).
106. Barbara J. Shapiro, “To a Moral Certainty”: Theories of Knowledge and Anglo-American Juries 1600-1850, 38 HASTINGS L.J. 153, 174-75 (1986). Professor Shapiro points out that “[t]he addition of the concept of moral certainty reflected the desire to make legal language consistent with the philosophical terminology of the day.” Id. at 175. The Court relies on this article by Shapiro in Victor. Victor v. Nebraska, 511 U.S. 1, 11 (1994).
107. Shapiro, supra note 106, at 170-75. While earlier uses of reasonable doubt in jury instructions may have been lost due to the casual record keeping of courts of the time, it is clear that the standard was used in some cases of the late 1700s, including the Boston Massacre trials, and was well-established in the states by the late 1800s. Anthony A. Morano, A Reexamination
in fact the first use of "moral certainty" to explain the reasonable doubt standard,\textsuperscript{108} it simply applied an understandable philosophical term to an established legal standard.

At least seven more states adopted the moral certainty approach in the 1800s.\textsuperscript{109} Over time, a number of other states have adopted the approach.\textsuperscript{110} Even in states that never adopted the moral certainty approach, trial judges occasionally offered the phrase in their instructions.\textsuperscript{111} Legal treatises also supported the use of moral certainty to explain reasonable doubt.\textsuperscript{112} The final step in the widespread adoption of the moral certainty approach occurred in the movement toward pattern instructions, which tend to freeze instructions into the approach used at the time of codification. For example, the \textit{Webster} formulation was never mandated by the California Supreme Court; rather, the court recommended the use of moral certainty over a long period of time, during which it reviewed convictions based on individually crafted instructions.\textsuperscript{113} Then, in 1927, a law reform commission called for legislative adoption of a uniform approach, which resulted in a statutory mandate to use the \textit{Webster} instruction.\textsuperscript{114}

If juries understand that moral certainty has the same meaning as beyond a reasonable doubt, then the \textit{Webster} formulation should cause no problem.\textsuperscript{115}

\begin{verse}
of the Development of the Reasonable Doubt Rule, 55 B.U. L. Rev. 507, 516-19 (1975); see also Shapiro, supra note 106, at 171-75 (discussing Irish treason trials and various United States, Canadian, and English trials).
\end{verse}

\textsuperscript{108} It seems more likely that this was simply the first set of instructions set down in a generally available reporter. Nothing in the reporter indicates that the use of moral certainty is "new" or "improved" or otherwise unusual. See \textit{Webster}, 5 Mass. at 319-20.

\textsuperscript{109} Morano, supra note 107, at 523 & n.120 (noting that courts in California, Georgia, Illinois, Iowa, Nebraska, New Jersey, and Ohio adopted the moral certainty approach).


\textsuperscript{111} See, e.g., Lambert v. State, 69 A.2d 461, 464 (Md. 1949) (not discussing the trial court's use of a moral certainty charge); Commonwealth v. Banks, 311 A.2d 576, 581 (Pa. 1973) (giving a moral certainty charge despite contrary case law). While no federal courts recommend the use of moral certainty, it has been approved in many federal decisions. See, e.g., United States v. Jacobs, 44 F.3d 1219, 1225-26 (3d Cir. 1995) (finding moral certainty instructions did not violate due process); United States v. Lawson, 507 F.2d 433, 441 (7th Cir. 1974) (allowing the use of moral certainty when supported by acceptable authority); United States v. Smaldone, 485 F.2d 1333, 1348 (10th Cir. 1973) (concluding that moral certainty aids jury understanding).

\textsuperscript{112} See, e.g., V.R.M. GATTIE, WILL'S PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE 8, 320 (7th ed. 1937); THOMAS STARKIE, LAW OF EVIDENCE 861 (10th ed. 1876).

\textsuperscript{113} People v. Brigham, 599 P.2d 100, 106-07 (Cal. 1979) (Mosk, J., concurring).

\textsuperscript{114} Id. at 107. This statute also prohibited other instructions on the subject. Id.

\textsuperscript{115} Some courts have simply accepted this synonymous meanings argument with little critical analysis. See, e.g., People v. Fox, 423 N.Y.S.2d 171, 172 (N.Y. App. Div. 1980). Of
The concept of moral certainty developed because philosophers after 1600 were more troubled by human or moral evidence than by scientific evidence.\textsuperscript{116} They recognized that absolute knowledge based on moral evidence was impossible.\textsuperscript{117} Therefore, the concept of moral certainty provided the highest degree of conviction possible from human, and necessarily fallible, sources.\textsuperscript{118} Moral evidence can lead to no greater level of confidence than moral certainty. Careful scrutiny of the \textit{Webster} charge suggests that this was Chief Justice Shaw's intended meaning.\textsuperscript{119} The instruction describes reasonable doubt as "that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."\textsuperscript{120} Thus, the jury may convict only if it has great confidence in the truth of the allegations. That confidence must be based on an examination of the evidence, applying the same underlying principles as \textit{Winship}.\textsuperscript{121} This formulation is the present understanding of moral certainty,\textsuperscript{122} and many courts permit the instruction where moral certainty is used as a descriptive term to clarify the need for the jury to be strongly convinced of the defendant's guilt based on the proof at trial.\textsuperscript{123}

To the casual observer, the concept of moral evidence might seem to be the more problematic aspect of \textit{Webster}.\textsuperscript{124} However, the Supreme Court in course, this argument raises a different problem. Even if lawyers agreed on the instruction's meaning, it would not serve the intended purpose unless jurors shared that understanding.

\textsuperscript{116} See Shapiro, supra note 106, at 155-62.

\textsuperscript{117} See id.

\textsuperscript{118} See generally Victor v. Nebraska, 511 U.S. 1, 10-12 (1994) (citing a 1790 lecture by Supreme Court Justice James Wilson and the Greenleaf Evidence Treatise). Shifting the perspective slightly may make understanding easier. It is impossible to learn about past events with perfect knowledge, or without some possibility of distortion. Accordingly, factfinders can be convinced only to some degree of certainty. C.M.A. McCauliff, \textit{Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?}, 35 VAND. L. REV. 1293, 1295-96 (1982). The standard of proof establishes the appropriate degree of certainty. \textit{Id}.

\textsuperscript{119} See Commonwealth v. Webster, 5 Mass. 295, 320 (1850).

\textsuperscript{120} \textit{Id.; see also supra text accompanying note 104}.

\textsuperscript{121} \textit{See supra} notes 19-30 and accompanying text.

\textsuperscript{122} This understanding is adopted in \textit{Victor}, notwithstanding the Court's equivocal approval of the instruction. See \textit{Victor}, 511 U.S. at 14-15; \textit{see also} Shapiro, supra note 106, at 191-93 (tracing the development of moral certainty). Lawyers may understand abiding conviction in this fashion. However, it is potentially troublesome for communicating with jurors.

\textsuperscript{123} See, e.g., Commonwealth v. Watkins, 683 N.E.2d 653, 658-59 (Mass. 1997) (stating that there was enough explanation of moral certainty to prevent misunderstanding); People v. Brigham, 599 P.2d 100, 104-05 & nn.9, 12 (Cal. 1979) (relying on "abiding conviction" language and the same language as the original \textit{Webster} version).

\textsuperscript{124} "Moral evidence" has no readily discernible meaning and is archaic at best. As explained in Professor Shapiro's work, moral evidence is evidence obtained from observation
Victor saw the matter differently. Acknowledging that both the terms moral evidence and moral certainty are rooted in past usage, the Court had little problem with moral evidence, concluding that its present meaning is consistent with its historical meaning. The Court was more troubled by the term moral certainty because dictionary research revealed different understandings of the term, ranging from an intended synonym of the phrase “beyond a reasonable doubt” to substantially lesser degrees of probability.

A more convincing objection is that jurors might interpret a moral certainty instruction to allow conviction based on emotion rather than on evidence and reason. One trial court presented the problem this way:

Does the interpretation of [moral certainty] depend on the individual juror’s religious belief, values or philosophy? If so, it might run the gamut of a standard of absolute certainty for some individuals and mean little more than firm belief to others, depending upon their own subjective evaluations. The typical definitions for ‘moral’ judgments are synonymous with ‘ethical,’ ‘good’ and ‘righteous’ decisions as opposed to intellectual, factual conclusions.

This was certainly Justice Blackmun’s concern in Victor. There, he noted that jurors might convict based on weak evidence in especially heinous cases if they were told to apply a moral certainty standard. This is also the main concern of most commentators who fear that “moral certainty” can be interpreted to authorize vigilante justice, in which intuition or faith replaces a reasoned analysis of the evidence.

and experience rather than from undisputable scientific sources. See Shapiro, supra note 106, at 192-93; see also BARBARA J. SHAPIRO, “BEYOND REASONABLE DOUBT” AND “PROBABLE CAUSE” ch. 1 (1991) (discussing the evolution of reasonable doubt). Thus, moral evidence includes evidence such as testimony from a witness, as opposed to the results of a scientific test. For example, moral evidence would include the testimony of eyewitnesses to the crime, while demonstrative evidence would include the fingerprints on the gun.

125. Victor, 511 U.S. at 12. Justice O’Connor’s majority opinion stated “[W]e do not think [moral evidence] means anything different today than it did in the 19th century. The few contemporary dictionaries that define moral evidence do so consistently with its original meaning.” Id. (citing three modern dictionaries).

126. Id. at 13-14.

127. Id. One commentator points out that jurors might misunderstand moral certainty as requiring absolute certainty, thereby imposing too high a burden of proof on the prosecution. Dery, supra note 14, at 630; see also infra notes 325-26 and accompanying text.


129. Victor, 511 U.S. at 37 (Blackmun, J., concurring in part and dissenting in part); see Irwin A. Horowitz & Laird C. Kirkpatrick, A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts, 20 LAW & HUM. BEHAV. 655, 667-68 (1996) (observing that mock juries given the moral certainty instruction convicted in weak cases as well as in strong cases).

130. E.g., Dery, supra note 14, at 629 (“[T]he word ‘moral’ could signal jurors to abandon
discredited politician facing criminal charges. A misunderstanding of the meaning of moral certainty in the instructions could undo a careful jury selection that stressed the need for jurors to remain open-minded and decide the case on the basis of the evidence alone. In this sense, the moral certainty instruction can be viewed as a return to medieval notions of justice, in which belief replaces proof as the key determinant of jury verdicts.

2. Criticism and Decline

Victor was not the first case to evince concern about the propriety of reasonable doubt instructions using moral certainty. The California Supreme Court seriously bruised the moral certainty instruction in its decision in the case of People v. Brigham. The court disapproved of a pattern instruction using moral certainty because it failed to surround the phrase with language sufficient to ensure that the jurors understood that beyond a reasonable doubt required that they be nearly certain of their verdict based on the evidence at trial. In a footnote, the court expressed its belief that even the full Webster formulation of the instruction was inappropriate, and called for legislative reform. Justice Mosk’s lengthy concurring opinion was more direct in its criticism. The beginning of his analysis neatly stated his conclusion: “The problem is that the 1850 language of Chief Justice Shaw was already obsolete in 1927, and it is hopelessly superannuated in 1979.” Other courts have raised similar concerns about the moral certainty language. Another blow came in 1977, when the third edition of Devitt &
Blackmar took special note of the fact that it had eliminated a moral certainty instruction in response to criticism. Despite its partial acquiescence to the instruction in Victor, the Supreme Court has been uniformly critical of moral certainty instructions. The Cage Court unanimously struck down such an instruction, noting the potential for jury misunderstanding. The Victor majority went out of its way to state: "We do not condone the use of the [moral certainty] phrase." This statement was underscored by Justice Kennedy's comments that the moral evidence and moral certainty concepts are "indefensible," will "baffle" jurors, and are "unruly" and unnecessarily "malleable.

State courts have received the Supreme Court's message but have responded in different ways. By the 1980s, the moral certainty instruction was in decline, a trend that probably was accelerated by Cage. Courts considering moral certainty instructions after Cage and especially after Victor have tended to require language that explains moral certainty or at least underscores the importance of evidence.

Smith, 637 So. 2d 398, 407 (La. 1994) (Ortique, J., dissenting) (concluding that the instruction did not make the required connection between certainty and evidence); People v. Borrero, 259 N.E.2d 902, 905 (N.Y. 1970) (finding moral certainty confusing); Commonwealth v. Kloiber, 106 A.2d 820, 828 (Pa. 1954) (commenting that moral certainty "serves to confuse and befog the jury"). It is also possible for trial judges to mangle the instruction to make it appear that moral certainty is required to have a reasonable doubt. See, e.g., Perez v. Irwin, 963 F.2d 499, 501-02 (2d Cir. 1992).

141. Id. at 23 (Kennedy, J., concurring). While concluding that Victor was indistinguishable from Cage, Justice Blackmun found that the attempts to sanitize the moral certainty phrase by parsing the instructions to find language to promote jury certainty was not helpful. Id. at 37-38 (Blackmun, J., concurring in part and dissenting in part). However, Justice Blackmun agreed with the majority in concluding that the California formulation did not deprive Sandoval of a fair trial. Id.
142. The defendant's brief for Sandoval in Victor claimed that only five states used the moral certainty formulation in 1993. See Brief for the Petitioner at App. A at 1, Victor v. Nebraska, 511 U.S. 1 (1994) (No. 92-9049). The instruction had also been formally abolished in several states by this time. E.g., People v. Sammons, 478 N.W.2d 901, 912 (Mich. Ct. App. 1991) (describing change in pattern instruction "which no longer requires the 'moral certainty' language"); State v. Kozak, 637 A.2d 782, 782 (R.I. 1994) (reversing conviction due to use of moral certainty instruction). However, as indicated above, several other states and federal courts acquiesce in the use of moral certainty instructions by trial courts. See supra notes 109-11 and accompanying text.
143. See, e.g., Felker v. Turpin, 83 F.3d 1303, 1309 (11th Cir. 1996) (finding that the trial court's reasonable doubt definition "served to erase any taint created by the term 'moral certainty'"); Weston v. Ieyoub, 69 F.3d 73, 75 (5th Cir. 1995) (holding that the jury was given
The varying experiences of several moral certainty jurisdictions both illuminate the decline of moral certainty and indicate the range of options available after *Cage* and *Victor*. The Supreme Court of Rhode Island, a state that had long used moral certainty instructions,\(^\text{144}\) summarily rejected them in 1994 as "misleading at best and violative of constitutional requirements at worst."\(^\text{145}\) On the other hand, Tennessee continues to use moral certainty instructions. After *Cage*, numerous Tennessee defendants unsuccessfully appealed convictions, alleging the invalidity of the state's pattern moral certainty instruction.\(^\text{146}\) However, a federal habeas corpus decision, issued several months after *Victor*, struck down the pattern instruction, finding insufficient explanatory language and additional ambiguities that may have imposed a burden of proof that was less than beyond a reasonable doubt.\(^\text{147}\) The Tennessee state courts continued to uphold the moral certainty instruction in a long series of appeals and collateral attacks.\(^\text{148}\) Finally, Tennessee

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145. *Kozak*, 637 A.2d at 782. The instruction in *Kozak* had included the "abiding conviction, amounting to a moral certainty" language deemed sufficient in other cases, even after *Victor*. *Id*.


compromised by providing an alternative pattern instruction that omits moral certainty.\textsuperscript{149} Different appellate panels have reached different conclusions about the validity of this alternative instruction.\textsuperscript{150}

Massachusetts, the state first using the moral certainty instruction, also has struggled with the place of moral certainty in modern criminal law. It continues to use moral certainty in reasonable doubt instructions, but it requires additional explanation to ensure that the jury understand the prosecution’s burden.\textsuperscript{151}

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\textsuperscript{149} The traditional instruction states:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

\textsuperscript{T.P.I.-CRIM. 2.03 (4th ed. 1995).} The alternative states:

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in this case.

It is not necessary that the defendant’s guilt be proved beyond all possible doubt, as absolute certainty of guilt is not demanded by the law to convict of any criminal charge.

A reasonable doubt is just that - a doubt that is reasonable after an examination of all the facts of this case.

If you find the state has not proven every element of the offense beyond a reasonable doubt, then you should find the defendant not guilty.

\textit{Id.} at 2.03(a).


California also has changed its instructions. In *People v. Freeman*, the California Supreme Court upheld a variation on the moral certainty pattern instruction that was specifically upheld in the portion of the *Victor* decision concerning California jury instructions. Noting that departing from pattern instructions is ordinarily a mistake, the court stated that "it might be more perilous for trial courts not to modify it in a narrow and specific manner" as a result of the warning in *Victor*. The court's preference for abolishing the moral certainty language was palpable and eventually succeeded.

The near abolition of the moral certainty definition has not been without criticism. Professor Shapiro concludes that the principles conveyed in the moral certainty instructions remain valid today and should be the basis for revised reasonable doubt instructions using modern language. Also, the large number of decisions permitting the use of the phrase, at least to provide additional direction to the jury, suggests that it is not necessarily harmful to include moral certainty in jury instructions. If this moral certainty controversy is a minor matter of "nuance," perhaps federal courts should be slower to assert authority over the states through the due process clause.

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152. *Id.* at 279.

153. *Id.* at 279.

154. The majority called for changes and recommended that the state legislature and the judicial committee act on the issue. *Id.* at 280. Justice Mosk adhered to his view in *Brigham* that the court should use its powers to prohibit moral certainty instructions. *Id.* at 294 (Mosk, J., concurring). Justice George presented history of the legislative consideration of the issue and described the instruction as "unnecessary and indecipherable phraseology." *Id.* at 294-97 (George, J., concurring).

155. *See* *People v. Tran*, 69 Cal. Rptr. 2d 535, 539 (Ct. App. 1997) (finding that an instruction, modified to exclude references to moral evidence and moral certainty, only eliminated "a term which added nothing to the instruction but posed a danger of misleading the jury").

156. Shapiro, *supra* note 106, at 193. Her proposed instruction reads as follows:

We can be absolutely certain that two plus two equals four. In the real world of human actions we can never be absolutely certain of anything. When we say that the prosecution must prove the defendant's guilt beyond a reasonable doubt, we do not mean that you, the jury, must be absolutely certain of the defendant's guilt before finding the defendant guilty. Instead, we mean that you should not find the defendant guilty unless you have reached the highest level of certainty of the defendant's guilt that it is possible to have about things that happen in the real world and that you must learn about by evidence presented in the courtroom.


158. *See* United States v. Magnano, 543 F.2d 431, 436-37 (2d Cir. 1976); *cf.* Dery, *supra* note 14, at 632 (recommending an end to the use of moral certainty because it may have no meaning and may be ignored by juries).

159. This may be the real reason that the majority in *Victor* backed off from what appeared
After all, many defendants prefer the moral certainty formulation, and some have argued that its omission denies due process.160

B. The Weakening Hold of the Analogy Approach

1. Theme and Variations

The dominant instruction on reasonable doubt asks the members of the jury to compare their decision in the case to important decisions in their personal lives. This "analogy" instruction describes the process instead of giving a definition.161 Although there are a number of variations of the analogy instruction, the Devitt & Blackmar text provides a typical example:

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 or her own affairs.162

to have been resolved in Cage.


161. See Lambert v. State, 69 A.2d 461, 464-65 (Md. 1949) (using Webster and Supreme Court cases to illustrate this distinction).

162. DEVITT & BLACKMAR, supra note 45, § 12.10, at 354. Another commonly used compilation of instructions also includes an analogy:

A reasonable doubt is one based upon reason and common sense after careful and impartial consideration of all the evidence. 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 without hesitation in the more serious and important transactions of life. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

The key assumption is that reasonable people will hesitate to act if there is reasonable doubt. Therefore, the proof necessary for conviction must be such that a reasonable person would proceed to act even in the most important matters.

As discussed above, the analogy approach has enjoyed the approval of the Supreme Court since the Court upheld such an instruction in Hopt v. Utah. The analogy instruction soon became common throughout the country, receiving its most important support in 1954, when the Court reaffirmed its validity in Holland v. United States. Devitt & Blackmar reports that some version of the analogy instruction was required or widely used in at least six of the circuits as of 1992. Case law suggests that several more circuits have adopted it and that others have used it in the recent past. Chief Judge Newman describes the analogy as "[t]he most widely used explanation, especially favored in most federal courts." It is also popular in state courts, where various forms have been used in each region of the country.

163. 120 U.S. 430, 441 (1887). This decision cites to English practice of the period, stating "[t]he instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock, in Rex v. Muller." Id. The Court then lays out an elaborate instruction touching on the same points. Id.

164. See, e.g., Wilson v. United States, 232 U.S. 563, 570 (1914) (combining an analogy and a moral certainty charge in the instruction); Egan v. United States, 287 F. 958, 967 (D.C. Cir. 1923) (calling for an analogy or "abiding conviction" instruction); United States v. Carpenter, 41 F. 330, 341 (C.C.D. Tenn. 1889) (using an analogy in the actual charge to jury). Of course, not all courts used the analogy instruction. The moral certainty instruction was widely used at this time, often without the analogy. E.g., Commonwealth v. Schmous, 29 A. 644, 645-46 (Pa. 1894) (upholding an instruction that included moral certainty but rejecting the analogy language) (instructions available only at 1894 Pa. LEXIS 983 ***12).

165. 348 U.S. 121, 140 (1954); see also supra notes 61-62 and accompanying text.

166. DEVITT & BLACKMAR, supra note 45, §12.10, at 356-58 (First Circuit); 359-60 (Second Circuit); 363-64 (Fifth Circuit); 365 (Sixth Circuit); 369-71 (Eighth Circuit); 372 (Eleventh Circuit).


168. For example, in United States v. Shaffner, 524 F.2d 1021 (7th Cir. 1975), the court approved an instruction including the analogy despite that court's disapproval of reasonable doubt instructions in general. Id. at 1023 n.2.


analogy instruction is intended to convince jurors that they should take their responsibility seriously, giving their verdict the same deliberation that is appropriate to important matters in their personal lives.

The analogy instruction has been used for so many years that it is treated by courts as self-evident and noncontroversial. Few decisions evaluate the meaning or strength of the analogy, apparently accepting the preference for it articulated by the Supreme Court as sufficient authority.\textsuperscript{171} Perhaps as a result, courts often refer to the inclusion of the analogy in dismissing the use of faulty reasonable doubt instructions, suggesting that the analogy prevented jury error.\textsuperscript{172} The failure to give the analogy instruction, at least in concert with other failings, can be reversible error even in jurisdictions that purport not to require its use.\textsuperscript{173}

There are a number of subtle variations in the form of the analogy instruction. The Devitt & Blackmar version differs from most because it gives a two-way analogy.\textsuperscript{174} The analogy for reasonable doubt is that doubt which “would make a reasonable person hesitate to act.”\textsuperscript{175} The analogy for beyond a reasonable doubt is that doubt which “a reasonable person would not hesitate to rely and act upon . . . in the most important of his or her own affairs.”\textsuperscript{176} None of the federal appeals courts prescribes the use of the two-
way analogy. Instead, most use the beyond a reasonable doubt analogy. \(^{177}\) There also are subtle, but potentially significant, differences within the individual analogies. The following chart identifies these differences in four areas: (1) Reasonable doubt (RD) or beyond a reasonable doubt (BRD), (2) Subject (who), (3) Verb (action), and (4) Object (which matters):

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Doubt</th>
<th>Subject</th>
<th>Verb</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td>D.C. (^{178})</td>
<td>RD</td>
<td>Reasonable prudent man</td>
<td>hesitate and pause</td>
<td>graver and more important transactions of life</td>
</tr>
<tr>
<td>1st (^{179})</td>
<td>RD</td>
<td>Reasonable person</td>
<td>hesitate to act</td>
<td>transaction of importance and seriousness</td>
</tr>
<tr>
<td>2d (^{180})</td>
<td>BRD</td>
<td>Reasonable person</td>
<td>not hesitate to rely and act upon it</td>
<td>most important of his own affairs</td>
</tr>
<tr>
<td>3d (^{181})</td>
<td>BRD</td>
<td>You</td>
<td>willing to rely and act</td>
<td>most important of your own affairs</td>
</tr>
<tr>
<td>5th (^{182})</td>
<td>BRD</td>
<td>You</td>
<td>willing to rely and act</td>
<td>most important of your own affairs</td>
</tr>
</tbody>
</table>

premise for "willing to act." See Smith v. Butler, 696 F. Supp. 748, 755-57 & n.10 (D. Mass. 1988) (discussing both formulations and Holland). Logically, there should be no clear preference for one version over the other as long as the correct language is used. There may be more of a difference, however, when more subtle messages from the structure are considered. See infra note 369 and accompanying text.

177. See infra notes 180-83, 185-87 and accompanying text.
178. Egan v. United States, 287 F. 958, 967 (D.C. Cir. 1923). Variations of this analogy are found in other District of Columbia cases. See, e.g., Moore v. United States, 345 F.2d 97, 98 & n.1 (D.C. Cir. 1965) (describing this instruction as "exemplary").
179. United States v. Munson, 819 F.2d 337, 345 (1st Cir. 1987). This analogy is not found in the circuit's recent pattern instructions. COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N FIRST CIRCUIT, PATTERN JURY INSTRUCTIONS—CRIMINAL CASES § 3.02, at 38-40 (1998) (rejecting analogy). The First Circuit has one of the longest pattern reasonable doubt instructions, but rejects moral certainty, the analogy, and the FJC model. Id. at 39-41.
180. United States v. Delibac, 925 F.2d 610, 614 (2d Cir. 1991); see also United States v. Birbal, 62 F.3d 456, 459-60 (2d Cir. 1995).
182. COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS'N FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS—CRIMINAL CASES § 1.06, at 16 (1990). This instruction was upheld in United States v. Hunt, 794 F.2d 1095, 1101 (5th Cir. 1986).
<table>
<thead>
<tr>
<th>Circuit</th>
<th>Doubt</th>
<th>Subject</th>
<th>Verb</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td>6th(^{183})</td>
<td>BRD</td>
<td>You</td>
<td>not hesitate to rely and act</td>
<td>most important decisions</td>
</tr>
<tr>
<td>7th(^{184})</td>
<td>RD</td>
<td>Reasonably prudent person</td>
<td>hesitate</td>
<td>more important affairs</td>
</tr>
<tr>
<td>8th(^{185})</td>
<td>BRD</td>
<td>Reasonable person</td>
<td>not hesitate to rely and act</td>
<td>(none mentioned)</td>
</tr>
<tr>
<td>10th(^{186})</td>
<td>BRD</td>
<td>You</td>
<td>willing to rely and act upon it</td>
<td>more important of your own personal affairs</td>
</tr>
<tr>
<td>11th(^{187})</td>
<td>BRD</td>
<td>You</td>
<td>willing to rely and act upon it without hesitation</td>
<td>most important of your own affairs</td>
</tr>
</tbody>
</table>

The state definitions vary more widely but generally emphasize the same factors.\(^{188}\)

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183. COMMITTEE ON PATTERN CRIMINAL JURY INSTRUCTIONS, DISTRICT JUDGES ASS’N SIXTH CIRCUIT, PATTERN JURY INSTRUCTIONS—CRIMINAL CASES § 1.03, at 6 (1993), cited with approval in United States v. Goodlett, 3 F.3d 976, 979 (6th Cir. 1993).

184. United States v. Shaffner, 524 F.2d 1021, 1023 n.2 (7th Cir. 1975). This instruction is no longer given. See infra notes 264 and accompanying text.


188. Some of the state variations use different subjects in the instruction. See, e.g., State v. Gomez, 622 A.2d 1014, 1017 n.8 (Conn. 1993) (using the phrase “reasonable and prudent men and women”); State v. Gleason, 944 P.2d 721, 724 (Idaho Ct. App. 1997) (using the term “ordinary person” in the instruction); Commonwealth v. Banks, 311 A.2d 576, 581 (Pa. 1973) (approving an instruction defining reasonable doubt as “the kind of doubt that would restrain a reasonable man or woman”). State instructions also vary with respect to the object of the instruction. See, e.g., Vargas v. Keane, 86 F.3d 1273, 1279-80 (2d Cir. 1996) (stating that jurors should “use the same power of reasoning and power of thinking as they would apply in ‘matters related to [their] important business affairs’”) (quoting the New York trial court’s jury charge) (alteration in original); Lambert v. State, 69 A.2d 461, 464 (Md. 1949) (approving the phrase “important affairs in your life or your business or with regard to your property”); State v. Moorman, 505 N.W.2d 593, 605 n.7 (Minn. 1993) (using the phrase “you would act readily in your most important affairs of life, in matters which may be of the highest importance...
Some of these distinctions may be the result of chance or misapprehension, and it would be a mistake to attach great significance to what seem to be minor deviations in structure or terminology. There also appears to be no real concern over the distinction in subject between "reasonable person" and "you," which may mean that the law tacitly acknowledges the inevitability of juror self-identification with the reasonable person.

However, there may be an important difference between the reasonable doubt and the beyond a reasonable doubt formulations. In the context of a full set of instructions, the choice between two versions may underscore either the heavy burden on the prosecution or the limitations on that burden. Accordingly, the decision of the authors of Devitt & Blackmar to provide the double analogy may reflect a wise choice that the courts have not yet made. The parallel phrasing and structure of these two alternatives could potentially lead to harmful error. For example, in United States v. Magnano, the Second Circuit reported that the trial judge "instructed the jury that reasonable doubt is 'an abiding conviction of his guilt which amounts to a moral certainty—I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives.'" If the trial court had actually instructed the jury in that way, the connection should have been overturned for making the finding of reasonable doubt exceptionally and unconstitutionally burdensome. In fact, the appellate opinion itself confused the operative language; its recitation of the actual charge reveals that the trial judge was describing to yourself); Bollinger v. State, 901 P.2d 671, 674 n.2 (Nev. 1995) (using "more weighty affairs" language); see also Commonwealth v. Kluska, 3 A.2d 398, 403 (Pa. 1939) (noting various formulations).

189. E.g., Butler v. United States, 646 A.2d 331, 334 (D.C. 1994) (citing D.C. redbook instruction using "or" in place of "and" in the analogy); State v. Medina, 685 A.2d 1242, 1247 (N.J. 1996) (approving instruction using "pause or hesitate"). In theory, such variations could make a major difference because it might take a very different magnitude of doubt to pause and hesitate than it would to do either. No courts have made such a careful review of the precise terms of the analogy.


191. More substantial problems may exist with respect to the verb and object of the analogy. However, "verb" problems may simply involve choosing the wrong term for the particular analogy, as in Holland. See supra note 61-64 and accompanying text.

192. Generally, this is the context approach to instructions, in which the careful trial judge includes everything imaginable in the reasonable doubt instructions so as to avoid the possibility of error. See infra Part III.E.

193. See DEVITT & BLACKMAR, supra note 45, § 12.10; see also supra note 174-76 and accompanying text.

194. 543 F.2d 431 (2d Cir. 1976).

195. Id. at 436 (footnote omitted) (emphasis added).
beyond a reasonable doubt.\textsuperscript{196} Of course, many jurors may make the same mistake in courtrooms every day.\textsuperscript{197}

A problem concerning the form of the analogy recently arose when an Idaho court considered whether the comparison to an “ordinary” person would understate the prosecution’s burden.\textsuperscript{198} The court permitted the substitution of “ordinary” person for “reasonable” person.\textsuperscript{199} Another court addressed the distinction between the level of certainty that one would “want” in making a decision and the level at which one would be “willing to act,” concluding that “want” is theoretically a higher level.\textsuperscript{200}

2. Criticism

One of the recurring themes in appellate decisions is that trial judges should not casually improvise around standard instructions. The “object” of the analogy has been one area of concern in this regard. One trial judge in the District of Columbia decided to augment the analogy by discussing the life choices of a “young couple” and their daily struggles to resolve matters concerning automobiles, back-to-school clothing, vacation trips, and new jobs.\textsuperscript{201} The appellate court concluded that the instruction was inappropriate.

\textsuperscript{196} \textit{Id.} at 436 n.4. By contrast, the trial court made a similar error in \textit{State v. Black}, 368 A.2d 1177 (N.H. 1976), and was not reversed because the instructions as a whole presented the matter accurately to the jury, \textit{id.} at 1178-79.

Reading errors of this type are not uncommon. Appellate courts sometimes deem the error reversible and sometimes they do not. \textit{See}, e.g., \textit{Perez v. Irwin}, 963 F.2d 499, 502-03 (2d Cir. 1992) (reversing a conviction based on “doubt to a moral certainty” instruction); \textit{Dunn v. Perrin}, 570 F.2d 21, 23-24 (1st Cir. 1978) (reversing in part because of the equation of reasonable doubt and “strong and abiding conviction” language); \textit{United States v. Guglielmini}, 384 F.2d 602, 606-07 (2d Cir. 1967) (reversing in part because the instruction referred to “probability of innocence” as reasonable doubt); \textit{People v. Malloy}, 434 N.E.2d 237, 239 & n.1 (N.Y. 1982) (finding no error where the trial judge mixed reasonable doubt and beyond a reasonable doubt descriptions).

\textsuperscript{197} This underscores the importance of the clarity of the language used in instructions. \textit{See infra} Part IV.A.


\textsuperscript{199} \textit{Id.} Conversely, the Idaho Supreme Court refused to allow the replacement of “important” matters with “ordinary” matters. \textit{See State v. Taylor}, 283 P.2d 582, 585 (Idaho 1955) (finding that the “important/ordinary” matters distinction is important). The Pennsylvania Supreme Court also considered a trial judge’s omission of the word “important” before “affairs” in \textit{Commonwealth v. Kluska}, 3 A.2d 398, 403 (Pa. 1939). The court found two paths in the precedents, one stressing important affairs and the other stressing ordinary affairs. \textit{Id.} at 403-04. Although the court doubted that the distinction would really matter to a jury, it ultimately concluded that “important” was a necessary part of the instruction. \textit{Id.}

\textsuperscript{200} \textit{Commonwealth v. Ferguson}, 309 N.E.2d 182, 189 n.9 (Mass. 1974). In this analysis, the court recommended discontinuing the use of the analogy instruction. \textit{Id.} at 189.

\textsuperscript{201} \textit{United States v. Pinkney}, 551 F.2d 1241, 1243 (D.C. Cir. 1976) (discussing a six-paragraph illustration given by the trial judge).
and reversed the conviction. Similar free-form use of concrete examples apparently was a problem in Massachusetts, where the state's appellate courts have often taken trial courts to task for such commentary. The use of personal examples also has been criticized for trivializing the jury's responsibility and for understating the prosecution's burden. In overturning an analogy instruction using examples, the Massachusetts Supreme Judicial Court commented that "[w]e do not think that people customarily make private decisions according to [the reasonable doubt standard] nor may it even be possible to do so. Indeed, we suspect that were this standard mandatory in private affairs the result would be massive inertia."

In slightly different ways, several additional criticisms reveal that the analogy approach fails from the outset because of its inappropriate guiding concept. "Deciding the wisdom of future action involves a different type of judgment than that used in deciding whether something did or did not happen." The examples used in these instructions require a prediction of

202. Id. at 1243-46.
203. See, e.g., Bumpus v. Gunter, 452 F. Supp. 1060, 1061-63 (D. Mass. 1978) (reviewing an analogy of the jury's role to "a young man suffering from heart disease from which he 'might die at any time' and who was contemplating surgery that he 'might not survive'"); Commonwealth v. Bonds, 677 N.E.2d 1131, 1133-34 (Mass. 1997) (finding reversible error when the trial judge compared moral certainty "to the decision to marry, to buy a new house or leave a long held job"); Commonwealth v. Rembiszewski, 461 N.E.2d 201, 204-09 & n.1 (Mass. 1984) (finding error based on an instruction including comparisons to decisions regarding professions, marriage, the home, and surgery); Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272-73 (Mass. 1977) (reversing a conviction because the instruction compared leaving school, staying married, continuing to rent, and leaving one's hometown to the important decision a jury must make); Ferguson, 309 N.E.2d at 189 (disapproving of the use of the analogy).
204. Pinckney, 551 F.2d at 1244 (using the term "denigrates" and "trivializes"); United States v. Anglada, 524 F.2d 296, 300 (2d Cir. 1975) (criticizing use of "confusing parable"); United States v. Cassino, 467 F.2d 610, 619 (2d Cir. 1972) (suggesting that hypotheticals "may divert the jury"); Rembiszewski, 461 N.E.2d at 207-08 (finding that "judge's use of examples of decisions in the personal lives of the jurors detracted from the seriousness of the issue before them"); Ferreira, 364 N.E.2d at 1272-73 (asserting that the examples "trivialize" the jury's duty); State v. Francis, 561 A.2d 392, 396-97 (Vt. 1989) (finding that comparisons trivialize the standard). It is theoretically possible that an individual juror might erroneously refuse to vote guilty in a case because he or she would never marry, buy a house, or leave the hometown.
205. Ferreira, 364 N.E.2d at 1273, quoted in Bonds, 677 N.E.2d at 1133. This comment could be directed at the analogy instruction in general, although it is the slice-of-life examples in some of these cases that occasionally turn the instruction into a parody of a thoughtful analogy to other serious matters.
206. Bumpus, 452 F. Supp. at 1062. The court also pointed out that in the "life examples" the person is faced with an important matter and would want to be certain beyond a reasonable doubt whichever way he or she should choose. Id. In the criminal justice system, there is no such hard choice for acquittal; it is simply the proper ruling in the absence of proof of guilt beyond a reasonable doubt.
consequences rather than a finding about past events. People generally have little information on which to base many of their important life decisions, yet they have to act despite very reasonable doubts. They also may be able to reverse their decisions—a power denied to trial juries. Moreover, the most important life decisions tend to be about the most personal and private matters. They usually are discussed only with close friends or family but certainly not in a formal setting with eleven strangers.207 One trial judge reached the same conclusion from a different direction, stating that reaching a verdict is a "difficult and unique task" and "the defendant is entitled to have the undivided attention of the jury focused on the evidence presented at trial."208

Similarly, while one hopes that a good decision-maker such as our reasonably prudent person will weigh the pros and cons of important questions before acting, a juror may fail to think through the analogy and to realize that the inability to choose guilt with confidence is, under our system, a decision to vote not guilty.209 Finally, if giving the jury examples of important matters is not acceptable because it trivializes the process, what good is it merely to say "important matters"? It simply allows the jurors to fill in the blanks with their own analogues, which may offer poorer examples than those given by the trial judge.210

Chief Judge Newman also notes a problem in the formulation emphasizing hesitation:

I was always bemused by [the instruction’s] ambiguity. If the jurors encounter a doubt that would cause them to “hesitate to act in a matter of importance,” what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?211

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207. See Dery, supra note 14, at 636. Dery also stresses that the risk-taking inherent in personal decisions is incompatible with the proper decision-making structure for jury deliberations. Id.
208. Fortunato, supra note 14, at 428-29.
209. This seems to be the court’s concern in Scurry v. United States, 347 F.2d 468 (D.C. Cir. 1965). Judge Wright suggested that the “willing to act” version of the analogy understates the burden because people act on much less than the required standard in matters of importance. Id. at 470. He also rejected Hopt and insisted on the use of the “hesitate and pause” version. Id. at 469-70.
210. Even a conscientious juror might fill in the blank with an analogy to a civil case and end up applying the preponderance test. See People v. Cubino, 635 N.Y.S.2d 625, 626 (N.Y. App. Div. 1995) (Murphy, P.J., dissenting). This opinion raises several arguments similar to those addressed above. Id. at 626-28.
211. Newman, supra note 14, at 983 (footnote omitted).
Perhaps the answer to Judge Newman's query turns on other factors. In a matter of real importance, a risk-averse person would likely hesitate over any doubt for an eternity and take no action. However, a reasonable person would hesitate but then act unless the doubt were at least somewhat substantial. This contrast suggests that the analogy merely papered over the problem of explaining the necessary level of confidence in the verdict.\footnote{212}

The \textit{Victor} majority concluded that the analogy helped to alleviate the potentially prejudicial effects of the "moral certainty" and "substantial doubt" portions of the jury instructions.\footnote{213} Still, Justice Ginsburg's concurring opinion harshly criticized the analogy approach,\footnote{214} and Justice Blackmun noted his agreement with the critics that an analogy "may in fact make matters worse by analogizing the decision whether to convict or acquit a defendant to the frequently high-risk personal decisions people must make in their daily lives."\footnote{215}

Perhaps the reality is something like this: For many years "moral certainty" was meaningful to the public and gracefully expressed the mindset of a conscientious jury confidently delivering a guilty verdict. But those years are long past. Now, a simpler, more straightforward notion—an analogy to the outside world—expresses a more modern, secular idea of confidence. However, the analogy itself is now becoming an anachronism because it is just a bunch of platitudinous words that do not really provide a useful comparison of the jury's task to the important decisions of personal life.\footnote{216}

\footnote{212. This problem caused the trial judge to refuse to give the analogy instruction in \textit{Commonwealth v. Schmous}, 29 A. 644 (Pa. 1894), available in 1894 Pa. LEXIS 983. The Pennsylvania Supreme Court upheld the decision without discussion. \textit{Id.} at 645. The Pennsylvania Superior Court probably had the right idea in \textit{Commonwealth v. Orlowski}, 481 A.2d 952 (Pa. Super. Ct. 1984). The court heard a challenge to an instruction that described a reasonable doubt as one that "would cause a reasonable man . . . to stop, restrain himself and seriously consider as to whether or not he should do a certain thing before finally acting." \textit{Id.} at 966. The court concluded that this was essentially what is meant by the hesitation version of the analogy instruction. \textit{Id.}; cf. Dery, supra note 14, at 636 ("[J]urors automatically hesitate during deliberations, pausing to consider evidence or to listen [to] a fellow juror.").}

\footnote{213. \textit{Victor v. Nebraska}, 511 U.S. 1, 20-21 (1994). This casual acceptance of the analogy approach has been criticized. Dery, supra note 14, at 635 (finding the Court's explanation wanting on this point); Fortunato, supra note 14, at 392-94 (stating that the Court grossly inflated the role and value of the analogy).}

\footnote{214. \textit{Victor}, 511 U.S. at 24-25 (Ginsburg, J., concurring in part and concurring in the judgment). She quoted Judge Newman's article and called for the use of the Federal Judicial Center's model instruction discussed in Part III.C. \textit{Id.} (quoting Newman, supra note 14, at 204). Justice Breyer was not yet on the Court. However, it is likely that he would join Justice Ginsburg in refusing to accept the analogy as an appropriate instruction. See United States v. Colon-Pagan, 1 F.3d 80, 81 (1st Cir. 1993) (Breyer, C.J.) (rejecting analogy approach).}

\footnote{215. \textit{Victor}, 511 U.S. at 34 (Blackmun, J., concurring in part and dissenting in part).}

\footnote{216. A federal district judge in the District of Columbia refused to give the pattern analogy instruction, stating "I don't know and have never known what a doubt is that could cause a reasonable person to hesitate or pause in the graver or more important transactions of life."}
The New (and Improved) Federal Judicial Center Version

The Federal Judicial Center (FJC) has published a reasonable doubt instruction that has received some support by the courts. It consists of only two paragraphs, the second of which attempts the major task of explaining the reasonable doubt standard:

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.217

The commentary that accompanies the model instruction expresses the Center's intention "to give a relatively short instruction highlighting the

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217. FJC INSTRUCTION, supra note 99. This instruction was included in earlier reports of the Judicial Conference. See id. at title page. Accordingly, it is sometimes cited in cases decided before the 1988 publication. A preliminary paragraph of the FJC instruction addresses the different burdens in civil and criminal cases:

As I have said many times, the 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.

Id. This portion of the instruction has been adopted or approved in a number of jurisdictions. See, e.g., United States v. Porter, 821 F.2d 968, 972-74 (4th Cir. 1987) (finding instructions "as a whole" acceptable); Winegeart v. State, 665 N.E.2d 893, 902 n.2 (Ind. 1996) ("We believe that jurors will benefit from an instruction that refers to civil juries . . . . Not only should this be helpful to jurors who actually have such experience, but it will also help dispel inapplicable concepts that jurors may have obtained from national television or popular novels."); State v. Medina, 685 A.2d 1242, 1251 (N.J. 1996) (adopting it under the court's supervisory powers); State v. Castle, 935 P.2d 656, 660 n.4 (Wash. Ct. App. 1997) (finding it "useful to juries"). Jurors who have served in civil cases might overlook the differences in the burdens of proof unless the matter is called to their attention. Other jurors presumably can only be helped by language stressing that the prosecution must do more than prove its case "more likely true than not true." FJC INSTRUCTION, supra note 99, at 28 (instruction 21). Alone, however, this paragraph could cause serious problems because it does not explain how much additional certainty is required in a criminal case. Id.
importance of the concept.\textsuperscript{218} Most of the remaining comments are defensive; they note the conflict among the circuits about giving any reasonable doubt instruction and explain the absence of an analogy by challenging its usefulness.\textsuperscript{219} The FJC model received a boost from Justice Ginsburg who, in her concurring opinion in \textit{Victor}, described it as "clear, straightforward, and accurate."\textsuperscript{220} Taking Justice Ginsburg's lead, a number of federal and state courts have adopted or approved the FJC instruction.\textsuperscript{221}

Two key concepts underlie the FJC model: a juror must be "firmly convinced" of the defendant's guilt to vote guilty, and a reasonable doubt is "a real possibility" that the defendant is not guilty.\textsuperscript{222} Courts have wrestled with both concepts, usually finding them to be permissible. The "firmly convinced" language has encountered the least criticism.\textsuperscript{223} The District of Columbia Court of Appeals, for example, expressed the view that "firmly convinced" is just a contemporary version of "abiding conviction," a common component of the moral certainty formulation.\textsuperscript{224} Other courts have similarly

\begin{itemize}
\item 218. FJC INSTRUCTION, \textit{supra} note 99, at 28 (commentary).
\item 219. \textit{Id.} at 28-29.
\item 220. \textit{Victor}, 511 U.S. at 26 (Ginsburg, J., concurring in part and concurring in the judgment); \textit{see also} \textit{Id.} at 27-28 (describing the FJC instruction as "succinct[] and comprehensible[[]"). Justice Ginsburg noted with apparent disappointment that the Court has no supervisory powers to utilize and that it must therefore review state cases rather than prescribe mandatory instructions. \textit{Id.} This left open the possibility that the Court would decide to use its powers in a \textit{federal} criminal case, notwithstanding its unwillingness to do so in the hundred-plus years since it issued opinions applying the reasonable doubt standard.
\item 221. \textit{E.g.}, United States v. Campbell, No. 94-30295, 1996 U.S. App. LEXIS 12141, at *22 (9th Cir. May 9, 1996) (approving the Ninth Circuit model which was patterned after the FJC model); United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995) (upholding trial court instruction "copied virtually verbatim" from the FJC model); United States v. Gibson, 726 F.2d 869, 874 (1st Cir. 1984) (approving of the use of the 1982 committee draft of the FJC model); State v. Portillo, 898 P.2d 970, 974 (Ariz. 1995) (imposing FJC model prospectively through state lawmaking power); \textit{Winegeart}, 665 N.E.2d at 902 (recommending use of the FJC model); \textit{Medina}, 685 A.2d at 1251-52 (directing trial courts "not to deviate" from FJC model). \textit{Winegeart} is an unusually rich opinion, utilizing primary and secondary legal sources as well as social science literature. \textit{Winegeart}, 665 N.E.2d at 898-902.
\item 222. FJC INSTRUCTION, \textit{supra} note 99, at 28 (instruction 21).
\item 223. \textit{E.g.}, United States v. Velasquez, 980 F.2d 1275, 1278-79 (9th Cir. 1992) (finding that the phrase does not understate the burden); United States v. Barrera-Gonzales, 952 F.2d 1269, 1273 (10th Cir. 1992) (stating that "firmly convinced" is stronger than some other formulations); United States v. Hunt, 794 F.2d 1095, 1100-01 (5th Cir. 1986) (finding it to be the same as "a real doubt" and citing cases approving that definition); \textit{Medina}, 685 A.2d at 1251-52 (approving the phrase without discussion).
\item 224. Foreman v. United States, 633 A.2d 792 (D.C. 1993). The court found that [t]he judge's modification of the standard instruction stemmed, most probably, from his dissatisfaction with the phrase "abiding conviction," a dissatisfaction we share. The adjective "abiding" borders on the archaic, hence may carry little precise meaning to modern ears; and "conviction" has its own potential for confusion with, say, conviction for
compared the phrase to previously approved formulations or absorbed it into circuit pattern instructions. The Fifth Circuit concluded that the instruction does not create a problem even though it is based on probabilities. In general, as long as “firmly convinced” is used in conjunction with other explanatory language and is carefully presented to the jury, it complies with the constitutional requirement. Stated somewhat differently, “firmly convinced” merely restates the required legal standard in modern language. Thus, the formulation is “a correct and comprehensible statement of the reasonable doubt standard.”

The “real possibility” language, on the other hand, poses a greater danger. In contemporary usage, this phrase, particularly when read aloud with a vocal emphasis on the word real, could suggest a burden on the defense to make a substantial showing that the defendant is not guilty. The Fourth

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225. See, e.g., United States v. Taylor, 997 F.2d 1551, 1557 (D.C. Cir. 1993) (concluding that the phrase is in substance the same as the “hesitate to act” analogy); see also Velasquez, 980 F.2d at 1278 (same). This conclusion seems odd because the structure of the analysis differs so dramatically in the two approaches. “Firmly convinced” is plainly a synonym approach to explaining the concept, while an analogy is a description by simile. However, they have the same purpose—to accurately convey the concept to the jury.

226. See COMMITTEE ON MODEL JURY INSTRUCTIONS, NINTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS 31 (1992) (instruction 3.03). In United States v. Campbell, 1996 U.S. App. LEXIS 12141, at *22, the court approved this portion of the FJC instruction without analysis, citing only the circuit pattern instruction.

227. United States v. Williams, 20 F.3d 125, 131 (5th Cir. 1994). The court reasoned that the reasonable doubt standard itself is probabilistic in nature and that what matters is how the required level of probability is communicated to the jury. Id.

228. United States v. Brand, 80 F.3d 560, 566 (1st Cir. 1996); Williams, 20 F.3d at 131. Justice Ginsburg noted that “[t]he ‘firmly convinced’ standard for conviction [is] repeated for emphasis [and] further enhanced” by the “real possibility” formulation. Victor v. Nebraska, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring in part and concurring in the judgment). Commentators are also generally supportive of the phrase. Jessica Cohen asserts that the use of “firmly convinced” in standard instructions “makes the instruction clearer without changing its meaning.” Cohen, supra note 14, at 700; see also Horowitz & Kirkpatrick, supra note 129, at 664–66 (discussing experiments which indicated that jurors using this definition identified the proper standard and best understood its meaning during deliberations); Note, supra note 103, at 1969 n.103 (noting favorable and unfavorable views in cases and articles and concluding that this version “has the most to recommend it”).

229. United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995).

230. For example, Judge Fortunato finds the use of the phrase problematic and points out that “real” is a colloquialism that is used as a synonym for ‘very.’” Fortunato, supra note 14, at 390 & n.105.
Circuit, which strongly disfavors explanations of reasonable doubt, expressed serious concerns about this aspect of the FJC instruction in United States v. Porter. In Porter, the appellate court found error in the trial court's use of what in effect was the FJC instruction because the failure to explain the relationship between "a" possibility and "a real" possibility could have confused the jury and potentially shifted the burden of proof.

Despite such concerns, most courts have approved the use of "real" in this instruction, concluding that its meaning is "actual" or "in existence." Those words would be acceptable because they merely explain that conviction is appropriate if there is no doubt. The courts that uphold the use of the "real possibility" phrase tend to treat the burden-shifting concerns as specious both because the FJC instruction does not address the source of the doubt and the presumption of innocence instructions clarify that the burden never shifts. Hence, while contemporary usage might provide a fairly substantial quantitative meaning for "real" that is at odds with its use in both formal English and the FJC instruction, other aspects of the reasonable doubt instructions provide adequate assurance that the jury will understand "real" to mean "the nature of the possibility, not . . . its quantum.

In short, the FJC instruction is a stripped-down version of the reasonable doubt instruction that purports to restate the core meaning of the reasonable doubt standard. It represents the modern trend toward brevity and simplicity, as intended by the drafters. It also emphasizes the positive concept of proof beyond a reasonable doubt, which focuses the jury's attention on the prosecution's burden instead of implying a burden on the defense to prove a doubt. If this is all we need or want from a reasonable doubt instruction, then the FJC instruction is as good as any and better than most.

231. See infra notes 265-66 and accompanying text.
232. 821 F.2d 968, 973 (4th Cir. 1987).
233. Id. at 972-73. The court also found "firmly convinced" to be an "unnecessary concept[]." Id. at 973. On balance, the court concluded that there were enough "good" instructions to avoid reversible error. Id. This is a pervasive theme in cases concerning reasonable doubt instructions. See Part III.E. The Second Circuit has identified similar concerns. See United States v. McBride, 786 F.2d 45, 51-52 (2d Cir. 1986) (concluding that "real possibility" may cause jury confusion and result in "shifting the burden of proof").
234. E.g., Jones v. State, 889 S.W.2d 706, 714 (Ark. 1994) (describing "real doubt" as a "paraphrase, cast in positive terms, of the phrase 'not a mere possible or imaginary doubt,'" which is approved by established authorities; and also relying on the dictionary); State v. Castle, 935 P.2d 656, 661 (Wash. Ct. App. 1997) (looking to dictionary terms).
235. See United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995) (rejecting the contention that the use of "real" impermissibly shifts the burden of proof); United States v. Hunt, 794 F.2d 1095, 1101 (5th Cir. 1986) (characterizing challenges to the "real possibility" phrase as "ridiculous" and bordering on "frivolous").
236. Castle, 935 P.2d at 661.
237. FJC INSTRUCTION, supra note 99, at 28 (commentary).
238. Id.
D. Say Nothing

1. The Different Ways to Say Nothing

A number of jurisdictions now require or recommend that reasonable doubt not be explained to the jury. Describing this category of instructions is difficult for several reasons. First, the commitment of "no-explanation" jurisdictions varies widely from tolerance to recommendation to mandate. Second, different approaches may be appropriate in different fact settings, depending, for example, on whether the jury requests explanation. Finally, the "no-explanation" category should include various types of explanatory instructions that offer very little substance, regardless of how many words they use. The first portion of this section tries to reduce the confusion in this area.

A recent article by Jessica Cohen concludes that two federal circuits and approximately nine states disapprove of reasonable doubt instructions. The Fourth and Seventh Circuits are aggressively hostile to explanations of reasonable doubt. The Fourth Circuit purports to prohibit any explanation while the Seventh Circuit recommends against explanation but acquiesces in fair and clear definitions. The First, Fifth, Ninth, and D.C. Circuits have each issued decisions approving in some manner trial court decisions not to instruct on reasonable doubt. However, the rhetoric of these four circuits suggests that deference to trial court discretion, rather than principle, motivated their approval of the decision not to explain reasonable doubt.

239. Cohen, supra note 14, at 682-88. Cohen accurately describes the federal system. However, her attempt to capture the state practices is less successful due to the fluidity of the issue and the inconsistent practices of different panels of state appellate courts. See also Winegeart v. State, 665 N.E.2d 893, 898-99 (Ind. 1996) (citing federal and state cases); Butler v. United States, 646 A.2d 331, 333 n.1 (D.C. 1994) (summarizing some of the federal decisions disapproving instructions).

240. See, e.g., United States v. Reives, 15 F.3d 42, 46 (4th Cir. 1994) (reaffirming "proscription against any attempts to define reasonable doubt to jurors"); United States v. Lawson, 507 F.2d 433, 443 (7th Cir. 1974) (stating that the "better practice" is not to define reasonable doubt). Neither court has had much success in getting their district courts to agree.


242. See United States v. Shaffiner, 524 F.2d 1021, 1024 (7th Cir. 1975) (suggesting that the instruction creates problems); Lawson, 507 F.2d at 442-43.


244. The general practice in each of these circuits was to use explanatory reasonable doubt instructions. Later decisions approved reasonable doubt explanations without suggesting that
In contrast to the deferential stance of some federal circuits, most of the states identified by Cohen seem to be hostile to the use of explanatory instructions. However, at least one state, Arizona, has now moved out of the “no-explanation” category by mandating a modified version of the FJC instruction.

The attempt to isolate “no-explanation” jurisdictions is further complicated by the fact that different circumstances can produce different results. For example, a “no-explanation” jurisdiction might decide to provide an explanation if a jury indicates that it would like additional instruction on the meaning of reasonable doubt. Moreover, “no-explanation” courts show little tendency to reverse convictions merely because the trial judge gave an explanatory instruction. When the trial judge has given a constitutionally permissible instruction, appellate courts persistently uphold the convictions rather than assert their supervisory powers and reverse the trial court for trial courts should change the practice. The First Circuit provides the clearest examples of this trend. See, e.g., United States v. Sullivan 85 F.3d 743, 748 (1st Cir. 1996) (noting that the lower court “left the fine tuning of the meaning of reasonable doubt to the jurors, as is appropriate”); United States v. Catano, No. 94-1502, 1995 U.S. App. LEXIS 26745, at *16 (1st Cir. Sept. 18, 1995) (describing the matter as discretionary); Smith v. Butler, 696 F. Supp. 748, 763 (D. Mass. 1988) (describing the nonexplanatory approach as a “safe harbor”). The First Circuit’s recent pattern instruction on reasonable doubt is lengthy and repetitive, includes entirely noncontroversial statements, and may be deemed to be in the category of saying nothing at great length. See DISTRICT JUDGES ASS’N FIRST CIRCUIT, supra note 179, at 3.02.

The lack of firm guidance by such courts may result from the fact that the Supreme Court itself has dithered on the question, criticizing many instructions as confusing but upholding almost all challenged convictions. See, e.g., Victor v. Nebraska, 511 U.S. 1, 5 (1994).


247. Despite its severe criticism of explanatory instructions, the Fourth Circuit did not close the door to explanation when requested by the jury until 1994. United States v. Reives, 15 F.3d 42, 45-46 (4th Cir. 1994). Dicta in previous decisions suggested that instructions would be appropriate upon request from the jury. Id.; see also United States v. Ricks, 882 F.2d 885, 894 n.12 (4th Cir. 1989). It seems that the policies served by avoiding explanation are no longer valid in settings in which the jury has questions about the meaning of reasonable doubt.

248. See, e.g., Murphy v. Holland, 776 F.2d 470, 475-76 (4th Cir. 1985) (upholding conviction despite the trial court’s use of explanatory instructions).
failure to follow circuit policy.²⁴⁹

Finally, it is not always easy to identify a "no-explanation" jurisdiction because there always is some instruction on reasonable doubt. Supreme Court decisions indicate that the jury must be told of both the reasonable doubt standard and the presumption of innocence.²⁵⁰ In practice, all manner of additional phrases are used, leading one to wonder whether two identical sets of instructions have ever been given.²⁵¹ Instructions that merely state the government's burden and the defendant's presumption plainly are "no-explanation" instructions. Still, this fails to account for states such as Arizona, which, prior to adopting a modified version of the FJC instruction, recommended the following explanation of reasonable doubt:

The term "reasonable doubt" means doubt based upon reason. This does not mean an imaginary or possible doubt. It is a doubt which may arise in your minds after a careful and impartial consideration of all the evidence or from the lack of evidence.²⁵²

By comparison, Kansas's pattern instruction uses a few more words but appears to say less:

The State has the burden of proving the defendant is guilty. The defendant is not required to prove he is not guilty. You must assume the defendant is not guilty unless the evidence convinces you of the defendant's guilt.

Your determination should be made in accordance with these instructions, and this is the test you should apply: If you have no reasonable doubt as to the truth of any of the claims made by the State, you should find the defendant guilty. If you have reasonable doubt as to any of the claims made by the State, you should find the defendant not guilty.²⁵³

Such airy strings of words communicate very little information. Accordingly, the "no-explanation" category includes courts that disfavor the use of either

²⁴⁹. E.g., United States v. Hall, 854 F.2d 1036, 1038 (7th Cir. 1988); United States v. Moss, 756 F.2d 329, 333-34 (4th Cir. 1985).
²⁵⁰. See supra notes 31-35, 70 and accompanying text.
²⁵¹. This is one of the problems of analyzing jury instructions. There are many possible variations and combinations of even the most basic instructions. Aggravating the matter is the fact that judges sometimes make mistakes in reading instructions and those mistakes may or may not be perceived by the jurors. See supra notes 194-97 and accompanying text. One apparent result of the case law is the piling on of additional explanatory instructions, which reviewing courts use to cancel out erroneous instructions by trial judges. See infra Part III.E.
the definitional approach, such as the moral certainty or FJC language, or the descriptive approach, such as the use of analogy.254

2. Arguments for Saying Nothing

The antipathy toward explaining reasonable doubt can be traced to statements made by the Supreme Court that deride explanations as being of no help to jurors or, even worse, as making the jury’s task more difficult.255 Justice Ginsburg noted in her concurrence to the Victor decision that these statements were dicta and that the Court had never held that instructing the jury on the meaning of reasonable doubt is either discretionary or erroneous.256 Nevertheless, when dicta are repeated often enough, courts and litigants tend to assume that the Court means what it says.

Many other courts have recognized the failings of reasonable doubt explanations. The most common assertion is that reasonable doubt is self-defining and therefore requires no explanation.257 The Seventh Circuit expressed this view: “Reasonable doubt must speak for itself. Jurors know what is ‘reasonable’ and are quite familiar with the meaning of ‘doubt.’”258

254. Examples of instructions that really say nothing can be found in United States v. Olmstead, 832 F.2d 642, 644, 646 (1st Cir. 1987), and in State v. Aubert, 421 A.2d 124, 126 (N.H. 1980).

255. See supra notes 59, 63, 244 and accompanying text. Judge Ervin of South Carolina writes that Victor “urges trial courts to avoid defining the term.” Tom J. Ervin, What Does ‘Beyond a Reasonable Doubt’ Really Mean?, S.C. LAW, July-Aug. 1994, at 32, 33; cf. Note, supra note 103, at 1960 (stating that “the Court has consistently signaled that the Constitution allows” trial court discretion not to explain reasonable doubt).

256. Victor v. Nebraska, 511 U.S. 1, 26 (1994) (Ginsburg, J., concurring in part and concurring in the judgment). In every case in which the Court made such comments about reasonable doubt instructions, it upheld the instruction under review. These instructions included both moral certainty and analogy instructions. The Court has yet to rule on the FJC instruction. If history is a guide, a majority will express deep misgivings about the instruction but then uphold its use.

257. United States v. Reives, 15 F.3d 42, 45 (4th Cir. 1994) (laying out reasons for disapproving instruction); Olmstead, 832 F.2d at 645 (“The term reasonable doubt itself has a self-evident meaning comprehensible to the lay juror.”); United States v. Witt, 648 F.2d 608, 610 (9th Cir. 1981) (“[T]he legal concept of the term is one of common usage and acceptance.”); United States v. Lawson, 507 F.2d 433, 442 (7th Cir. 1974) (“We are ... dealing with ordinary English words of common acceptance.”); Payne v. State, 210 S.E.2d 775, 787 (Ga. 1974) (citing numerous state decisions for the proposition that reasonable doubt is “self-explanatory” and “readily understandable”); State v. Dunn, 820 P.2d 412, 416 (Kan. 1991) (citing prior Kansas authority); State v. Morrison 72 P. 554, 559-60 (Kan. 1903) (showing that definition is not a new concern); Barnes v. State, 532 So. 2d 1231, 1235 (Miss. 1988) (citing numerous state cases); Williams v. State, 572 P.2d 257, 259 (Okla. Crim. App. 1977) (“‘[R]easonable doubt’ is self-explanatory, and ... definitions thereof do not clarify the meaning of the phrase, but rather tend to confuse the jury.”).

258. United States v. Glass, 846 F.2d 386, 387 (7th Cir. 1988). This “no-explanation”
The Seventh Circuit iterated what is the second most widespread criticism of reasonable doubt explanation: "Judges’ and lawyers’ attempts to inject other amorphous catch-phrases into the ‘reasonable doubt’ standard, such as ‘matter of the highest importance,’ only muddy the water." 259 This view has been repeated in both federal and state courts for many years. 260 For example, Judge Sam J. Ervin, III of the Fourth Circuit wrote: "Instead of improvement, the most likely outcome of attempts to define reasonable doubt is unnecessary confusion and a constitutionally impermissible lessening of the required standard of proof." 261

To some degree, the "self-defining" view of reasonable doubt is inconsistent with the idea that discussion of the standard is detrimental. After all, if the phrase is so understandable that jurors do not need explanation, then why are lawyers unable to restate the phrase in an equally understandable fashion? Nevertheless, cases routinely assert that the clarity of the standard argument is sometimes rooted in notions of the history and role of the jury. One commentator argues that "jurors possess an ‘original understanding’ of reasonable doubt," which permits them to reach a verdict without explanatory instructions. Note, supra note 103 at 1962-64. Ironically, the author finds support in Holland. Id. at 1963. The author also uses the Court’s tolerance of a mangled analogy to prove that juries inherently understand the concept of reasonable doubt and will implement it properly despite erroneous instructions. Id. at 1963-64. The constitutional requirement is, by definition, simply the juror’s understanding of the concept, untainted by lawyerly explanation. The commentator concludes that the members of the jury serve as the community’s representatives in the criminal justice process and that the jury is the appropriate body both to determine the meaning of the standard and to apply it. Id. at 1970. Somewhat more subtly, this article argues that "[a] stark, unadorned reasonable doubt instruction provokes [considered] thought, because the phrase, standing alone, invites deliberation." Id. (footnote omitted).

259. Glass, 846 F.2d at 387.

260. Reives, 15 F.3d at 45 (cataloging criticisms); Olmstead, 832 F.2d at 645 (“Most efforts at clarification result in further obfuscation of the concept.”); Lawson, 507 F.2d at 442 (“Because of the very commonness of the words, the straining for making the [meaning] more clear has the trap of producing complexity and consequent confusion.”); State v. Thorpe, 429 A.2d 785, 789 (R.I. 1981) (noting that “courts have refused to define [reasonable doubt] to avoid confusion”); State v. McMahon, 603 A.2d 1128, 1128 (Vt. 1992) (citing to a 1904 decision on this point); see also Vargas v. Keane, 86 F.3d 1273, 1282 (2d Cir. 1996) (Weinstein, J., concurring) ("Experience suggests that the unvarnished constitutionally sufficient minimum jury charge may be best . . . . Any modifying language may have a dilutive effect."); People v. Malloy, 434 N.E.2d 237, 240 (N.Y. 1982) (stating that "amplification often leads to error"); COMMITTEE ON FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CRIMINAL JURY INSTRUCTIONS § 2.07, at 18 (1980) ("Further elaboration ‘tends to misleading refinements’ which weaken and make imprecise the existing phrase.").

somehow becomes obscured as a result of additional discussion. Perhaps the only cogent argument is that "[e]very attempt to explain [simple terms such as 'reasonable doubt'] renders an explanation of the explanation necessary."262

While the practice of not explaining reasonable doubt has been followed by some states for many years,263 it is relatively new among the federal circuits. The Seventh Circuit was apparently the first to hold, in 1974, that refusing to define or explain reasonable doubt is not error.264 The Fourth Circuit began criticizing the practice of explaining reasonable doubt in the mid-1980s265 and has strongly discouraged explanation by trial courts since then.266

Other courts, however, express equally strong support for explanatory instructions,267 providing adequate balance to the criticisms from "say

262. State v. Robinson, 23 S.W. 1066, 1069 (Mo. 1893). The court also made the related point that "[i]t is difficult to explain simple terms like 'reasonable doubt' so as to make them plainer." Id. Professor Uviller, who favors explanatory instructions, writes that courts who discourage explanation "really mean ... that some core essence of the standard will be diffused, its meaning diluted by inevitable variations of interpretation." Uviller, supra note 14, at 38.

263. See, e.g., Battle v. State, 29 S.E. 491, 492 (Ga. 1897) (finding no need to add any explanation of the words "reasonable doubt"); State v. Morrison, 72 P. 554, 559 (Kan. 1903) (stating that "the term 'reasonable doubt' best defines itself"); State v. Blay, 58 A. 794, 795 (Vt. 1904) (finding that "the great weight of authority is that no definition of [reasonable doubt] need be given").

264. United States v. Lawson, 507 F.2d 433, 444 (7th Cir. 1974). The Seventh Circuit has since stated its strong preference that trial courts not define the term in a series of cases upholding convictions where defendants challenged the absence of instructions (or reluctantly upholding convictions where instructions had been given). See Reynolds, 64 F.3d at 298 (approving the trial court’s refusal to give explanatory instructions); United States v. Hall, 854 F.2d 1036, 1039 (7th Cir. 1988) (criticizing the trial judge for trying to define reasonable doubt, but finding no reversible error); Glass, 846 F.2d at 386-87 (approving the trial court’s failure to explain reasonable doubt in response to jury question during deliberations); United States v. Dominguez, 835 F.2d 694, 701 (7th Cir. 1987) (describing the explanation as improper); United States v. Larson, 581 F.2d 664, 669 (7th Cir. 1978) (approving the trial court’s failure to give a defining instruction); Shaffer, 524 F.2d at 1023-24 (finding the instruction was not prejudicial but suggesting that it should be omitted in the future).

265. United States v. Porter, 821 F.2d 968, 972 (4th Cir. 1986); Murphy, 776 F.2d at 475; United States v. Love, 767 F.2d 1052, 1060 (4th Cir. 1985); United States v. Moss, 756 F.2d 329, 333 (4th Cir. 1985); Smith v. Bordenkircher, 718 F.2d 1273, 1276 (4th Cir. 1983).

266. United States v. Brown, No. 94-5731, 1996 U.S. App. LEXIS 3381, at *3 (4th Cir. Feb. 29, 1996); United States v. Garcia, No. 94-5117, 1996 U.S. App. LEXIS 1882, at *27 (4th Cir. Feb. 9, 1996); United States v. Reives, 15 F.3d 42, 45 (4th Cir. 1994); United States v. Ricks, 882 F.2d 885, 894 (4th Cir. 1989). In fact, the Fourth Circuit has provided the angriest commentary on the issue. Murphy, 776 F.2d at 475 ("But in the sanguine hope that some trial courts may someday heed our suggestions, trial courts are again urged to adopt what we think is the better practice by declining to define reasonable doubt in their jury instructions.").

267. See, e.g., United States v. Goodlett, 3 F.3d 976, 978-79 (6th Cir. 1993) (approving a pattern jury instruction that includes an explanation); United States v. Gatzonis, 805 F.2d 72,
nothing" jurisdictions. For example, seventy-five years ago the Court of Appeals for the District of Columbia stated: "To what purpose is it to tell the average juror that he must be satisfied from the evidence of the guilt of the accused beyond a reasonable doubt without some intelligent statement of its meaning?" In 1997, the Appeals Court of Massachusetts reversed a conviction for plain error based on the same reasoning. Other courts, aware of the difficulties in this area, insist on the use of careful definitions and mandatory pattern instructions in order to ensure as much as possible that jurors will understand the heavy burden of proof on the prosecution. Similarly, Justice Ginsburg’s concurrence to the *Victor* decision alluded to the importance of a proper instruction. Thus, while there are strong theoretical and practical arguments against explaining reasonable doubt to juries, it is by no means clear that the practice of saying nothing is appropriate.

E. Say Everything

The final category differs from the previous four in that it is not recommended or even officially approved as an approach to jury instructions. It is instead the practical lesson that a perceptive trial judge takes from the case law in this area. The cases are replete with boilerplate language requiring reviewing courts to look at the instructions as a whole before evaluating the significance of a trial court’s error. It is both ironic and instructive that the most effective approach is for judges to include in their

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74 (2d Cir. 1986) (recommending the use of an instruction in the third edition of *Devitt & Blackmar*); United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974) (stating that a defendant is entitled to an explanation of reasonable doubt).

268. Egan v. United States, 287 F. 958, 967 (D.C. 1923). The court then defined a reasonable doubt in terms of "abiding conviction" and the analogy. *Id.*


270. See, e.g., Pepe, 501 F.2d at 1144 (approving some instructions and disapproving others); State v. Portillo, 898 P.2d 970, 974 (Ariz. 1995) (en banc) (mandating a pattern instruction through its supervisory powers); People v. Phillips, 69 Cal. Rptr. 2d 532, 535 (Ct. App. 1997) (reversing a conviction where the trial judge failed to give a separate reasonable doubt instruction); State v. Aubert, 421 A.2d 124, 127 (N.H. 1980) (acknowledging criticisms but requiring adherence to a model instruction from a prior decision).


instructions as much explanation of reasonable doubt as is possible; the more they say, the more likely they will be upheld, because even a possibly inadvertent "right" instruction can trump a "bad" instruction.

The issue often arises in a wholly unexceptional way. For example, if a trial court makes a mistake in instructing the jury about reasonable doubt (or anything close for that matter), reversal is not warranted if, taking the instructions as a whole, the jury was given an accurate description of the law. Courts occasionally make this point in the context of a traditional harmless error analysis.273 This occurs despite the principle that a deficient reasonable doubt instruction is not subject to harmless error review because it in effect deprives a defendant of a jury trial.274 These issues continue to arise, however, so that appellate courts must determine whether a particular flaw in a reasonable doubt instruction has reached the level of constitutional error or if the flaw was mitigated by the halo effect of other language.275 The Supreme Court's decisions in this area are no exception. From early decisions to those of the present, the Court has examined alleged errors in reasonable doubt instructions in context.276 Cage v. Louisiana277 is the rare case in which the Court found the error to be significant. Even in Cage, however, the Court took pains to set forth the standard rule that "[i]n construing the instruction, we consider how reasonable jurors could have understood the charge as a whole."278

The premise is logical:

Sometimes, erroneous portions of the jury instructions are offset when considered in context or explained by the trial court in later sections of the instruction. Other times, a seemingly innocuous incorrect statement becomes extremely damaging when coupled with other sections of the jury instructions or with improper conduct by counsel during the trial.279

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274. See Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993); see also supra notes 75-78 and accompanying text.


276. See Victor, 511 U.S. at 22; Holland v. United States, 348 U.S. 121, 140 (1954). The Victor court described the test as whether there is a reasonable likelihood the jury used the wrong standard to find proof beyond a reasonable doubt. Victor, 511 U.S. at 22-23.

277. 498 U.S. 39 (1990) (per curiam); see supra notes 71-74 and accompanying text.

278. Id. at 41.

279. Chalmers v. Mitchell, 73 F.3d 1262, 1267 (2d Cir. 1996) (citations omitted); see also United States v. Williams, 20 F.3d 125, 131 (5th Cir. 1994) (looking to instructions as a whole
Thus, language before or after a problematic statement can clarify the extent of the prosecution’s burden, accurate language can correct even an undisputed mistake about the burden of proof, and lengthy but accurate commentaries on reasonable doubt can render potentially serious errors insignificant. A common way for trial judges to avoid reversible error is simply to “outshout” their mistakes by following erroneous statements to the jury with accurate ones. Reviewing courts often rely on the fact that the judge repeated accurate statements about reasonable doubt in deciding that previously made, inaccurate statements do not require reversing a resulting conviction.

To examine the meaning communicated by “firmly convinced” and “real possibility”); Jones, 889 S.W.2d at 714 (seeing “real doubt” in context as “quite clearly a paraphrase, cast in positive terms, of the phrase ‘not a mere possible or imaginary doubt,’” which had been approved); State v. Wentworth, 395 A.2d 858, 861 (N.H. 1978) (deciding that the burden of proof was not shifted to defense in context); State v. Avila, 532 N.W.2d 423, 429-30 (Wis. 1995) (examining the full burden of proof and the presumption of innocence instructions to evaluate a challenged portion).

280. Vargas v. Keane, 86 F.3d 1273, 1277-80 (2d Cir. 1996) (discussing several erroneous instructions and finding all to have been corrected or rehabilitated by later language); Medina, 685 A.2d at 1250 (same).

281. Adams v. Aiken, 41 F.3d 175, 180-82 (4th Cir. 1994) (stating that a correct instruction can “neutralize” the harmful effect of an inaccurate instruction); United States v. Porter, 821 F.2d 968, 973 (4th Cir. 1987) (noting that an error of omission did not affect the jury because “[o]ther instructions . . . compensated for this omission”); State v. Evans, No. 96CA31, 1997 Ohio App. LEXIS 1897, at *7-8 (Ohio Ct. App. Mar. 6, 1997) (holding that the use of the preponderance burden on an alibi defense was not reversible, in part because of the proper use of the reasonable doubt standard elsewhere).

282. Chalmers, 73 F.3d at 1268 (finding that the “closing of its instruction” in lengthy set of instructions prevented burden from shifting); State v. Black, 368 A.2d 1177, 1178 (N.H. 1976) (“The criticized phrase here occurs near the beginning of a page and a quarter of [otherwise unobjectionable] instruction on reasonable doubt.”); Commonwealth v. Stokes, 615 A.2d 704, 709-10 (Pa. 1992) (dismissing the challenge to one word in the reasonable doubt instruction, which was over three pages long).

283. See, e.g., Brown v. Cain, 104 F.3d 744, 754 (5th Cir. 1997) (holding that the use of one “questionable phrase” was outweighed by numerous mentions of reasonable doubt requirement); Harvell v. Nagle, 58 F.3d 1541, 1545 (11th Cir. 1995) (stating that at least six references to “abiding conviction” dissipates the effects of weaker language); Williams, 20 F.3d at 131 (noting that the trial judge’s repetition of the “firmly convinced” requirement clarified the “near certainty” requirement); United States v. Taylor, 997 F.2d 1551, 1557 (D.C. Cir. 1993) (relying on the fact that the reasonable doubt standard was given 13 times); United States v. Patman, 557 F.2d 1181, 1182 (5th Cir. 1977) (finding that 16 uses of “reasonable doubt” outweighed one use of “fair doubt”); United States v. Pepe, 501 F.2d 1142, 1144 (10th Cir. 1974) (noting that “reasonable doubt” was used 23 times with “numerous” repetitions of the presumption of innocence); State v. Gordon, 508 A.2d 1339, 1350 (R.I. 1986) (stating that the trial court “repeatedly instructed” on the proper standard); cf. United States v. Catano, No. 94-1502, 1995 U.S. App. LEXIS 26745, at *16-17 (1st Cir. Sep. 18, 1995) (stating that the trial “court instructed on . . . reasonable doubt many, many times, and with appropriate gravity and
On one level, this balancing test is totally proper. There are many minor errors that in the context of other instructions cannot realistically be deemed to understate the prosecution's burden of proof. As the Second Circuit stated, "not every unhelpful, unwise, or even erroneous formulation" constitutes a constitutional violation or requires reversal.\(^{284}\) A slight mistake in word choice, even one that understates the burden of proof, may be so insignificant that reversal is inappropriate.\(^{285}\) Given the broad range of words and phrases used in this area, mistakes are often a question of degree. Therefore, the guiding principle should be that, if the instruction adequately conveys the meaning of reasonable doubt to the jury, the conviction should not be reversed, notwithstanding the presence of erroneous language.\(^{286}\)

This is not to say that courts refuse to overturn convictions simply because there is some good to balance the bad. A number of courts have overturned convictions because the problem was not an isolated error, but rather either a key portion of the instructions or the combined effect of several errors. For example, in the leading case of Dunn v. Perrin,\(^{287}\) the First Circuit refused to accept several correct statements of the reasonable doubt requirement in the instructions as correcting three separate errors in explaining reasonable doubt.\(^{288}\) While the most serious flaw in the instruction,
equating reasonable doubt with "a strong and abiding conviction," was probably a simple reading error, the court would not assume that the jury had recognized the error and therefore ignored the judge's improper usage during deliberations. Another decision that evaluated the combined effect of instructions is Rickman v. Dutton. In this case, a federal district court in Tennessee distinguished the Victor Court's grudging acceptance of moral certainty by concluding that the instructions as a whole aggravated the problem by including other vague language that could have the effect of lowering the burden of proof. In this sense, the context approach can work to a defendant's advantage as well as disadvantage.

Still, jury instructions should almost always contain more "good" than "bad" comments about reasonable doubt. This means that the context rule will usually help the prosecution. Moreover, trial judges can avoid reversal by drafting instructions using the language in appellate court opinions. An unfortunate result of this strategy is instructions that are long and weighed down with themes and variations from prior cases. A common example of this problem and the prevailing judicial response to it can be seen in State v.

289. Id. at 24. The Second Circuit was similarly unwilling to rely on the totality of the instructions in a case in which the trial judge told the jury that reasonable doubt is a "probability of innocence, reasonably." United States v. Guglielmini, 384 F.2d 602, 606-07 (2d Cir. 1967). The court recognized that some jurors had probably seen through the error but had to assume that some jurors wrongly believed that the defendant had to prove "probability of innocence" based on the instructions. Id. The Second Circuit seems to be particularly careful in this regard. See United States v. Birbal, 62 F.3d 456, 460 (2d Cir. 1995) (noting that mixing accurate and inaccurate instructions is problematic because at best it makes the jury uncertain); Perez v. Irwin, 963 F.2d 499, 502 (2d Cir. 1992) (refusing to treat correct general instructions as curing the error that occurred when the trial court repeatedly equated reasonable doubt to "doubt to a moral certainty").


291. Id. at 708-09. The court also found other constitutional deficiencies, which may have contributed to a cumulative effect of an unfair trial. See also Chalmers v. Mitchell, 73 F.3d 1262, 1267-71 (2d Cir. 1996) (upholding an instruction based on the context approach). But see id. at 1274-76 (Newman, C.J., dissenting) (arguing that the effect of one trial court misstatement requires reversal when combined with a series of inaccurate descriptions of reasonable doubt in the prosecution's summation).

292. See Winegeart v. State, 665 N.E.2d 893, 898 (Ind. 1996) (recognizing that trial courts draft reasonable doubt instructions using the language of appellate courts); see also infra Part IV.B.

293. See, e.g., Harvell v. Nagle, 58 F.3d 1541, 1545-47 (11th Cir. 1995) (containing edited reasonable doubt instructions that are 31 sentences long, many of which are compound, and many of which paraphrase different legal conceptions of the standard); United States v. Taylor, 997 F.2d 1551, 1555-57 (D.C. Cir. 1993) (long, repetitive instructions); Dunn v. Perrin, 570 F.2d 21, 23-25 (1st Cir. 1978) (finding errors harmful in context with a very inclusive instruction); Commonwealth v. Gagliardi, 638 N.E.2d 20, 23-25 (Mass. 1994) (looking to context where there were long, detailed instructions on the presumption of innocence and on reasonable doubt).
Moss.\textsuperscript{294} There, the trial court's instruction on reasonable doubt was long and abstract, with a series of semi-colons where mere commas (or more autocratic periods) would produce different meanings.\textsuperscript{295} There were at least two grammatical errors serious enough for the Connecticut Supreme Court to include "(sic)" in its recitation of the instructions.\textsuperscript{296} Also, the instructions twice used the term "equipoise" without ever explaining its meaning to the jury.\textsuperscript{297} The Connecticut Supreme Court rejected the defendant's challenges to the instruction with reference to the standard rule of examining the totality of the instructions.\textsuperscript{298} This reference was followed by a selection of "accurate" statements about reasonable doubt gleaned from the instructions, most of them in the language of prior appellate cases.\textsuperscript{299} The lesson to trial judges is hard to miss: courts should give every instruction ever approved by the appellate courts—the more the better—because appellate courts will treat such accurate language as antibodies that surround erroneous statements and render them harmless. In that fashion, they protect convictions from reversal, regardless of whether the instructions are truly coherent or understandable to the members of the jury.

IV. FLAWS IN THE INSTRUCTION PROCESS

A. The Language of Instructions

Many studies over the years have attempted to assess juries' understanding of instructions.\textsuperscript{300} Researchers have studied various groups of "jurors," including actual jurors, members of jury pools, and volunteer

\begin{itemize}
\item \textsuperscript{294} 456 A.2d 274 (Conn. 1983).
\item \textsuperscript{295} Id. at 275.
\item \textsuperscript{296} Id.
\item \textsuperscript{297} Id. at 276.
\item \textsuperscript{298} Id.
\item \textsuperscript{299} Id.
\item \textsuperscript{300} The most useful resource for this Part was INSIDE THE JUROR (Reid Hastie ed. 1993), which contains 13 articles and additional commentary on the analytical processes of individual jurors. Also valuable was REID HASTIE ET AL., INSIDE THE JURY (1983). A third book in this area, ELWORK ET AL., supra note 48, provided substantial data on problems of jury instructions and the methods of improving them.

subjects (often college students), and they have collected data through various means, such as simulated trials and questionnaires. There are significant disagreements among these studies; however, they all agree that many jurors fail to comprehend key instructions. Poor understanding can prevent a jury from properly applying even accurate jury instructions, and can thereby deprive a defendant of the constitutionally guaranteed protection of the reasonable doubt standard.

Scholars have identified numerous problems with jury instructions. The most common problem is the use of jargon or legalese. Many legal terms are unfamiliar to laypersons or, even worse, have slightly different meanings in the general community. Too often instructions are stated in abstract legal terms


302. Kagehiro found that verbal instructions concerning the standard of proof are largely misunderstood. Kagehiro, *supra* note 301, at 196-97; see also Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 617 ("[A]ll jury studies to date, but for a single exception, reach the conclusion that legalese in trials, particularly as contained in jury instructions, is neither adequately understood nor properly applied by jurors.") (footnote omitted); Kerr et al., *supra* note 301, at 292 (finding that the meaning of reasonable doubt was not clear to college student test subjects); Kramer & Koenig, *supra* note 301, at 412-16 (finding a very poor understanding of reasonable doubt even with instruction); Steele & Thornburg, *supra* note 300, at 78 (discovering that jurors try to use instructions but are confused and unable to apply them properly); Strawn & Buchanan, *supra* note 300, at 480-81 (noting that substantial misunderstanding exists even after instructions are given).

303. If juror misunderstanding makes the standard too demanding, the prosecution is denied the traditional allowance for "unreasonable" or other lesser doubts.

304. ELWORK ET AL., *supra* note 48, at 12-18; Forston, *supra* note 302, at 616-18; Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & SOC'y REV. 153, 157 (1982); Strawn & Buchanan, *supra* note 300, at 482-83; see also Tanford, *supra* note 50, at 79 (noting that all empirical studies agree that instructions "are incomprehensible to jurors"). The law review literature is generally in agreement. See, e.g., Diamond, *supra* note 14, at 1722-24 & nn.61-69 (discussing studies showing juror confusion); Laufer, *supra* note 300, at 364 & n.161 (noting research indicating juror misunderstanding); Mulrine, *supra* note 14, at 210 & nn.104-06 (noting studies showing juror confusion from the use of legal language); Nichols, *supra* note 14, at 1709-10 & nn.3-12 (citing studies finding a lack of juror comprehension).

305. The problem with the term reasonable doubt seems to be the latter. This standard
that further aggravate jury confusion. \footnote{306} Ironically, the pattern instruction movement has facilitated the development of instructions that are intentionally rendered in the abstract so that they can be used in all criminal cases. Robert F. Forston, a speech scholar, reports that a substantial percentage of jurors misunderstand terms that are central to most sets of instructions. \footnote{307} Another commentary compared the jury’s task to that of persons who are “given a thirty minute lecture in how to perform an appendectomy and [are] then . . . immediately tested on their comprehension.” \footnote{308}

This problem is particularly severe with respect to the reasonable doubt standard. One scholar’s first response to Victor was to reflect on the jury instructions the Court upheld: “[T]he complexity is daunting. There are 3.1 clauses per sentence, 4.4 prepositional phrases per sentence, and a number of ambiguous concepts.” \footnote{309} Reid Hastie describes the empirical literature as agreeing that “the communication of a precise, unambiguous meaning of the standard of proof to jurors is a notoriously impossible task.” \footnote{310}

Studies does not require use of legalese, such as “circumstantial evidence” or “proximate cause,” but it may require applying unusual meanings to some terms. This appears to be the reason for Justice O’Connor’s reluctant acquiescence in the use of moral certainty in Victor. See supra notes 84-90 and accompanying text.

\footnote{306} See Nancy Pennington & Reid Hastie, The Story Model for Juror Decision Making, in INSIDE THE JUROR, supra note 300, at 192, 200 (“The verdict definition information in the judge’s instructions is usually abstract and often couched in unfamiliar language . . . .”); Severance & Loftus, supra note 304, at 156 (”[P]attern instructions are too abstract: because they are written to apply in general, they do not apply effectively to any case in particular.”); Tanford, supra note 50, at 82 (concluding that judges use abstractions “to avoid commenting on the evidence”). In complex cases, even lawyers can be mystified by the instructions. See Symposium, Selecting Impartial Juries: Must Ignorance Be a Virtue in Our Search for Justice?, Panel One: What Empirical Research Tells Us, and What We Need to Know About Juries and the Quest for Impartiality, 40 AM. U. L. REV. 547, 556 (1991).

\footnote{307} Forston, supra note 302, at 615-16. Forston notes that more than a quarter of the individuals participating in the study thought that “speculate” means “either to examine or conclude.” \textit{Id.} at 615. “Speculate” occasionally turns up in reasonable doubt instructions, largely in the context of an instruction like “a reasonable doubt is not a doubt based on speculation.” Thus, jurors who misunderstand the term could conclude that a carefully examined doubt is not a reasonable doubt.

\footnote{308} Strawn & Buchanan, supra note 300, at 482. This article gives examples of jargon in Florida’s Standard Criminal Instructions, \textit{id.} at 482-83, and identifies reasonable doubt instructions as among the most problematic, \textit{id.} at 482. Put somewhat differently, “from the jury’s standpoint, a jury trial is often very much like watching a foreign movie without subtitles. . . . [A]s a general rule you only have the vaguest notion of what is going on.” Symposium, Improving Communication in the Courtroom, Panel One: Judge-Jury Communications: Improving Communications and Understanding Bias, 68 Ind. L.J. 1037, 1038 (1993) (comment of Steven J. Adler).

\footnote{309} Horowitz, supra note 130, at 289.

\footnote{310} Reid Hastie, Algebraic Models of Juror Decision Processes, in INSIDE THE JUROR, supra note 300, at 84, 101 (citation omitted).
consistently note that jurors understand the phrase "beyond a reasonable doubt" to require lower levels of certainty than judges deem appropriate.\textsuperscript{311} While their methodologies and subjects differ, the commentators agree that reforms are necessary.

One study that focused on jury requests for clarification found that the term "reasonable doubt" posed a particular problem for juries.\textsuperscript{312} A second study agreed, placing some of the fault on the dynamics of group decision-making.\textsuperscript{313} This study confirmed the importance of the approach taken in the instruction\textsuperscript{314} by using the following three "levels" of reasonable doubt instruction: (1) a simple statement of the requirement (i.e., no explanation), (2) a "lax-criterion" model, and (3) a "stringent-criterion" model.\textsuperscript{315} The results indicated that jurors, both as individuals and in groups, are most likely to convict under lax instructions and least likely to convict under stringent instructions.\textsuperscript{316} The "no-explanation" instruction (called "undefined" by the authors) provided a wide range of outcomes.\textsuperscript{317} Most notably, this study yielded enormously different outcomes by similar mock juries that saw an identical "case": when lax instructions were used, there were eight guilty verdicts, three not guilty verdicts, and eight hung verdicts, but when stringent instructions were used, there were two guilty verdicts, ten not guilty and seven hung verdicts.\textsuperscript{318}

Proving discrepancies of this sort is not reserved for social scientists. Judge Weinstein, a federal district judge, conducted an experiment several years ago by having a jury rate fourteen different formulations from

\textsuperscript{311} See, e.g., Horowitz & Kirkpatrick, supra note 129, at 663 ("One startling aspect of the reasonable doubt scores [of jurors] is that they are set at a level lower than deemed acceptable by the courts and much lower than [the authors] expected."); Stuart Nagel, Bringing the Values of Jurors in Line with the Law, 63 JUDICATURE 189, 192-93 (1979) (finding surprisingly low propensity to convict threshold); Rita James Simon & Linda Mahan, Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom, 5 L. & SOC’Y REV. 319, 322-29 (finding that jurors give lower probability estimates for standards of proof than judges or college students).
\textsuperscript{312} Severance & Loftus, supra note 304, at 172.
\textsuperscript{313} Kerr et al., supra note 301, at 282, 291.
\textsuperscript{314} These studies find significant differences based on the instructions used. However, not all studies agree that instructions produce significant differences. Hastie summarizes some of the conclusions on this point and suggests additional avenues for research. Hastie, supra note 310, at 107-08.
\textsuperscript{315} Kerr et al., supra note 301, at 286-87. All of these instructions are in use. In this study, the simple instruction was consistent with instructions from "no-explanation" jurisdictions, see id. at 286; the lax-criterion model emphasized limitations on types of doubts that are reasonable, id.; and the stringent-criterion model used language such as moral certainty to underscore the prosecution’s burden of proof, id.
\textsuperscript{316} Id. at 287 tbl.1.
\textsuperscript{317} Id. The subjects showed "greater uncertainty and group disagreement" when reasonable doubt was left undefined. Id. at 292.
\textsuperscript{318} Id. at 287 tbl.1. See generally id. at 287-93.
reasonable doubt instructions. The test asked both the perceived "heaviness" of the burden on a 1-10 scale and the percentage of certainty the juror believed was required under each formulation. The test revealed profound disagreements. The hesitation analogy instruction was found to range from 6 to 10 in "heaviness" and from 50% to 100% in "certainty." However, simply turning the analogy around to the convoluted Holland version, in which a reasonable doubt is described as one a juror may be willing to act upon, resulted in somewhat higher scores. This result is problematic because logic and traditional legal analysis would suggest the opposite conclusion. Judge Weinstein's analysis involved a group too small to support the type of general conclusions reached by the empirical studies. However, at the very least, the experiment revealed that the truth about jury instructions cannot be discovered by legal analysis or in appellate case law.

The difficulties in presenting the reasonable doubt standard in a form understandable to juries do not necessarily work to the advantage of either the prosecution or the defense. There is nonetheless a pervasive notion that juror misunderstanding results in understating the government's burden. Logically, the asymmetry of the standard leaves more room for error on that side of the line. Still, many bright and conscientious people—the sort who become jurors and often lead in deliberations—sometimes equate "reasonable" doubt with "any" doubt. Interviews with members of the jury immediately after the verdict in the trial of Terry Nichols for the bombing of the Oklahoma City federal building suggest that juror misunderstanding of the

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319. See Vargas v. Keane, 86 F.3d 1273, 1281-87 (2d Cir. 1996) (Weinstein, J., concurring). Judge Weinstein distributed a questionnaire to jurors and alternates who had just decided a simple criminal case. Id. at 1281. He found the group "to be highly responsible in exercising their duties as jurors." Id.

320. Id. at 1284-87.

321. Id. at 1285 tbl.B.

322. See id. at 1285-86 tbls.B, H.

323. Logically one would hesitate to act in an important matter more readily than one would act on the basis of a reasonable doubt. The range of responses to three variations involving "moral certainty" indicate the impossibility of attaching a fixed meaning to that concept as well. Id. at 1286 tbls.E, G, & J.

324. See Steele & Thornburg, supra note 300, at 99 (noting that empirical studies do not support the notion that confusion helps the party with the burden of proof). Still, judges appear to be more demanding than juries. See Hastie, supra note 310, at 107 (indicating that "judges have somewhat higher decision criteria for the reasonable doubt standard" than juries); see also supra note 311. If (and this may be a big if) the difference between judges and juries on this point is due to juror confusion, then clearer and more accurate instructions would favor the defense.

325. Kramer & Koenig, supra note 301, at 414 (explaining that a substantial portion of the public believes that "any" doubt is enough to defeat the prosecution, regardless of instruction or education level of the jurors).
reasonable doubt standard may have played a role in their verdict. A juror’s casual equation of “beyond a shadow of a doubt” and “reasonable doubt” suggests that the notion of jury understatement of the standard may be more complicated than the simple assertion would imply.

The potential impact of incomprehensible instructions is obvious. Joseph Kadane makes a strong but not atypical comment about jury treatment of instructions:

> It is not an accident that the instructions to jurors are sometimes vague, incomplete, and difficult to understand. In fact, there is a cliche that jurors frequently set aside these instructions and decide the case on its merits according to the dictates of their consciences and not according to written statutory law.327

An only slightly less disconcerting ramification is the following assertion by the Tenth Circuit: “[W]hile the term [reasonable doubt] itself is common and readily associated by most individuals with our criminal justice system, it is unlikely that two persons would supply the same characterization of its meaning.”328

Similar problems exist concerning jury understanding of the presumption of innocence.329 Burdens of proof and concepts such as the presumption of innocence set out the rules for lawyers. But these instructions are not particularly helpful to lay jurors. The reasonable doubt standard was developed as a way of explaining to jurors how certain they must be before they may return a guilty verdict; instructions that obscure that message have no place in the courtroom.

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326. The jury foreperson, Niki Deutchman, stated: “Obviously the government was not able to prove beyond a shadow of a doubt more than just the basic conspiracy.” CNN Breaking News (CNN television broadcast Jan. 7, 1998). Deutchman also stated: “[N]one of the rest of it was strong enough for all of the jurors to say that Terry Nichols was really there or really did any of those things, beyond a shadow of a doubt.” News Conference with Niki Deutchman, Foreman of the Jury, Federal News Service, Jan. 7, 1998, available in LEXIS, News Library, Transcripts File. Another juror, Holly Hanlin, stated: “There’s always that shadow of a doubt in your mind, did I do the right thing? God, I hope we did.” Good Morning America (ABC television broadcast, Jan. 8, 1998). Ms. Deutchman later admitted that she misspoke and the local press took note of her misstatement of the burden of proof. See, e.g., Chuck Green, Jury Chose Excuses, Not Justice, Denver Post, Jan. 9, 1998, at B1; Editorial, Our Flawed Jury System, Rocky Mountain News (Denver), Jan. 16, 1998, § F, 6A.


328. United States v. Pepe, 501 F.2d 1142, 1144 (10th Cir. 1974).

329. Forston, supra note 302, at 615-16 (noting that only two-thirds of the subjects understood meaning of presumption of innocence); Hastie, supra note 310, at 98-100 (discussing different interpretations of the presumption of innocence).
B. Lawyers, Judges, and Juries

Jury misapplication of the reasonable doubt standard reflects more than linguistic flaws in the instructions. Many of the problems can be traced to the legal process, from jury education to the training of trial attorneys. Moreover, perhaps due to its focus on process, the legal profession itself has not reached a firm consensus concerning the applied meaning of the reasonable doubt standard.

Jurors are not selected for their intelligence or their impartiality. Much of jury selection lore involves stereotypes that embarrass us today—Protestants convict, women are sympathetic to defendants.330 While the most egregious practices have been declared unconstitutional,331 most people do not believe that they have ended altogether or that the primary attribute sought in a potential juror is the ability to evaluate the evidence and apply the standard of proof. H. Richard Uviller suggests that prosecutors are prone to strike “well-born, well-educated, culturally cultivated jurors” because of a perception that they will be skeptical about law enforcement.332 He also points out that such jurors have the skills to understand a complicated case, which often makes them less attractive to defense counsel as well.333 It is most likely that intelligent people end up on juries despite the wishes of the attorneys, rather than due to their efforts. Impartiality is also a product of serendipity. Attorneys do not try to seat an impartial jury; they attempt to prevent the opposing side from seating jurors favorable to its case. An impartial jury is the fortunate product of a balanced jury pool and equally successful efforts by both sides to gain a partial jury.

Jurors may learn something about the substantive law and the burden of proof during the selection process, but any explanation provided is usually limited in scope and given by the attorneys rather than the judge.334 With rare
exceptions, the jury learns nothing more about these matters until the end of the trial. Then after closing arguments, the judge gives the final instructions, including those on reasonable doubt. Jury experts agree that even if these instructions are understandable, they are heard too late to serve their intended purpose. As with jury selection, the system seems to be designed less to aid juries in performing their function and more to allow attorneys to manipulate the jury.

This "obstructionist" view of the legal system's approach to jury understanding is reinforced by the nature and variety of reasonable doubt issues addressed by appellate courts. Lawyers have found far more to fight over in appellate courts than the five main approaches discussed in Part III. Recent decisions have struggled with issues such as the "reasonable hypothesis" charge, whether a reasonable doubt is an "honest doubt" and "not a fanciful doubt," or perhaps a "fair doubt," the use of a set of scales as a metaphor, and an arguable switch from a subjective to an objective standard. It does not seem credible that these are the most severe problems of jury application of the reasonable doubt standard. As an example of the ever-expanding morass in this area, despite the general repudiation of "moral certainty," the phrase is still used in some jurisdictions, and its omission may

attorneys. The issue arises most often in the context of the defense attorney's obligation to object at trial to an instruction in order to raise the question on appeal. See, e.g., Friedman v. United States, 381 F.2d 155, 160-61 (8th Cir. 1967); State v. Gomez, 622 A.2d 1014, 1017-18 (Conn. 1993); State v. Nabozny, 375 N.E.2d 784, 790-91 (Ohio 1978). It might make sense to give attorneys a greater role in explaining the law of reasonable doubt. Attorneys could then fit their arguments to the specifics of the case; and the trial courts could stick to a short, simple explanation of reasonable doubt as "near certainty." Finally, it would give appellate judges a fuller record from which to determine whether the standard has been satisfied.

335. Forston, supra note 302, at 620-23; Kramer & Koenig, supra note 301, at 403 n.7 (citing Saul M. Kassin & Lawrence S. Wrightsman, On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts, 37 J. PERSONALITY & SOC. PSYCHOL. 1877 (1979)).

One of the key discoveries from the jury studies is that jurors tend to make up their minds during the presentation of evidence by putting together the most convincing "story" from the opening statements and the evidence. Pennington & Hastie, supra note 306, at 192-202; see also HASTIE ET AL., supra note 300, at 22-23. Thus, the order in which evidence is presented may be more significant to the jury verdict than the instructions and arguments that attorneys perceive as more important. See Lola Lopes, Two Conceptions of the Juror, in INSIDE THE JUROR, supra note 300, at 255, 258.

341. "There is a risk in appellate courts' picking over every possible nuance of an instruction, as it is likely to drive district courts into a ritualistic recital of canned language that numbs the jury." United States v. Merlos, 984 F.2d 1239, 1241 (D.C. Cir. 1993).
even be deemed to be error.\textsuperscript{342} Courts themselves occasionally make unintentionally ironic references to the problem of explaining reasonable doubt, such as the \textit{Victor} Court’s own description of the standard as “ancient and honored . . . [yet] defies easy explication.”\textsuperscript{343}

A few cases present palpably deficient instructions and can be resolved quickly.\textsuperscript{344} More often, however, a phrase may pass muster one day, be struck down the next, but then grudgingly tolerated on the third day, if only due to context.\textsuperscript{345} This area of the law is replete with cases that “back and fill”: appellate judges identify problems and then look at the instructions as a whole, to other instructions as curing the problem or balancing the inaccuracy, and to the defendant’s own failure to provide better instructions. Finally, they conclude that the trial court’s action does not warrant reversal.

Why does this happen? At least three factors contribute to the failure of the legal system to have a coherent view of the standard. First, there is insufficient agreement regarding reasonable doubt within the legal profession (including judges) to resolve the instruction problem neatly. Second, instructions are prepared more for appellate judges than for jurors. Third, trial lawyers have little incentive to correct the problem. These three factors are mutually supportive.

Most trial judges and attorneys probably understand that “beyond a reasonable doubt” means “nearly certain.”\textsuperscript{346} Many members of the public have the same understanding, or can be educated quickly on the subject. However, agreement breaks down at the point of calibrating and explaining just \textit{how} close to certain “beyond a reasonable doubt” requires. Professor


\textsuperscript{343} \textit{Victor}, 511 U.S. at 5; \textit{see also} \textit{United States v. Birbal}, 62 F.3d 456, 457 (2d Cir. 1995) (“This appeal requires us to address one of the most ancient and time-honored aspects of our criminal justice system, although perhaps one of the least susceptible to verbal formulation . . . .”); \textit{cf. State v. Wentworth}, 395 A.2d 858, 861 (N.H. 1978) (noting that the instruction struck down in \textit{Dunn v. Perrin}, 570 F.2d 21 (1st Cir. 1978), had been used in New Hampshire “for decades without challenge”).

\textsuperscript{344} \textit{See}, e.g., \textit{Collins v. State}, 888 P.2d 926, 926 (Nev. 1995) (“[T]he [trial judge] stated that reasonable doubt is ‘a little stronger than preponderance of the evidence’ and ‘almost equal to clear and convincing.’”). I expect my first year Criminal Law students to understand the error here from the first day of the course.

\textsuperscript{345} California Supreme Court Chief Justice Bird’s analysis of the history of the moral certainty instruction in California is particularly instructive. Although she refers to one pattern instruction on the subject as “the last vestigial remains of an inartfully drawn statute which has never been given a consistent interpretation” by the courts, she supports a quite similar instruction. \textit{People v. Brigham}, 599 P.2d 100, 105 (Cal. 1979).

\textsuperscript{346} There are exceptions. \textit{See}, e.g., \textit{supra} note 344.
McCauliff's data reveal a wide range of views on the probabilities associated with various legal standards, including the reasonable doubt standard.\textsuperscript{347} Of the 171 federal judges who responded to a questionnaire she distributed, a bare majority clustered in the 80% to 90% range as the level of certainty required by the reasonable doubt standard.\textsuperscript{348} The bulk of the rest were scattered in the 95% and up range, with twenty one judges (or 12\%) at the theoretically impossible level of 100%.\textsuperscript{349} Professor McCauliff also includes the results of a survey Judge Weinstein published in \textit{United States v. Fatico}.\textsuperscript{350} Of the nine judges in his district who were willing to quantify "beyond a reasonable doubt," the lowest selected 76\%, and the highest selected 95\%, with the other seven at 80\%, 85\%, or 90\%.\textsuperscript{351} All in all, these studies suggest approximately as much disagreement among experienced trial judges as one would expect to find among laypersons in their first jury service.\textsuperscript{352} The judges all quantify reasonable doubt as \textit{near} to certain and therefore comply with the raw words of \textit{Winship}. Since the difference between conviction and acquittal is often determined by the size of the gap that we are willing to tolerate between near and absolute certainty, however, the typical judicial variation of roughly 15\% represents a stunning lack of consensus among judges.\textsuperscript{353} In other words, the apparent agreement on "near certainty" hides a substantial disagreement over just how much certainty is required.

Even if judges and lawyers were to agree on a specific meaning of the reasonable doubt standard, there could be no confidence in the jury's application of the standard without instructions that effectively communicate that meaning to lay jurors. Unfortunately, juries are not always uppermost in trial judges' minds in the drafting process. The Indiana Supreme Court criticized the standard instruction practice as follows:

\begin{itemize}
  \item \textsuperscript{347} McCauliff, \textit{supra} note 118, at 1325-27.
  \item \textsuperscript{348} \textit{Id}. at 1325.
  \item \textsuperscript{349} \textit{Id}.
  \item \textsuperscript{350} \textit{Id}. at 1324-25 (citing \textit{United States v. Fatico}, 458 F. Supp. 388, 410 (E.D.N.Y. 1978)). This study differs from Judge Weinstein's \textit{Vargas} survey. \textit{See supra} notes 319-23 and accompanying text.
  \item \textsuperscript{351} \textit{Fatico}, 458 F. Supp. at 410. The two judges who selected 76\% and 80\% attributed less certainty to "beyond a reasonable doubt" than two other judges quantifying the "clear, unequivocal and convincing" standard used in some civil cases.
  \item \textsuperscript{352} \textit{See} Wald, \textit{supra} note 10, at 111. Immediately following her statement that jurors ignore reasonable doubt instructions, Judge Wald commented: "In fairness, it is hard to criticize jurors for not following the reasonable doubt standard religiously, given that after two hundred years, the courts themselves are still not sure what it means." \textit{Id}.
  \item \textsuperscript{353} McCauliff's data report that 25 judges (or 15\%) gave "proof beyond a reasonable doubt" a level of less than 85\%, with 36 judges (or 21\%) requiring more than 95\% certainty. McCauliff, \textit{supra} note 118, at 1325. Weinstein's smaller raw figures make meaningful comparisons difficult, but the 9 judges were spread out somewhat equally over a range of 76\% to 95\%. \textit{Fatico}, 458 F. Supp. at 410. Hastie includes percentage findings from a series of studies with a similar range of results. Hastie, \textit{supra} note 310, at 102-03.
\end{itemize}
The instruction uses 300 words in eleven sentences to explain reasonable doubt. This is not atypical for reasonable-doubt instructions, which often appear to be a conglomeration of phrases providing supplemental or alternative explication of reasonable doubt. Through the years, appellate decisions have held a wide variety of reasonable-doubt instructions to satisfy the minimal constitutional requirements. After a particular phrase has thus been tolerated by appellate courts, trial courts will often—usually in response to requests by counsel—incorporate such "approved" phrases into reasonable-doubt instructions. As a result, most reasonable-doubt instructions commonly in use in our courts today have not been crafted for the purpose of most effectively explaining the concept of reasonable doubt to jurors but rather are used primarily because the language therein is considered adequate to avoid appellate reversal.  

The practice of writing instructions for appellate judges rather than for juries is understandable. Trial judges look to case law and prior instructions and then draft a short or long series of comments about the reasonable doubt standard. If this drafting is done carefully, appellate courts will deem the new instructions permissible, thereby creating more case law and more prior instructions to be modified for future use.  

The trial bar must be a leading force in any reform movement in this area. Of course, attorneys share with trial judges the lack of consensus about the

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354. Winegeart v. State, 665 N.E.2d 893, 898 (Ind. 1996); see also Strawn & Buchanan, supra note 300, at 479 ("The Florida instructions are effective communication from one lawyer to another, and from a trial judge to an appellate judge, to determine whether the law has been correctly stated to jurors."). Severance and Loftus put a slightly different spin on the issue, pointing out that reformers in this area must carefully avoid drafting new instructions that will not be accepted by appellate courts. Severance & Loftus, supra note 304, at 184. Similarly, another group of reformers presents a method of rewriting instructions rather than a set of "new and improved" instructions due to the variations and revisions in applicable law. Elwork et al., supra note 48, at 29; see also Mulrine, supra note 14, at 209-10 & n.98 (citing additional commentary on the issue).

355. See, e.g., Symposium, supra note 306, at 1038 (statement of Steven J. Adler) ("You are dealing with two very separate world views: the world view of the lawyers and the judges who are trying to fit instructions into a scheme that will appeal to appellate court judges and the world view of the audience—in this case, the people trying to make the decisions: the jury."); see also Fortunato, supra note 14, at 385 & n.88, 425 (discussing the problem and quoting Edmund M. Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 59-60 n.1 (1933)); Mulrine, supra note 14, at 210 n.98 (citing additional commentary); cf. Symposium, Improving Communications in the Courtroom, Panel Two: Innovations for Improving Courtroom Communications and Views from Appellate Courts, 68 Ind. L.J. 1061, 1074 (1993) (statement of Michael Saks) (suggesting that instructions are intended for the entire legal community rather than for juries).

356. This is virtually foreordained by the "say everything" approach. As long as trial judges are rewarded for including repetitious correct legal statements in their instructions, the instructions will just continue to get longer. State v. Moss, 456 A.2d 274 (Conn. 1983), illustrates this point. See supra notes 292-99 and accompanying text.
meaning of reasonable doubt. Prosecutors also share the interest in preventing reversals on appeal. In addition, because only convictions can result in appeals, defense attorneys have every incentive to try to gain unduly favorable instructions at trial. Attorneys serving on bar committees or task forces assigned to draft pattern instructions may seek to write clear and correct jury instructions as part of their duty to improve the legal system; however, attorneys in other settings are bound to seek instructions that favor their clients. Professors Steele and Thornburg provide a sharp and disheartening vision of the dilemma:

There are . . . at least three parties advocating different versions of instructions. Because of the adversary system, the lawyers have to be primarily concerned with presenting instructions that benefit their clients, and only secondarily concerned with improving the legal system as a whole by drafting clear instructions. More important, the ultimate decision on the form of instructions is made by the trial judge. Unfortunately, judges are the ones with the least to gain by using comprehensible but unorthodox instructions. Lawyers, at least, may be interested in rewriting instructions if they perceive that it benefits their clients. Judges, however, lack that motivation and instead risk reversal by deviating by one word from the pattern instruction or the language of appellate opinions. The adversary system, then, tends to discourage lawyers from writing the clearest possible instructions and puts the ultimate control in the hands of the party with the least incentive to change.  

Due to this inhospitable environment for reform, progress is likely to be measured in extremely small increments.

V. IMPROVING JURY UNDERSTANDING OF REASONABLE DOUBT

A. The "Easy" Remedies

The reasonable doubt standard cannot be fairly applied when the courts cannot agree on instructions, when jury experts agree that existing instructions are poorly drafted, and when powerful institutional factors obstruct improvement of instructions. This section addresses "easier" methods of reform that focus on improving the instruction process without confronting professional politics or disagreements about the proper approach to jury instruction.

Poor drafting is one theme that pervades the case law on reasonable doubt instructions. This theme reflects the opinions of the jury experts considered

357. Steele & Thornburg, supra note 300, at 105 (footnote omitted).
358. See, e.g., Winegeart v. State, 665 N.E.2d 893, 898-90 (Ind. 1996) (criticizing structure and language of instructions). Most of the Court's early decisions criticized reasonable doubt instructions or otherwise found fault with the trial court's formulation. See supra notes 59-68
in Part IV.\textsuperscript{359} For example, Professors Steele and Thornburg conclude that rewriting instructions to improve vocabulary, syntax, and organization is necessary to improve jury understanding.\textsuperscript{360} One of the studies they cite provides additional suggestions, including simplifying the language of instructions and using communications specialists in the drafting process.\textsuperscript{361}

Perhaps the most exhaustive discussion regarding the reform of jury instructions is found in \textit{Making Jury Instructions Understandable},\textsuperscript{362} a joint project of lawyers and social scientists. This study addresses a topic that is rarely mentioned elsewhere: organization.\textsuperscript{363} The point is that organization affects juror understanding and recollection. Therefore, instructions should be presented in a logical sequence, in which associational, hierarchical, and algorithmic substructures are followed.\textsuperscript{364} In short, instructions should be ordered so that each instruction leads to the next in such a manner that helps jurors understand the law and the task of applying it to the facts.\textsuperscript{365} An

\begin{itemize}
  \item \textsuperscript{359} See generally Tanford, \textit{supra} note 50, at 80-83. His summaries include a number of recommendations that are referenced here and in Part IV.A, \textit{supra}.
  \item \textsuperscript{360} Steele \& Thornburg, \textit{supra} note 300, at 82-83. They rewrote the presumption of innocence instruction, which was based on the Texas Pattern Instruction and included a reasonable doubt discussion. \textit{Id.} at 88 n.91. Their revised version falls into the “say nothing” category, \textit{id.} at 112, as did the Texas instruction of the time, \textit{id.} at 110. However, Texas has now become an analogy jurisdiction. Geesa v. State, 820 S.W.2d 154, 161-62 (Tex. Crim. App. 1991).
  \item \textsuperscript{361} Forston, \textit{supra} note 302, at 616-20.
  \item \textsuperscript{362} ELWORK ET AL., \textit{supra} note 48. This book is well organized to suit the needs of its intended audience: judges and lawyers seeking to improve instructions. \textit{Id.} at xv. Part I describes the problem and the authors’ methodology. \textit{Id.} at 3-69. Part II is a detailed analysis of the process of using their methodology to rewrite or otherwise improve instructions. \textit{Id.} at 73-188. Appendices include materials related to the Nevada criminal trial that provided the instructions analyzed in the text, \textit{id.} at 189-265, and the authors’ revised version of those instructions, \textit{id.} at 266-367.
  \item \textsuperscript{363} \textit{Id.} at 149-67.
  \item \textsuperscript{364} An associational structure is one where topics that share a “common concept” are kept together. \textit{Id.} at 150. A hierarchical structure is also what it sounds like, as the authors explain: “[I]n defining an ‘intent’ to murder, we might explain that it must have four components: willfulness, premeditation, deliberation and malice. Each of these components may, in turn, have to be broken down further into its sub-components.” \textit{Id.} at 151. More complicated concepts usually require more instructions to break them down into component ideas. “Algorithmic structure” is a phrase that has the potential to scare off the lawyers, but it is more accessible than it sounds. It is “one where the order of ideas presented is such that each is helpful to the understanding of the succeeding one.” \textit{Id.}
  \item \textsuperscript{365} The overall recommended structure includes four major sections: (1) roles of the judge, jury, and instructions, (2) rules of evidence, (3) jury room duties, and (4) substantive law applicable to the case. \textit{Id.} at 152. Instructions are ordered within these categories with two key premises in mind. The first is to order logically, for example, by placing general principles of evidence before specifics, such as circumstantial evidence or expert testimony. The second is
instruction on the reasonable doubt standard should begin by addressing the presumption of innocence, move to a description of the prosecution's burden, continue on to a formulation of the reasonable doubt requirement, and end with an explanation of reasonable doubt. 366

Making Jury Instructions Understandable also examines the details of writing style and presents worthwhile commentary on grammar and vocabulary issues. 367 For example, the authors recommend against sentences using negative constructions and provide suggestions to minimize the confusion that results when judges tell jurors what a reasonable doubt is not—an instruction that, on a subliminal level, may understate the prosecution's burden. 369 The authors experienced substantially improved performance by their mock jurors after applying their principles and rewriting instructions from a state murder prosecution. 370 The reasonable doubt instructions came late in the process, quantified to some degree, and called for an analogy using an affirmative rather than a negative structure. 371

The partially-quantified approach used in Making Jury Instructions Understandable appeals to common sense and has empirical support. For example, a layperson can readily conceptualize that 90% certainty is stronger than 55% certainty. Dorothy Kagehiro reports test results that bear out the value of quantified approaches. 372 Seven pattern standard of proof definitions were joined with eight instructions from other sources in an experiment to order the points so that the explanations come when the jury needs them.

366. See id. at 156-57, 321-22. The authors acknowledge that this is not the only or necessarily the best approach. It is clear, however, that the instructions are structured to help the jury focus on the issues they need to resolve in a logical fashion. Id. at 152.

367. Id. at 168-88.

368. Id. at 172-73. Other language recommendations concern sentence length and complexity, verb structures, using concrete words, using the active voice, using similar grammatical forms, avoiding legal jargon or other uncommon words, taking care with homonyms, synonyms, and antonyms, and putting together a thesaurus for use in instructions. Id. at 168-88.

369. E.g., State v. Moss, 456 A.2d 274, 275 (Conn. 1983) ("We come to a phrase that is difficult to define. What judges do is define it by eliminating, by saying what it is not and hoping that what is left you can understand to be a reasonable doubt."). This emphasis on what is not a reasonable doubt may enlarge the category of unreasonable doubts simply by focusing attention on that topic. This effect is similar to the criticism of instructions that focus on reasonable doubt rather than on beyond a reasonable doubt. See supra note 176 and accompanying text.

370. See ELWORK ET AL., supra note 48, at 45-57.

371. Id. at 330. The four short and repetitive instructions originally used in the case culminated in "abiding conviction." See id. at 213. The authors claim that their revisions caused a substantial improvement in the ability of laypersons to understand the difference between beyond a reasonable doubt and preponderance. Id. at 52 (noting a change from .11 proportion correct to .73 proportion correct).

372. See Kagehiro, supra note 301.
intended to reveal the factors that influence jury decisions. The result was clear: "[O]nly the quantified definitions consistently had their intended effect; the proportion of verdicts favoring the plaintiffs decreased significantly as the standard of proof became stricter." Kagehiro's studies found that other variations of reasonable doubt explanation, intended as improvements on legally accepted instructions, were substantially less successful. Not all researchers agree that verbal reforms are ineffective, and quantification can be problematic unless very carefully controlled. One jury study discovered both a high rate of misunderstanding of quantifiable concepts and that some of the misunderstanding was aggravated by accurate instructions.

In any event, courts have not been particularly receptive to quantified instructions. One reason may be that adopting such an approach would reveal the enormous differences of opinion among judges concerning the quantity that "beyond a reasonable doubt" represents. Judge Posner, a noted exponent of economic analysis of law, is an opponent of quantified

373. Id. at 195-96.
374. Id. at 196.
375. Id. at 197 & tbl.1. Some had no positive effect; others had some effect, but less than quantitative instructions; still others had a reverse effect, in which a plaintiff's verdict was more likely under a reasonable doubt standard than under a theoretically lesser civil standard. Id. Professor Hastie addresses the Kagehiro study, describing the difference between numerical and verbal standard of proof instructions in the following manner:

The theme that emerges from [Kagehiro's] research is that verbal instructions expressing alternate standards of proof . . . have surprisingly small effects on the decision criterion. . . . However, Kagehiro found that 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.

Hastie, supra note 310, at 108.

376. Kerr et al., supra note 301, at 291 (noting that the differences in the lax and stringent views of reasonable doubt resulted in a 26% difference in the conviction rate); Severance & Loftus, supra note 304, at 180 (citing a study in which the specific reasonable doubt instruction "significantly reduced errors").

377. Kramer and Koenig report that answers to two seemingly mirror-image questions, one relating the reasonable doubt standard to 100% certainty and the other relating it to "any possibility" of innocence, revealed that roughly three-quarters of the subjects (actual and potential jurors) misunderstood the concept. Kramer & Koenig, supra note 301 at 414-15. Instructions did not help. Id. The authors surmise that the difficulties largely stemmed from the "apples/oranges" aspect of going from qualitative instructions to quantitative questions. Id. at 415.


379. Such disagreement is most clearly evident in the McCauliff and Weinstein studies. See supra notes 347-53 and accompanying text.

380. Judge Posner is the author of numerous books on or that utilize economic analysis.
instructions. In his view, attempts to turn the standard into probabilities may deceive jurors. According to this argument, quantification may be deemed impractical even if theoretically sound.

Jury experts and practitioners also recommend changes in procedural aspects of instructions, particularly their timing. One suggestion calls for judges to give opening and closing instructions. Another idea is to move instructions to a point earlier in the trial, a change that could assist jurors in putting the evidence into a legal context. Other reforms, such as allowing jurors to take notes during trials and providing jurors with written copies of instructions, may help juries weigh the evidence and apply the standards


381. United States v. Hall, 854 F.2d 1036, 1044 (7th Cir. 1988) (Posner, J., concurring). Consistent with his background, Judge Posner concludes:

Numerical estimates of probability are helpful in investments, gambling, scientific research, and many other activities but are not likely to be helpful in the setting of jury deliberations. No objective probability of a defendant’s guilt can be estimated other than in the rare case that turns entirely on evidence whose accuracy can be rigorously expressed in statistical terms (e.g., fingerprints and paternity tests). In other cases the jury’s subjective estimate would float free of check and context. Id.; see also Winter, supra note 25, at 340 (explaining that quantification will confuse jurors because verdicts ultimately rest on subjective decisions about reliability and persuasion, and because many people do not understand quantitative analysis).

382. Forston, supra note 302, at 620-23. There could also be additional instructions throughout the trial. Id. See generally ELWORK ET AL., supra note 48, at 17-24 (identifying presentation problems). This is a common area for suggestions by jury reformers. See, e.g., Kelso, supra note 49, at 1513-14 (identifying a need for basic substantive instructions before trials); Symposium, supra note 306, at 1049 (statement of Steven J. Adler) (identifying a need for judges to discuss the case with the jury throughout the trial); id. at 1050 (statement of Judge Ladoris H. Cordell) (explaining that the judge gives a full set of instructions at beginning of trial); id. at 1058 (statement of Charles F.C. Ruff) (suggesting that lawyers should be able “to make periodic mini-statements to the jury”). See generally Fred H. Cate & Newton N. Minow, Communicating with Juries, Introduction, 68 IND. L.J. 1101, 1109-12 (1993) (summarizing procedural techniques to help jurors understand the facts and legal issues).

383. It would also help to solve the problem of jurors creating their “story” about the case before they learn the rules governing their deliberations and verdict. See supra note 335.

384. Forston, supra note 302, at 631-33. There is a potential problem with allowing jurors to take notes. Presumably the more literate, or perhaps the more copious note-takers, would have some advantage in deliberations. The authors point out, however, that present practices favor jurors who claim a better memory or who are otherwise more dominant. Id. They urge following safeguards identified by judges who already follow the practice. Id.

385. Forston, supra note 302, at 610, 619-20; Steele & Thornburg, supra note 300, at 297; see also Kramer & Koenig, supra note 301, at 428 (finding that written instructions significantly increased comprehension levels); Symposium, supra note 306, at 1052 (favoring sending written instructions into jury deliberations); Tanford, supra note 50, at 93 (criticizing traditional practice of prohibiting written instructions). There is a potential problem with written instructions as well. Better educated jurors are already more likely to understand
despite potential problems they may present.386

But better language and procedures, alone, will not resolve all issues in this area. Virtually all studies that report success in revising the language of instructions also report limitations on the impact of the changes.387 Real reform, if any is truly to be had, depends on confronting the more central issues.

B. Making the Hard Decisions

Improving the language of reasonable doubt instructions should make it more likely that the jury will understand those instructions. However, until we agree on what the message should be, we will see only a partial improvement. Solutions to more fundamental problems require answers to difficult questions: Do we really want juries to understand the reasonable doubt standard? Do we need instructions that explain the standard? Which explanatory instructions are most likely to help the jury?

1. The Black Box

Our criminal trial system is based in large part on an assumption that juries do what they are supposed to do—find the facts and apply the law set out in the judge’s instructions.388 To the extent that this assumption is

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386. These problems are evidenced by alternate pattern instructions prohibiting (§ 10.03) and permitting (§ 10.04) jurors to take notes. 1A KEVIN F. O’MALLEY ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS (5th ed. 2000). While the matter is left to trial court discretion, the cautious approach to notes even where allowed suggests some of the possible dangers. See, e.g., DISTRICT JUDGES ASS’N FIFTH CIRCUIT, supra note 182, § 1.03 (1990) (listing reasons for disallowing notes); see also United States v. Oppon, 863 F.2d 141, 148 n.12 (1st Cir. 1988) (stating that notes are only to refresh recollection of the trial evidence).

387. E.g., Nagel, supra note 311, at 193 (stating that improvements will be blunted by jurors who “adjust their perception” to rationalize their decision); Severance & Loftus, supra note 304, at 191, 194 (warning that reforming instructions through psycholinguistic principles is helpful, but substantial jury errors will still occur); Tanford, supra note 50, at 102-03 (arguing that revising instructions will solve only some of the problems).

388. “[T]he Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.” Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985); see also Richardson v. Marsh, 481 U.S. 200, 206 (1987) (“invariable assumption” of understanding); Parker v. Randolph, 442 U.S. 62, 73 (1979) (“crucial assumption” of understanding); Chalmers v. Mitchell, 73 F.3d 1262, 1267 (2d Cir. 1996) (assuming jury understanding of reasonable doubt instructions); Nichols, supra note 14, at 1724 & n.129 (criticizing the assumption).
premised on the impossibility of re-creating, after trial, the individual and group understandings of the jurors at all stages of their deliberations, this is an understandable and arguably necessary legal fiction. It serves, for example, as a reason for the strict limitations placed on reopening jury verdicts based on juror allegations regarding events during deliberations.\(^{389}\) To some extent, the assumption is also a convenient vehicle for the legal system to turn its eyes from the failure of juries to apply the proper standards, including the “near certainty” reasonable doubt requirement.

This notion regarding jury deliberations tolerates the jury as “a black box into which we dare not look.”\(^{390}\) The “black box” jury is not expected to apply the law to the facts in a careful and non-emotional fashion. It is instead expected to engage in “commonsense justice.”\(^{391}\) Thus, there is no particular need to draft reasonable doubt instructions that carefully inform jurors what to do because they know what to do. Judge Wald describes this view as embracing juries as “some kind of amorphous community conscience.”\(^{392}\)

Professor Horowitz argues that one result of commonsense justice may be the lessening of the prosecution’s burden of proof.\(^{393}\) Other commentators agree that the growing public concern with crime presents a real possibility of a downward shift in the standard of conviction.\(^{394}\) However, not all commonsense justice favors the prosecution. Jury nullification of “unjust” prosecutions remains a possibility despite widespread condemnation in recent

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389. Rule 606(b) of the Federal Rules of Evidence provides:
Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith . . . .
FED. R. EVID. 606(b); see also Tanner v. United States, 483 U.S. 107, 118-27 (1987) (explaining the rule, legislative history, and common law origins).


392. Wald, supra note 10, at 110. Professor Kadane, who suggests that there is an intentional connection between convoluted instructions and jury reliance on their own biases, ties these characteristics to the legal system’s efforts to keep jury decision-making secret. Kadane, supra note 327, at 229.

393. Horowitz, supra note 130, at 298-300.

394. See, e.g., Dery, supra note 14, at 615 (stating that the “standard has been severely weakened” in recent years); Horowitz & Kirkpatrick, supra note 129, at 669 (discussing the probability of “a willful diminution of the acceptable threshold of proof by jurors”); Nagel, supra note 311, at 191-92 (noting that studies show an “undue” willingness to convict).
For example, a leading case from the U.S. Court of Appeals for the District of Columbia Circuit held that juries should not be told of their power to nullify. But, in a lengthy discussion of the nature of jury trials, the court admitted that use of the power to nullify is appropriate in certain cases.

The black box notion is attractive to those who wish to manipulate juries to return verdicts at odds with the evidence. Michael Saks argues that "judges routinely nullify the law by rendering it meaningless" in their instructions. It is less confrontational, but ultimately no less manipulative, to emphasize the representative nature of the jury without stressing its sworn duty to examine the evidence and find the facts without passion or prejudice. Informing juries of their power to nullify may result in a runaway institution; however, using unintelligible instructions has the same result. There is a severe flaw in the black box approach, at least in criminal cases. If defendants only were entitled to a jury trial, then perhaps this would be acceptable. A jury can be good, bad, conscientious, racist, or contemptuous of the law, and still be a jury—a group selected through

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395. Professor Hastie suggests that jury studies indicate that jury nullification does not happen often, although his disclaimers are prominent. Reid Hastie, *Introduction* to INSIDE THE JUROR, supra note 300, at 13, 29. The pros and cons of jury nullification are beyond the scope of this Article. However, there have been a number of thoughtful works on the subject in recent years, some of them in response to the O.J. Simpson trial. A landmark work in this area that pre-dates the Simpson trial is Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS. 51 (1980).

396. United States v. Dougherty, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972). The majority stated: "The jury system has worked out reasonably well overall, providing 'play in the joints' that imparts flexibility and avoid[s] undue rigidity. An equilibrium has evolved—an often marvelous balance—with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution." *Id.* at 1134. This was a political case involving trespass and vandalism at Dow Chemical offices during the Vietnam War. *Id.* at 1117. Chief Judge David Bazelon issued a lengthy dissent arguing that the jury should have been told of its power to act "as community conscience," *id.* at 1140, by returning not guilty verdicts to nullify unjust prosecutions, *id.* at 1138-44.

397. *Id.* at 1130-32, 1134.


399. It is common for courts recommending against explanatory instructions to describe juries in language such as the "collective conscience of the community." E.g., Smith v. Butler, 696 F. Supp. 748, 751 (D. Mass. 1988). Judge Woodlock identified the federal-state conflict over moral certainty and upheld the state conviction despite several problematic aspects of the instructions. *Id.* at 751-66. He ultimately suggested leaving the meaning of reasonable doubt "to the jury as the collective conscience of the community." *Id.* at 765.

400. Professor McCauliff connects some of the difficulties in accurately conveying the meaning of standards of proof to the (at least arguable) benefits of symbolism associated with the historic phrasings. McCauliff, *supra* note 118, at 1298-99. Her strongest statement in this regard suggests another rationale for judicial tolerance of unclear reasonable doubt instructions: "Indeed, fear of precision may be at the root of much praise for the inscrutability of the jury." *Id.* at 1299.
established voir dire procedures from a fair cross section of the community. However, criminal defendants also have rights to the reasonable doubt standard under *Winship* and a rational application of that standard under *Jackson*. These constitutional rights are inconsistent with show trials where the law of reasonable doubt is immaterial to a juror’s gut instinct, even if we choose to call that instinct “justice.” At bottom, the uninformed opinions of the jurors might reflect a community concern that holding the prosecution to its heavy burden means being soft on crime. That would violate the defendant’s rights and is therefore a legally impermissible view of the role of the jury.

2. The Due Process Requirement of Explanation

Similar due process concerns mandate explanatory reasonable doubt instructions. The refusal to explain the meaning of the reasonable doubt standard can co-exist with the due process requirements only if the words “beyond a reasonable doubt” alone are sufficiently clear to inform the jury of the standard’s meaning. Most evidence is to the contrary. The empirical studies described above reveal widespread misunderstanding among laypersons of the reasonable doubt standard. More importantly, the studies reveal that understanding can be enhanced by careful and thoughtful instructions. The fact that this misunderstanding tends to understate the prosecution’s burden should alone be a sufficient reason to establish a constitutional requirement of more elaborate explanation.

The studies further reveal that explanatory instructions tend to increase acquittal rates, thereby balancing to some degree the typical understatement of the burden. This result convinced the authors of one study to argue as a matter of policy that “the practice of letting the jury define reasonable doubt” should be reconsidered. A reexamination of the data some years later and in the light of more recent studies on the verdict process convinced the study’s lead author, Norbert Kerr, to state its conclusion in more positive terms: “[T]rial procedures should insure that the burden of proof and standard of proof instructions are clearly understood and correctly applied. Such precautions may be the best protection against extra-legal biases in juror judgment.”

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401. *See supra* Part I.
402. *See supra* Part IV.A.
403. Horowitz’s work is particularly helpful to understanding the study results and their impact. *See* Horowitz, *supra* note 130, at 292-98 (showing how careful instructions tend to push jurors toward imposing a higher burden than their natural tendencies); *see also* Nagel, *supra* note 311, at 194-95 (addressing the use of “equalizing” instructions to respond to juror propensities for or against the defendant).
404. Kerr et al., *supra* note 301, at 292; *see also* Horowitz & Kirkpatrick, *supra* note 129, at 659 (noting the conclusion that the standard’s meaning must not be left to the jury).
The U. S. Supreme Court may state that there is no need for reasonable doubt explanations in cases, such as Victor, in which explanatory instructions were given; however, the Court seems to expect some explanation by the trial court. One year prior to the decision in Jackson, the Court required trial courts to instruct on the presumption of innocence to protect the constitutional standard. The Court described the trial court’s instructions, which went well beyond the mere statement of the reasonable doubt standard, as “truncated” and “hardly a model of clarity.” When the policies of Winship and Jackson and the results of the jury studies are all considered, it is hard to believe that the Supreme Court would actually conclude that “no explanation” will result in a rational application of the reasonable doubt standard.

“Beyond a reasonable doubt” is not a magic phrase, but it is a meaningful concept that is intended to prevent a conviction in the absence of what a jury thoughtfully and carefully concludes to a near certainty is proof of guilt. While one way to approach the problem is through more rigorous testing of the evidentiary basis of guilty verdicts by appellate courts, a more direct approach is to improve the chances of proper jury consideration. Providing clear explanatory instructions would seem to be the easiest and probably the only way to reach this result. In fact, some courts explicitly link explanation to the constitutional requirement. The Arizona Supreme Court did so in the case of State v. Portillo, in which it required explanatory instructions. The court reasoned that since lawyers have difficulty agreeing on the meaning of reasonable doubt, it is impossible to assume that jurors comprehend and apply the test in a proper fashion without receiving thoughtful explanation. Justice Blackmun’s reasoning in Victor was similar:

Despite the inherent appeal of the reasonable-doubt standard, it provides protection to the innocent only to the extent that the standard, in reality, is an

supra note 300, at 116, 133.

406. Justice Ginsburg revealed the weak foundation of this assertion in Victor. See supra note 256 and accompanying text.

407. Taylor v. Kentucky, 436 U.S. 478, 485-86 (1978). One of the student commentators on Victor noted that after Jackson and Victor, “[s]ome type of explanation for the concept of reasonable doubt seemed necessary, but the required elements of such an explanation were far from clear.” Nichols, supra note 14, at 1718.

408. Taylor, 436 U.S. at 488.

409. Professor Uviller wrote that the Court treated the standard as a “mystical phrase” in Cage. Uviller, supra note 14, at 36. He went on to note that judicial approval of “say nothing” reasonable doubt instructions invites the jury “to clothe it by invention, its flexibility an opportunity to bend it to prefigured purposes.” Id. at 38.


411. 898 P.2d 970 (Ariz. 1995). The court concluded “that the meaning of such a fundamental concept should not be left either to chance or the random, ad hoc interpretation of different trial courts and counsel.” Id. at 973.

412. Id. at 973-74.
enforceable rule of law. To be a meaningful safeguard, the reasonable-doubt standard must have a tangible meaning that is capable of being understood by those who are required to apply it.\textsuperscript{413}

Courts analyzing reasonable doubt issues often look to the policies underlying the standard and conclude that an explanation of reasonable doubt is central to the fairness of a criminal trial.\textsuperscript{414} Judge Posner may be correct when he says that the reasonable doubt standard is “deeply entrenched in the popular culture,” but he is wrong when he concludes from this statement that further instruction is unnecessary.\textsuperscript{415} Popular culture is overcrowded with poorly understood facts and concepts. Reasonable doubt needs additional explanation precisely because of the public’s awareness—and widespread misunderstanding—of the requirement.\textsuperscript{416} The disagreements among judges and scholars eliminate any doubt on this point. If they cannot agree on a straightforward meaning of the reasonable doubt standard, then how can the law expect jurors to apply the standard in a fair and consistent fashion?\textsuperscript{417}

\textsuperscript{413} Victor v. Nebraska, 511 U.S. 1, 29 (1994); see also Diamond, supra note 14, at 1721-32.

\textsuperscript{414} Dunn v. Perrin, 570 F.2d 21, 25 (1st Cir. 1978); see also United States v. Nolasco, 926 F.2d 869, 871-72 (9th Cir. 1991); Butler v. United States, 646 A.2d 331, 333-38 (D.C. 1994); Lansdowne v. State, 412 A.2d 88, 91-92 (Md. 1980); State v. Thorpe, 429 A.2d 785, 789 (R.I. 1981); State v. McHenry, 558 P.2d 188, 190 (Wash. 1977). These cases all stress the importance of reasonable doubt instructions.

\textsuperscript{415} United States v. Hall, 854 F.2d 1036, 1044 (7th Cir. 1988).

\textsuperscript{416} Most commentators favor explanatory instructions. See, e.g., Cohen, supra note 14, at 688-96 (arguing for explanatory definitions on theoretical and pragmatic grounds); Fortunato, supra note 14, at 370 (stating that we do not really have a standard unless the instruction conveys to jurors “the subjective state of mind they must have after deliberations in order to return a verdict of ‘guilty’”); Uviller, supra note 14, at 38 (stating that the standard alone invites abuse and appellate courts should recognize the jury’s need for a more meaningful standard). But see Note, supra note 103, at 1970-72 (noting that only jurors can properly define the standard).

\textsuperscript{417} The Maryland Court of Appeals explained this notion as follows: In our view, the term “reasonable doubt” is not so commonplace, simple, and clear that its meaning is self-evident to a jury. Even judges, who have “professional expertise” and “experience,” and who, by their “legal training, traditional approach to problems, and the very state of the art of [their] profession . . . learn to perceive, distinguish and interpret the nuances of the law which are its ‘warp and woof,’” have difficulty construing the meaning of “reasonable doubt.” Indeed, in myriads of cases, trial judges have committed error by incorrectly explaining “reasonable doubt.” Some unskilled and untutored lay jurors are at least as likely as judges to misconstrue the meaning of “reasonable doubt.” Consequently, a correct explanation may well serve the useful function of enlightening rather than confusing a jury.

Lansdowne v. State, 412 A.2d 88, 93 (Md. 1980) (citation omitted) (footnote omitted); see also Egan v. United States, 287 F. 958 (D.C. Cir. 1923) (reversing for failure to instruct on reasonable doubt beyond basics); Diamond, supra note 14, at 1721-24, 1728 & nn.61-72
Since the words "beyond a reasonable doubt" fail to explain the standard in a clear and coherent fashion, explanatory instructions are a due process minimum, notwithstanding the difficulty of drafting them.

3. Creating a Core Instruction

Part III of this Article identified five standard approaches to reasonable doubt instructions. Given the creative minds that developed those approaches and the judicial disinclination to free-form improvisation, those approaches are likely to provide the most fruitful avenues for reforming reasonable doubt instructions.

However, two of these approaches can be eliminated. The previous two sections of this Article ruled out the "say nothing" approach as a matter of logic. Refusing to explain the reasonable doubt standard is consistent only with treating the phrase beyond a reasonable doubt as either 1) an invitation to apply community values and non-evidence-based reasoning during deliberations, or 2) a belief that the more technical "near certainty" meaning is self-evident to jurors. Neither claim withstands analysis.418

The "say everything" approach fails for slightly different reasons. First, it is not a principled approach to improving jury understanding. Rather, it is a form of safe harbor in which jury verdicts are upheld as long as a sufficient number of accurate statements are included among the reasonable doubt instructions. Unfortunately, the sometimes aimless rambling of instructions that fall into this category only aggravates jury confusion, providing support for the claim that confusion mounts as courts attempt to clarify the reasonable doubt standard.419 The only appropriate role for this approach is the far more limited notion that recognizes that due process does not mandate any particular phrasing of reasonable doubt explanation, but instead permits any explanation that accurately informs the jury about the standard it must apply.

However, the still-vital principle of due process provides guidance for

\text{(stating that jury determination of the standard's meaning "rob[s] the standard of any meaning \ldots [and] render[s] [it] form without substance".)

418. One conclusion from this Article is that attorneys in jurisdictions where no helpful explanation is given should seek reform. The only remedy may be to request instructions that provide meaningful explanation and, if the request is denied, appeal in the hope that the Supreme Court agrees to consider the matter. It is possible that the Court would require meaningful explanation if it is convinced of the failings of the "no-explanation" model. The Court has occasionally relied on empirical data concerning juries to help it interpret and apply the right to trial by jury. \textit{E.g.}, Ballew v. Georgia, 435 U.S. 223, 231-39 & nn.10-32 (1978); Colgrove v. Battin, 413 U.S. 149, 158-60 & nn.15-16 (1973); Williams v. Florida, 399 U.S. 78, 101-02 & nn.48-49 (1970).

419. \textit{See supra} note 293-97 and accompanying text. An equally problematic aspect of this approach lies in its assumption that correct statements of the law cancel or cure incorrect statements. Courts that take this view rarely provide any reason to assume that it is correct. Conversely, it could just as easily be said that the incorrect statements cancel the correct. \textit{See}, \textit{e.g.}, Dery, \textit{supra} note 14, at 624.
those courts that desire to improve their explanations of the reasonable doubt standard. Too often courts use one approach to the exclusion of others. This method works for those jurors who perceive the significance of the approach being used, but fails those who do not. For example, the use of an analogy can be an effective tool for explaining the concept to some jurors, but the daily life examples may trivialize the process to others. Including other ways of presenting the standard along with an analogy should prevent that problem. Therefore, the answer is to create a fairly concise explanatory instruction that retains the strengths of the various approaches while softening their flaws through clarification.

The first step is to rule out those instructions that are erroneous in and of themselves. Professor Horowitz organizes common instructions into "approved" and "suspect categories." Following his lead, instructions that focus on the magnitude of a "reasonable doubt" should be stricken from the list, not only because of the case law disapproving their use, but because the focus on the level of doubt inevitably takes attention away from the appropriate subject—whether the prosecution has proved its case beyond a reasonable doubt.

Professor Horowitz includes moral certainty in the suspect category. While contemporary usage of the phrase makes its use problematic, there remains something positive about the concept. When properly surrounded by language that underscores the need to be "nearly certain on the basis of the evidence," moral certainty can have the effect of emphasizing the substantial burden on the prosecution. As long as the near certainty and evidence requirements are clarified, moral certainty appears to remind jurors of another aspect of their responsibility—to defend a guilty verdict to their own conscience. They must be able to sleep, to look at themselves in the mirror, and to remember their verdict without regret. As the First Circuit has noted, it is "hard to imagine . . . a charge more reflective of the solemn and rigorous standard intended" than moral certainty.

There is also a role for the analogy instruction. An analogy asks jurors to place the defendant in the jurors' important life decisions, but the subliminal

420. Horowitz, supra note 130, at 289-91.
421. See supra text accompanying notes 268-69.
422. Horowitz, supra note 130, at 290. He also concludes that moral certainty is unlikely to be used much anymore. Horowitz & Kirkpatrick, supra note 129, at 668 (citing Victor v. Nebraska, 511 U.S. 1 (1994)).
423. See supra notes 126-30 and accompanying text.
424. The jury studies may be instructive here. In one study, in which moral certainty instructions were given without substantial explanation, juries returned more convictions in weak cases than on the basis of any other instructions, suggesting they understated the prosecution's burden. See, e.g., Horowitz & Kirkpatrick, supra note 129, at 661-69. However, when moral certainty was one concept among others clarifying the extent of the prosecution's burden, the instructions had the opposite effect. See Kerr et al., supra note 301, at 286-93.
425. Lanigan v. Maloney, 853 F.2d 40, 43 (1st Cir. 1988).
purpose of the analogy instruction is for the jurors to place themselves in the defendant’s position. The analogy reverses the relationship between the jurors and the defendant to avoid offending jurors by associating them with crime. Potential problems, however, include trivializing the severity of the matter by using everyday examples and substituting future choice for past fact-finding. Both problems may be negated by the use of an analogy that asks jurors to place themselves in the position of possibly losing something very valuable to them based on a determination of past events.426

Reformed reasonable doubt instructions also should address near certainty. The most appropriate form of the near certainty instruction is found in the FJC instruction.427 “Firmly convinced” is a modern way of expressing the historical concept of moral certainty, and it avoids the confusion engendered by another synonym, “abiding conviction.”428 There is also nothing wrong with the use of “nearly” or “almost” certain, unless courts conclude that they suggest too wide a gap between absolute certainty and “beyond a reasonable doubt.”429 There is a problem, however, with using the “real possibility” language in referring to the not guilty option. Courts that have expressed problems with the FJC instruction have focused on that phrase.430 “Real” is so often a colloquial substitute for “substantial” or “weighty” that the word is best avoided in jury instructions. Possibly, it could be replaced by “actual.”

Other phrases might be added to jury instructions to explain the reasonable doubt standard in more depth. One possibility is to return to the primary source and explain the reason for the high standard of proof, utilizing Blackstone’s “ten-to-one” explanation.431 Another possibility is to compare the standard to the lesser standards used in non-criminal cases.

It should be fairly easy for courts to modify their practices to satisfy due process and to help jurors understand the reasonable doubt standard. These two efforts should be mutually supportive. There is no need to legislate a precise instruction, and trial judges should retain some degree of discretion in how they present the standard.432 The Court in Victor was correct to the

426. On a more subtle level, a clear explanation of the reasonable doubt requirement must state that any juror not convinced of guilt beyond a reasonable doubt should vote not guilty.

427. FJC INSTRUCTION, supra note 99, at 28.

428. Id.

429. Judge Fortunato takes this view. His proposed instruction tells the jurors to find the defendant guilty only if “convinced in your own mind that it is just about certain—or nearly certain—that the defendant committed the crime.” Fortunato, supra note 14, at 427. The use of “just about” in context with “nearly” underscores how close to certain the standard requires.

430. See supra notes 230-33 and accompanying text.

431. See supra notes 26-27 and accompanying text. One study found substantial success in explaining the necessary standard of proof in terms of both these numerical probabilities and the underlying policy expressed by Blackstone and the Supreme Court in Winship. Nagel, supra note 311, at 194-95.

432. One commentator concludes that a precise form instruction is not practical. Diamond,
extent that it recognized that no specific form of instruction is necessary. The error was in examining the various portions of the challenged instructions in isolation from one another. Jurors do not have the time, the skill, or the library resources to perform that task at the end of a trial. But, if judges take the time and make the effort to craft instructions that communicate the extent of the prosecution’s burden in an effective manner and that prevent juries from basing their verdicts on factors other than the evidence, they will improve the quality of justice.

VI. CONCLUSION

The reasonable doubt standard is amorphous, and our system does not take enough care in defining the standard or explaining its meaning to juries. Yet the standard and the instructions that explain it are central to our criminal justice system, serving as the axle between the equally fundamental rights to acquittal unless proven guilty beyond a reasonable doubt and to a trial by jury.

It is surprising that after well over a hundred years of evaluation, our society has been unable to determine a manner in which to explain the reasonable doubt requirement to a jury. We know that the standard applies in criminal cases, that it does so by constitutional mandate, and that it requires near certainty about guilt. But we remain uncertain about how to explain its meaning to a jury. Perhaps we have been unable to resolve the communication dilemma because there is no perfect answer:

Some day the courts may recognize the utter impossibility of conveying metaphysical concepts to a jury and approve a simple charge, if charge be needed at all, such as “reasonable doubt is a doubt based on reason.” Such simplicity, of course, might well be anathema to the Law—hence, clarity (or probably greater confusion) is supplied by . . . clichés . . . .

supra note 14, at 1725. “But certain broad requirements can be identified: A constitutional definition of reasonable doubt emphasizes a level of proof that is far above a preponderance of the evidence and that approaches complete certainty.” Id.

433. See supra notes 94-96 and accompanying text.


435. Judge Newman suggests that the standard has had “very little” importance as a legal requirement. Newman, supra note 14, at 989. As noted in the introduction, Judge Wald finds the standard “essentially irrelevant.” Wald, supra note 10, at 101. One commentator points out that the lack of adequate reasonable doubt instructions is a world-wide problem. Mulrine, supra note 14, at 225.


437. United States v. Guglielmini, 384 F.2d 602, 608 (2d Cir. 1967) (Moore, J.,
Too often it appears that an attempt to communicate the reasonable doubt standard turns into an instruction that is too wordy to be effective, and yet is deemed sufficient for covering all of the bases. Cases such as State v. Moss, 438 which approve all-inclusive instructions, merely delegate the defining job to the jury, while cases such as United States v. Reynolds 439 do the same by insisting on no explanatory instructions. The most effective efforts at improvement must work on two fronts. First, we should simplify and clarify instructions to avoid legalese and unnecessarily convoluted language. Judges should also exercise their authority to instruct early and often, to help jurors absorb the law they must apply, including reasonable doubt.440 Second, we should resolve the larger questions about the role of the reasonable doubt standard and the status of instructions on the issue. Until that happens, the place of the standard will be uncertain and appellate courts will react only to the more extreme practices of trial judges. Once we agree that instructions help juries and that juries need to understand the near certainty requirement, there should be little difficulty in drafting more effective jury instructions from existing models. At present those models are at war with one another and their combination tends to confuse the jury. Reconfigured to meet agreed upon objectives, the models can be used to strengthen and clarify each other. In this way, we can regain confidence that instructions are not just gibberish and that criminal trials are—in reality as well as in rhetoric—factual inquiries governed by the reasonable doubt standard.

438. 456 A.2d 274 (Conn. 1983). See generally supra Part III.E.

439. United States v. Reynolds, 64 F.3d 293 (7th Cir. 1995). See generally supra Part III.D.

440. My preferred way to state the burden of the criminal factfinder can be inferred from Part V.B.3: we should emphasize the FJC instruction, delete “real possibility,” and add thoughtful references to moral certainty and a revised analogy. Admittedly, the phrasing might be just another “grand conglomeration of garbled verbiage and verbal garbage.” Joseph J. O’Mara, Standard Jury Charges—Findings of Pilot Project, 43 PENN. B. ASS’N Q. 166, 166 (1972), quoted in State v. Aubert, 421 A.2d 124, 127 (N.H. 1980).