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A Reasonable Doubt About "Reasonable Doubt"

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A REASONABLE DOUBT ABOUT “REASONABLE DOUBT”

MILLER W. SHEALY, JR. *

Abstract

The Supreme Court has failed to define the concept of “reasonable doubt” with any precision. The Court tolerates conflicting definitions of “reasonable doubt.” It permits some jurisdictions to forbid any definition of “reasonable doubt,” while giving others wide latitude to define the concept in ways that are contradictory.

If the Court truly regards the “proof beyond a reasonable doubt” standard to be an “ancient and honored aspect of our criminal justice system,”¹ a “bedrock ‘axiomatic and elementary’ principle whose ‘enforcement lies at the foundation of the administration of our criminal law,’”² then the Court cannot continue to tolerate the current state of the law. This article will explore how this came about and propose a new way forward. In short, modern courts have lost sight of the origins of “reasonable doubt.”

“Reasonable doubt” has roots that stretch back to antiquity. However, we have lost the sense of “reasonable doubt” which emphasized the fearsome and awesome moral responsibility of judging a fellow human being. This sense of “reasonable doubt” has deep Judeo-Christian roots, though it is not limited to this perspective. It is simply a reminder that in judging our fellow human beings we are dealing with something unique: a being with dignity and extraordinary worth, a person that is *imago dei*. It is this sense of “reasonable doubt” which we must recapture.

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* Associate Professor of Law, Charleston School of Law, Charleston, South Carolina. I would like to thank those who reviewed earlier drafts of this article, especially Professor Larry Laudan. Also, I am grateful to my colleagues Sheila Scheuerman, Margaret Lawton, Randall Bridwell, Paul Lund, and Jorge Roig for their support and generous counsel. I am also grateful for the assistance of my research assistants, Edward R. Corvey, Christopher S. Lietzow, and Stephanie P. Brown. Any mistakes that remain are, as always, my own.

1. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994).
2. *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

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I. Introduction

Lawyers, media pundits, and the public are fascinated with big criminal trials and the spectacles they provide. Jury verdicts might have some finality in law, but not in public opinion. Public debate about whether the jury was right is frequent and often acrimonious. How much proof is enough? What kind of evidence constitutes sufficient proof? This is the essence of “reasonable doubt” in today’s criminal courtrooms and public opinion.

Former O.J. Simpson prosecutor Marcia Clark said she was “[s]ick, shaken, in disbelief” upon hearing the verdict of acquittal in the high profile Casey Anthony case.³ Anthony was tried for the murder of her young daughter in July 2011.⁴ Clark said, “I relived what I felt back when [the] court clerk . . . read the verdicts in the Simpson case.”⁵ Clark believes that the evidence overwhelmingly supported a conviction for both O.J. Simpson and Casey Anthony.⁶ She would never have voted to acquit Anthony: “If I’d been in that jury room, the vote would’ve been 11 to 1. Forever.”⁷ For Clark, the jury instructions in both the O.J. Simpson and Casey Anthony cases were too complex and the jury got confused about the meaning of “reasonable doubt.”⁸ The jurors “confus[ed] reasonable doubt with a reason

3. Marcia Clark, *Worse than O.J.!*, DAILY BEAST (July 5, 2011, 7:12 PM), <http://www.thedailybeast.com/articles/2011/07/05/casey-anthony-trial-marcia-clark-says-the-verdict-was-worse-than-the-o-j-simpson-case.html>.

4. Fox & Friends, *One Year Later: Casey Anthony’s Lawyer Jose Baez Reveals All in New Book*, FOX NEWS (July 6, 2012, 9:33 AM), <http://foxnewsinsider.com/tag/casey-anthony/>.

5. Clark, *supra* note 3.

6. *Id.*

7. *Id.*

8. *See id.*

to doubt. . . . A reason does not equal *reasonable*. Sometimes that distinction can get lost.”⁹

Indeed, what is “reasonable”? As we will see, “reasonable doubt” may well be an American invention. At its core it is about the right of each American citizen charged with a crime to have the government prove its case against him beyond a “reasonable doubt.” This great right is at the very core of our system of ordered liberty; it is a great bulwark of our freedom, a fundamental, bedrock aspect of our criminal justice system. It is a point on which all courts agree and virtually no one questions.¹⁰ This is so despite a disquieting uncertainty about its origins and place in the history of the jury trial.¹¹ However, there is a reasonable doubt about “reasonable doubt.” The

9. *Id.*

10. See *Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *In re Winship*, 397 U.S. 358, 363 (1970).

11. See JAMES FRANKLIN, *THE SCIENCE OF CONJECTURE: EVIDENCE AND PROBABILITY BEFORE PASCAL* (2001); Larry Laudan, *The Rules of Trial, Political Morality, and the Costs of Error: Or, Is Proof Beyond a Reasonable Doubt Doing More Harm than Good?* [hereinafter Laudan, *The Rules of Trial*], in 1 OXFORD STUDIES IN THE PHILOSOPHY OF LAW 195 (Leslie Green & Brian Leiter eds., 2011); LARRY LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY* (2006) [hereinafter LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW*]; BARBARA J. SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE* (1991) [hereinafter SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE*]; JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 2-7* (2008) [hereinafter WHITMAN, *THE ORIGINS OF REASONABLE DOUBT*]; Thomas P. Gallanis, *Reasonable Doubt and the History of the Criminal Trial*, 76 U. CHI. L. REV. 941, 962 (2009); Larry Laudan, *Is It Finally Time to Put “Proof Beyond a Reasonable Doubt” Out to Pasture?* (Apr. 2011) (Public Law Research Paper No. 194, University of Texas Law) [hereinafter Laudan, *Put “Reasonable Doubt” Out to Pasture*]; Larry Laudan, *Is Reasonable Doubt Reasonable?*, 9 LEGAL THEORY 295 (2003) [hereinafter Laudan, *Is Reasonable Doubt Reasonable?*]; Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507 (1975); François Quintard-Morénas, *The Presumption of Innocence in the French and Anglo-American Traditions*, 58 AM. J. COMP. L. 107 (2010); Barbara Shapiro, *Changing Language, Unchanging Standard: From “Satisfied Conscience” to “Moral Certainty” and “Beyond Reasonable Doubt”*, 17 CARDOZO J. INT’L & COMP. L. 261 (2009) [hereinafter Shapiro, *Changing Language*]; Barbara J. Shapiro, *The Beyond Reasonable Doubt Doctrine: ‘Moral Comfort’ or Standard of Proof?*, 2 LAW & HUMAN. 149 (2008) [hereinafter Shapiro, *The Beyond Reasonable Doubt Doctrine*]; Barbara J. Shapiro, *“To a Moral Certainty”: Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153 (1986) [hereinafter Shapiro, *“To a Moral Certainty”*]; Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 NOTRE DAME L. REV. 1165 (2003); Theodore Waldman, *Origins of the Legal Doctrine of Reasonable Doubt*, 20 J. HIST. IDEAS 299 (1959); James Q. Whitman, *Response to Shapiro*, 2 LAW & HUMAN. 175 (2008) [hereinafter

Supreme Court has held that “reasonable doubt” is a fundamental requirement of constitutional due process.¹² There is no firmer grounding in law. Yet, the Supreme Court has refused to define or clarify the meaning of “reasonable doubt.” It has approved a welter of definitions and explanations. It has permitted jurisdictions to refuse to define or explain the concept, even upon a jury’s request to do so.

But an undefined and unspecified right is no right at all. One very frustrated trial judge, instructing the jury on “reasonable doubt,” deftly summarized the current state of the law when he said, “[W]ho are we to tell you what is reasonable and what is not? That is wholly within your province.”¹³ While this is, unfortunately, the de facto state of the law, it is unacceptable.¹⁴ Property, liberty, and life are at risk every day in American criminal courts. Everything turns on the evidence and whether there is “reasonable doubt.” As Justice Blackmun said, “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. It must be stated accurately and with the precision owed to those whose liberty or life is at risk.”¹⁵

All of this points to the ultimate issue. What exactly is “reasonable doubt”? It is not the purpose of this article to challenge the basic moral and legal premise that those accused of crime should be held criminally liable if and only if the prosecution can prove its case against them with substantial and reliable evidence.¹⁶ Nor does this article question the elementary principle of our criminal justice system that the standard in criminal cases should be higher than it is in routine civil and administrative proceedings.

Whitman, *Response to Shapiro*]; James Q. Whitman, *The Origins of “Reasonable Doubt”*, YALE FAC. SCHOLARSHIP SERIES (2005), available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1000&context=fss_papers.

12. See *infra* Part II.A.

13. *Wansing v. Hargett*, 341 F.3d 1207, 1214 (10th Cir. 2003) (citation omitted).

14. See *infra* note 254.

15. *Victor*, 511 U.S. at 29 (Blackmun, J., concurring in part and dissenting in part).

16. See, e.g., *In re Winship*, 397 U.S. 358, 362 (1970); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *Coffin v. United States*, 156 U.S. 432, 453 (1895); see also WHITMAN, *THE ORIGINS OF REASONABLE DOUBT*, *supra* note 11, at 202 (“Indeed, the proposition that guilt must be proven beyond a reasonable doubt has become a pillar of our secular legal system.”); GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 871 (2d ed. 1961) (“The philosophy underlying the rule is the oft-quoted maxim that it is better that ten guilty persons should escape than one innocent suffer.”). See generally WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING, *CRIMINAL PROCEDURE* § 1.4(d)-(e) (West Grp., 3d ed. 2000) (1985); 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 3:17 (3d ed. 2009).

This article's concern is the precise standard that has developed for criminal cases in Anglo-American jurisprudence: the "proof beyond a reasonable doubt" standard.¹⁷ It is only when the prosecution meets this standard that it can be said to have met its "burden of proof."¹⁸

This article will focus on American jurisprudence regarding the development of "reasonable doubt" as a standard of proof in criminal cases. The analysis will unfold in three steps.

First is a detailed explanation of the current status of "reasonable doubt" in the Supreme Court and, to a lesser extent, the United States Courts of Appeals. Only if the putative constitutional basis is clear can one then examine the broader history of the concept in light of the Supreme Court's understanding. This article will show that the Supreme Court has inexcusably failed to give definition or substance to this concept, which it regards as fundamental to our system of justice. This is so primarily because the Court has forgotten the rich common law roots of "reasonable doubt."

Second, this article will examine some of the recent scholarly literature regarding the history and meaning of "reasonable doubt." The article will show that two poles of thought have developed about "reasonable doubt": the standard or received view, which sees "reasonable doubt" as a concept born of the secular Enlightenment and humanist philosophy, and the theological view articulated by Professor James Q. Whitman¹⁹ in his recent work, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*. For now, the difference between the two views comes down to this: The received view emphasizes epistemology. Its focus is about how we know something. That is, how do we rationally and justifiably choose among competing testimonies and alleged facts to determine the "truth" of the matter? It is about factual proof and analysis. The theological view presupposes a different problem. It is not about "facts" but about judges' and jurors' fears about standing in judgment of another human being.

17. See *In re Winship*, 397 U.S. at 362-66; see also 1 BARBARA E. BERGMAN & NANCY HOLLANDER, *WHARTON'S CRIMINAL EVIDENCE* § 2:3 (15th ed. 1997); 1 MUELLER & KIRKPATRICK, *supra* note 16; 5 WIGMORE ON EVIDENCE § 2497(1) (2d ed. 1923).

18. *Victor*, 511 U.S. at 5; *Davis v. United States*, 160 U.S. 469, 485-86 (1895), *superseded by statute*, 18 U.S.C. § 17 (1984); *Miles v. United States*, 103 U.S. 304, 312 (1880); *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850); 2A CHARLES ALAN WRIGHT & PETER J. HENNING, *FEDERAL PRACTICE & PROCEDURE: CRIMINAL* § 502 (4th ed. 2009); see also CHARLES T. MCCORMICK, *LAW OF EVIDENCE* § 321 (1954); 9 WIGMORE ON EVIDENCE § 2497 (Chadbourn rev., 3d ed. 1981).

19. See James Q. Whitman, *Faculty*, YALE L. SCH., <http://www.law.yale.edu/faculty/JWhitman.htm> (last visited March 7, 2012).

People in pre-modern Christian and non-Christian societies thought that in judging others they put their souls in jeopardy. Thus, they sought moral comfort rather than factual proof. They often knew who was guilty, so that was not the issue. Rather, they wanted assurance that God would not punish them if they wrongly judged another. “Reasonable doubt” has origins in this theological background, as a moral comfort mechanism. If Professor Whitman is substantially correct then his analysis of the history of “reasonable doubt” will shed substantial light on the problem of defining the concept. Indeed, his understanding of the history of “reasonable doubt” can be used to lead us out of our current impasse.

Last, this article offers a way forward by proposing a definition of “reasonable doubt.” The definition is not new. It was a pillar of our criminal jurisprudence for over a century. It has roots that go back at least 300 years, if not to antiquity. We have forgotten the answer we once had. We just need to remember. The “reasonable doubt” instruction developed by Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court in 1850, was right from the start.²⁰ Chief Justice Shaw’s definition is regarded as the high water mark for the common law definition of “reasonable doubt” by most scholars.²¹ Although Chief Justice Shaw’s definition is most strongly supported by Whitman’s historical thesis, it also finds substantial support in the contrary view. Simply put, in the context of our legal system as currently constituted, it is the best available choice.

II. The Federal Courts on Reasonable Doubt

When the Supreme Court declares a right to be a fundamental, basic element of due process, but consistently fails to give that right minimum content or definition, it fails in its basic function. This section shows how the Court has carelessly abandoned the common law understanding of “reasonable doubt” it once had and has allowed this understanding to be supplanted by a nebulous, incoherent concept that cannot possibly meet its due process requirement. This is the Achilles heel of the Court’s jurisprudence in this area.

A. The Supreme Court

Some scholars have argued that the precise origins of the concept of “reasonable doubt” may well be lost to us.

20. *See infra* note 40.

21. *See infra* notes 40-41.

All we can safely say, given the state of the evidence, is that something changed in the 1780s—or earlier, but was recorded in the 1780s—to prompt the use of the reasonable doubt instruction. Frustratingly, we do not know more. On this aspect of the trial’s history, the jury is still out.²²

The rather late arrival in the history of the common law of “proof beyond a reasonable doubt” is well attested to by Dean Wigmore and “seems to have had its origin no earlier than the end of the 1700s.”²³ In fact, the Supreme Court noted that the burden in criminal cases of “proof beyond a reasonable doubt” did not solidify into that specific formula until as late as 1798.²⁴

It was not until 1970 that “[t]he constitutionalization of [the] burden of proof began with *In re Winship*.”²⁵ In *Winship* the Court held the “reasonable doubt” standard applicable to the States via the Due Process Clause.²⁶ While *Winship* was not the first case to discuss the concept of reasonable doubt,²⁷ it was the first case to do so in a manner that was profoundly constitutional with broad and sweeping implications for criminal justice.²⁸

22. Gallanis, *supra* note 11, at 963.

23. 9 WIGMORE ON EVIDENCE, *supra* note 18, § 2497(1).

24. *In re Winship*, 397 U.S. 358, 362 (1970); *see also* 2 MCCORMICK ON EVIDENCE § 341(c) (6th ed. 2006).

25. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and the Burden of Proof in Criminal Law*, 88 YALE L.J. 1325, 1328 (1979); *see also* 1 BERGMAN & HOLLANDER, *supra* note 17.

26. 397 U.S. at 364. *See generally* 1 MUELLER & KIRKPATRICK, *supra* note 16; Ronald J. Allen, *The Restoration of In re Winship: A Comment on Burdens of Persuasion in Criminal Cases after Patterson v. New York*, 76 MICH. L. REV. 30, 37 (1977) (“*Winship* was the first Supreme Court decision to hold explicitly that the reasonable doubt standard possesses constitutional dimensions.”).

27. *See, e.g.*, *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958); *see also* *Holland v. United States*, 348 U.S. 121, 139-40 (1954); *Leland v. Oregon*, 343 U.S. 790, 795 (1952); *Brinegar v. United States*, 338 U.S. 160, 174 (1949); *Wilson v. United States*, 232 U.S. 563, 569-70 (1914); *Holt v. United States*, 218 U.S. 245, 253 (1910); *Davis v. United States*, 160 U.S. 469, 488 (1895), *superseded by statute*, 18 U.S.C. § 17 (1984); *Coffin v. United States*, 156 U.S. 432, 452-53 (1895); *Miles v. United States*, 103 U.S. 304, 312 (1880).

28. While it is beyond the scope of this article, the implications of the Court’s holding in *Winship* were nothing less than revolutionary to criminal law. Ultimately, *Winship* and its progeny substantially changed the rules applying to many affirmative defenses and some lesser included offenses. In the case of affirmative defenses, the defendant no longer has the “burden of persuasion.” Once such defenses are raised, that is, once the defendant has met a “burden of production,” the burden to disprove the existence of an affirmative defense shifts to the prosecution. *See* *Montana v. Egelhoff*, 518 U.S. 37, 65-66 (1996); *Martin v. Ohio*, 480 U.S. 228, 242-43 (1987); *Francis v. Franklin*, 471 U.S. 307, 317-19 (1985); *Sandstrom v.*

1. *The Road to Winship*

How did we get to *Winship*? The Supreme Court required “proof beyond a reasonable doubt” in federal courts long before it imposed the standard on state criminal proceedings.²⁹ The first time the Court squarely addressed the issue of the definition of “reasonable doubt” was in *Miles v. United States*.³⁰ The *Miles* case involved a prosecution for bigamy in Utah.³¹ The trial court defined “reasonable doubt” in pertinent part as follows:

The prisoner’s guilt must be established beyond reasonable doubt. Proof 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. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant’s guilt, *that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests*.³²

The Court found no error in this instruction.³³ Some of the basic elements of “reasonable doubt” as it developed in the common law appear in this short instruction. “Reasonable doubt” is equated with such phrases as “abiding conviction,” “moral certainty,” and what “a prudent man would feel safe to act upon.”³⁴ The Court clearly sees the potential for future trouble: “Attempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.”³⁵ The failure of the

Montana, 442 U.S. 510, 516-17 (1979); *Patterson v. New York*, 432 U.S. 197, 220-21 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975); *see also* 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.8 (2d ed. 2003); 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5142 (2d ed. 2005); Allen, *supra* note 26, at 63.

29. *See Coffin*, 156 U.S. at 452-54; *see also Davis*, 160 U.S. at 487-89; *Miles*, 103 U.S. at 309.

30. *See* 103 U.S. 304.

31. *Id.* at 306-07.

32. *Id.* at 309 (emphasis added) (citation omitted).

33. *Id.* at 312.

34. *Id.* at 309.

35. *Id.* at 312 (citing *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295 (1850); *Winter v. State*, 20 Ala. 39 (1852); *Giles v. State*, 6 Ga. 276 (1849); *Arnold v. State*, 23 Ind. 170 (1864); *State v. Ostrander*, 18 Iowa 435 (1865); *State v. Nash*, 7 Iowa 347 (1858);

Court at this early stage to firmly settle on a definition marks the origin of the problem.

In *Hopt v. Utah*,³⁶ the Court came as close as ever to giving a full definition of "reasonable doubt." It is worth setting forth the instruction at length:

The instruction to the jury, which is the subject of exception, relates to the meaning of the words "reasonable doubt," which should control them in their decision. . . . "The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. That *if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so*

[A] reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

The word "abiding" here has the signification of "settled and fixed," a conviction which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so *settled and fixed* as to control his action *in the more weighty and important matters relating to his own affairs. . . . [T]here is no absolute certainty. . . . Persons of speculative minds may in almost every such case suggest possibilities of the truth being different from that established by the most convincing proof. The jurors are not to be led away by speculative notions as to such possibilities.*³⁷

Donnelly v. State, 26 N.J.L. 601 (1857)). This is highly significant, as only state cases following common law are cited. The Court seems to lack developed independent jurisprudence of the issue at the time. Clearly, the Court is drawing on the rich tradition of the common law.

36. 120 U.S. 430 (1887).

37. *Id.* at 439-40 (emphasis added).

The emphasized portions of the instruction reflect classic common law evolution of the definition. However, the real significance of *Hopt* is that the Court relied very heavily on two crucial state cases, both from Massachusetts: *Commonwealth v. Webster*³⁸ and *Commonwealth v. Costley*.³⁹ Courts and scholars have long viewed the *Webster* decision⁴⁰ in particular as the classic common law definition of “reasonable doubt.”⁴¹ In

38. 59 Mass. (5 Cush.) 295 (1850).

39. 118 Mass. 1 (1875).

40. Chief Justice Shaw’s opinion regarding reasonable doubt is worth reproducing at length:

Then, what 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 [sic] 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

Webster, 59 Mass. (5 Cush.) at 320.

41. Ultimately, the *Webster* definition should be viewed as a model. See also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 76 (5th ed. 2009) (“Chief Justice Shaw of the Massachusetts Supreme Judicial Court crafted the traditional definition of ‘beyond a reasonable doubt,’ which served for more than a century as the basis for many reasonable-doubt jury instructions.”); LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11, at 33 (“Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts nicely summed up the equation between moral certainty and proof beyond a reasonable doubt in a famous case from 1850. . . . [I]t was to become the canonical formulation of [beyond a reasonable doubt] for almost a century”); 9 WIGMORE ON EVIDENCE, *supra* note 18, § 2497 (“From time to time, various efforts have been made to define more in detail this elusive and undefinable state of mind. One that has received frequent sanction and has been quoted innumerable times is that of Chief Justice Shaw of Massachusetts, on the trial of Dr. Webster for the murder of Mr. Parkman”); Barbara Shapiro, *Changing Language*, *supra* note 11, at 277 (“The most widely adopted formula”). Further,

The vitality of the old moral theology was not yet sapped, and everyone understood why jurors should seek moral certainty. Thus one of the great figures of early nineteenth-century American law, Chief Justice Lemuel Shaw

Hopt, the Court seemed to substantially accept the reasoning of *Webster* and *Costley*, even though the instruction it approved did not strictly follow *Webster*. The bottom line is that "reasonable doubt" and "moral certainty" are seen as substantially the same.⁴² However, the Court in *Hopt* went on to favorably cite *Webster* and *Costley* for the proposition that "reasonable doubt" could be defined or left undefined.⁴³ At the risk of jumping too far ahead, if the Court had acted more propitiously and embraced *Webster's* definition more firmly we might have been spared the confusion that currently reigns in this area of the law.

This paper focuses on "reasonable doubt," not the "presumption of innocence." These two concepts, more than merely mirror images of each other, are not distinct in the minds of many. However, in the Court's jurisprudence, they are separate legal requirements.

In *Coffin v. United States*, the Court dealt with the relationship between the "presumption of innocence" and "reasonable doubt."⁴⁴ The trial court failed to charge the "presumption of innocence."⁴⁵ The issue was whether this failure could be harmless in light of a full and correct charge on "reasonable doubt."⁴⁶ The "reasonable doubt" instruction was in substance the same as in *Hopt*, and, therefore, presumed to be correct.⁴⁷ The significance of *Coffin* is the Court's holding that a proper "reasonable doubt" instruction does not render harmless the failure to properly instruct

of the Massachusetts Supreme Judicial Court, still understood proof beyond a reasonable doubt as proof sufficient to attain "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."

WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 204-05. Indeed, "The *Webster* charge is representative of the time when 'American courts began applying [the beyond a reasonable doubt standard] in its modern form in criminal cases.'" *Victor v. Nebraska*, 511 U.S. 1, 8 (1994) (alteration in original) (citing *Apodaca v. Oregon*, 406 U.S. 404, 412 n.6 (1972) (plurality opinion)); *see also* *Perovich v. United States*, 205 U.S. 86, 92 (1907) (approving *Webster*); *People v. Strong*, 30 Cal. 151, 155 (1866) (referring to the *Webster* charge as "probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal jurisprudence"). In fact, Chief Justice Shaw's definition of "reasonable doubt" is so well established that it is adopted as the definition of the concept in the most recent edition of *Black's Law Dictionary*. *See* BLACK'S LAW DICTIONARY 1380 (9th ed. 2009).

42. *Hopt*, 120 U.S. at 440.

43. *Id.* at 440-41.

44. 156 U.S. 432 (1895).

45. *Id.* at 452.

46. *Id.* at 453-54.

47. *Id.*

the jury on the “presumption of innocence.”⁴⁸ A clear charge on both concepts is required because the two concepts are legally distinct.

In both *Dunbar v. United States*⁴⁹ and *Holt v. United States*, the Court upheld instructions on “reasonable doubt.”⁵⁰ In *Dunbar*, it held that an instruction which equated “reasonable doubt” with “strong probabilities” was not unconstitutional.⁵¹ In *Holt*, the Court upheld equating “reasonable doubt” with both “an actual doubt” and whether “a reasonable man in any matter of like importance would hesitate to act.”⁵² The *Dunbar* holding would come back to haunt the Court.⁵³ In *Wilson v. United States*, the Court approved yet another instruction similar to that used in *Holt* and again clearly approved equating “reasonable doubt” with “moral certainty.”⁵⁴

One of the last major pre-*Winship* cases concerning “reasonable doubt” was *Holland v. United States*.⁵⁵ *Holland* involved a conviction for willfully attempting to defeat and evade the payment of income taxes.⁵⁶ Two aspects of *Holland* are important. First, the Court again approved language defining “reasonable doubt” in terms of what would make a reasonable person act or hesitate to act.⁵⁷ As we will soon see, this language continues to appear in traditional instructions. Second, the Court reaffirmed *Miles v. United States* for the proposition that “[a]ttempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to the minds of the jury.”⁵⁸

48. *See id.* at 458-60. The precise relationship between “reasonable doubt” and the “presumption of innocence” adopted in *Coffin* was rejected in *Taylor v. Kentucky*, 436 U.S. 478, 483-84 (1978). *See also* MUELLER & KIRKPATRICK, *supra* note 16. It is still necessary to instruct the jury on both concepts. The Court’s modern understanding of the relationship between the two concepts is enshrined in *Taylor*.

49. 156 U.S. 185 (1895). The Court also reaffirmed the proposition set forth in *Miles v. United States* that “[a]ttempts to explain the term ‘reasonable doubt’ do not usually result in making it any clearer to minds of the jury.” *Id.* at 199 (quoting *Miles v. United States*, 103 U.S. 304, 312 (1880)) (internal quotation marks omitted). Thus, while the Court was in possession of a solid common law definition from *Webster*, it once again failed to settle the issue once and for all. *See id.*

50. *Id.*; *Holt v. United States*, 218 U.S. 245, 253-54 (1910).

51. 156 U.S. at 199.

52. 218 U.S. at 254.

53. *See* *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam) (holding that equating “reasonable doubt” with “substantial doubt” is error), *overruled on other grounds by* *Estelle v. McGuire*, 502 U.S. 62 (1991).

54. *Wilson v. United States*, 232 U.S. 563, 570 (1914).

55. 348 U.S. 121 (1954).

56. *Id.* at 124.

57. *Id.* at 140.

58. *Id.* (quoting *Miles v. United States*, 103 U.S. 304, 312 (1880)) (internal quotation marks omitted).

The Court has yet to see this last point as the Achilles heel it has come to be.

2. Winship

In *Winship*, the Court phrased the issue as “whether proof beyond a reasonable doubt is among the ‘essentials of due process and fair treatment’ required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.”⁵⁹ The Court answered in the affirmative.⁶⁰

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. . . .

*The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock “axiomatic and elementary” principle whose “enforcement lies at the foundation of the administration of our criminal law.”*⁶¹

Winship is at the very heart of the modern Court’s “reasonable doubt” jurisprudence. It finally made the “reasonable doubt” standard applicable to the States by virtue of the Due Process Clause⁶² and made explicit the constitutional status of “reasonable doubt.”⁶³ For the first time, the Court explored some of the history and development of “reasonable doubt.”⁶⁴ However, and far more important, the Court looked upon “reasonable doubt” as a means of reducing error and guaranteeing that convictions would rest on sound factual bases.⁶⁵ “Reasonable doubt” was thus identified first and foremost as a standard for guaranteeing factual accuracy in criminal trials.⁶⁶ The *Winship* Court made clear that “[t]here is always in

59. *In re Winship*, 397 U.S. 358, 359 (1970) (quoting *In re Gault*, 387 U.S. 1, 30 (1967)).

60. *See id.* at 368.

61. *Id.* at 362-63 (emphasis added) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

62. *Id.* at 364.

63. *Id.* at 361.

64. *See id.* at 361-63.

65. *Id.* at 363.

66. *See id.*

litigation a margin of error, representing error in factfinding [sic].”⁶⁷ The Court went on to note that “[t]o this end, the reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.’”⁶⁸

In Justice Harlan’s concurring opinion, the identification of “reasonable doubt” with factual proof was taken even further.⁶⁹ Though Justice Harlan noted that “even though the labels used for alternative standards of proof are vague and not a very sure guide to decisionmaking [sic],” he nevertheless went on to find that the difference between the “preponderance of evidence” and “reasonable doubt” was quite real.⁷⁰ Without ever defining “reasonable doubt” or “preponderance of the evidence,” Justice Harlan insisted that the “preponderance of evidence” standard would produce “a smaller risk of factual errors that result in freeing guilty persons” than the “proof beyond a reasonable doubt” standard.⁷¹ Given the sources cited by Justice Harlan, it is difficult to see how he knew this as he neither cited to nor offered definitions of “reasonable doubt” and “preponderance of evidence.”⁷²

The importance of Justice Harlan’s concurring opinion is that it more thoroughly developed and affirmed the majority’s view that “reasonable doubt” was primarily a tool for analyzing the prosecution’s sufficiency of factual proof.⁷³ Justice Harlan insisted that “reasonable doubt” and “preponderance of the evidence” conferred different degrees of confidence and factual accuracy to the fact-finder.⁷⁴ Justice Harlan had ample precedent to fall back on, i.e., *Webster* and many earlier cases from the Court citing it. The mystery is why he chose to ignore this. Without a precise definition of these concepts, and without professional knowledge

67. *Id.* at 364 (quoting *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958)).

68. *Id.* (quoting Norman Dorsen & Daniel A. Rezneck, In re *Gault and the Future of Juvenile Law*, 1 FAM. L.Q. 1, 26 (1967)).

69. *See id.* at 368-72 (Harlan, J., concurring).

70. *Id.* at 369-70. “Preponderance of the evidence” was the standard for adjudicating delinquency in the State of New York at the time of this case; thus, Justice Harlan’s comparison of the two standards. *See id.* at 360 (majority opinion).

71. *Id.* at 371 (Harlan, J., concurring). Of course, error here runs both ways. The concern has often been expressed in terms of false convictions, but there are surely false acquittals as well. *See* Laudan, *The Rules of Trial*, *supra* note 11, at 202-08.

72. *See Winship*, 397 U.S. at 369-71 (Harlan, J., concurring). The history and meaning of the “preponderance of the evidence” standard is well beyond the scope of this article. It is mentioned here only to fully analyze Justice Harlan’s very important concurrence.

73. *See id.* at 371-72.

74. *Id.* at 370.

and experience in deciding cases, how is it that lay juries understand the “different notions concerning the degree of confidence [they are] expected to have in the correctness of [their] factual conclusions”?⁷⁵

3. *Post-Winship: Cage and Victor*

The Court’s most recent, and most important, decisions concerning the meaning and definition of “reasonable doubt” are *Cage v. Louisiana*⁷⁶ and *Victor v. Nebraska*.⁷⁷ These are the first, and only, cases where the Court genuinely addressed the definition of “reasonable doubt.” In fact, *Victor* is the only case in the Court’s history where the definition of the concept was seriously addressed in any detail and did not occur until 1994.⁷⁸

In *Cage*, the petitioner challenged his conviction on the basis that the trial court gave an inappropriate “reasonable doubt” instruction to the jury.⁷⁹ The trial court’s instruction to the jury was:

If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant’s guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*.⁸⁰

75. *Id.*

76. 498 U.S. 39 (1990) (per curiam), *overruled on other grounds by* *Estelle v. McGuire*, 502 U.S. 62 (1991).

77. 511 U.S. 1 (1994).

78. *See id.* at 1.

79. 498 U.S. at 40.

80. *Id.* at 40 (quoting *State v. Cage*, 554 So. 2d 39, 41 (La. 1989)); *see Sullivan v. Louisiana*, 508 U.S. 275, 280-81 (1993) (holding that *Cage* error can never be “harmless error”).

After reprinting the relevant portion of the challenged instruction in detail, the Court barely spent an additional page analyzing it. The Court's entire analysis of the definition of "reasonable doubt" was as follows:

In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. *It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.*⁸¹

What is incomprehensible about this claim is that this was the first time the Supreme Court ever struck down a definition of "reasonable doubt," yet the Court did not take the time to explain what "reasonable doubt" was. In the end, all the Court did was hold that certain words like "substantial," "grave," and "moral certainty" were improper when used together.⁸² Even more troubling is that the Court did not cite to any of its previous opinions in which it approved definitions of "reasonable doubt."⁸³ The only explanation given by the Court as to why Louisiana's "reasonable doubt" instruction was wrong was a reference in a footnote to several cases from the courts of appeals.⁸⁴ Without discussing these appellate cases in any detail, the Court simply noted that "[s]imilar attempts to define reasonable

81. *Cage*, 498 U.S. at 41 (emphasis added) (citation omitted).

82. *See id.*

83. *E.g.*, *Wilson v. United States*, 232 U.S. 563, 569-70 (1914) (equating "reasonable doubt" with "moral certainty"); *Holt v. United States*, 218 U.S. 245, 254 (1910); *Coffin v. United States*, 156 U.S. 432, 453 (1895) (equating "reasonable doubt" with "substantial misgiving"); *Miles v. United States*, 103 U.S. 304, 309 (1880). The Court in *Cage* was surely aware of its prior precedents containing charges on "reasonable doubt" and that it had upheld language nearly identical to the language used by the trial court in Louisiana.

84. *Cage*, 498 U.S. at 41 n.*.

doubt have been widely criticized by the Federal Courts of Appeals.⁸⁵ However, criticism of "reasonable doubt" instructions does not equal a finding of unconstitutionality.

Following closely on the heels of *Cage* was *Sullivan v. Louisiana*.⁸⁶ In *Sullivan*, the Court held that a constitutionally deficient "reasonable doubt" instruction was never subject to harmless error analysis.⁸⁷ "A constitutionally deficient reasonable-doubt instruction will always result in the absence of 'beyond a reasonable doubt' jury findings. . . . [Thus] harmless-error analysis cannot be applied in the case of a defective reasonable-doubt instruction consistent with the Sixth Amendment's jury-trial guarantee."⁸⁸ *Sullivan* tees up the problem perfectly. The real issue is not whether at some conceptual level an erroneous "reasonable doubt" instruction can ever be harmless error. The real problem is that if the Court continues to refuse to define "reasonable doubt," then how do we know with any certainty precisely what it is that can never be harmless? In the absence of a clear definition of the meaning of "reasonable doubt," we will forever be in conflict about whether or not the charge is error in the first place. Just as the real issue was avoided in *Cage*, so was it avoided in *Sullivan*. We have no idea what the modern Court believes "reasonable doubt" to be; yet the Court is willing to overturn convictions based on a concept that it will not define.

85. *Id.* (citing *Taylor v. Kentucky*, 436 U.S. 478, 488 (1978); *Monk v. Zelez*, 901 F.2d 885, 889-90 (10th Cir. 1990); *United States v. Moss*, 756 F.2d 329, 333 (4th Cir. 1985); *United States v. Indorato*, 628 F.2d 711, 720-21 (1st Cir. 1980); *United States v. Byrd*, 352 F.2d 570, 575 (2d Cir. 1965)).

86. 508 U.S. 275, 281 (1993).

87. *Id.*

88. *Id.* at 285 (Rehnquist, C.J., concurring). An important point is that *Sullivan* was a great rarity in the Court's harmless error jurisprudence. Of course, this makes the problem with "reasonable doubt" even more pronounced. The Court has clearly held that "most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Neder v. United States*, 527 U.S. 1, 8 (1999) (alterations in original) (quoting *Rose v. Clark*, 478 U.S. 570, 579 (1986)). *Neder* effectively rendered a vast array of "constitutional" errors subject to harmless-error analysis. How does this highlight the problem? "Reasonable doubt" is one of those precious few constitutional rights which, if violated, mandates automatic reversal. *Id.* at 7. No "harmless error" analysis may be done when reasonable doubt is not properly instructed. *Sullivan*, 508 U.S. at 280-81. Therefore, it is even more critical to have a precise definition of "reasonable doubt." At least the Supreme Court has declined to make *Cage* retroactive, that is, applicable to those cases where convictions are deemed "final." *Tyler v. Cain*, 533 U.S. 656, 658-59 (2001).

The apex of the modern Court's jurisprudence on "reasonable doubt" is *Victor v. Nebraska*.⁸⁹ In *Victor*, the Court actually combined two cases for review, both of which raised issues concerning the definition of "reasonable doubt." The second case was *Sandoval v. California*.⁹⁰ To round out the analysis of the modern Court's jurisprudence of "reasonable doubt," a close analysis of *Victor/Sandoval* is indispensable. In *Victor*, the Court held that "the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury.'" ⁹¹ Further, "In only one case have we held that a definition of reasonable doubt violated the Due Process Clause."⁹² In fact, "The constitutional question in the present cases, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard."⁹³ First, we should be absolutely clear about what the Constitution requires according to *Victor/Sandoval*: "[T]rial courts must avoid *defining* reasonable doubt so as to lead the jury to convict on a lesser showing than *due process* requires."⁹⁴ Thus, due process requires a certain definition of "reasonable doubt." So, what exactly is this due process standard?

The Court's opinion analyzed the language of the "reasonable doubt" instructions from both cases in great detail. The *Sandoval* case was first. *Sandoval* argued that in defining "reasonable doubt" the trial court erred in relating this concept to the following three phrases: (1) "moral evidence,"⁹⁵ (2) "moral certainty,"⁹⁶ and (3) that "reasonable doubt is not a mere possible doubt."⁹⁷ The Court then moved to the *Victor* case. *Victor* also argued that the trial judge erred in his case by relating "reasonable doubt" to three phrases: (1) "substantial doubt,"⁹⁸ (2) "moral certainty,"⁹⁹ and (3)

89. 511 U.S. 1 (1994).

90. *Id.* This article will refer to the Supreme Court cases as *Victor* or *Sandoval*. Where the opinion for the combined cases is referenced, *Victor/Sandoval* will be used. The cases from the state supreme courts below are *State v. Victor*, 457 N.W.2d 431 (Neb. 1990), and *People v. Sandoval*, 841 P.2d 862 (Cal. 1992) (in bank).

91. *Victor*, 511 U.S. 1, 5 (alterations in original) (quoting *Holland v. United States*, 348 U.S. 121, 140 (1954)).

92. *Id.* (citing *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam)).

93. *Id.* at 6.

94. *Id.* at 22 (emphasis added).

95. *See id.* at 10-13.

96. *See id.* at 10, 13-15.

97. *See id.* at 17.

98. *See id.* at 19.

“strong probabilities.”¹⁰⁰ The Court upheld the convictions in both cases.¹⁰¹ The challenge for the Court in *Victor/Sandoval* was to determine how to justify this result without squarely rejecting *Cage*. As we proceed through a close analysis of the Court’s reasoning in the *Sandoval* and *Victor* cases, we must not forget to keep our eye on the ball: “[T]rial courts must avoid *defining* reasonable doubt so as to lead the jury to convict on a lesser showing than *due process* requires.”¹⁰² This is both the standard and the rule.

The Court first noted that the charge in Sandoval’s case had its origins in the famous *Webster* decision.¹⁰³ It then began its analysis of the concept of “moral evidence” and “moral certainty.”¹⁰⁴ The Court noted that “[b]y the beginning of the Republic, lawyers had borrowed the concept of ‘moral evidence’ from the philosophers and historians of the 17th and 18th centuries.”¹⁰⁵ Furthermore, “James Wilson, who was instrumental in framing the Constitution and who served as one of the original Members of this Court, explained in a 1790 lecture on law that ‘evidence . . . is divided into two species—demonstrative and moral.’”¹⁰⁶ Further,

“Demonstrative evidence has for its subject abstract and necessary truths, or the unchangeable relations of ideas. Moral evidence has for its subject the real but contingent truths and connections, which take place among things actually existing. . . .

In moral evidence, there not only may be, but there generally is, contrariety of proofs: in demonstrative evidence, no such contrariety can take place. . . . With regard to moral evidence, there is, for the most part, real evidence on both sides. On both

99. *See id.* at 21-22.

100. *See id.* at 22. In *Victor*’s case “reasonable doubt” was also said to be an “‘actual doubt’ that would cause a reasonable person to hesitate to act.” *Id.* at 19 (citation omitted). However, this language does not seem to have been an issue on appeal.

101. *Id.* at 23.

102. *Id.* at 22 (emphasis added).

103. *Id.* at 8.

104. *Id.* at 10.

105. *Id.* The Court relied substantially upon the works of Barbara J. Shapiro and James Wilson. *See id.* at 10-11.

106. *Id.* at 10 (alteration in original) (quoting 1 WORKS OF JAMES WILSON 518 (James De Witt Andrews ed., 1896)).

sides, contrary presumptions, contrary testimonies, contrary experiences must be balanced.”¹⁰⁷

The Court cited another source, saying, “A leading 19th century treatise observed that ‘[m]atters of fact are proved by *moral evidence* alone; . . . [i]n the ordinary affairs of life, we do not require demonstrative evidence, . . . and to insist upon it would be unreasonable and absurd.’”¹⁰⁸ The Court then pointed out that the concept of “‘moral certainty’ shares an epistemological pedigree with moral evidence”¹⁰⁹ and that “[m]oral certainty was the highest degree of certitude based on such evidence.”¹¹⁰ The Court quoted from an early nineteenth century treatise which equated moral certainty with proof beyond a reasonable doubt:

“Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every *reasonable doubt*, constitutes full proof of the fact. . . .

Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to *moral certainty*.”¹¹¹

The Court stated, “[M]oral evidence’ is not a mainstay of the modern lexicon, though we do not think it means anything different today than it did in the 19th century.”¹¹² The Court concluded its discussion of “moral evidence” by “find[ing] the reference to moral evidence unproblematic.”¹¹³

107. *Id.* at 10-11 (first alteration in original) (quoting 1 WORKS OF JAMES WILSON, *supra* note 106, at 518-19).

108. *Id.* at 11 (alterations in original) (citing 1 SIMON GREENLEAF, LAW OF EVIDENCE 3-4 (13th ed. 1876)).

109. *Id.*

110. *Id.*

111. *Id.* (alteration in original) (emphasis added) (quoting THOMAS STARKIE, LAW OF EVIDENCE 478 (2d ed. 1833)).

112. *Id.* at 12.

113. *Id.* at 13. The Court largely based its conclusion on the evidence of three dictionaries it cited:

The few contemporary dictionaries that define moral evidence do so consistently with its original meaning. See, e.g., Webster’s New Twentieth Century Dictionary 1168 (2d ed. 1979) (“based on general observation of people, etc. rather than on what is demonstrable”); Collins English Dictionary 1014 (3d ed. 1991) (similar); 9 Oxford English Dictionary 1070 (2d ed. 1989) (similar).

Id. at 12-13. The jury in Sandoval’s case was charged that “everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.” *Id.* at 13 (internal quotation marks omitted). According to the Court, this was the equivalent of

What of "moral certainty"? This phrase was used in both Sandoval's and Victor's trials and is a phrase the Court previously struggled with in *Cage*.¹¹⁴ It is worth quoting the Court at length on this point, because the relationship between "moral certainty" and "reasonable doubt" is at the very heart of the issue:

We are somewhat more concerned with Sandoval's argument that the phrase "moral certainty" has lost its historical meaning, and that a modern jury would understand it to allow conviction on proof that does not meet the beyond a reasonable doubt standard. Words and phrases can change meaning over time: A passage generally understood in 1850 may be incomprehensible or confusing to a modern juror. And although some contemporary dictionaries contain definitions of moral certainty similar to the 19th century understanding of the phrase, see Webster's Third New International Dictionary 1468 (1981) ("virtual rather than actual, immediate, or completely demonstrable"); 9 Oxford English Dictionary, *supra*, at 1070 ("a degree of probability so great as to admit of no reasonable doubt"), we are willing to accept Sandoval's premise that "moral certainty," standing alone, might not be recognized by modern jurors as a synonym for "proof beyond a reasonable doubt." But it does not necessarily follow that the California instruction is unconstitutional.

Sandoval first argues that moral certainty would be understood by modern jurors to mean a standard of proof lower than beyond a reasonable doubt. In support of this proposition, Sandoval points to contemporary dictionaries that define moral certainty in terms of probability. *E.g.*, Webster's New Twentieth Century Dictionary, *supra*, at 1168 ("based on strong probability"); Random House Dictionary of the English Language 1249 (2d ed. 1983) ("resting upon convincing grounds of probability"). . . . The problem is not that moral certainty may be understood in terms of probability, but that a jury might

saying "that absolute certainty is unattainable in matters relating to human affairs." *Id.* The Court then went on to say that "moral evidence [as referenced in the jury instruction] can only mean empirical evidence offered to prove such matters—the proof introduced at trial." *Id.* Was the Court right about this? The Court's explanation seems unconvincing. The Court drew equivalencies between words and phrases that do not seem to hold.

114. See *Cage v. Louisiana*, 498 U.S. 39, 40-41 (1990) (per curiam), *overruled on other grounds* by *Estelle v. McGuire*, 502 U.S. 62 (1991).

understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases.

Although in this respect moral certainty is ambiguous in the abstract, the rest of the instruction given in Sandoval's case lends content to the phrase. The jurors were told that they must have "an abiding conviction, to a moral certainty, of the truth of the charge." An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof. [*Hopt v. Utah*, 120 U.S. 430, 439 (1887)] ("The word 'abiding' here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence"). And the judge had already informed the jury that matters relating to human affairs are proved by moral evidence; giving the same meaning to the word moral in this part of the instruction, moral certainty can only mean certainty with respect to human affairs. As used in this instruction, therefore, we are satisfied that the reference to moral certainty, in conjunction with the abiding conviction language, "impress[ed] upon the factfinder [sic] the need to reach a subjective state of near certitude of the guilt of the accused." [*Jackson v. Virginia*, 443 U.S. 307, 315 (1979)].¹¹⁵

Other arguments regarding the meaning of "moral certainty" made by Sandoval¹¹⁶ and Victor¹¹⁷ failed as well.

115. *Victor*, 511 U.S. at 13-15 (second alteration in original) (some citations omitted).

116. Sandoval actually made two arguments that "moral certainty" did not require proof beyond a reasonable doubt. The "second argument is a variant of the first." *Id.* at 15. Sandoval's second argument was that a juror could be convinced of a defendant's guilt to a moral certainty, but still not be convinced beyond a reasonable doubt. *Id.* In essence, that "moral certainty" was a standard that required less proof than reasonable doubt. *See id.* The Court cited yet another popular dictionary definition of "moral certainty" and reasoned that other language in the charge would not lead a reasonable juror to conclude that "moral certainty" was a standard requiring less than "reasonable doubt." *Id.* at 15-16 (citing AMERICAN HERITAGE DICTIONARY 1173 (3d ed. 1992)). Because this argument is only a slight variant of the first and is largely dependent on the first, we will not treat them as separate.

117. Victor's argument regarding "moral certainty" was virtually identical to Sandoval's. *See id.* at 21-22. For our purposes, what the Court said in Victor's case was not meaningfully different from its analysis in Sandoval's case. Elements specific to Victor's case will be addressed below, but on the issue of "moral certainty," the *Victor* and *Sandoval* holdings were basically the same.

The concept of “moral certainty” is absolutely critical to “reasonable doubt.” The two concepts, as shown, are thoroughly intertwined in the Court’s jurisprudence and American common law. In *Victor/Sandoval*, the Court was satisfied that the burden of proof instruction did not in any way “invite[] the jury to convict . . . on proof below that required by the Due Process Clause.”¹¹⁸

There are a number of serious problems with the Court’s analysis. First, why did the Court never explain what the Due Process Clause requires? Why did the Court not spell out clearly what quantum of proof is required to meet the “proof beyond a reasonable doubt” standard and, therefore, due process? Surely, these cases finally marked the time to do it.

Second, the Court’s use of modern and older English dictionaries in this context is odd, at best. The Court noted that “‘moral certainty,’ standing alone, might not be recognized by modern jurors as a synonym for ‘proof beyond a reasonable doubt.’”¹¹⁹ How did the Court know this? The Court has not given a definition of “reasonable doubt.” The Court’s statement was especially odd in light of the fact that the second of the two modern dictionaries it cited equated “moral certainty” with “reasonable doubt.”¹²⁰ If the Court used dictionaries to demonstrate what modern juries might understand by “moral certainty” then it satisfied the very concern that it raised. Of course, one has to wonder what the Court was trying to prove by the use of dictionaries in this context. It is one thing to cite to a dictionary when one is interpreting a statute, or perhaps even a constitution, in order to show what a word *should* mean or how it *should* be used. However, whether a dictionary definition of a legal term of art is any evidence as to how a typical lay jury would understand the term is highly questionable.

Third, if the Court was not going to explain, which it did not, what level of certainty is required by “proof beyond a reasonable doubt,” then how could it insist that what “moral certainty” may mean might not be what is required by “proof beyond a reasonable doubt”?¹²¹ Our efforts to determine precisely why “moral certainty” may not require enough proof are left in limbo.

The Court next addressed Sandoval’s argument that the instruction of “a reasonable doubt is ‘not a mere possible doubt’” presented a serious constitutional issue.¹²² The Court quickly rejected this.¹²³ The Court noted

118. *Id.* at 15.

119. *Id.* at 14.

120. *See id.*

121. *See id.*

122. *Id.* at 17.

that the charge in *Cage* used similar language, but the equation of “reasonable doubt” with “mere possible doubt” was not an issue there.¹²⁴ The Court, in *Victor*, equated “possible” with fanciful, and noted that “[a] fanciful doubt is not a reasonable doubt.”¹²⁵ Presto!

The chief problem in *Victor*’s case was “that equating a reasonable doubt with a ‘substantial doubt’ overstated the degree of doubt necessary for acquittal.”¹²⁶ Nevertheless, the Court went on to find that “substantial doubt” did not constitute reversible error in *Victor*’s case as it did in *Cage*.¹²⁷ The Court found the “substantial doubt” language not to be error in this case, as opposed to *Cage*, because the language was charged in connection with “a doubt that would cause a reasonable person to hesitate to act.”¹²⁸ It is this unique combination of language that saved the day for the prosecution in *Victor*’s case:

[T]o the extent the word “substantial” denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a commonsense benchmark for just how substantial such a doubt must be. We therefore do not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one.¹²⁹

How precisely did the Court know this? Again, without comparing the challenged instruction to an appropriate definition of “reasonable doubt,” how do we know exactly why the charge in *Cage* was defective while the charge in *Victor* was not defective? We cannot understand the Court’s analysis without it telling us what it is that makes a doubt “reasonable.” The Court demonstrated that it was aware of its past precedent but refused to cite to it to settle the definition of “reasonable doubt.”¹³⁰

123. *See id.*

124. *Id.*

125. *Id.* “Sandoval’s defense attorney told the jury: ‘Anything can be possible. . . . [A] planet could be made out of blue cheese. But that’s really not in the realm of what we’re talking about.’” *Id.* (alterations in original) (citation omitted). The Court noted that this is what “possible” meant in this context. *Id.*

126. *Id.* at 19.

127. *Id.* at 20-21.

128. *Id.* at 20.

129. *Id.* at 20-21. Here the Court noted that the “hesitate to act” language had been approved previously. *Id.* (citing *Holland v. United States*, 348 U.S. 121, 140 (1954); *Hopt v. Utah*, 120 U.S. 430, 439-41 (1887)).

130. *See supra* text accompanying notes 101-103.

Victor raised a similar challenge to his conviction because the phrase “moral certainty” was used by the trial judge in his case.¹³¹ The Court distinguished *Cage* on the grounds that the “moral certainty” language in *Cage* was not sufficiently explained the way it was in Victor’s case.¹³² The Court’s analysis in Sandoval’s case was basically the same as the analysis in Victor’s. Specifically, the Court noted that “[i]nstructing the jurors that they must have an *abiding conviction* of the defendant’s guilt does much to alleviate any concerns that the phrase ‘moral certainty’ *might be misunderstood in the abstract*.”¹³³ What is an “abiding conviction”? How did the Court know that this additional phrase clarified matters for the lay jury? The Court pointed out other language in conjunction with “moral certainty” that was charged to the jury in Victor’s case.¹³⁴ The Court rather summarily noted: “There is accordingly no *reasonable likelihood* that the jurors understood the reference to moral certainty to allow conviction on a standard insufficient to satisfy *Winship*”¹³⁵ Where is the definition of the standard referenced in *Winship*? Though the Court has elaborated at length on the meaning of “moral certainty” and why it was not error to use that phrase in these cases, it nevertheless stated “[t]hrough we reiterate that we do not countenance its use, the inclusion of the ‘moral certainty’ phrase did not render the instruction given in Victor’s case unconstitutional.”¹³⁶ Precisely why did the Supreme Court not “countenance its use”?¹³⁷ The Court explained at length why “moral certainty” was not error, but suggested no new language. Surely the Court has some burden to set forth language that it thinks clearly communicates what *Winship* requires. The Court measures phrases like “substantial doubt” and “moral certainty” against the nebulous standard announced in *Winship* without ever explaining what the standard enunciated in *Winship* actually is.

Justice Kennedy’s concurring opinion in *Victor/Sandoval* was in many ways the most telling. It was quite brief, running only three small paragraphs.¹³⁸ He first commended Chief Justice Shaw for authoring an instruction and a definition of reasonable doubt “that survived more than a

131. *Victor*, 511 U.S. at 21.

132. *Id.* at 15-16.

133. *Id.* at 21 (emphasis added).

134. *See id.* at 21-22.

135. *Id.* at 22 (emphasis added).

136. *Id.*

137. *Id.*

138. *See id.* at 23 (Kennedy, J., concurring).

century.”¹³⁹ This is one of the best reasons to squarely hold that *Webster* properly defined “reasonable doubt.” However, Justice Kennedy believed that terms which were clear a century ago may have become unclear with the passage of time.¹⁴⁰ Justice Kennedy criticized the trial court’s use of the phrases “moral certainty” and “moral evidence.”¹⁴¹ While he found the phrase “moral certainty” to lack clarity, he reserved his greatest criticism for the trial court’s use of the phrase “moral evidence.”¹⁴² He stated that it was “the most troubling, and . . . quite indefensible.”¹⁴³ Regarding the Court’s defense of the phrase “moral evidence,” Justice Kennedy remarked that “even with this help the term is a puzzle. And for jurors who have not had the benefit of the Court’s research, the words will do nothing but baffle.”¹⁴⁴ In a final paragraph, Justice Kennedy reserved his full broadside for the majority’s attempt to justify the use of the phrase “moral evidence.”¹⁴⁵ He believed the concept was an “unruly term,” and that “[t]he inclusion of words so malleable, because so obscure, might in other circumstances have put the whole instruction at risk.”¹⁴⁶

Given Justice Kennedy’s vehement criticism, it is unclear why he joined the majority opinion. If “moral certainty” and “moral evidence” constitute such a problem for the modern juror, then how could he vote to uphold the convictions? All one has to do is read Justice Kennedy’s concurrence and insert the phrase “reasonable doubt” where Justice Kennedy referenced “moral evidence.” What is the difference? Given that neither the majority, the concurrence, nor the dissent offered a definition of “reasonable doubt,” how is it possible that “reasonable doubt” is any clearer to the average jury than “moral certainty” or “moral evidence”?

Justice Ginsburg agreed with the majority “that the reasonable doubt instructions given in these cases, read as a whole, satisfy the Constitution’s due process requirement.”¹⁴⁷ Nevertheless, the fact that she concurred in part is remarkable. She continued, saying:

[T]he term “moral certainty” while not in itself so misleading as to render the instructions unconstitutional, should be avoided as

139. *Id.*; see also *supra* note 39.

140. See *Victor*, 511 U.S. at 23 (Kennedy, J., concurring).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. See *id.*

146. *Id.*

147. *Id.* (Ginsburg, J., concurring in part and concurring in the judgment).

an unhelpful way of explaining what reasonable doubt means.

Similarly unhelpful, in my view, are . . . other features of the instruction given in *Victor*'s case. That instruction . . . define[d] reasonable doubt as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon."¹⁴⁸

It was this very "hesitate to act" language that the majority relied upon to save the day for the prosecution in *Victor*'s case.¹⁴⁹

Justice Ginsburg continued, "Even less enlightening than the 'hesitate to act' formulation is the passage of the *Victor* instruction counseling: '[The jury] may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable.'"¹⁵⁰ She said this portion of *Victor*'s instruction involved "uninstructive circularity."¹⁵¹ Further, "These and similar difficulties have led some courts to question the efficacy of any reasonable doubt instruction. . . . This Court, too, has suggested on occasion that prevailing definitions of 'reasonable doubt' afford no real aid."¹⁵² However, regarding the possibility of defining "reasonable doubt," she noted that "we have never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition. Nor, contrary to the Court's suggestion, have we ever held that the Constitution does not require trial courts to define reasonable doubt."¹⁵³ Kudos to Justice Ginsburg. Her concurrence was one of the few opinions by any Justice that offered a definition of "reasonable doubt."¹⁵⁴ She advocated the proposed definition as set forth by the Federal Judicial Center.¹⁵⁵ At least one Justice

148. *Id.* at 24 (citations omitted).

149. *See id.* at 20-21 (majority opinion); *see also supra* note 129. The "hesitate to act" formulation was also criticized in the comments to the Federal Judicial Center's proposed "reasonable doubt" instruction. *See infra* note 155.

150. *Victor*, 511 U.S. at 25 (Ginsburg, J., concurring in part and concurring in the judgment) (alteration in original).

151. *Id.*

152. *Id.*

153. *Id.* at 26 (citation omitted).

154. *See id.* at 27.

155. *See id.* at 26-27. The proposed definition of reasonable doubt offered by the Federal Judicial Center in pertinent part is as follows:

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.

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.

FED. JUDICIAL CTR., PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1987) (emphasis added). The pattern instruction tracks some of the traditional language. Of great significance is the brief commentary to this proposed jury instruction that was offered by the committee that drafted the pattern instruction:

The circuit courts are divided on the question [of] whether a reasonable doubt instruction should be given. Because of the important, yet somewhat vague, underlying principles involved in this concept, some courts think no instruction could convey the broad sense of the term. See *United States v. Larson*, 581 F.2d 664, 669 (7th Cir. 1978). In other courts, however, because of the central importance of the phrase, it could well be reversible error to fail to give an instruction, particularly if requested by counsel. See *Friedman v. United States*, 381 F.2d 155, 160 (8th Cir. 1967).

The committee has attempted to give a relatively short instruction highlighting the importance of the concept. See *Tsoumas v. New Hampshire*, 611 F.2d 412 (1st Cir. 1980); *Reeves v. Reed*, 596 F.2d 628 (4th Cir. 1979).

The committee recognizes that many appellate opinions lend strong support to the standard formulation that a reasonable doubt is a doubt that would cause a person to hesitate to act in the most important of one's own affairs. E.g., *United States v. Morris*, 647 F.2d 568, 571-72 (5th Cir. 1981); *United States v. Fallen*, 498 F.2d 172, 177 (8th Cir. 1974); *United States v. Stubin*, 446 F.2d 457, 465 (3d Cir. 1971). Judges are cautioned that the committee's instruction may not be acceptable in some circuits. Nevertheless, the committee has rejected the standard formulation because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases.

Id. It is a testament to the Supreme Court's failure to properly and precisely define "reasonable doubt" that a committee of distinguished judges and experts of the Federal Judicial Center could not authoritatively and with finality set forth the definition of the concept of "proof beyond a reasonable doubt."

At the end of the day, one must wonder whether the recommendation of the Federal Judicial Center, which basically defined "reasonable doubt" in terms of a "firmly convinced" standard, is really an improvement. After all, is being "firmly convinced" really the same

was engaged with the primary issue. Alas, Justice Ginsburg was unable to convince any other Justices to join her. The recommendations of the Federal Judicial Center remain just that, recommendations.

Justice Blackmun's dissent in *Victor/Sandoval* certainly took the majority to task, but it also failed to provide a standard for reasonable doubt.¹⁵⁶ He began by pontificating eloquently about the importance of the reasonable doubt standard in our jurisprudence.¹⁵⁷ Justice Blackmun also noted that "[i]t is not sufficient for the jury instruction merely to be susceptible to an interpretation that is technically correct."¹⁵⁸ The dissent argued that "[a]ny jury instruction defining 'reasonable doubt' that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction offends due process. Either misstatement of the reasonable-doubt standard is prejudicial to the defendant"¹⁵⁹

However, the dissent failed to offer a definition or even suggest an alternate charge.¹⁶⁰ The dissent referred to the majority's analysis as a "confusing and misleading state of affairs" but only stated why the lower court was wrong, not what it should have done.¹⁶¹ This is particularly egregious where the dissenters are concerned because they would "reverse the conviction and remand for a new trial."¹⁶² However, it is fortunate for the trial court that the dissent did not prevail, because the dissent gave the lower courts no guidance as to how "reasonable doubt" should be defined the next time around.¹⁶³

thing as "proof beyond a reasonable doubt"? Could one be "firmly convinced" of a particular matter where the proof is not "beyond a reasonable doubt"? At least at a common sense level, it would seem possible to be "firmly convinced" of something about which we may not have "proof beyond a reasonable doubt."

156. See *Victor*, 511 U.S. at 28-38 (Blackmun, J., concurring in part and dissenting in part).

157. See *id.* at 28-29 (citing *In re Winship*, 397 U.S. 358, 363-64 (1970)).

158. *Id.* at 29.

159. *Id.*

160. See *id.* at 28-38.

161. *Id.* at 38.

162. *Id.*

163. See *id.* at 28-38. At the risk that one might still object on the grounds that no definition is necessary or even truly possible, it is sufficient for now to briefly compare "reasonable doubt" to two other closely related conceptual Fourth Amendment cousins in criminal jurisprudence: "probable cause" and "reasonable suspicion." The Court has offered lengthy and repeated definitions of "probable cause." See, e.g., *Ornelas v. United States*, 517 U.S. 690 (1996); *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The lesser standard of "reasonable suspicion" has also received sustained attention from the Court. See, e.g., *United States v. Arvizu*, 534 U.S. 266 (2002); *Terry v. Ohio*, 392 U.S. 1 (1968). Other Fourth

The bottom line is that *Victor/Sandoval* provided no guidance as to the meaning of “reasonable doubt.” The Justices, excepting Justice Ginsburg, do not even make a good faith effort to explain what it is. Instead, the Justices left the lower courts abandoned in a constitutional vacuum.

B. The Lower Courts

Victor/Sandoval did not bring closure or clarity to the lower courts; difficulties abound. One finds a polyglot of definitions, terms, and rationales.¹⁶⁴ Federal and state courts tolerate a wide variety of instructions on “reasonable doubt.” Even those courts which prefer not to define “reasonable doubt” will, on occasion, tolerate substantial differences among trial judges who attempt to do so.¹⁶⁵

The Fourth and Seventh Circuits have perhaps taken the most strident positions in regard to defining “reasonable doubt.” As recently as *United States v. Lighty*, the Fourth Circuit reiterated its categorical and long-

Amendment concepts have also been the subject of sustained efforts at definition. *See, e.g.*, *Brendlin v. California*, 551 U.S. 249 (2007) (seizure); *Kyllo v. United States*, 533 U.S. 27 (2001) (search); *California v. Hodari D.*, 499 U.S. 621 (1991) (seizure); *Katz v. United States*, 389 U.S. 347 (1967) (search). Likewise, under the Fifth Amendment, basic rights and key concepts have been the subject of sustained efforts at producing clear definitions. *See, e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (custody); *Davis v. United States*, 512 U.S. 452 (1994) (invocation of Fifth Amendment rights); *Berkemer v. McCarty*, 468 U.S. 420 (1984) (custody and arrest); *Rhode Island v. Innis*, 446 U.S. 291 (1980) (interrogation); *Miranda v. Arizona*, 384 U.S. 436 (1966) (setting forth precise warnings to be given to suspects who are taken into custody and interrogated by law enforcement). It is surely odd that the Court has considered it to be of vital importance to carefully define certain key concepts in criminal jurisprudence, yet “reasonable doubt” has been given short shrift. This neglect is even thought to be justified because what “reasonable doubt” means is supposedly clear enough. Is there any other concept in criminal law (or in law generally) where someone could say this and not thought to be grossly uninformed? “Reasonable doubt” is one of the few standards in criminal law that is left, almost exclusively, to the lay jury and not to legal experts to define. In its application, persons will lose life, liberty, and property. Thus, one would think there is an even greater need for careful definition of “reasonable doubt.” However, the Court has given more time and thought to concepts that rest almost entirely in the hands of those with legal training—judges, magistrates, lawyers, and police—than “reasonable doubt,” whose meaning and application rests largely in the untrained hands of the average citizen called for jury duty.

164. See 2A WRIGHT & HENNING, *supra* note 18, for an excellent overview of numerous state and federal court cases. There is no consensus. See also 1 BERGMAN & HOLLANDER, *supra* note 17, § 2:4.

165. The wide variety of definitions of “reasonable doubt” have been catalogued at length. See 1 BERGMAN & HOLLANDER, *supra* note 17, § 2:4; 1 LAFAVE, *supra* note 28; 1 MUELLER & KIRKPATRICK, *supra* note 16; 2A WRIGHT & HENNING, *supra* note 18.

standing position regarding definition of "reasonable doubt."¹⁶⁶ In *Lighty*, the district court refused the defendant's request to define "reasonable doubt."¹⁶⁷ The Fourth Circuit upheld the district court's refusal to define "reasonable doubt" even upon request by the defendant: "[A]ttempting to explain the words "beyond a reasonable doubt" is more dangerous than leaving a jury to wrestle with only the words themselves."¹⁶⁸ Further, the court found that "the district court followed [Fourth Circuit] settled precedent when it declined counsel for [defendant's] invitation to define reasonable doubt for the jury."¹⁶⁹ In this same context, the Fourth Circuit held that there is no way to clarify the meaning of the phrase "reasonable doubt."¹⁷⁰ The Fourth Circuit has consistently ruled that trial judges should leave "'reasonable doubt' to its 'self-evident meaning comprehensible to the lay juror.'"¹⁷¹ Despite its near categorical ban on any attempt to define reasonable doubt, the Fourth Circuit has not always reversed district courts when they have defined the term.¹⁷² In *United States v. Collins*, the Fourth Circuit upheld the district court's instruction that: "A reasonable doubt is a *real* doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case."¹⁷³ The Fourth Circuit's

166. 616 F.3d 321 (4th Cir. 2010). The Fourth Circuit does not have circuit-wide pattern instructions. However, the recent pattern instructions for the District of South Carolina give a limited definition of "reasonable doubt." They define "reasonable doubt" by stating that "the government's burden of proof is a strict and heavy burden, [but] it is not necessary that it be proved beyond all possible doubt." ERIC WM. RUSCHKY, PATTERN JURY INSTRUCTIONS FOR FEDERAL CRIMINAL CASES: DISTRICT OF SOUTH CAROLINA 2 (2011).

167. *Lighty*, 616 F.3d at 380.

168. *Id.* (quoting *United States v. Walton*, 207 F.3d 694, 696-97 (4th Cir. 2000) (en banc)).

169. *Id.*

170. *United States v. Oriakhi*, 57 F.3d 1290, 1300-01 (4th Cir. 1995) (citing *United States v. Reives*, 15 F.3d 42, 45 (4th Cir. 1994)).

171. *United States v. Adkins*, 937 F.2d 947, 950 (4th Cir. 1991) (quoting *Murphy v. Holland*, 776 F.2d 470, 475 (4th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986)).

172. *See, e.g.*, *United States v. Collins*, 372 F.3d 629 (4th Cir. 2004).

173. *Id.* at 635; *see also* *United States v. Williams*, 152 F.3d 294, 297-98 (4th Cir. 1998) (holding no reversible error occurred when district court told jury that a "reasonable doubt is a real doubt based upon reason and common sense"). In *United States v. Moss*, the Fourth Circuit had occasion to rule on the following definition of "reasonable doubt": "Now, proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely upon it without hesitation in your most important affairs of your own." 756 F.2d 329, 333 (4th Cir. 1985). Although the Fourth Circuit upheld the instruction, the Court stated: "District courts are again admonished not to define reasonable doubt in their jury instructions . . ." *Id.*

resistance to defining or explaining reasonable doubt extends to closing arguments of counsel, where it has barred counsel from defining or explaining “reasonable doubt” to the jury.¹⁷⁴

The Seventh Circuit has been equally vigorous in its rejection of all attempts to define “reasonable doubt.”¹⁷⁵ “Trial counsel may argue that the government has the burden of proving the defendant’s guilt ‘beyond a reasonable doubt,’ but *they may not attempt to define ‘reasonable doubt.’*”¹⁷⁶ The Seventh Circuit has stated flatly and forcefully, that “[i]t has been, and continues to be, ‘our opinion that any use of an instruction defining reasonable doubt represents a situation equivalent to playing with fire.’”¹⁷⁷ Although many federal and state courts often assert that the meaning of “reasonable doubt” is self-evident, these courts have not set forth any clear basis to show why or how the average lay jury knows this.

In sharp contrast to the Fourth and Seventh Circuits, the Sixth¹⁷⁸ and Eighth¹⁷⁹ Circuits actually have model jury instructions defining reasonable doubt.

In *United States v. McCraney*, the Eighth Circuit held that the “‘hesitate to act’” phrase and the “‘not the mere possibility of innocence’” language,

174. *United States v. Smith*, 441 F.3d 254, 270-71 (4th Cir. 2006) (finding defense counsel was properly barred from defining “reasonable doubt” in closing argument and upholding trial court’s instructing jury that reasonable doubt is best left undefined); *United States v. Patterson*, 150 F.3d 382, 388-89 (4th Cir. 1998) (prohibiting defense counsel from defining reasonable doubt during closing argument).

175. So powerfully does the Seventh Circuit hold to this view that in its pattern jury instructions there is no suggested charge whatsoever. SEVENTH CIRCUIT FEDERAL CRIMINAL JURY INSTRUCTIONS 18 (1999). There is only a comment which states “The Committee recommends that no instruction be given defining ‘reasonable doubt.’” *Id.*

176. *United States v. Glass*, 846 F.2d 386, 387 (7th Cir. 1988).

177. *United States v. Langer*, 962 F.2d 592, 600 (7th Cir. 1992) (quoting *United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975)); *accord* *United States v. Bruce*, 109 F.3d 323, 329 (7th Cir. 1997) (admonishing trial counsels, both defense and prosecution, that there should be no attempts to define “reasonable doubt”); *United States v. Hanson*, 994 F.2d 403, 408 (7th Cir. 1993) (finding attempts to define reasonable doubt present great risk without any real benefit).

178. The Sixth Circuit defines “reasonable doubt” in terms familiar to the common law: not all “possible doubts,” or “doubts based purely on speculation,” but rather “proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives.” PATTERN CRIMINAL JURY INSTRUCTIONS: SIXTH CIRCUIT § 1.03(4)-(5) (2011).

179. The Eighth Circuit defines “reasonable doubt” as “doubt based upon reason and common sense, and not the mere possibility of innocence.” EIGHTH CIRCUIT MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 3.11 (2011). It is “the kind of doubt that would make a reasonable person hesitate to act,” not “proof beyond all possible doubt.” *Id.*

both included in its model instructions, were constitutional.¹⁸⁰ While affirming the constitutionality of its model instructions, the Eighth Circuit rejected the defendant’s proposed definition which was more in line with traditional common law terminology.¹⁸¹

The Sixth Circuit held its model jury instruction to be constitutional in *United States v. Stewart*.¹⁸² However, despite having model instructions, district courts do not always follow them precisely. In *United States v. Perry*, the district court varied from the pattern jury instruction, instructing that “[a] reasonable doubt exists when, after the careful, entire, and

180. *United States v. McCraney*, 612 F.3d 1057, 1062-63 (8th Cir. 2010) (quoting EIGHTH CIRCUIT MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 3.11 (2009)). In upholding the “hesitate to act” phrase, the Eighth Circuit cited to *Holland v. United States*, 348 U.S. 121, 140 (1954), which also approved the “hesitate to act” language. *McCraney*, 612 F.3d at 1063. The Eighth Circuit also noted that in *Victor v. Nebraska*, 511 U.S. 1, 17 (1994), the Supreme Court approved the “‘not a mere possible doubt’ phraseology.” *McCraney*, 612 F.3d at 1063.

181. *McCraney*, 612 F.3d at 1063. The defendant proposed the following definition, which was rejected by the Eighth Circuit:

A reasonable doubt is such a doubt as fairly and naturally arises in your mind and by reason of which you cannot say that you have a full and *abiding conviction* of the guilt of the defendant . . . [A]nd it must be such a *doubt as would cause a reasonable, prudent and considerate person to pause and hesitate before acting in the graver and more important affairs of life*. But you should not ignore credible evidence to hunt for doubt, and you should not entertain such doubt as is purely imaginary or fanciful or based on groundless conjecture. If . . . you have a full and *abiding conviction* of the guilt of the defendant, then you are satisfied beyond a reasonable doubt, otherwise you are not satisfied beyond a reasonable doubt.

Id. at 1063 n.4 (emphasis added). That at least some defense counsel request more elaborate definitions of reasonable doubt would suggest that refusing to define the concept does not give defendants the protection they believe the constitution requires. In addition, comparing the defendant’s proposed instructions in *McCraney* with other, more traditional common law instructions, demonstrates its close similarity to some of those older charges. See generally *United States v. Cruz-Zuniga*, 571 F.3d 721 (8th Cir. 2009); *United States v. Patterson*, 412 F.3d 1011 (8th Cir. 2005); *United States v. Foster*, 344 F.3d 799 (8th Cir. 2003). It should also be noted that although the Eighth Circuit, like many other courts, approved a version of the “hesitate to act” charge in defining “reasonable doubt,” the “hesitate to act” formulation has also been criticized sharply. See *Victor v. Nebraska*, 511 U.S. 1, 24-25 (1994) (Ginsburg, J., concurring in part and concurring in the judgment); *Dunn v. Perrin*, 570 F.2d 21, 24 (1st Cir. 1978) (“[C]omparison of reasonable doubt in criminal cases with the standard employed by jurors to make even the most significant decisions in their daily lives has been criticized for its tendency to trivialize the constitutionally required burden of proof.”). Recall that this language was criticized by the drafters of the pattern instruction on reasonable doubt for the Federal Judicial Center. See *supra* note 155.

182. 306 F.3d 295, 306 (6th Cir. 2002).

impartial consideration of all of the evidence in the case, the jurors do not feel an *abiding conviction* to a *moral certainty* that a defendant is guilty of the offense charged.”¹⁸³ The court upheld the instruction on the grounds that it was consistent with *Victor/Sandoval*.¹⁸⁴

The Eleventh Circuit presents an interesting trio of cases illustrative of how federal courts of appeals have struggled with *Cage* and *Victor/Sandoval*. In *Harvell v. Nagle*,¹⁸⁵ *Felker v. Turpin*,¹⁸⁶ and *Johnson v. Alabama*,¹⁸⁷ the Eleventh Circuit faced an array of “reasonable doubt” charges in the context of federal habeas petitions.¹⁸⁸ In these cases, the Eleventh Circuit dealt with jury instructions which equated “reasonable doubt” with “actual and substantial doubt,”¹⁸⁹ “moral certainty,”¹⁹⁰ and “a doubt for which a good reason can be given or assigned,”¹⁹¹ as well as a comment “that in ‘the final analysis’ each juror would have to look into his ‘own heart and mind’ for the answer.”¹⁹²

In *Felker*, the Eleventh Circuit addressed an instruction which stated that “[t]he state, however, is not required to prove [the defendant’s] guilt beyond all doubt. *Moral and reasonable certainty is all that can be expected in a legal investigation.*”¹⁹³ Following *Victor/Sandoval*, the Eleventh Circuit found no constitutional violation in the “reasonable doubt” instruction as given.¹⁹⁴

In *Harvell*, the court noted that “[a]lthough the use of the term ‘actual and substantial doubt’ is somewhat problematic and perhaps even ill-advised, the Supreme Court made clear, subsequent to *Cage*, that the use of such a term in the proper context, bolstered by adequate explanatory language, can survive constitutional scrutiny.”¹⁹⁵ Following *Victor/Sandoval*, the Eleventh Circuit concluded “that the references to

183. 438 F.3d 642, 651 (6th Cir. 2006) (emphasis added); *accord* *Austin v. Bell*, 126 F.3d 843, 847 (6th Cir. 1997).

184. *Perry*, 438 F.3d at 650-51.

185. 58 F.3d 1541 (11th Cir. 1995).

186. 83 F.3d 1303 (11th Cir. 1996).

187. 256 F.3d 1156 (11th Cir. 2001).

188. *Id.* at 1165 (habeas petition from Alabama); *Felker*, 83 F.3d at 1304 (habeas petition from Georgia); *Harvell*, 58 F.3d at 1541-42 (habeas petition from Alabama).

189. *Harvell*, 58 F.3d at 1542.

190. *Id.*; *Johnson*, 256 F.3d at 1191; *Felker*, 83 F.3d at 1308.

191. *Johnson*, 256 F.3d at 1191 (internal quotation marks omitted).

192. *Id.*

193. *Felker*, 83 F.3d at 1309.

194. *Id.*

195. *Harvell*, 58 F.3d at 1543.

actual and substantial doubt and moral certainty in [*Harvell*]’s reasonable-doubt instruction did not create a reasonable likelihood that the jury understood the instruction to allow conviction based on proof insufficient to meet the [*Winship*] standard.”¹⁹⁶

The *Johnson* decision contained many of the same problematic words and phrases as were found in *Harvell*. In *Johnson*, “[T]he trial judge employed ‘beyond a reasonable doubt’ and ‘to a moral certainty’ interchangeably and even informed the jury that the two terms were synonymous.”¹⁹⁷ In response, the Eleventh Circuit held that “other portions of the instruction ensured that the ‘moral certainty’ language would not reasonably be understood to lower the State’s burden. . . . [T]he use of the term ‘moral certainty’ in a reasonable doubt instruction [was] not fatal.”¹⁹⁸ Despite many alleged improprieties,¹⁹⁹ none of these required reversal.²⁰⁰

Finally, in *Felker*, the court dealt with yet another instruction which equated “reasonable doubt” with “moral certainty.”²⁰¹ After comparing the language in *Felker*’s case to the charge given in *Harvell*, the court concluded that the standard set forth in *Victor/Sandoval* was not violated.²⁰² When one considers the charge given by the trial court in *Cage* and reviews carefully the analysis in *Harvell*, *Johnson*, and *Felker*, it is a challenge to appreciate the fine distinction between these cases and *Cage*. It is hard to understand, given the Eleventh Circuit’s application of *Victor/Sandoval*, how a charge like the one in *Cage* would be error.²⁰³

196. *Id.* at 1545.

197. *Johnson*, 256 F.3d at 1192.

198. *Id.*; see also *Felker*, 83 F.3d at 1309.

199. *Johnson*, 256 F.3d at 1191 (“Johnson contends that the instruction was flawed because . . . the trial judge (1) equated ‘beyond reasonable doubt’ with ‘moral certainty’; (2) referred to a reasonable doubt as an ‘actual and substantial one,’ or . . . ‘a doubt for which a good reason can be given or assigned’; and (3) said that in the ‘final analysis’ each juror would have to look into his ‘own heart and mind’ for the answer.”).

200. *Id.* at 1192-93.

201. *Felker*, 83 F.3d at 1309.

202. *Id.*

203. See *Victor v. Nebraska*, 511 U.S. 1, 16 (1994). Other courts have also held the use of “moral certainty” to be problematic; however, they have seldom found it to be error. See *United States v. Milan*, 304 F.3d 273, 286 (3d Cir. 2002); *United States v. DeVincent*, 632 F.2d 147, 153 (1st Cir. 1980) (holding that “proof to a moral certainty” should be discouraged but did not rise to the level of constitutional error); see also *United States v. Previte*, 648 F.2d 73, 83 (1st Cir. 1981); *Bumpus v. Gunter*, 635 F.2d 907, 910 (1st Cir. 1980); *United States v. Indorato*, 628 F.2d 711, 720-21 (1st Cir. 1980); *United States v. Magnano*, 543 F.2d 431, 436-37 (2d Cir. 1976); *United States v. Bilotti*, 380 F.2d 649, 654

There are also two cases in the Third Circuit which invite close attention.²⁰⁴ In *West v. Vaughn*, the court addressed the constitutionality of comparing “reasonable doubt” in a criminal case to the vicissitudes of buying a house.²⁰⁵ Following *Victor/Sandoval*, the court found that the challenged instruction when taken as a whole correctly charged the concept of “reasonable doubt.”²⁰⁶ One wonders whether the kinds of subjective attitudes and preferences that might be of concern when buying a home are really helpful in analyzing evidence in a criminal case. Buying a house is not simply a matter of objective facts regarding structural integrity and cost; a whole series of personal preferences and tastes are involved. Perhaps these concerns are just an example of pushing the analogy too far. Nevertheless, they also demonstrate how such an analogy might invite a jury to consider personal preferences and other matters which are not, strictly speaking, connected to the evidence in a criminal case.

In *Thomas v. Horn*, the court had an occasion to examine a unique aspect of Pennsylvania state law regarding the definition of “reasonable doubt.”²⁰⁷ In essence, the entire opinion came down to whether the word “restrain” demanded less proof from the government than the word “hesitate.”²⁰⁸ According to the court,

[The defendant’s] first claim is that the trial court’s instruction on the definition of reasonable doubt violated due process because it suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. Here, the trial court instructed the jury that a reasonable doubt is “such a doubt as would cause a reasonable person to *restrain* from acting in a matter of great importance in his or her own life.”²⁰⁹

(2d Cir. 1967); *Davenport v. State*, 519 P.2d 452, 456 (Alaska 1974); *Commonwealth v. Conceicao*, 446 N.E.2d 383, 390 (Mass. 1983).

204. See *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009); *West v. Vaughn*, 204 F.3d 53, 56 (3d Cir. 2000), *abrogated by* *Tyler v. Cain*, 533 U.S. 656 (2001). The Third Circuit allows district courts to provide some definitions. See THIRD CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 1.13 (2009). For instance, “reasonable doubt” is not “beyond all possible doubt or to a mathematical certainty.” *Id.* It is equated with a “fair doubt based on reason, logic, common sense, or experience.” *Id.* The “hesitate to act” language is also permitted. *Id.*

205. 204 F.3d at 56.

206. *Id.* at 63-64.

207. 570 F.3d 105 (3d Cir. 2009).

208. *Id.* at 117-19.

209. *Id.* at 117 (emphasis added).

As already shown, numerous courts have discussed and debated the "hesitate to act" formulation. However, the State of Pennsylvania added a new twist by requiring a form of this instruction that was slightly different, i.e., "restrain from acting."²¹⁰ The charge form approved by the Pennsylvania courts included that "a reasonable doubt 'must be an honest doubt arising out of the evidence itself, the kind of doubt that would restrain a reasonable man (or woman) from acting in a matter of importance to himself (or herself).'"²¹¹ The court went on to note that the Pennsylvania Supreme Court had approved this particular language for approximately five decades.²¹² Comparing "hesitate to act" and "restrain from acting," the Third Circuit found that the latter placed a lower degree of proof on the prosecution.²¹³ Nevertheless, the court did not find that this lesser burden was low enough to be unconstitutional.²¹⁴

A notable case from the First Circuit²¹⁵ is *United States v. Van Anh*.²¹⁶ The First Circuit provided another interesting twist with a somewhat unique instruction on "reasonable doubt." The trial court plainly told the jury that "reasonable doubt" could not be defined.²¹⁷

That brings us to the question of what's a reasonable doubt. I'm afraid I can't be a great deal of help to you on this one. It's a term that pretty much defies definition. All I can say is that the Government's obligation to prove these elements or to prove the defendant guilty beyond a reasonable doubt does not mean that the Government must prove the defendant guilty beyond all shadow of a doubt or beyond all doubt. What it means is that the Government must prove the defendant guilty beyond a reasonable doubt. . . .

I can't provide you with any better definition than that. The reason you're here is you know what a doubt is, and you know what's reasonable, and it's up to you to decide whether you think

210. *Id.* at 118.

211. *Id.* (quoting *Commonwealth v. Donough*, 103 A.2d 694, 697 (Pa. 1954)).

212. *Id.*

213. *Id.*

214. *Id.*

215. The First Circuit does not define "reasonable doubt" but merely requires the jury to find that the government has proven its case by this standard. PATTERN CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE FIRST CIRCUIT § 3.02 (rev. ed. 2011).

216. 523 F.3d 43 (1st Cir. 2008).

217. *Id.* at 57.

the government has proven the things it must prove beyond a reasonable doubt.²¹⁸

The defendants challenged the instruction on the basis that it only used “negative terms.”²¹⁹ The defendants argued that in setting out what the government did not have to prove, rather than what it did have to prove, the government’s burden of proof was diminished.²²⁰ The court explained “reasonable doubt is difficult to define,” but that it had permitted definitions in negative terms.²²¹ It held that the “reasonable doubt instruction was not a model instruction and [the court] in no way . . . endorse[d] it. [The court had], in the past, warned against attempts to define reasonable doubt noting that such attempts often ‘result in further obfuscation of the concept.’”²²² It further noted that the instruction taken as a whole was constitutionally sound.²²³

The instruction in *Van Anh* raised a number of problems. Perhaps the most troublesome part of the instruction was the statement that “[t]he reason you’re here is you know what a doubt is, and you know what’s reasonable.”²²⁴ Even in the context of the instruction taken as a whole, stating this to a jury is worse than simply not defining the term at all. It leaves jurors completely uninformed. How can due process possibly be satisfied by telling jurors that whatever it is they mean by “doubt” and whatever it is they mean by “reasonable” are the standard for purposes of a criminal trial? When this kind of open-ended definition of “reasonable doubt” is preceded by the statement that “I’m afraid I can’t be a great deal of help to you on this one,”²²⁵ surely the complete lack of guidance given to juries is problematic under *Winship*.²²⁶

218. *Id.*

219. *Id.*

220. *Id.* at 57-58.

221. *Id.* at 58.

222. *Id.* (quoting *United States v. O’Shea*, 426 F.3d 475, 482 (1st Cir. 2005)).

223. *Id.*; *accord* *United States v. Wallace*, 461 F.3d 15 (1st Cir. 2006) (approving a reasonable doubt instruction substantially similar to the one in *Van Anh*).

224. *See Van Anh*, 523 F.3d at 57.

225. *Id.* (emphasis omitted).

226. The First Circuit has also tolerated other instructions far different from those in *Van Anh*. *See, e.g.*, *United States v. Gerhard*, 615 F.3d 7, 28 (1st Cir. 2010) (“[A] reasonable doubt does not mean a mere possibility that the defendant may not be guilty; nor does it mean a fanciful or imaginary doubt, nor one based upon groundless conjecture. It means a doubt based upon reason.”). In *United States v. Ademaj*, the First Circuit upheld the defendant’s conviction after the trial court interrupted defense counsel’s closing when defense counsel attempted to define “reasonable doubt” in terms of “moral certainty” and

In *Gaines v. Kelly*, the Second Circuit struck down a jury instruction on "reasonable doubt" which was similar to instructions other circuits have upheld.²²⁷ The jury instruction used phrases like "moral certainty," "a doubt which leaves [the] mind in a state of suspense," a "good, sound, substantial reason," and a doubt that is not based on "sympathy," "imagination," or "prejudice," as well as others.²²⁸ The rule set forth by the Second Circuit for analyzing this type of instruction is seen countless times in other cases.²²⁹ However, the Second Circuit found that while many of the phrases taken in isolation might survive scrutiny, they did not survive when taken as a whole.²³⁰ It seems that courts can parse words to justify any conclusion.

A few years prior to the Second Circuit's decision in *Gaines*, the court decided *Beverly v. Walker*.²³¹ Like *Gaines*, *Beverly* was a habeas corpus case where the petitioner was originally convicted in New York.²³² Beverly challenged the reasonable doubt instruction, claiming that it impermissibly lessened the government's burden of proof.²³³ The court held it did so because the trial court charged that:

[A] juror who has a reasonable doubt and asserts it ought to first be able to give that reasonable doubt a reason for it to himself, and he should be able to communicate that to his fellow jurors that reasonable doubt in the event they ask him to do so.²³⁴

"abiding conviction." 170 F.3d 58, 66 (1st Cir. 1999). Last, in *United States v. Rodriguez*, the court permitted a reasonable doubt instruction that defined the concept in terms of "real possibility" and "reason and common sense." 162 F.3d 135, 145-46 (1st Cir. 1998). The court noted that this instruction was an alteration of the pattern criminal jury instructions produced by the Federal Judicial Center. *Id.* at 145; see FED. JUDICIAL CTR., *supra* note 155, at 28.

227. See *Gaines v. Kelly*, 202 F.3d 598, 600 (2d Cir. 2000).

228. *Id.* at 610.

229. See *id.* at 605.

230. *Id.* at 606. Perhaps, however, the real reason why the trial judge was reversed had less to do with the mixture of definitions of reasonable doubt, which we see in other cases, than that "the appellate court in New York State reviewing these instructions reversed no fewer than 21 convictions because of these instructions that were given by the same trial judge, with frequent citation to the Supreme Court's decisions in *Cage* and *Sullivan*." *Id.* (citations omitted).

231. 118 F.3d 900 (2d Cir. 1997).

232. *Id.* at 901.

233. *Id.* at 903. While we lack the entirety of the reasonable doubt instruction in *Beverly*, what we have is strikingly similar to the instruction found to be unconstitutional in *Gaines*. Compare *Gaines*, 202 F.3d at 610, with *Beverly*, 118 F.3d at 903-04.

234. *Beverly*, 118 F.3d at 903.

The court noted that this language was disapproved previously and that it presented a danger of shifting the burden away from the prosecution.²³⁵ However, in light of other phrases in the instruction that guilt must be proven “beyond a reasonable doubt,” the court “conclude[d] that it was not reasonably likely that the jury was misled as to which party bore the burden of proof.”²³⁶

In regard to Beverly’s second challenge “that ‘reasonable doubt must be based entirely and absolutely upon some good sound substantial reason,’” the court found that the prosecution’s burden was not impermissibly lessened.²³⁷ The court upheld the language even though the New York appellate courts had previously condemned it.²³⁸ The court noted that:

Nevertheless, although the “good sound substantial” language should not be used, and we applaud the Appellate Division for condemning it in the exercise of its supervisory authority, we cannot conclude that the entire charge was constitutionally deficient. It is not reasonably likely that the jury understood these words to describe the quantity of doubt necessary for acquittal, rather than as a contrast to doubt based on impermissible criteria such as conjecture or speculation.²³⁹

Last, Beverly challenged the trial judge’s charge on “reasonable doubt” because it required the prosecution to establish guilt “to a reasonable degree of certainty.”²⁴⁰ The court noted that this language had also been condemned by the New York intermediate appellate courts.²⁴¹ The Second Circuit even said that “we agree with Beverly that the language is misleading. However, this error did not render the entire charge constitutionally deficient. The trial court made it abundantly clear that the governing standard was one of reasonable doubt.”²⁴² It is difficult to see how one squares *Beverly* with *Gaines*. The instructions used in both cases were obviously substantially similar. These kinds of decisions demonstrate that the *Winship* standard is so ill-defined and ill-understood that virtually

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 903-04.

239. *Id.* at 904.

240. *Id.*

241. *Id.*

242. *Id.*

any charge on “reasonable doubt” which contains certain buzz words can be found to be permissible or impermissible in an ad hoc manner.

In the Tenth Circuit,²⁴³ there are two cases which present an interesting contrast between very similar instructions.²⁴⁴ One instruction was upheld as constitutional while the other was found to be defective.²⁴⁵ In *Monk v. Zelez*, an instruction which defined “reasonable doubt” in terms of “substantial doubt” and “moral certainty” was constitutionally infirm.²⁴⁶ The instruction in *Monk* was found to be unconstitutional because of the particular combination of phrases.²⁴⁷

However, in *Tillman v. Cook*, the court upheld a similar instruction.²⁴⁸ The court upheld a “reasonable doubt” instruction which defined

243. The pattern instructions of the Tenth Circuit generally follow the instructions proposed by the Federal Judicial Center. Compare FED. JUDICIAL CTR., *supra* note 155, at 28, with CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 1.03 (2011). The same is also substantially true of the Fifth and Ninth Circuits. Compare FED. JUDICIAL CTR., *supra* note 155, at 28, with FIFTH CIRCUIT DISTRICT JUDGES ASSOCIATION PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 1.05 (2001), and NINTH CIRCUIT MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS § 3.5 (2010).

244. See *Tillman v. Cook*, 215 F.3d 1116 (10th Cir. 2000); *Monk v. Zelez*, 901 F.2d 885 (10th Cir. 1990).

245. Compare *Tillman*, 215 F.3d at 1127 (constitutional instruction), with *Monk*, 901 F.2d at 890 (unconstitutional instruction).

246. 901 F.2d at 890. The instruction held unconstitutional in *Monk* read:

What is meant by the term “reasonable doubt”? “Reasonable doubt” means a substantial honest, conscientious doubt suggested by the material evidence or lack of it in the case. It is an honest, substantial misgiving generated by insufficiency of proof of guilt. It is not a captious doubt, nor a doubt suggested by the ingenuity of counsel or court and unwarranted by the testimony, nor a doubt born of a merciful inclination to permit the accused to escape conviction, nor a doubt prompted by sympathy for him or those connected with him. Proof beyond reasonable doubt means proof to a moral certainty although not necessarily an absolute or mathematical certainty. If you have an abiding conviction of [the defendant’s] guilt such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

Id. at 889.

247. See *id.* at 893.

248. See 215 F.3d at 1127. The instruction at issue in *Tillman* was:

I have heretofore told you that the burden is upon the State to prove the defendant guilty beyond a reasonable doubt. Now, by reasonable doubt is meant a doubt which is based on reason and one which is reasonable in view of all the evidence. Proof beyond a reasonable doubt is that degree of proof which satisfies the mind and convinces the understanding of those who are bound to

“reasonable doubt” in terms of “abiding conviction” and a doubt that “must be a real, substantial doubt.”²⁴⁹ The real difference between *Monk* and *Tillman* was the “substantial doubt” language. *Monk* and *Tillman* present good examples of how the Supreme Court’s failure in *Cage* and *Victor/Sandoval* to formulate a precise “reasonable doubt” definition leaves the lower courts without a concrete basis of comparison to know when a “reasonable doubt” instruction requires too little or just enough proof. Indeed, *Victor/Sandoval* left the lower courts playing word games. Courts parse words and phrases, looking at them singularly and as a whole, all in an effort to determine if the nebulous *Winship* standard has been satisfied.

Finally, the Tenth Circuit decision in *Wansing v. Hargett* provides one of the more humorous “reasonable doubt” instructions in the law: the wedding instruction.²⁵⁰ In many ways it represents what is most wrong with current “reasonable doubt” jurisprudence. While the Tenth Circuit found that the “reasonable doubt” instruction deprived the defendant of a fair trial,²⁵¹ this case is worth close attention because it is one of the best examples of the kind of incoherence bred by *Cage* and *Victor/Sandoval*. Judge McConnell sets forth the issue quite well:

act conscientiously upon it. . . .

. . . But if after such impartial consideration and comparison of all the evidence you can truthfully say that you have an *abiding conviction* of the defendant’s guilt *such as you would be willing to act upon in the more weighty and important matters relating to your own affairs*, you have no reasonable doubt. A reasonable doubt must be a *real, substantial doubt and not one that is merely possible or imaginary*.

Id. at 1123 (emphasis added).

249. *Id.* at 1125-26. Courts have routinely upheld “abiding belief” or “abiding conviction” language. *See, e.g.*, *United States v. Barrera*, 486 F.2d 333, 339-40 (2d Cir. 1973); *see also* *Victor v. Nebraska*, 511 U.S. 1, 21 (1994) (“Instructing the jurors that they must have an abiding conviction of the defendant’s guilt does much to alleviate any concerns that the phrase ‘moral certainty’ might be misunderstood in the abstract.”); *United States v. Guy*, 456 F.2d 1157, 1164 (8th Cir. 1972); *McGill v. United States*, 348 F.2d 791, 796-98 (D.C. Cir. 1965). Courts have also been supportive of instructions to the effect that “reasonable doubt” is a doubt “based on a reason.” *See* *United States v. MacDonald*, 455 F.2d 1259, 1262-63 (1st Cir. 1972) (“[T]he overwhelming majority of courts which have confronted instructions containing a definition of reasonable doubt as a doubt ‘based on reason’ or for which the juror can ‘give a reason’ have not found reversible error.”), *superseded on other grounds by statute*, 21 U.S.C. §§ 801-971 (1973), *as recognized in* *United States v. Castro*, 279 F.3d 30 (1st Cir. 2002).

250. 341 F.3d 1207, 1208 (10th Cir. 2003).

251. *Id.* at 1212.

In the final scene of *The Philadelphia Story*, the late Katherine Hepburn faces a room packed with wedding guests and calls off her impending marriage to a man she has come to despise. She begins hesitantly and apologetically, showing just how mortifying the experience must be, but gains in confidence as she speaks—perhaps emboldened by the knowledge that a debonair Cary Grant and an earthy Jimmy Stewart are waiting in the wings as possible replacements for the rejected groom. The question in this case is whether the degree of certitude required to cancel a wedding at the last minute provides so flawed an analogy to the degree of certitude required to convict a defendant of manslaughter that a verdict rendered by a jury under the influence of such an analogy must be overturned on habeas review.²⁵²

In this particular case the trial judge gave a folksy charge on “reasonable doubt” that equated “reasonable doubt” with canceling a wedding.²⁵³ The

252. *Id.* at 1208.

253. *Id.* at 1213. The relevant part of the instruction on reasonable doubt is as follows:

We do not define reasonable doubt, and it is error to instruct on a definition of reasonable doubt. This is not true in some other jurisdictions. . . . I in no way intend to express or imply a definition of reasonable doubt, or beyond reasonable doubt, [but] I’ll tell you about an episode that I had when I was a brand new lawyer.

. . . I heard [a] prosecutor define reasonable doubt to the jury [as:] . . . [R]easonable doubt is the kind of serious doubt that causes you to act or not act in matters that are serious, like calling off a wedding at the last minute, after you’ve walked down the aisle and are waiting on the other party or waiting on the best man, or something like that, all of a sudden just saying, “No, it’s all off, I’m not going to get married,” and just quitting right there after all the announcements are out and the gifts have been received and everybody’s all dressed up and sitting in church, and the minister’s looking at you, and all of a sudden you walk out.

. . . I thought some people, if they were considering their future happiness, and the seriousness with which marital vows ought to be taken, would probably, if they had the slightest bit of doubt, stop a wedding. Other persons . . . were so nervous about the wedding, and they thought it was a bad idea, but they still wouldn’t walk out because of the embarrassment it would cause their mother or their intended, and all the inconvenience and trouble everybody had gone to. And they wouldn’t budge. . . .

The fact of the matter was, that reasonable doubt is a subjective matter that has to be resolved by each person, and each person in the individuality of his or her own conscience and reason. And furthermore, it’s going to vary every case, because every case is different. The facts and the evidence are always different.

charge was unconstitutional for a number of reasons, the least of which was that the charge suggested an impermissibly broad range of meanings for the term “reasonable doubt.”²⁵⁴ The last two sentences of the trial judge’s charge are specifically worth repeating: “And, so, who are we to tell you what is reasonable and what is not? That is wholly within your province.”²⁵⁵ Unfortunately, though this statement is actually a correct statement of the current state of the law, it is still unconstitutional.

This is the logical outcome of the Supreme Court’s refusal to define “reasonable doubt” and its continued flirtation with the idea that “reasonable doubt” is self-evident and needs no definition. The trial judge’s anecdote may be unconstitutional, but the point is incontrovertible.²⁵⁶

III. The Origins of Reasonable Doubt

The lower courts have applied *Cage* and *Victor/Sandoval* in a confused and inconsistent manner. How might we move forward out of the current morass that is “reasonable doubt”? As with many things, it is a question of origins. A thorough understanding of how things began will help lead us to a better ending. Why is “reasonable doubt” important? How did we get it?

The roots of the “reasonable doubt” rule are ancient. This is attested by many authorities: “In ancient Roman law as well as in medieval canon law, the evaluation of evidence of a fact had to make that fact *manifestum*. A case was manifest when the proof against the defendant was considered

So, Oklahoma takes the position that it’s wrong to tell you what reasonable doubt is. Only you can decide what is reasonable, in the light and under the circumstances of each individual case. Because, after all, it is your reason that we rely on to decide the evidentiary issues in the case. And, so, who are we to tell you what is reasonable and what is not? That is wholly within your province.

Id. at 1209-10. The court noted that “[d]efense counsel immediately moved for a mistrial on the ground that the anecdote misled the jury as to the nature of reasonable doubt.” *Id.* at 1210.

254. *Id.* at 1214.

255. *Id.* at 1210.

256. Before dismissing the wedding charge out of hand, we should recall the earlier case of *West v. Vaughn*, 204 F.3d 53, 56 (3d Cir. 2000), *abrogated by* *Tyler v. Cain*, 533 U.S. 656 (2001). Recall that *West* involved an instruction where the trial judge anecdotally compared “reasonable doubt” in a criminal case to the purchase of a home. *Id.* at 56. The charge was upheld as not violating due process. *Id.* at 64. From a due process perspective, is backing out of a home closing really that different from whether one should walk down the aisle and say, “I do”?

sufficient.”²⁵⁷ Shortly after AD 382, when Christianity had been declared the official faith of the Roman Empire, the emperors ruled that a verdict could only be had if it was based on “indubitable evidence” (*Indiciis Indubitatis*).²⁵⁸ It was said that the “evidence had to be brighter than light.”²⁵⁹ Saint Augustine also followed this rule and believed that suspicion was not an adequate basis to support a conviction.²⁶⁰ In the late sixth century, Pope St. Gregory the Great established the basic rule of the early medieval period: “‘Grave satis est et indecens, ut in re dubia certa detur sententia’: ‘It is a grave and unseemly business to give a judgment that purports to be certain when the matter is doubtful.’”²⁶¹ By the early ninth century, the canon lawyers also required a high standard of proof.²⁶² Following the Gospel of Matthew²⁶³ they demanded evidence that was “‘clear as the noon-day sun’ (*luce meridiana clarior*).”²⁶⁴

This high standard of proof required by Christian teachings did not quickly disappear. Rather:

These ideas of the ninth century remained in place even during the two dark centuries that followed, and were staples in the renewed jurisprudence of the later eleventh century forward. Theologians, too, increasingly understood them as principles of moral theology. Particularly Thomas Aquinas, in his *Summa*

257. MATHIAS SCHMOECKEL, CHRISTIANITY AND LAW: AN INTRODUCTION 154-55 (John Witte, Jr. & Frank S. Alexander eds., 2008).

258. *Id.* at 155.

259. *Id.*

260. *Id.*

261. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 116 (footnote omitted); *see also* SCHMOECKEL, *supra* note 257, at 155.

262. SCHMOECKEL, *supra* note 257, at 155.

263. *Matthew* 13:43 (King James) (“Then shall the righteous shine forth as the sun in the kingdom of their Father. Who hath ears to hear, let him hear.”). The context of this verse is highly relevant. In *Matthew* 13, Jesus sets forth the famous parable of the sower in an effort to show his listeners what the Kingdom of God was like. However, in the verses immediately preceding *Matthew* 13:43, Jesus sent the crowd away and took his closest disciples into a nearby house and told them the parable of the tares (weeds). *Matthew* 13:36-42. This is a parable of judgment and ends just before verse 43 with the famous but frightening statement: “And shall cast them into a furnace of fire: there shall be wailing and gnashing of teeth.” *Matthew* 13:42. It appears that judgment must come just before or at the full inauguration of the Kingdom. Judging is an awesome responsibility and a fearsome task. This understanding of judging another was a pillar of the medieval mindset.

264. SCHMOECKEL, *supra* note 257, at 155.

theologiae, explained these rules of proof thoroughly, which added to their authority.²⁶⁵

These are some of the earliest references to the burden of proof that would later develop into “proof beyond a reasonable doubt” in Anglo-American jurisprudence.

There are currently two lines of thought regarding the development of the “proof beyond a reasonable doubt” standard. For lack of a better form of expression, the first view will be termed the “received view.” The second view is the theological analysis recently offered by Professor James Q. Whitman in his book *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial*. The phrase “received view” is used with some trepidation. It could be argued that there is no “received view.” There are many differences among those who can be said to advocate for the received view that go far beyond mere nuance. Nevertheless, it is now possible to discern two reasonably distinct poles of thought.²⁶⁶ In order to make the ultimate point of this article, it is necessary to set out both views in some detail.

What has been dubbed the “received view” is currently represented most ably by scholars like Barbara Shapiro,²⁶⁷ Anthony A. Morano,²⁶⁸ Theodore Waldman,²⁶⁹ and Steve Sheppard.²⁷⁰ However, the primary focus will be on Professor Shapiro’s work. Her work is a paradigmatic example of the “received view” and was extensively cited by the Supreme Court in *Victor/Sandoval*.²⁷¹ Additionally, Professors Whitman and Shapiro have recently debated their opposing views; thus the issue is now ripe for further discussion.²⁷²

265. *Id.*

266. While two poles of thought have clearly emerged, there is obviously substantial overlap. Scholars actually agree on many details and a great deal of the overarching narrative. As is usually the case, the dispute is largely one of interpretation and emphasis. Nevertheless, the difference is real and has consequences for how we understand “reasonable doubt.”

267. See SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 4; see also Shapiro, “To a Moral Certainty”, *supra* note 11.

268. See Morano, *supra* note 11.

269. See Waldman, *supra* note 11.

270. See Sheppard, *supra* note 11.

271. See *Victor v. Nebraska*, 511 U.S. 1, 10-11 (1994).

272. Shapiro and Whitman aired their differences in a rather sharp and somewhat testy debate. See Shapiro, *Changing Language*, *supra* note 11; Shapiro, *The Beyond Reasonable Doubt Doctrine*, *supra* note 11; Whitman, *Response to Shapiro*, *supra* note 11. This debate is fascinating but difficult to follow if one is not familiar with both professors’ previous

A. The “Received View”

In order to understand the origins of the “proof beyond a reasonable doubt” standard, one must first understand something about the origins of the jury system. Prior to the thirteenth century, trials were not by jury as we understand the concept today, but rather by ordeal.²⁷³ The ordeals predate Christianity in medieval England “but the Church absorbed and ritualized them.”²⁷⁴ The ordeals consisted of such things as the hot iron and cold water.²⁷⁵ The ordeal of the hot iron required an individual to carry a hot iron for some distance in hand, after which the hand was bandaged.²⁷⁶ After a brief period the bandage was removed.²⁷⁷ If the wound was infected, the individual was deemed guilty.²⁷⁸ Of course, if the wound was not infected,

work. Shapiro insists that “moral comfort” may have had some relevance, but was not the driving force in the development of the “reasonable doubt” standard. Shapiro, *The Beyond Reasonable Doubt Doctrine*, *supra* note 11, at 173. “[T]he more plausible inference is concern for the defendant and an increasing awareness of the uncertainties of fact-finding” *Id.* at 172. “[T]he overwhelming weight of the evidence indicates that the epistemological concerns [and not moral comfort] were the driving force for the standard.” *Id.* at 173. Whitman responds that Shapiro “has failed to give a faithful account of my thesis.” Whitman, *Response to Shapiro*, *supra* note 11, at 175. Whitman’s central claim in defense is that Shapiro overstates his argument that premodern societies were not concerned with proof, but with moral comfort. *Id.* at 177. Whitman reemphasizes that concern with factual proof and moral comfort have always gone hand in hand. *Id.* However, “[T]he mix has changed. Moral comfort used to matter much more than it does today, and the shape of premodern procedure reflects that fact.” *Id.* at 177-78 (quoting WHITMAN, *THE ORIGINS OF REASONABLE DOUBT*, *supra* note 11, at 13).

Thus my book does not offer any challenge to Shapiro’s claims, made over many years, that when jurists of the past worried about factual proof, they sometimes pondered the literature on epistemology. What my book denies is that premodern trials, like modern ones, were typically about factual proof. My book does not focus on sophisticated evidence lawyers, but on the ordinary run of past trials, which presented fewer factual problems than is the case today. . . . Careful reading of the sources shows that the “reasonable doubt” rule was not the creation of sophisticated jurists. It was the creation of theologians and other Christians responding to the felt needs of the premodern trial.

Id. at 188.

273. SHAPIRO, *BEYOND REASONABLE DOUBT AND PROBABLE CAUSE*, *supra* note 11, at 3.

274. JOHN H. LANGBEIN, ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 44 (2009).

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

then God had worked a miracle for the obviously innocent individual.²⁷⁹ The ordeal of cold water involved tying an individual up and lowering him into freezing water.²⁸⁰ If the individual sank, he was deemed innocent and pulled out.²⁸¹ If he did not sink, he was deemed guilty.²⁸² “The water, being pure, accepted the innocent but rejected the guilty.”²⁸³ These are just two examples of many utilized ordeals.

Whether one had to submit to an ordeal was largely determined by the early presentment jury.²⁸⁴ Presentment juries were composed of persons from the local community and are generally thought to have neither heard evidence nor taken testimony.²⁸⁵ These were later developments. The presentment jury was “self-informing” and was expected “to come to court already knowing that it thought someone ‘notoriously suspect.’”²⁸⁶ In 1215, the Fourth Lateran Council abolished the ordeals.²⁸⁷ As a result, the English “government found itself in the remarkable position of having suddenly lost its trial procedure for cases of serious crime.”²⁸⁸ At this point, the English established “convicting” or trial juries.²⁸⁹ The abolition of the ordeals would give rise to the formal procedure of hearing evidence.²⁹⁰

The abolition of ordeals and other “irrational proofs” meant that the jury would now have to begin a system of formal inquiry. Jurors were still expected to know most of the facts of their own accord, as they usually lived in the same community as the accused.²⁹¹ Jurors were not impartial, but were instead expected to rely on their personal knowledge as members of the community where the offense occurred and any evidence that might

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 43.

285. *Id.* at 38.

286. *Id.* at 41; *see also* SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 1; Morano, *supra* note 11, at 509-11; Waldman, *supra* note 11, at 299-303.

287. LANGBEIN ET AL., *supra* note 274, at 59-60.

288. *Id.* at 58; *see* SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 3.

289. LANGBEIN ET AL., *supra* note 274, at 58-64; *see also* Shapiro, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 3-6.

290. LANGBEIN ET AL., *supra* note 274, at 58-63; SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 3-5.

291. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 2-4.

be offered to them at the trial.²⁹² Jurors were local men who came to the decision-making process with knowledge of the facts based on their own first-hand knowledge and investigation.²⁹³ By the thirteenth and fourteenth centuries, “jurors probably were both gatherers and weighers of evidence. Witnesses do not seem to have appeared as a regular part of criminal prosecutions.”²⁹⁴

However, by the fifteenth century, jurors no longer did their own investigations; nor did they always have sufficient personal knowledge of the defendant to make decisions without hearing additional evidence.²⁹⁵ Rather, they “were listening to and assessing evidence introduced by private accusers and government officials.”²⁹⁶ As such, they did not have enough information to come to verdicts without formal evidence and relied on numerous sources: the judge’s questioning, the defendant’s response, the demeanor of the accused and witnesses, testimony of lay witnesses for both sides, and testimony from royal officials.²⁹⁷ As more and more jurors became passive viewers of the facts and increasingly did not live in the same locale as the defendant, they began to rely more heavily on “witnesses and documents that . . . had to be evaluated for truthfulness and accuracy.”²⁹⁸ As a result, it became necessary to develop standards of evaluation by which jurors could test witnesses and other evidence. Thus, standards began to develop for jury evaluation of evidence.²⁹⁹ This is the beginning of the development of the formal “reasonable doubt” rule in England.³⁰⁰

By the sixteenth century, the Protestant Reformation was fully underway in England, and Europe began to experience a new humanist philosophy.³⁰¹ This process developed in the seventeenth century when English thinking on the subject matter began to mature.³⁰²

The attempt to build an intermediate level of knowledge, short of absolute certainty but above the level of mere opinion, was

292. *Id.*

293. *Id.*

294. *Id.* at 4.

295. *See id.*

296. *Id.*

297. *Id.* at 4-5.

298. *Id.* at 6.

299. *Id.*

300. *Id.*

301. *Id.* at 6-7.

302. *See id.* at 7.

made by an overlapping group of theologians and naturalists. For the Protestant theologians, who rejected Roman Catholic assertions of infallibility, the central question was whether religious truths, such as the existence of God, miracles, the biblical narratives, and various doctrines and practices of the church, could survive skeptical attack, once they were stripped of claims to absolute truth and reduced to claims based on evidence. For the naturalists, the central problem was that of making truthful statements about natural phenomena which could be observed but not be reduced to the kinds of logical, mathematical demonstrations that traditionally had been thought to yield unquestionable truths. Both groups concluded that reasonable men, employing their senses and rational faculties, could derive truths that they would have no reason to doubt.³⁰³

It was in the late seventeenth century that different levels of probability on a graduated scale began to develop.³⁰⁴ The highest level of knowledge regarding practical matters in human affairs came to be thought of as rational belief or moral certainty.³⁰⁵ Basically, two ideas about the categorization of knowledge were involved.³⁰⁶ The first was the category of mathematical knowledge and the second involved the empirical realm, where mathematical certainty was not possible.³⁰⁷ The second category is our focus:

[I]n this realm of events, just because absolute certainty is not possible, we ought not to treat everything as merely a guess or a matter of opinion. Instead, in this realm there are levels of certainty, and we reach higher levels of certainty as the quantity and quality of the evidence available to us increases. The highest level of certainty in this realm in which no absolute certainty is possible is what traditionally has been called *moral certainty*.³⁰⁸

By the late seventeenth century, it is clear that English juries were weighing the credibility of witnesses.³⁰⁹ Credibility issues became

303. *Id.*

304. *Id.* at 8.

305. *Id.*

306. Shapiro, "To a Moral Certainty", *supra* note 11, at 192-93; *see also* Sheppard, *supra* note 11, at 1179; Waldman, *supra* note 11, at 302-04.

307. Shapiro, "To a Moral Certainty", *supra* note 11, at 192-93.

308. *Id.* (emphasis added).

309. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 13.

significant in criminal trials and drove standards for the jury verdict.³¹⁰ The first such standard was “satisfied conscience.”³¹¹ It “became the first vessel into which were poured the new criteria for evaluating facts and testimony.”³¹² “Satisfied conscience” was viewed as having a “rational belief,” and this eventually became “belief beyond a reasonable doubt.”³¹³ These new standards drew heavily on prevalent philosophical and theological understandings, most especially, moral certainty.³¹⁴

By the early eighteenth century, trials repeatedly made reference to terms like “conscience” and “an inner tribunal.”³¹⁵ Jurors were not to violate their consciences in reaching an appropriate verdict.³¹⁶ “Satisfied conscience is central to the development of the beyond reasonable doubt standard.”³¹⁷ Shapiro “emphasize[s] that the judgment of conscience was a rational decision.”³¹⁸ She quotes philosopher John Locke at length to emphasize that “conscience” involves reason and is ultimately a rational process, not connected with the emotions or passions.³¹⁹ Shapiro also notes that conscience is “a concept so important in English legal terminology, [and] is linked to the concepts of moral certainty and beyond reasonable doubt.”³²⁰ These standards—“satisfied conscience,” “moral certainty,” and “beyond reasonable doubt”—were typical of English criminal courts in the late seventeenth and eighteenth centuries.³²¹ The terms developed from other philosophies and modes of thinking that sought to apply probabilistic judgment to the circumstances of normal life.³²² Judges who were especially interested “with issues of credibility, probability, and certainty in many other fields, not surprisingly turned to religious and intellectual traditions where these were well developed or developing.”³²³

It is not at all clear why or how the precise phrase “reasonable doubt” came into being. We do not have sufficient information from the trials of

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 14.

316. *Id.*

317. *Id.*

318. *Id.* at 16.

319. *Id.* at 17.

320. *Id.* at 18.

321. *Id.* at 19.

322. *Id.* at 15-18.

323. *Id.* at 19.

the late eighteenth century. However, both Morano and Shapiro agree that the term seems to have first appeared in the Boston Massacre trials of March 1770.³²⁴ Thus, the precise phrase, “reasonable doubt,” may be genuinely American in origin.³²⁵ What is especially noteworthy is that it appears a prosecutor, not defense counsel or a judge, first used the phrase.³²⁶ This has led to the conclusion that the “reasonable doubt” test “actually was designed to provide less protection to the accused than the ‘any doubt’ test, which did not require that doubts be reasonable.”³²⁷ Thereafter, the “reasonable doubt” standard appeared in Irish treason trials and in various proceedings at the Old Bailey in the last two decades of the eighteenth century.³²⁸

Professor Shapiro concludes that: “The beyond reasonable doubt standard articulated in both the cases and the evidence treatises stemmed from the late seventeenth-century cluster of ideas associated with the concept of moral certainty and with, to use Lockean terminology, the highest degree of probability.”³²⁹ Shapiro traces the origins of “reasonable doubt” to “secular” foundations, albeit with religious overtones.³³⁰

Once it became evident that trial by jury required the critical evaluation of witnesses, legal thinkers began to adopt the then current religious and philosophical ideas about dealing with matters of fact. . . . Although one might wish to . . . investigate the contributions of scholastic philosophy and medieval and early modern canon and civil law, there can be little doubt that eighteenth- and early nineteenth-century legal practitioners and writers attempted to bring English law into conformity with the most advanced philosophical thought. Early in the seventeenth century the concern for evaluating evidence was encapsulated in “satisfied conscience,” or “satisfied belief,” formulas that resonated [with] . . . the moral and religious obligations of jurors serving under oath. During the seventeenth and eighteenth centuries, the concepts of probability, degrees of certainty, and

324. *See id.* at 22; Morano, *supra* note 11, at 516.

325. Morano, *supra* note 11, at 516.

326. *Id.* at 517.

327. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 21; *see also* Morano, *supra* note 11, at 519.

328. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 22-23.

329. *Id.* at 40.

330. *Id.* at 40-41.

moral certainty were poured into the old formulas so that they emerged at the end of the eighteenth century as the *secular* moral standard of beyond reasonable doubt.³³¹

This, then, is the “received view”: The secular, Enlightenment basis for “reasonable doubt.”

B. The Theological Roots of the Criminal Trial

*“It is a riddle, wrapped in a mystery, inside an enigma; but perhaps there is a key.”*³³²

We have a mystery indeed. Despite the profound importance of the “reasonable doubt” standard, we still cannot agree on what it means; thus, the mystery. The concept of “reasonable doubt” is indeed “a riddle, wrapped in a mystery, inside an enigma.”³³³ However, we are fortunate because there definitely “is a [new] key.”³³⁴

[T]he reasonable doubt formula seems mystifying today because we have lost sight of its original purpose. The origins of reasonable doubt lie in a forgotten world of premodern Christian theology, a world whose concerns were quite different from our own. . . .

. . . At its origins, this familiar rule was not intended to perform the function we ask it to perform today: It was not primarily intended to protect the accused. Instead, it had a significantly different purpose. Strange as it may sound, the reasonable doubt formula was originally concerned with protecting the souls of *the jurors* against damnation. . . .

. . . The famous injunction of St. Matthew—*Judge not lest ye be judged!*—had a concrete meaning: convicting an innocent defendant was regarded, in the older Christian tradition, as a potential mortal sin. The reasonable doubt rule was one of many rules and procedures that developed in response to this disquieting possibility. It was originally a theological doctrine, intended to reassure jurors that they could convict the defendant without risking their own salvation, so long as their doubts about

331. *Id.* (emphasis added).

332. WINSTON CHURCHILL, *Russia: ‘A Riddle, Wrapped in a Mystery, Inside an Enigma’*, in NEVER GIVE IN!: THE BEST OF WINSTON CHURCHILL’S SPEECHES 199, 199 (Winston S. Churchill ed., Hyperion 2003).

333. *See id.*

334. *See id.*

guilt were not “reasonable.” . . . This means that if we wish fully to understand our contemporary law, we must leave modern legal doctrine behind and dive deep into the waters of medieval Christian moral theology. . . .

. . . As we shall see, medieval and early modern Christians experienced great anxiety about the dangers that acts of judgment presented for the soul. . . .

. . . Doubt was the voice of an uncertain conscience, and in principle it had to be obeyed. Such was the rule laid down in particular by the standard “safer way” school of Christian moral theology, which grew up during the central Middle Ages: “In cases of doubt,” as the safer way formula ran, “the safer way is not to act at all.” . . .

The story of the reasonable doubt rule is simply an English chapter in this long history of safer way theology, a history in which Christian theologians worried for centuries over the nature of judging, over the problems of doubt³³⁵

335. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT*, *supra* note 11, at 2-4. See Samuel H. Pillsbury, *Fear and Trembling in Criminal Judgment*, 7 OHIO ST. J. CRIM. L. 827 (2010), for one of the few thorough reviews of Whitman’s book. While, in many particulars, Pillsbury agrees with Whitman, he disagrees on some points that he claims do not hold up for Whitman. First, Pillsbury characterizes Whitman’s factual proof versus moral comfort dichotomy in terms of “emotion and reason.” *Id.* at 836-37. Perhaps this is so, but the more apt opposition is simply theological versus factual. The theological is not reducible to emotion in Whitman’s work. Whitman’s moral comfort grows out of theological issues, not simply emotional ones. Second, Pillsbury notes that Whitman’s historical argument rests on the view that factual proof issues predominate in contemporary criminal trials. *Id.* at 838. Admittedly, Whitman seems to assume this without much detailed argument or support. However, it surely seems right. There is no doubt that many today have religious and moral scruples about judging, but all Whitman says is that factual proof “predominates.” *Id.* at 837-38. I have not found any research that would support the opposite view. As the reader will see, the overwhelming scholarship is only about factual proof and accuracy. As already seen, this is the sole focus of the courts today. Third, Pillsbury critiques Whitman’s theological interpretation of some of the verses of scripture which Whitman cites. *Id.* at 840-42. This is a fair point. There is indeed an issue here about scripture, but this does not necessarily take away from Whitman’s broader anthropological and sociological point about how Christians in earlier times approached the issue of judgment. Fourth, Pillsbury claims Whitman treats religion badly, which he does not do. *Id.* Whitman simply notes that in much of the modern, secular world the influence of religion has declined. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT*, *supra* note 11, at 2-7. Whitman says, “It is not my purpose in this book to offer a cynical or postmodern account.” *Id.* at 2. Fifth, Pillsbury criticizes Whitman’s penchant for continental legal systems, which, admittedly, Whitman has. Pillsbury, *supra*, at 845. I do not share this penchant, but it is irrelevant. Despite his pessimism, Whitman does

Jurors were simply terrified to convict.³³⁶ The “reasonable doubt” standard developed so that English jurors could, in fact, render convictions in appropriate cases.³³⁷ The standard “arose in the face of this religiously motivated reluctance to convict, taking its now-familiar form during the 1780s. It is still with us today, a living fossil from an older moral world.”³³⁸

While complimentary of the work of many other scholars, Professor Whitman is clearly aware of the fact that he is challenging the received view advocated for by much scholarship in this area.³³⁹ Whitman notes that:

[I]n the end . . . these scholars have not gotten the history right. In one way or another, all of them have conceived of the reasonable doubt rule as a rule of factual proof, as a heuristic for determining the truth in cases of ignorance, akin to the rules of factual proof in natural science.³⁴⁰

The first task for Whitman is to set out the basic difference between “factual proof” and “moral comfort.” This distinction is imperative for Whitman; without it, his thesis collapses. Whitman notes that premodern people had extreme anxiety over judging others.³⁴¹ This is true in a variety of cultures and contexts. Christian, Islamic and Buddhist cultures have faced this difficulty.³⁴² In fact, premodern people so dreaded judging others that they developed various stratagems to avoid being responsible for directly judging another human being.³⁴³ The purpose of legal procedures in the premodern world was not to achieve certainty in a confusing factual situation or to sort out competing claims in a logical or analytical manner, but rather to help those who had to judge, whether judges or juries, to overcome their own anxieties about the very act of judging.³⁴⁴ Premodern judges not only had to worry about the spiritual consequences of improper or careless judging, but also had to be concerned with the serious problem

discuss “modern implications” at the end of his book for the American criminal justice system and its understanding of “reasonable doubt.” WHITMAN, *THE ORIGINS OF REASONABLE DOUBT*, *supra* note 11, at 202-12. That is the point of departure for this article: Chief Justice Lemuel Shaw got it right. *See supra* note 40.

336. *See* WHITMAN, *THE ORIGINS OF REASONABLE DOUBT*, *supra* note 11, at 4.

337. *Id.*

338. *Id.*

339. *See id.* at 5.

340. *Id.*

341. *Id.* at 10.

342. *Id.* at 10-12.

343. *Id.* at 10.

344. *Id.*

of clan violence, vengeance, or reprisal by an accused's next of kin, family, or friends.³⁴⁵ This may well "sound bizarre to the modern reader" because we are at such a great cultural and psychic distance from the premodern world.³⁴⁶ Today, judges and jurors have developed means and institutions to put themselves at a psychic and moral distance from those whom they judge.³⁴⁷ However, "the capacity to maintain that kind of psychic distance developed only very slowly."³⁴⁸

Because of these judging difficulties, premodern societies developed what Whitman calls "moral comfort procedures."³⁴⁹ These are contrasted sharply with the kinds of procedures that characterize modern legal systems, especially those now prevalent in the Anglo-American legal world. Modern legal systems, including the Anglo-American system, are dominated by "factual proof" procedures.³⁵⁰ Although moral comfort procedures were far more dominant in the premodern world, this does not mean that premodern legal systems were not concerned with factual proof.³⁵¹ Factual proof has always been relevant.³⁵² The point is that moral comfort was often just as important as factual proof.³⁵³

Whitman recognizes that even in modern legal systems there are procedures best characterized as procedures designed to achieve moral comfort.³⁵⁴

It does not aim to eliminate our ignorance about the facts. Instead, it aims to reassure those of us who act as judges. It offers us a kind of moral safe harbor in administering punishment, by allowing us to declare that the accused was convicted according to impersonal procedures, and not according to our own individual whim. Procedures, in such cases, serve to diminish the anxiety we feel in punishing others.³⁵⁵

Whitman provides several examples of such moral comfort procedures. First is the example of the firing squad where one or more members of the

345. *Id.* at 10-11.

346. *Id.* at 11.

347. *Id.*

348. *Id.*

349. *Id.* at 12-13.

350. *Id.* at 18-19.

351. *See supra* note 272.

352. *See supra* note 272.

353. *See supra* note 272.

354. *See* WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 13.

355. *Id.*

firing squad may receive a blank cartridge.³⁵⁶ Of course, no one knows who has the blank cartridge(s).³⁵⁷ However, everyone on the firing squad knows that one or more persons will not fire live ammunition.³⁵⁸ This is a moral comfort procedure.³⁵⁹ It allows members of the firing squad to go forward with an execution, but to have some moral comfort that they may not have actually killed the convicted party.³⁶⁰

Another comfort procedure is illustrated by the famous 1884 English case of *Regina v. Dudley & Stephens*.³⁶¹ In this case, several seamen were shipwrecked and trapped at sea in a lifeboat for many days.³⁶² Eventually, in order to survive, they drew lots to see who would die for the sake of the others.³⁶³ This is also a kind of moral comfort procedure.³⁶⁴ The arbitrary process of drawing lots makes the decision procedure itself responsible for the outcome, rather than the individuals involved being responsible for the outcome themselves.³⁶⁵

A third typical moral comfort procedure is what Whitman calls randomizing: Using random processes to select persons for execution who have been sentenced to death, military conscription, or other dangerous duty is a way of minimizing responsibility on the part of those who oversee the process.³⁶⁶

Interestingly, Whitman also characterizes the medieval ordeal as a means of shifting responsibility in providing moral comfort.³⁶⁷

The medieval ordeal offers a striking example of a procedure that could serve such a guilt-shuffling . . . purpose: . . . [O]rdeals were often inflicted on persons whose guilt was already obvious. The ordeal, in such cases, did not serve as a means of factual proof. Instead, its purpose was to force God to make the decision to convict the accused, thus shuffling . . . "the odium of human responsibility" off the shoulders of the community and onto the

356. *Id.*

357. *Id.*

358. *Id.* at 13-14.

359. *Id.* at 13.

360. *Id.* at 13-14.

361. 14 Q.B.D. 273 (1884); see WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 14.

362. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 14.

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.* at 15.

367. *Id.* at 17.

shoulders of the Almighty himself. *Let God be the one who makes the decision to kill him!*³⁶⁸

According to Whitman, “*Moral comfort has been playing a steadily declining role in procedure over the past two centuries, while factual proof has grown steadily more important*” and, furthermore, “[t]his is one of the master themes in the making of modern law.”³⁶⁹ He offers several reasons for this decline: First, religion and personal piety no longer have the hold over modern persons that they held in the premodern world.³⁷⁰ Our worldview has changed. Many of us no longer see the world or ourselves through the lens of religious piety. The secular has swept us away. In addition, modern societies, especially urbanized life, create a very different social fabric.³⁷¹ Today’s world is plagued by greater uncertainty. In modern cities and urban environments, anonymity is the rule.³⁷² Witnesses, victims, defendants, and jurors frequently do not know each other. In the past, this was not the case: “This was less true two or three centuries ago, when crimes were often committed in small, often intimate, communities.”³⁷³ People knew each other, and they often knew the facts of the cases in which they were involved. Therefore, the concern at trial was not so much with finding facts, as typically those were substantially known by all involved.

Whitman notes that plea bargaining is an additional factor that makes factual proof more important in a modern world.³⁷⁴ Simply put, there was no plea bargaining in the premodern world.³⁷⁵ “It was expected that every case would go to trial—even ones in which there was no uncertainty whatsoever about the facts.”³⁷⁶ In today’s world, even the most obviously guilty do not often go to trial.³⁷⁷ “Before the mid-nineteenth century, by contrast, the dockets were heavy with cases in which the guilt of the accused was entirely obvious to everybody in the courtroom.”³⁷⁸ It was clear to all wherever criminal court was being held that “one manifestly guilty offender after another was paraded before the court for ceremonious

368. *Id.* (footnote omitted).

369. *Id.* at 18.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

condemnation. As a result, trials did not routinely present the kind of difficult problems of factual proof that they present today.”³⁷⁹

Simply put, it was different then: “Factual proof simply loomed less large to our ancestors than it does to us.”³⁸⁰ In premodern societies neighbors judged neighbors, persons generally knew who was guilty and who was not, and there simply weren’t complex factual puzzles to be resolved.³⁸¹ Nevertheless, while the premodern world may be gone, its concerns foreshadow our modern world. This is Whitman’s thesis: “[M]any of our American ‘proof’ procedures—most importantly the reasonable doubt standard—were not originally intended as factual proof procedures at all. They are institutional survivals from an earlier age. They are premodern moral comfort procedures that have been converted, often clumsily and unsuccessfully, into modern factual proof procedures.”³⁸²

All of this has resulted in a severe dilemma for modern legal systems. Whitman believes there is a relationship, and a close one, between moral comfort and factual proof.³⁸³ However, while the two are strongly related, and indeed overlap, they are not the same. Factual proof procedures do more than provide factual proof, they provide moral comfort.³⁸⁴ Unfortunately, many good moral proof procedures do not function well in determining factual proof.³⁸⁵

According to Whitman, a jury’s unanimity is a particularly good example of a moral comfort procedure.³⁸⁶ It is not designed as a factual proof procedure. Whitman notes that other legal systems do not have juror unanimity rules: “After all, the rule requires unanimity to acquit as well as to convict. So can we describe it as a factual proof rule?”³⁸⁷ Whitman traces the jury unanimity rule to disputes over land in the Middle Ages.³⁸⁸ He notes that “there was great reluctance [among persons] to award a disputed piece of property to one of two disputants unless [at least] twelve members of the community” could agree.³⁸⁹ Thus responsibility of the decision was

379. *Id.* at 19.

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.* at 25.

384. *Id.* at 13.

385. *Id.* at 20.

386. *Id.* at 22.

387. *Id.*

388. *Id.* at 22-23.

389. *Id.* at 23.

shared and diluted.³⁹⁰ Another example is the common law's disdain for uncorroborated confessions.³⁹¹ Whitman notes that "modern American law (like modern English law) rejects this nearly universal factual proof rule!"³⁹²

So why do we do this when, in virtually every other legal system in the world, this rule is not followed? The answer, according to Whitman, is that factual proof was less important in the premodern world.³⁹³ It was important in the premodern world that the accused confessed.³⁹⁴ The confession was not about factual proof, but about moral comfort.³⁹⁵ If the accused confessed, it took the burden off the accuser or the judge to convict and impose a sentence.³⁹⁶ Finally, Whitman notes that the jury trial itself is more of a moral comfort procedure than a factual proof procedure.³⁹⁷ It works to shuffle the burden of condemnation from judges to jurors and to disburse responsibility among jurors rather than impose such responsibility on one person.³⁹⁸

Yet Americans treat it as an institution designed to aid in the search for truth. In particular, American law declares the jury to be a "lie detector": it claims that lay jurors are especially good at finding the truth, because they have a peculiar talent for distinguishing true testimony from false testimony.³⁹⁹

However, scholar after scholar has noted that this is simply not the case: "The idea of the jury as a lie detector . . . is a relatively recent historical invention."⁴⁰⁰

Therefore, moral comfort aims to do just that: comfort those who have to make difficult decisions and relieve their anxiety. Factual proof, on the other hand, involves procedures that by design are intended to sift and weigh facts and proceed in an analytical manner toward the discovery of truth. However, there is one point at which moral comfort and factual proof

390. *See id.*

391. *Id.*

392. *Id.* (footnotes omitted).

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.* at 24.

398. *Id.*

399. *Id.*

400. *Id.*

come together, and this is important for Whitman’s thesis regarding “reasonable doubt” as a moral comfort rule:

They both tend to raise the bar against conviction. If the truth of the allegations against the accused must be adequately proven, it is of course more difficult to convict. . . . [I]f judges are reluctant to judge, that reluctance too may make it more difficult to convict. Indeed . . . conviction rates in the premodern world were often quite low, precisely for that reason. . . . [B]oth the commitment to finding the truth and the urge to avoid moral responsibility for judgment can lie at the foundation of a system of procedural protections for the accused.⁴⁰¹

On the European continent, the theology of conscience and doubt led to the “safer path” doctrine, which informed the English conception of “proof beyond a reasonable doubt.”⁴⁰² To understand what was happening on the continent, one must understand something about the vagaries of the word “conscience.” Whitman tells us that the original form of the word “conscience” is Greek in its root.⁴⁰³ The Greek word is “*syneidesis*.”⁴⁰⁴ “*Syneidesis*” is the word on which the Latin “*conscientia*” was based.⁴⁰⁵ Both words come from roots which mean “knowledge of facts.”⁴⁰⁶ “*Eidesis*” is the Greek, and “*scientia*” is the Latin.⁴⁰⁷ Quite literally then, the word “*syn-eidesis*” and “*con-scientia*” are equivalent to “shared knowledge” or “deepened knowledge.”⁴⁰⁸ The Latin term “*conscientia*” is ambiguous. This ambiguity is central for Whitman’s argument.

On the one hand, “*conscientia*” can signify a form of moral apperception—an ability to distinguish between right and wrong. It is in that sense, of course, that we use the word “conscience” in English today. But the Latin “*conscientia*”—like the modern French “conscience” or the modern Italian “*coscienza*”—can also mean “awareness of certain facts,” or “the state of being informed.” . . . Both senses of the term played important roles in Christian thinking about the proper role of the conscientious

401. *Id.*

402. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 114-24.

403. *Id.* at 106.

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

judge: “the conscience of the judge” can refer both to the judge’s moral conviction *and* to the judge’s knowledge of particular facts—to what canon lawyers would call his “private knowledge,” the knowledge he had as a witness.⁴⁰⁹

The concept of “conscience” was important to Christian thought throughout the Middle Ages and later.⁴¹⁰ Conscience was ambiguous because it had two implied meanings.⁴¹¹ First, it could refer to “knowledge of facts.”⁴¹² Second, and typically, it was thought of “as an inner moral voice—an inborn sensitivity to the danger of sin, implanted by God. Our conscience was the voice of our ‘internal forum,’ the voice, implanted by God, of the ‘little judge’ who sits within us, passing upon the rightness and wrongness of our every act.”⁴¹³ In the medieval tradition, conscience was not simply a matter of private individual concern.⁴¹⁴ Conscience was regulated institutionally by the Church’s practice of confession.⁴¹⁵ During the Middle Ages, for the judge to bring private knowledge to bear on a problem on the continent was most improper.⁴¹⁶ The opposite applied in England.⁴¹⁷

The ban on private knowledge was a moral comfort rule, a way for professional judges to assure themselves that they had maintained a safe distance from the bloody consequences of the case they were judging. So long as the judge did not comport himself as a witness, he would be safe.⁴¹⁸

A judge was to judge according to the evidence offered, not his private conscience.⁴¹⁹ “So long as you do not use your private knowledge, it is the law that kills him, and not you.”⁴²⁰

Doubt played a key role in the medieval concept of conscience.⁴²¹ Unreasonable or imprudent doubts were not to be followed.⁴²² As noted,

409. *Id.* (footnote omitted).

410. *Id.*

411. *See id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.* at 107-08.

417. *Id.* at 109-10.

418. *Id.* at 110.

419. *Id.* at 111.

420. *Id.* at 112.

421. *Id.* at 115.

Pope St. Gregory the Great gave content to this notion when he said, "It is a grave and unseemly business to give a judgment that purports to be certain when the matter is doubtful."⁴²³

This kind of thinking led to the "safer path doctrine," which required that "[w]hen in doubt, it was necessary to take 'the safer path.'"⁴²⁴

The doctrine was reiterated in famous form a few years later by [Pope] Innocent III, [who] . . . produced the classic formulation of the safer path doctrine: "In dubiis via eligenda est tutior," "When there are doubts, one must choose the safer path."⁴²⁵

All of this eventually led to a famous rule of continental law: "in dubio pro reo," "in doubt you must decide for the defendant."⁴²⁶ Whitman notes, "This celebrated rule represented the Continental form of the presumption of innocence."⁴²⁷ *In dubio pro reo* grew "directly out of [the] safer path doctrine."⁴²⁸

The in dubio pro reo rule was indeed a rule of moral theology, just like the private knowledge rule: it too offered counsel about how to act when you found yourself, in Innocent III's constantly cited phrase, "in dubiis," "facing cases of doubt." Indeed, as the standard juristic writing of the early modern Continent explained, in dubio pro reo was the other side of the procedural coin that required proof "clearer than the midday sun" before sending a person to blood punishment.⁴²⁹

In England, the ban on ordeals by the Fourth Lateran Council led directly to the jury trial.⁴³⁰ As previously noted, once the ordeal was gone, English legal procedure needed something to take its place.⁴³¹ Thus, the jury took shape. The English Monarchy slowly began "compelling panels of local

422. *Id.* at 116.

423. *Id.* (footnote omitted) (internal quotation marks omitted).

424. *Id.* at 117.

425. *Id.*

426. *Id.* at 122 (internal quotation marks omitted).

427. *Id.*

428. *Id.* at 123.

429. *Id.*

430. *Id.* at 126-27.

431. *Id.* at 127.

witnesses to make accusations.”⁴³² The presenting jury and the convicting trial jury took shape out of this system.⁴³³

English judges, however, did not face the same problems as their continental counterparts.⁴³⁴ English judges did not enter the verdict; that was left to the jury.⁴³⁵ Thus, the jury took responsibility for judgment and, therefore, relieved the judge of this great burden.⁴³⁶ Consequently, common law jurors faced an unusual burden in that they squarely had the responsibility of judging their fellows.⁴³⁷ Whitman catalogues in detail the anxieties faced by common law jurors and how most modern historians of this period have failed to recognize these deep anxieties and the spiritual problems they raised.⁴³⁸

After all, the common law lodged the power to find facts and enter verdicts not in the judges but exclusively in the jurors. But the jurors, by contrast, were in a difficult position: it was well understood that they might indeed sometimes judge on the basis on their private knowledge as witnesses; and at the end of the trial, taking on the role of judge, they were to pronounce the perilous word of judgment, “guilty.”⁴³⁹

Whitman points out that in the sixteenth century and early seventeenth century things changed for the jury.⁴⁴⁰ This period was known as the Renaissance.⁴⁴¹ Princes and monarchs of this era were far more powerful and claimed that they were “absolute.”⁴⁴² The Tudor and Stuart kings began a series of great changes in government.⁴⁴³ In particular, the Tudors tied various pressures to common law criminal jurors.⁴⁴⁴ Put bluntly, the monarchs of the sixteenth and early seventeenth century began crackdowns on crime and did not appreciate acquittals.⁴⁴⁵ Thereafter, the moral pressure

432. *Id.* at 133-35.

433. *Id.* at 136-37.

434. *Id.* at 147.

435. *Id.* at 148.

436. *Id.*

437. *Id.* at 150-51.

438. *See id.*

439. *Id.* at 153.

440. *Id.* at 161.

441. *Id.*

442. *Id.*

443. *Id.* at 161-62.

444. *Id.* at 162.

445. *Id.* at 161-62.

increased on common law criminal juries.⁴⁴⁶ Various mechanisms that helped common law criminal juries avoid imposing blood punishments were slowly removed, such as the benefit of clergy.⁴⁴⁷ However, in the late seventeenth century and eighteenth century, this situation was reversed.⁴⁴⁸ Criminal jurors began to recover the privileges and rights they had enjoyed in the Middle Ages.⁴⁴⁹

The sixteenth and seventeenth centuries were thus moral hard times for English criminal jurors. Only beginning in the later seventeenth century did relief gradually arrive. Over the period from 1660 to 1800, the great period of the solidification and creation of common law "liberties," English government took a critical turn away from the princely practices of the Continent.⁴⁵⁰

Finally, in the late eighteenth century, particularly the last three decades, the safer path doctrine finally developed into the "proof beyond a reasonable doubt" rule.⁴⁵¹ Whitman agrees with the vast majority of historians on this point.⁴⁵²

Whitman is careful to distance the development of "reasonable doubt" from increased lawyerization.⁴⁵³ The introduction of trained professionals as legal representatives profoundly affected the trials, but "the emergence of the rule is not related to lawyerization, or at least not in any direct way. . . . The underlying concern was not with protecting the defendant at all. It was with protecting the jurors."⁴⁵⁴ This is Whitman's major contribution to the history of the criminal trial.

Thus, the rule that in order to convict a criminal defendant the prosecution must produce "proof beyond a reasonable doubt" finally emerged in something akin to its present form in the late eighteenth century. Furthermore, the standard is substantially a moral comfort procedure and not primarily one of factual proof. However, these overlap; to say that "reasonable doubt" is primarily a rule of moral comfort is not to

446. *Id.* at 162.

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.*

451. *See id.* at 192-200.

452. *See, e.g.,* LANGBEIN ET AL., *supra* note 274, at 696-68; SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE, *supra* note 11, at 18-25; WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 192-200.

453. *See* WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 194.

454. *Id.*

deny that it is related to factual proof. It is, rather, a question of emphasis.⁴⁵⁵

Whitman emphasizes that there is nothing whatsoever in the “reasonable doubt” rule that helps us analyze, in a scientific or analytical way, the facts of a criminal case.⁴⁵⁶ The rule addresses our consciences and our anxieties, not our desire for discovery of truth or rational fact finding:

[There] is nothing in [the phrase “reasonable doubt”] that tells us how to go about determining uncertain facts in any rational or scientific way. The phrase tells us a great deal, though, about how to feel easy in our consciences when we condemn others. And when our ancestors sought to feel easy in their consciences, they drew on a Christian moral theology that did indeed reach back to Gregory the Great, and beyond him to Saint Augustine and Saint Paul.⁴⁵⁷

IV. A Way Forward

The confusion in the law can be overcome.⁴⁵⁸ Professor Whitman’s attitude is too pessimistic. He believes that “[t]he most honest and courageous response to the quandaries of jury trial would be to follow the path of our Continental cousins, radically reworking our procedures and our law of evidence so they are better suited to solving the factual puzzles that the modern world presents.”⁴⁵⁹ We are cautioned against any attempt to be faithful to the original intent of “reasonable doubt,”⁴⁶⁰ because “the theology that taught . . . the lesson of reasonable doubt is lost to us for good. But the lesson is one that we can try to relearn.”⁴⁶¹ A future blueprint for a possible change on “reasonable doubt” is available.⁴⁶² We should simply, openly and routinely tell jurors that the decision they make is “a

455. Whitman, *Response to Shapiro*, *supra* note 11, at 187-88.

456. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 204.

457. *Id.*

458. See Laudan, *Is Reasonable Doubt Reasonable?*, *supra* note 11, at 295-96 (“At the core of criminal jurisprudence in our time lurks a fundamental conceptual confusion. Stated succinctly, the notion of guilt ‘beyond a reasonable doubt’—the only accepted, explicit yardstick for reaching a just verdict in a criminal trial—is obscure, incoherent, and muddled.”).

459. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 210.

460. *Id.* at 210-11.

461. *Id.* at 212.

462. *Id.*

moral one” and that “their judgment will be final.”⁴⁶³ Further, we should remind jurors before they deliberate that they are about to decide “the fate of a fellow human being.”⁴⁶⁴

The purpose of this article is to suggest a different proposal that is thoroughly in line with the theological roots of the “reasonable doubt” standard: “[T]he lesson is one that we can try to relearn.”⁴⁶⁵ If Professor Whitman’s analysis is right, we are duty bound to relearn the standard we have forgotten. We must recapture the gravity of judging a fellow human being and the moral aspects of the criminal trial which Professor Whitman captures in his examination of its theological underpinnings.⁴⁶⁶

463. *Id.* (internal quotation marks omitted).

464. *Id.*

465. *Id.*

466. Recent years have seen a plethora of recommendations as to how to understand or define “reasonable doubt.” Scholars such as Ronald J. Allen, Michael S. Pardo, Larry Laudan (whose work is referenced in greater detail later in this article), and others have contributed enormously to this discussion. Allen and Pardo have made extensive contributions to the epistemological issues involved in criminal and civil trials. However, as regards “reasonable doubt,” they have developed an approach that focuses on “‘whether there is a plausible explanation or version of events consistent with innocence’ or ‘whether the prosecution’s explanation or version of events is the only plausible one’ or ‘whether all plausible explanations or versions imply guilt.’” Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation*, 27 *LAW & PHIL.* 223, 267 (2008); see also Michael S. Pardo, *Second-Order Proof Rules*, 61 *FLA. L. REV.* 1083, 1112 (2009). While Laudan stops short of endorsing a standard, he maintains—incorrectly in my view—that some proposed standards avoid subjective pitfalls. One standard is based on the Allen/Pardo concept of plausible explanations. See LAUDAN, *TRUTH, ERROR, AND CRIMINAL LAW*, *supra* note 11, at 82. The second standard is based on a notion that when “there is credible, inculpatory evidence . . . that would be very hard to explain if the defendant were innocent, and no credible, exculpatory evidence . . . that would be very difficult to explain if the defendant were guilty, then [the jury should] convict. Otherwise, [it should] acquit.” *Id.* Under the last standard, jurors could be asked to “figure out” if the prosecution has “rule[d] out every reasonable hypothesis . . . that would leave the defendant innocent.” *Id.* at 83. In addition, the debate over the appropriate uses of mathematical models to sort out these issues seems to be as intractable as it always was. See Roger C. Park et al., *Bayes Wars Redivivus – An Exchange*, 8 *INT’L COMMENT. ON EVIDENCE* (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711430. Professor Tribe may have been somewhat prescient forty years ago when he argued that extensive use of mathematical models would be problematic for understanding criminal trials. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *HARV. L. REV.* 1329 (1971); Laurence H. Tribe, *A Further Critique of Mathematical Proof*, 84 *HARV. L. REV.* 1810 (1971). Some problems present themselves in the Allen/Pardo/Laudan recommendations. First, do they really represent an advancement over the *Webster* definition? Second, no court to date has taken them up. Third, the various formulations do not agree. Fourth, do they really serve

Simply put, Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court got it right.⁴⁶⁷ Even if we quibble about whether or not he got it right, he clearly got it better than just about anyone else.⁴⁶⁸ His definition of “reasonable doubt” in *Webster* is the model for good reasons.⁴⁶⁹

The instruction is without question constitutional under *Winship* and *Victor*. It avoids certain buzzwords and phrases that have caused problems in recent years: “hesitate to act” and “substantial doubt,” for instance.⁴⁷⁰ It preserves the moral gravity of the act of judging by its persistence in the use of phrases such as “abiding conviction,” “moral certainty,” “moral evidence,” “convinces and directs the understanding,” “satisfies the reason and judgment,” and “bound to act consciously upon it.”⁴⁷¹ It reminds us of the grave morality of the act of judging and relates the act to the concept of “reasonable doubt” when it states: “This we take to be proof beyond reasonable doubt; because . . . the law . . . depends upon considerations of a moral nature”⁴⁷² This language reminds us of “the power of the moral

Professor Laudan’s goal of avoiding subjectivity? They do not. Surely, to the ordinary juror or judge words like “plausible” invite an analysis of their “own degree of confidence” in the “plausibility” of this or that explanation. Simply put, what is the definition of “plausible” that will remove the concern with the “subjective mental state” of jurors? Fifth, phrases like “hard to explain” and “difficult to explain” do not rule out subjectivity. It is not absurd to ask how hard is “hard” and how difficult is “difficult” in this proposal. This invites subjectivity as much as anything in the old common law instructions did. Sixth, asking jurors to “figure out” what is “established” in a “reasonable” way is not the road to objectivity. This is precisely the kind of phraseology that leads to the difficulties raised by Allen/Pardo/Laudan. What jurors will “figure out” or regard as “established” and view as “reasonable” backs us into the same old subjective corner. In the end, we do not seem to have advanced very far from *Webster*.

467. See *supra* note 40.

468. See *supra* notes 40-41.

469. See *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 320 (1850); see also *supra* note 41.

470. Professor Larry Laudan has been highly critical of various accretions to the definition of “reasonable doubt.” Some of the definitions strongly criticized by Laudan equate “reasonable doubt” with important decisions in one’s own life, a doubt that would make a prudent person hesitate to act, “abiding conviction,” a doubt for which a reason could be given, high probability, and the belief that “reasonable doubt” is self-evident and needs no clarification or definition whatsoever. LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11, at 36-51. It is worth noting, however, that only one of these—“abiding conviction”—actually appears in Chief Justice Shaw’s original definition. See *Webster*, 59 Mass. (5 Cush.) at 320.

471. *Webster*, 59 Mass. (5 Cush.) at 320.

472. *Id.*

drama of judging."⁴⁷³ Nor does Professor Shapiro wish to abandon the moral element inherent in "reasonable doubt," as even for her it still carries a certain gravitas. She argues that "before we abandon a three-centuries-old tradition," we should make every effort to explain what "moral certainty" meant.⁴⁷⁴

473. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 205.

474. Shapiro, "To a Moral Certainty", *supra* note 11, at 193. While some scholars and judges might argue that the very definition of "moral certainty" is a problem, the difficulties are overstated. Even from Professor Shapiro's perspective, this is simply untrue as a historical matter. *Id.*; see also SHAPIRO, BEYOND REASONABLE DOUBT, *supra* note 11, at 13-29; Shapiro, *Changing Language*, *supra* note 11. Professor Shapiro offers the following language which she believes captures the essence of "moral certainty":

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.

Shapiro, "To a Moral Certainty", *supra* note 11, at 193. Shapiro's definition of "moral certainty" is not substantially dissimilar to the other definitions. In fact, other respected definitions seem to get to the same basic point. Professor Henry G. van Leeuwen offers this famous definition of "moral certainty":

"[Moral certainty] is the certainty of everyday life about matters of fact and is based on such evidence as for all practical purposes excludes the possibility of error. . . . Moral certainty is described as the certainty a sane, responsible, thoughtful person has after considering all available evidence as fully and impartially as possible and giving his assent to that side on which the evidence seems strongest."

HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION 319 n.52 (2003) (quoting HENRY G. VAN LEEUWEN, THE PROBLEM OF CERTAINTY IN ENGLISH THOUGHT 1630-1690, at 23 (1963)). Finally, the *Catholic Encyclopedia* from 1908 is especially instructive on "moral certitude." After distinguishing between "metaphysical certitude" (geometry, mathematics, logic) and "physical certitude" (empirical sciences), it defines "moral certitude":

Moral certitude is that with which judgments are formed concerning human character and conduct; for the laws of human nature are not quite universal, but subject to occasional exceptions. It is moral certitude which we generally attain in the conduct of life, concerning, for example, the friendship of others, the fidelity of a wife or a husband, the form of government under which we live, or the occurrence of certain historical events, such as the Protestant Reformation or the French Revolution. Though almost any detail in these events may be made a subject of dispute, especially when we enter the region of motives and

Chief Justice Shaw's original definition also avoids the problem of strongly identifying "reasonable doubt" with jurors' subjective beliefs or mental states. This is a problem with some of the more expansive definitions in federal and state courts in the wake of the *Webster* decision.⁴⁷⁵ Chief Justice Shaw reminds us that there is nothing subjective about "reasonable doubt":

It is *not mere possible doubt*; because every thing [sic] relating to human affairs, and depending on moral *evidence*, is open to *some possible or imaginary doubt*. . . . [T]he *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.*⁴⁷⁶

While the instruction uses phrases like "abiding conviction," this in no way invites the juror to engage in a kind of subjective gut check as to

try to trace cause and effect, and though almost any one of the witnesses may be shown to have made some mistake or misrepresentation, yet the occurrence of the events, taken in the mass, is certain.

THE CATHOLIC ENCYCLOPEDIA 540 (Charles G. Herbermann et al. eds., 1908). What is it about these definitions that the ordinary citizen jury might not understand? We can surely have moral certainty about one thing: all of these definitions would be constitutional after *Victor/Sandoval*.

475. The previous discussion of nineteenth-century Supreme Court precedent demonstrates that careless and slow accretions to Chief Justice Shaw's original language have emphasized a subjective aspect to "reasonable doubt." See *infra* notes 501-02.

476. *Webster*, 59 Mass. (5 Cush.) at 320 (emphasis added). Why Laudan's concerns about the meaning of "abiding conviction" are not quelled by this language in the original *Webster* instruction is unclear. See LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11, at 38-40. But this is not a problem. In *Hopt v. Utah*, the Court held, "The word 'abiding' here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence." 120 U.S. 430, 439 (1887). This definition was accepted by the Court in *Victor/Sandoval* as well. *Victor v. Nebraska*, 511 U.S. 1, 15 (1994). Laudan's mistaken belief arises from his own definition of "abiding." "Taken literally, an abiding conviction is one that one will have for a long time—as opposed to a transitory belief." LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11, at 39. Laudan cites no authority for this definition or for his assertion that this is how it is traditionally understood. See *id.* However, as the Court noted in *Hopt* and *Victor/Sandoval*, the lengthy chronological element is not a necessary part of the definition of "abiding." The essence of "abiding" is "settled and fixed," not necessarily long held. I do not mean to turn this into a mere semantic quibble. We have to live with the natural ambiguity of language in law, as well as in life. The concepts used in the Allen/Pardo/Laudan formulations suffer from as much ambiguity as the traditional language. See *supra* note 480.

whether the defendant is guilty. The instruction strongly emphasizes that possible and imaginary doubts are to be rejected. It informs jurors that the evidence must point to "truth," not feeling, and that the certainty which jurors are to reach before conviction must direct understanding and rest on reason and judgment. This is not the language of subjective feeling and speculation. No juror, then or now, would think so.

Likewise, if jurors wonder what Chief Justice Shaw meant when he said, "This we take to be proof beyond reasonable doubt . . . which mostly depends upon considerations of a moral nature,"⁴⁷⁷ we should remember that such language not only relates to accurate fact-finding but also to moral comfort.⁴⁷⁸ Whitman tells us how to explain the latter: jurors should be told "that the decision they are about to make is, despite its legal trappings, a moral one and that, in the absence of legal error, their judgment will be final."⁴⁷⁹ Furthermore, "[i]nstructing jurors forcefully that their decision is 'a *moral* one,' about the fate of a fellow human being, is, in the last analysis, the only meaningful modern way to be faithful to the original spirit of reasonable doubt."⁴⁸⁰

Another challenge to the *Webster* definition is that it is "[f]inally [t]ime to [p]ut '[p]roof [b]eyond a [r]easonable [d]oubt' [o]ut to [p]asture."⁴⁸¹ Professor Laudan claims that "reasonable doubt" is not adequate to the task of guiding juries and judges in weighing and analyzing evidence in any sort of reliable manner.⁴⁸²

The . . . fact is that we have been expecting one doctrine to do multiple tasks. To begin with, we want it to stress to jurors that the burden of proof in criminal proceedings falls on the state, not the defendant. Then, we have used it to warn jurors that they must not let exaggerated, hyperbolic doubts stand in the way of conviction. We have used it to make clear that guilty verdicts in criminal trials must depend on much higher levels of proof than

477. *Webster*, 59 Mass. (5 Cush.) at 320.

478. Whitman, *Response to Shapiro*, *supra* note 11, at 177-78 (citing WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 3, 13).

479. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 212 (quoting Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing*, 44 BUFF. L. REV. 339, 379 (1996)).

480. *Id.*

481. Laudan, Put "Reasonable Doubt" Out to Pasture, *supra* note 11, at 1.

482. See Laudan, *Is Reasonable Doubt Reasonable?*, *supra* note 11; see also Laudan, *The Rules of Trial*, *supra* note 11; LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11; Laudan, Put "Reasonable Doubt" Out to Pasture, *supra* note 11.

those associated with civil actions or practical life. We have used it to impress on jurors just how much is at stake and how somber must be the decision when they decide to send people to prison, depriving them of their liberty and blackening their good name. Finally, we have used it to secure—insofar as possible—uniformity of standards, making sure that every criminal verdict employs the same bar for conviction. On most of these scores, [beyond a reasonable doubt] is failing.⁴⁸³

Laudan identifies “the causes of . . . failure” as various accretions and “glosses” on the definition of “reasonable doubt” that “focus on the subjective state of the juror.”⁴⁸⁴ However, most of Laudan’s criticism is reserved for “glosses” that are post-*Webster* and are not part of the original *Webster* instruction.⁴⁸⁵ While Professor Laudan is not likely to be satisfied with the *Webster* charge, he does not really offer an alternative. Laudan’s concern is with broader issues of the entire criminal trial process, not merely the burden of proof.⁴⁸⁶ His goal is to reform the criminal trial in the broadest possible sense. He has described his work as a proposal for an “ideal system” that would “fine tune the standard of proof” and “make the rules of trial epistemically robust in the sense of maximizing the likelihood that the triers of fact would have an optimal evidence base for their decision.”⁴⁸⁷ This is a laudable goal and there is much in Laudan’s work that should be considered in any reform of the criminal justice system.

However, the scope of this article is more focused. The goal is to find a “reasonable doubt” instruction that can be used immediately. It must be an

483. LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11, at 51.

484. *Id.*

485. *See supra* notes 40-41.

486. LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11, at 48-49.

487. Laudan, Put “Reasonable Doubt” Out to Pasture, *supra* note 11, at 11.

What I am proposing, then, is, in part a *meta-epistemology* of the criminal law, that is, a body of principles that will enable us to decide whether any given legal procedure or rule is likely to be truth-conducive and error reducing. . . .

. . . .

I should stress, as well, that I approach these questions as a philosopher, looking at the law from the outside, rather than as an attorney, working within the system. Although I have thought seriously about these issues over several years, I cannot possibly bring to them the competences and sensibilities of a working trial lawyer. . . . In this role, I am less concerned than a civil libertarian or defense attorney might be with the rights of the accused and more concerned with how effectively the criminal justice system produces true verdicts.

LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11, at 7-8.

instruction that will operate within the current legal system that has developed out of and is still steeped in the common law. It must be consistent with current constitutional standards, nebulous as they may be.⁴⁸⁸ Last, any definition must be both politically palatable and truly practical. Put plainly, it must fit reasonably well with current attitudes, practices, and understandings about the trial process, as well as with the roles of judges, jurors, and trial lawyers. For reasons set forth in *Victor/Sandoval*, as well as the historical analysis of Shapiro and Whitman, only Chief Justice Shaw's definition has even the slightest possibility of meeting this test.

Perhaps the best lesson to draw from this history and the scholarly debate is that we should teach "reasonable doubt" rather than abandon it.

The real root of our confusion about reasonable doubt has to do with the fact that we have lost the old conviction that judging and punishing are morally fearsome acts. We have a far weaker sense than our ancestors that we should doubt our own moral authority when judging other human beings. . . . We have lost any sense that the challenge facing any humane system of law is to protect the guilty as well as the innocent. . . . The old moral theologians were right: it is part of our sober public duty to

488. Laudan concedes:

I will say next to nothing about the constitutional status of [beyond a reasonable doubt], leaving that to my elders and betters who do constitutional law. Save for noting that I can find no reference anywhere in the Constitution to any criminal standard of proof whatsoever (save the standard specified for trial in cases of treason, where there is still no mention of [beyond a reasonable doubt])

Laudan, *The Rules of Trial*, *supra* note 11, at 209. Fair enough, but, as already seen, the Supreme Court is unlikely to change its view on this point any time soon. We must work within the legal system we have, flawed as it may be, not within an ideal system we would like to create. Laudan believes that we can come up with a better standard than "reasonable doubt" to protect the innocent from false conviction. He does not offer a new definition, but instead suggests some possible changes in trial procedure. A brief sample of some of his suggestions: tell jurors they will be charged with perjury if a convicted defendant is later exonerated by new evidence, use a standard of "beyond all doubt" and allow "irrational doubts," exclude all confessions because some are false, allow the defendant at jury selection to exclude as many jurors as he wishes without cause, unconditionally exclude all evidence about a defendant's criminal past, and prohibit inculpatory testimony from codefendants and accomplices who have made plea bargains. *Id.* at 215-16. As fascinating as these suggestions are and as meritorious as some may be, they are not likely to pass muster. There are serious legal and constitutional problems with some as well as grave political, practical, and policy problems with others. For better or for worse, our legal system is wedded to "reasonable doubt" in some form or another for a long time to come.

punish. But it is a *sober* duty. Open-hearted human beings condemn others in a spirit of humility, of duteousness, of fear and trembling about their own moral standing. That is what our ancestors, for all their bloodiness, believed; and it is why they spoke about “reasonable doubt.”

. . . .
 We can also try to relearn the old lesson of reasonable doubt in conducting [a] jury trial. After all, lay jurors can still find something shocking and fearful in what they do, especially in capital cases, but perhaps in others at [sic] well.⁴⁸⁹

Chief Justice Shaw’s charge on “reasonable doubt” meets these requirements.

The worst possible solution, given the historical analysis of Whitman and Shapiro or the philosophical and empirical analysis of Laudan, is the very one that seems to be the trend—no definition at all. As we have seen, many courts argue there is no need to define “reasonable doubt” because its meaning is clear or self-evident. The problem here is that “[w]hat would amount to a reasonable doubt or be defined as a reasonable doubt by one juror would not necessarily be so considered by another.”⁴⁹⁰ This is just a form of capitulation: A rejection of any real standard.

The idea that reasonable doubt must already be clear to all because ordinary people understand each of its two constituent terms is laughable. “Reasonable doubt,” like many other compound terms of art (think of “civil servant” or “black box”), carries a freight not implied by either of its constituents. . . .

. . . .
 . . . The most common excuse is that [beyond a reasonable doubt] is “self-evident” or “self-defining,” and thus not in need of further commentary. . . . But this is false on its face.⁴⁹¹

It seems reason and common sense compel a definition of some sort.

One additional point must be made about what should reasonably be expected from the “reasonable doubt” standard. At least since *Winship*, courts have overwhelmingly identified “reasonable doubt” with factual proof and analysis. We have put too great a burden on the single jury

489. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 211-12.

490. Azhar J. Minhas, *Proof Beyond a Reasonable Doubt: Shifting Sands of a Bedrock?*, 23 N. ILL. U. L. REV. 109, 127 (2003).

491. LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW, *supra* note 11, at 48-49.

instruction of "proof beyond a reasonable doubt." We have tried to make it bear far too great a load. While it is absolutely vital as a reminder of the moral gravity of judging a fellow human being and as an admonition to consider all the evidence with extreme care, Wigmore was surely right when he said: "[N]o one has yet invented or discovered a mode of measurement for the intensity of human belief."⁴⁹²

To the extent that "reasonable doubt" is not merely concerned with "moral comfort," but also with "factual proof," as it undoubtedly is, it does not and has never been expected to carry the load all by itself. After all, we have detailed and complex rules of evidence and procedure for a reason: to guarantee both the fairness and accuracy of the trial process. "Reasonable doubt" has never had to go it alone. Clear rules of evidence, confrontation, compulsory process, the right to counsel, an impartial judge, fair notice, and appeal are just a few of the elements of the criminal trial that are necessary to fairness and accuracy. Whatever philosophical criticisms may be put forth as to the weaknesses of the Anglo-American trial,⁴⁹³ within this

492. 9 WIGMORE ON EVIDENCE, *supra* note 18, at 414.

493. Most advocates who view factual accuracy as the *sine qua non* of the American criminal trial process simply overlook the fact that this is not so. The criminal jury trial is as much about protecting liberty, resisting an overbearing government or prosecutor, safeguarding against a corrupt judge, and allowing the conscience of the community to express itself in the enforcement of the criminal sanction, as it is about factual accuracy.

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary

process we look not only to “proof beyond a reasonable doubt,” but also to innumerable rules of evidence and trial procedure to guide and guarantee the integrity of the process.⁴⁹⁴ “Reasonable doubt,” as important as it is, is but one lone aspect of an elaborate system of trial procedure which has evolved to do many things, including, but not limited to, “factual proof” and “moral comfort.” We must not forget this. Thus, to the extent that the Court in *Winship* was concerned, as it surely was, about factual proof, it should look not primarily to “reasonable doubt,” but to rules of evidence, procedure, and the entire panoply of the trial process. The *Winship* Court wrongly singled out “reasonable doubt” as the sole guarantor of factual accuracy.

While Shapiro and Whitman strongly disagree over certain aspects of the historical record and its interpretation, their respective analyses would seem to support Chief Justice Shaw’s definition as the best available alternative at present for two reasons.⁴⁹⁵ First, whether the historical analysis ultimately favors a secular epistemology or a theologically based moral comfort, the historic language actually used is substantially the same, e.g., “moral certainty” et al. Second, whether the ultimate concern is with finding the correct facts because we are concerned “for the fate of the defendants”⁴⁹⁶ or with providing moral comfort to “protect[] the souls of *the jurors* against damnation,”⁴⁹⁷ the basic moral concern is the same: we place a high value on human life and liberty for secular *and* theological reasons. We believe that if we know the correct facts, we will know who is guilty

law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968). The *Duncan* Court went on to note some of the criticisms of the jury trial. *See id.* at 156-57. However, the Court ultimately rejected these challenges, holding that:

[J]uries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.

Id. at 157; *see also* *Williams v. Florida*, 399 U.S. 78, 100 (1970); 4 WILLIAM BLACKSTONE, COMMENTARIES *349 (1769).

494. Michael S. Pardo, *The Nature and Purpose of Evidence Theory*, 66 VAND. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2060340&download=yes. This article contains an excellent discussion of recent evidence theory. It demonstrates that there are many pieces to the factual reliability puzzle.

495. *See supra* note 283.

496. Shapiro, *The Beyond Reasonable Doubt Doctrine*, *supra* note 11, at 72.

497. WHITMAN, THE ORIGINS OF REASONABLE DOUBT, *supra* note 11, at 3.

and who is innocent, and an innocent person will not be unjustly punished. Consequently, judging is such a fearsome and awesome task, and one for which God holds us accountable, precisely because we are dealing with the life and liberty of a fellow human being, who, like us, is created *imago dei*. The dignity of the human person is surely what is at the foundation of both Whitman's and Shapiro's versions of history. Whitman's theory affirms this more clearly and unequivocally. Chief Justice Shaw's charge affirms this boldly.

What about Chief Justice Shaw's old fashioned language? Understanding what words mean begins with learning and using the words. For years, we have required that school children memorize the opening lines of the Declaration of Independence, the Preamble to the Constitution, and the Gettysburg Address. Persons who are adherents to a religious faith are routinely required to memorize certain prayers, creeds, or passages from sacred texts as part their religious education. Why? Because the words mean something important. Meaning does not exist in some metaphysical vacuum. There is no meaning absent precise words. If the meaning is to be learned and retained, one must know the words that carry the meaning.

So, it is with "reasonable doubt." If the meaning of Chief Justice Shaw's definition of "reasonable doubt" is as Whitman says, then Chief Justice Shaw's words must be heard, and heard often, in our courthouses. We must use and learn the words Chief Justice Shaw gave us. We knew what Chief Justice Shaw meant for nearly 150 years.⁴⁹⁸ Somewhere along the way, we stopped using his words and nearly forgot what they meant. The Court in *Victor/Sandoval* fretted that Chief Justice Shaw's words were "not a mainstay of the modern lexicon" and that they had "lost [their] historical meaning."⁴⁹⁹

The solution is to use his words again and use them often. This is especially true in our ever more pluralistic and multicultural society. It is no longer possible to find words that have some common and ordinary meaning in the minds of all the persons who may serve on a jury. This is one reason there are twelve jurors in criminal cases and we require deliberation and unanimity. Like the Gettysburg Address or the Twenty Third Psalm, if we want people to know what they mean, we cannot constantly change the words to mean what we think ordinary people will understand at any given moment. The words will come to mean nothing.

498. See *supra* notes 40-41.

499. *Victor v. Nebraska*, 511 U.S. 1, 12-13 (1994).

In an effort to say something everyone can easily understand, we will end up saying what no one comprehends. Constant rewording will lead to something that is no longer even recognizable. A pluralistic society requires careful adherence to specific language in important matters, not a constant effort to rephrase in what we think is ordinary, everyday language. Words are like tools and musical instruments; they are mastered only when they are frequently used.

V. Conclusion

The current state of the law on “reasonable doubt” is nothing short of chaos. It is best represented by the wedding charge in *Wansing v. Hargett*, where the trial judge concluded the “reasonable doubt” instruction with: “And, so, who are we to tell you what is reasonable and what is not? That is wholly within your province.”⁵⁰⁰ This is totally unacceptable if “reasonable doubt” is a fundamental aspect of due process. If jurors cannot have a “reasonable doubt” before they convict, surely we cannot have a reasonable doubt about “reasonable doubt” in our law.

It is a very strange thing indeed that, as modern courts have moved toward factual proof, they have abandoned all attempts at providing a more precise and accurate definition of “reasonable doubt.” This is truly a great irony. One would think that precisely the opposite would be the case. Professor Whitman has shown that when the concept of “reasonable doubt” was thought to be one of moral comfort, definitions that generally accorded with Chief Justice Shaw’s abounded. As times have changed and we have professed to become more concerned with the facts, we seem to have lost the ability to define “reasonable doubt” at all. This alone should tell us that there is something gravely wrong with our jurisprudence in this area. We knew more about what “reasonable doubt” meant when we thought it was a rule of moral comfort than we know now that we think it is a rule of factual proof.

500. 341 F.3d 1207, 1214 (10th Cir. 2003).