American University International Law Review

Volume 12 | Issue 1 Article 4

1997

Reasonable Doubt: How in the World Is It Defined?

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REASONABLE DOUBT: HOW IN THE WORLD IS IT DEFINED?

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INTRODUCTION

The "not guilty" verdict delivered by the jury in the celebrated O.J. Simpson murder trial[1] stunned a large segment of the American population[2] and baffled ob-

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* J.D., January, 1997, Washington College of Law, American University. This article is dedicated to the memory of my son Matthew. I will never forget his spirit, his sweetness, his genuine love of others, his gentleness, and his smile. He will always be my pride, my joy, and my hero.

1. *See* People v. Simpson, No. BA 097211, 1995 WL 704381, at 2-4 (Cal. Super. Trans., Oct. 3, 1995) (Official Transcript Verdict) (finding Orenthal James Simpson not guilty of the murders of Nichole Brown Simpson and Ronald Lyle Goldman). Many in the media dubbed this the "Trial of the Century." *E.g.* Virginia Culver, *History in the Making; Landmark Trials Punctuate Past*, DENVER POST, June 9, 1996, at B1; *Rivera Live: Panel Discussion on How Race Relations have been Affected by the O.J. Simpson Trial* (CNBC television broadcast, June 13, 1996), *available in* WESTLAW, 1996 WL 7051687; Denny Heck, *Viewpoint: Citizens Will be Better Served by Seeing Justices on Camera*, NEWS TRIBUNE (TACOMA, WASH.), June 10, 1996, at A9. In this case, prosecutors accused O.J. Simpson, a prominent black football hero and immensely popular television sportscaster, of the murders of his former wife and her friend. Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863. Mr. Simpson possessed the economic means to assemble a team of nationally prominent defense attorneys. *Id.* The defense team, throughout the lengthy and nationally televised trial, presented a number of theories designed to counter the evidence gathered by the prosecution and raise a reasonable doubt to the possibility of Simpson's guilt. Susan B. Jordan, *Raising a Reasonable Doubt*, 1995 WL 462124 (O.J.Comm.). The defense claimed:

> a police conspiracy, that blood was planted to establish the guilt of Simpson, that the police investigation was sloppy, that the coroner's work was riddled with errors of protocol, that the time frame could only be established by a dog barking, and that the DNA evidence was unbelievably technical and therefore capable of rejection by a jury of lay people.

Id. Another important factor in the outcome of the trial was the assertion by the defense that one of the key prosecution witnesses, Mark Fuhrman, the Los Angeles detective who found much of the physical evidence used by the prosecution, was a racist. *Simpson Jury Forewoman Thought Fuhrman a "Snake"*, WASH. POST, Jan. 17, 1996, at A3. After the trial, several jurors wrote that they did not believe any of his testimony. *Id.* The standard California jury instructions on reasonable doubt state:

servers worldwide.[3] Many people wondered how a jury presented with such massive amounts of evidence could conclude a "reasonable doubt" existed concerning the guilt of O.J. Simpson.[4] Some prominent citizens even opined that one could buy a reasonable doubt.[5]

The O.J. Simpson case is only one in a recent series of highly publicized criminal cases that illustrates the complexities surrounding the jury system[6] and the dif-

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> A defendant in a criminal action is presumed innocent until the contrary is proved, and in the case of a reasonable doubt whether (his)(her) guilt is satisfactorily shown, (he)(she) is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving (him)(her) guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Jordan, *supra* at 2 (citing California Criminal Jury Instructions, CALJIC 2.90).

2. *See* Steve Marshall, *The Simpson Verdict*, CHIC. SUN-TIMES, Oct. 4, 1995, at 11 (reporting that in a poll of 639 people nationwide conducted by USA Today/CNN/Gallup on the day the verdict was delivered, October 3, 1995, 56% did not agree with the verdict, 33% did agree, and 11% had no opinion); Kevin Johnson, *After the Verdict*, USA TODAY, Oct. 4, 1995, at 5A (reporting that online traffic was extremely heavy immediately following the announcement of the verdict and that a Prodigy survey showed 85% did not agree with the jury's finding of not guilty, and 62% of those sending electronic messages to USA Today Online also disagreed).

3. *See* Tom Barrett, *The Verdict on Juries; O.J. Simpson's Rapid Acquittal Rings Alarm About Whether Justice is Served by the Jury System*, EDMONTON J., Oct. 22, 1995, at D1 (noting that many around the world were shocked by the jury verdict and observing, in countries where the jury system exists, a revival of the question of whether jury trials adequately enable discovery of the truth).

4. *See* Erin Donnelly, *On-campus: What Do You Think of the O.J. Verdict?*, SUN-SENTINEL (FT. LAUDERDALE), Nov. 15, 1995, at 19 (reporting interviews with students reflecting a variety of viewpoints including those who felt there was no reasonable doubt).

5. *See* Hugh Davies, *Simpson Acquittal*, DAILY TELEGRAPH, Oct. 25, 1995, at 14 (quoting former New York Governor Mario Cuomo, "Money can buy you reasonable doubt. I say that with no bitterness. It's just a fact."); 141 CONG. REC. H9776-01 (daily ed. Oct. 10, 1995) (statement of Rep. Owens) (stating there was reasonable doubt in the O.J. Simpson case because the defense lawyers, the "architects and engineers of reasonable doubt" and the "best-paid lawyers in America," had "great skills and unlimited funds" and put reasonable doubt in the minds of the jurors).

6. *See* Laura Mansnerus, *Deliberating on the U.S. Jury System; Ire over Recent Verdicts Highlights Demand for Change*, NEWS AND OBSERVER (RALEIGH, NC), Nov. 6, 1995, at A4 (quoting Professor Jeffrey Abramson of Brandeis University that the "big-time cases," including the trials of John Hinckley, Oliver North, Lorena Bobbitt, the Menendez Brothers, Lemrick Nelson, the Los Angeles police officers accused of beating Rodney King, and particularly O.J. Simpson have "not been pretty"). Abramson expresses the belief that cases such as these feed the public's fear that juries are not reflecting the community conscience, but are merely

ficulties juries sometimes encounter in understanding the "reasonable doubt" concept. A certain skepticism regarding both the jury system and the concept of reasonable doubt, however, is not just emerging. The great American satirist Mark Twain wrote the following observation about the jury system in 1872:

> When the peremptory challenges were all exhausted, a jury of twelve men was impaneled—a jury who swore that they had neither heard, read, talked about nor expressed an opinion concerning a murder which the very cattle in the corrals ... were cognizant of! ... It actually came out afterward that one of [the jurors] thought that incest and arson were the same thing.[7]

In a similarly skeptical, although less light-hearted, vein, it has been said that "[w]hat a reasonable doubt really amounts to, judges have found difficulty in explaining."[8]

The concept of reasonable doubt continues to receive a considerable amount of judicial attention.[9] A Canadian court recently observed that "throughout the common law jurisdictions of the world there is widespread disagreement as to the proper definition of both reasonable doubt and the reasonable doubt standard of proof."[10] Justice O'Connor, writing for the majority in *Victor v. Nebraska*,[11] noted

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"chosen for their susceptibility to lawyers' racial or political appeals." *Id.*

7. MARK TWAIN, ROUGHING IT 341-43 (American, 1872), *quoted in* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire Peremptory Challenges, and The Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 233 n.4 (1989). Alschuler further quotes a saying attributable to Mark Twain that, "[w]e have a jury system [in the United States] that is superior to any in the world, and its efficiency is only marred by the difficulty of finding twelve men everyday who don't know anything and can't read." *Id.* at 154.

8. PHIPSON ON EVIDENCE, § 119, at 121 (John H. Buzzard et al. eds., 11th ed. 1970). The treatise further notes that while some British jurists have criticized the phrase itself, one jurist, Judge Denning, expressed it in these terms:

> Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong ... as to leave only a remote possibility in [the accused's] favor, which can be dismissed with the sentence "of course it's possible but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Id.

9. *See* Barbara J. Shapiro, *"To a Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600-1850*, 38 HASTINGS L.J. 153, 154 (1986) [hereinafter Shapiro, *To a Moral Certainty*] (noting, as a typical example of such attention, a suggestion by California Supreme Court Justice Stanley Mosk to remove all attempts to explain "reasonable doubt" from the California reasonable doubt instruction and leave only the phrase itself in the instructions). This suggestion was incorporated into a bill and presented to the California legislature in 1986. *Id.* Apparently the bill did not pass; in 1995 the instructions read to jurors in the O.J. Simpson trial referred to "moral certainty," a phrase that had caused Justice Mosk particular concern. Jordan, *supra* note 1, at 2.

10. Regina v. Brydon [1995], 95 C.C.C. (3d) 509, 517 (Wood, J.A., dissenting).

that although the standard of reasonable doubt "is an ancient and honored aspect of our criminal justice system, it defies easy explication."[12] In spite of the international judicial attention,[13] however, the "reasonable doubt" concept appears no less elusive today than it was in 1880 when Justice Woods, delivering the opinion of the Court in *Miles v. United States*,[14] observed that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."[15]

Several views exist regarding the complicated concept of reasonable doubt. Some legal scholars and analysts strongly advocate not defining the term at all.[16] Others argue that suggesting the meaning of "reasonable doubt" as self-evident is "patently absurd,"[17] and believe that a jury comprised of ordinary citizens with no legal training cannot possibly understand the term's meaning without further definition.[18] Still other scholars opine that additional explanation of the term creates increasing ambiguity.[19]

This Comment will examine the concept of reasonable doubt. Part I examines the origins of the reasonable doubt concept and traces its development to the present. Part II addresses recurrent problems in applying the concept and examines various attempts to define it. In light of the increasingly strident controversy in the United States regarding the reasonable doubt standard, Part III explores other countries' approaches to the determination of guilt. Finally, Part IV recommends

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11. 114 S. Ct. 1239 (1994).

12. *Id.* at 1242.

13. *See Brydon*, 95 C.C.C. (3d), at 516 (noting widespread disagreement as to the definition and standard of "reasonable doubt" in common law jurisdictions throughout the world).

14. 103 U.S. 304 (1880).

15. *Id.* at 312.

16. *See, e.g.*, Note, *Reasonable Doubt: An Argument Against Definition*, 108 HARV. L. REV. 1955 (1995) [hereinafter *Reasonable Doubt*] (exploring the advantages and disadvantages of providing a detailed explanation of the term "reasonable doubt" to jurors and concluding that the term is better left undefined); Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 100 (suggesting that an attempt to define reasonable doubt may "rob the law of its flexibility, its ability to evolve with changing times and changing community standards"); United States v. Taylor, 997 F.2d 1551, 1558 (1993) (providing that "[t]he purposes of having juries may best be served if juries, in the first instance, bear the responsibility for defining reasonable doubt").

17. *See* H. Richard Uviller, *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 CRIM. L.F. 1 (1990) (examining two cases of what appear to be false acquittals and concluding that the reasonable doubt standard is ambiguous and may partly account for the apparently erroneous acquittals); *Reasonable Doubt*, *supra* note 16, at 1959 (acknowledging that even judges often incorrectly describe the reasonable doubt standard).

18. *See* Henry A. Diamond, Note, *Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716 (1990) (arguing that jurors should always be provided with an explanation of the term "reasonable doubt" in criminal trials).

19. *See* Jon O. Newman, *Madison Lecture: Beyond Reasonable Doubt*, 68 N.Y.U. L. REV. 979, 984 (1993) (finding "it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.").

approaches to reduce the existing confusion surrounding the concept of "reasonable doubt" and restore some of the luster to our tarnished trial by jury system.

I. BACKGROUND AND HISTORICAL DEVELOPMENT

In 1970 the Supreme Court explicitly held for the first time that, according to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the state must prove every element of a charged criminal offense beyond a reasonable doubt to convict an accused criminal.[20] This holding, however, did not introduce a revolutionary concept to the criminal justice system - the reasonable doubt standard has held a central role in the Anglo-American criminal justice system since the late eighteenth century.[21]

The reasonable doubt standard evolved from the jury trial system spawned in England during the twelfth century.[22] Although details of early British jury trials are largely unknown,[23] jurors in the thirteenth and fourteenth centuries most likely both gathered and weighed evidence, and witnesses were probably not a regular part of the criminal trial process.[24] The "self-informed jurors" were men from the local area who were assumed to know the facts of the case and were expected to reach a verdict through their own personal knowledge.[25] The jurors arrived at their verdicts based on their own intuition, common sense, and common knowledge of the facts surrounding the circumstances.[26]

By the sixteenth century, however, witnesses became a vital part of criminal trials and members of the jury were no longer self-informed.[27] Jurors were now responsible for weighing and evaluating facts about which they had no personal knowledge;[28] they needed standards to evaluate the credibility of testimony.[29] A standard of proof short of absolute certainty, but more exact than mere opinion, evolved from religious and scientific arguments concerning proof.[30] The phrase

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20. *In re* Winship, 397 U.S. 358, 364 (1970) (holding that "[l]est there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

21. *See* BARBARA J. SHAPIRO, BEYOND "REASONABLE DOUBT" AND "PROBABLE CAUSE" 1 (1991) (tracing the development of the reasonable doubt standard).

22. *Id.* at 3.

23. *Id.*

24. *Id.* at 4.

25. *Id.*

26. SHAPIRO, *supra* note, at 4.

27. *Id.* at 5.

28. *Id.* at 6.

29. *Id.*

30. *See id.* at 7 (discussing, at length, an overlapping group of theologians' and naturalists' efforts to develop a level of knowledge less than absolute certainty, but more certain than opinion). Theologians and naturalists subscribed to three subcategories of "knowledge" (as

"beyond a reasonable doubt" captures this standard.[31]

The precise origin and development of the standard represented by the words "beyond a reasonable doubt" for criminal trials are uncertain.[32] Two primary accounts exist regarding when the reasonable doubt standard first appeared in English and American case law.[33] One theory, outlined by Judge John Wilder May in an influential article written in 1876,[34] claims that the reasonable doubt standard originated in the Irish Treason Trials in 1798.[35] The other theory holds that both English and American courts used the phrase earlier in the eighteenth century; proponents of this theory cite its use during the Boston Massacre Trials in 1770.[36]

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opposed to "probability"): (1) physical knowledge, derived from sensory data such as seeing, hearing, or touching; (2) mathematical knowledge, established by "logical demonstrations" such as geometric proofs; and (3) moral knowledge, based on testimonial evidence and the reports of others about physical data. *Id.* at 7-8. It was the last, moral certainty, that was most related to the law. *Id.* at 8. Shapiro explains that while these moral certainties were not absolute, they could be so clear that anyone "whose judgment is free from prejudice will consent to them." *Id.* at 8 (quoting JOHN WILKINS, OF THE PRINCIPLES AND DUTIES OF NATURAL RELIGION, 7-8 (London 1675)). This concept of moral certainty has survived to vex Justice O'Connor, who wrote in 1994 that "[i]ndeed we have said that 'proof to a moral certainty is an equivalent phrase with beyond a reasonable doubt'." Victor v. Nebraska, 114 S. Ct. 1239, 1246 (1994) (quoting Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 317 (1902)). Justice O'Connor further stated that the Court was "somewhat more concerned with [the] 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." *Id.* at 1247. The Court then concluded that, given the facts of *Victor*, the term "moral certainty" was not ambiguous because other jury instructions were given that put the phrase into its proper perspective. *Id.*

31. Newman, *supra* note 19, at 981.

32. *See* Uviller, *supra* note 17, at 38 (noting that there is little information about the origin and development of the reasonable doubt standard because no one took verbatim transcripts, or even notes, at trials in the seventeenth and eighteenth centuries, and the writers of the period very rarely mentioned common practices of judges).

33. *See* Shelagh Kenney, Note, *Fifth Amendment—Upholding The Constitutional Merit of Misleading Reasonable Doubt Jury Instructions*, 85 J. CRIM. L. & CRIMINOLOGY 989, 990 (1995) (tracing the history of the reasonable doubt standard).

34. John Wilder May, *Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases*, 10 AM. L. REV. 642 (1876) *cited in* Petitioner's Brief on the Merits at 10 n.8, Sandoval v. California, 114 S.Ct. 1239 (1993) (No. 92-9049). The Petitioner notes that May's authoritative and widely read article criticized the addition of moral certainty language into the reasonable doubt instruction. Wigmore later cited May's article with approval. *Id.* (citing WIGMORE ON EVIDENCE § 2497, at 410 (9th ed.)).

35. May, *supra* note 34, at 656. *See* Kenney, *supra* note 33, at 990 (noting May's contention that during the trial of Rex v. Finney, 26 How. St. Tr. 1019 (Ire. 1798), the defense counsel argued that as a rule of law the jury must acquit the defendant if its members "entertain a reasonable doubt upon the truth of the testimony of witnesses given upon the issue").

36. Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. REV. 507, 508 (1975) (relating that in the Boston Massacre Trials of 1770, Robert Treat Paine, British Crown counsel, used the term "beyond a reasonable doubt"). Paine argued for the conviction of the British soldiers for firing into an unruly crowd of Bostonians

Both Professor Anthony A. Morano and Professor Barbara J. Shapiro's writings extensively document this second theory.[37] Professor Shapiro also notes that the reasonable doubt standard appears in a number of American trials around the early 1800's.[38] Regardless of its origin and development, by the mid-nineteenth century the reasonable doubt standard became "widely accepted as the accurate description of the degree of doubt necessary for acquittal of a criminal defendant."[39]

The reasonable doubt standard remained an important consideration not only in the case law of this period, but discussions of the topic also frequently appeared in the treatises of the day.[40] These legal scholars sought to demonstrate that the standards of proof in the law were compatible with those in other forms of inquiry such as religion and philosophy.[41]

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protesting the presence of the Crown's soldiers. He asserted,

> If therefor in the examination of this Cause the Evidence is not sufficient to Convince you beyond reasonable doubt of the Guilt of any or all of the Prisoners by the Benignity and Reason of the Law you will acquit them, but if the Evidence be sufficient to convince you of their Guilt beyond a reasonable doubt the Justice of the Law will require you to declare them Guilty and the Benignity of the Law will be satisfied in the fairness and impartiality of their Tryal.

3 KINNIN WROTH & HILLER B. ZOBEL, LEGAL PAPERS OF JOHN ADAMS 271 (1965) *as quoted in* Kenig, *supra* note 16. *See* Shapiro, *To a Moral Certainty*, *supra* note 9, at 171 (noting with approval Morano's conclusion that the beyond reasonable doubt standard was used in the Boston Massacre Cases in 1770, but that it did not appear innovative because both bench and prosecution stressed the trial was being conducted in the traditional English manner).

37. *See supra* note 34 and accompanying text (criticizing moral certainty language added into reasonable doubt instruction).

38. *See* Shapiro, *To a Moral Certainty*, *supra* note 9, at 174 (citing *Lyon's Case*, 15 F. Cas. 1183, 1185 (D.Vt. 1798) (Case No. 8646), in which the judge informed the jury, "[y]ou must be satisfied beyond all reasonable substantial doubt that the hypothesis of innocence is unsustainable," and the *Case of Fries*, 9 F. Cas. 826, 883 (D.Pa. 1799) (Case No. 5126), in which the defense counsel advised the jury to "remember it is enough for us in defence of the prisoner, to raise a doubt; for, if you doubt (it is the principal of law, as well as humanity) you must acquit").

39. Kenney, *supra* note 33, at 991.

40. *See id.* at 991-92 (citing WIGMORE ON EVIDENCE § 2856, at 502-03 (2d ed. 1935)). Dean Wigmore states that "when the risk of jury-doubt is exclusively on the prosecution, their belief must amount to a sense of being morally certain beyond any reasonable doubt, i.e. in favor of the prosecutor's contention." WIGMORE ON EVIDENCE § 2856, at 502-03 (2d ed. 1935) *as quoted in* Kenney, *supra* note 33 at 991. Simon Greenleaf refers to satisfactory evidence as "that amount of proof . . . which ordinarily satisfies an unprejudiced mind . . . beyond a reasonable doubt." SIMON GREENLEAF, LAW OF EVIDENCE § 1, at 4 (13th ed. 1876). *See also* Shapiro, *To a Moral Certainty*, *supra* note 9, at 189 (observing that Greenleaf's discussion of reasonable doubt explicitly links "satisfied mind" and "satisfied conscience," the formulas most common in seventeenth and early eighteenth century charges to the jury, with the concept of "beyond reasonable doubt").

41. *See* SHAPIRO, *supra* note 21, at 40 (noting that after the jury trial concept evolved to a point at which the jury was expected to critically evaluate the evidence, legal thinkers turned to the writings of such philosophers as Wilkens, Tillotson, Boyle, Locke, Stewart, Whately and

In her book, *Beyond "Reasonable Doubt" and "Probable Cause,"*[42] Barbara Shapiro concludes that throughout the development of the concept of reasonable doubt, writers have recognized the importance of the jury's understanding of two central concepts.[43] First, the jury must understand there are two separate categories of human knowledge.[44] There is the mathematical category in which it is possible to achieve certainty to the highest level.[45] For example, it is absolutely certain that two plus two equals four. Additionally there is the empirical category in which absolute certainty is not attainable.[46]

The second concept the jury must understand is that while it is not possible to attain absolute certainty in the empirical category, it is possible to achieve increased certainty through the introduction of better evidence.[47] The mid-nineteenth century treatise writers called this highest level of certainty in the empirical category "moral certainty"[48] and equated it with the concept of "beyond a reasonable doubt."[49] Reflecting this trend, the courts also adopted the linkage between "moral certainty" and "beyond a reasonable doubt."[50]

An early attempt to clarify reasonable doubt for a jury, after the concept became established in America, reflected the association between "moral certainty" and "reasonable doubt."[51] In 1850 Chief Justice Shaw of the Massachusetts Supreme Judicial Court attempted to articulate this association.[52] Delivering what has come to be known as the "*Webster* charge," Chief Justice Shaw instructed the jury in part that

> [reasonable doubt] is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt ... [I]t is not sufficient to establish a probability, though a strong one ...; but

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Mill and incorporated their religious and philosophical teachings into the concept of reasonable doubt).

42. *Id.* at 40-41.

43. *Id.* (tracing the development of the beyond reasonable doubt standard).

44. *Id.*

45. *Id.*

46. *Id.*

47. SHAPIRO, *supra* note 21, at 40-41.

48. *Id.*

49. *See id.* at 40 (noting legal scholars attempted to show that the standards of evidence and proof in the field of law were like those in other fields such as science and religion and that the "beyond reasonable doubt" standard was the result).

50. Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 317 (1902) (stating "proof to a moral certainty is an equivalent phrase with "beyond a reasonable doubt.") *as quoted* in Victor v. Nebraska, 114 S. Ct. 1239, 1246 (1994).

51. *See Victor* at 1244 (citing Apodaca v. Oregon, 406 U.S. 404, 412 n.6 (1972) (noting that "the *Webster* charge is representative of the time when 'American courts began applying [the beyond reasonable doubt standard] in its modern form in criminal cases'"). *See also infra* notes 52-56 and accompanying text (discussing *Webster* charge).

52. Commonwealth v. Webster, 59 Mass. 295 (Mass. 1850). *See Victor*, 114 S. Ct., at 1244 (approving the *Webster* charge as the most accurate definition of reasonable doubt).

> the evidence must establish the truth of the fact to a reasonable and moral certainty ... This we take to be proof beyond reasonable doubt.[53]

In *Victor v. Nebraska*[54] the Supreme Court noted with approval the California Supreme Court's characterization of the *Webster* charge as "probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal jurisprudence."[55] The Supreme Court's assessment of the *Webster* charge itself, however, failed to include or account for its identified inadequacies.[56]

In his article analyzing the Supreme Court decision in *Victor v. Nebraska*,[57] Shelagh Kenney points out that several distinguished commentators of the time

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53. *See* Victor, 114 S. Ct., at 1244 (1994) (quoting Commonwealth v. Webster, 59 Mass. 295, 320 (1850) and discussing the Court's use of the *Webster* charge in Sandoval v. California, 4 Cal 4th 155 (1992)). The full instruction given in *Webster* by the Massachusetts court is as follows:

> 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 everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they 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 the law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proven 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 a reasonable doubt.

Webster, 59 Mass., at 320 *as quoted in Victor*, 114 S. Ct. at 1244.

54. *Victor*, 114 S. Ct., at 1244.

55. People v. Strong, 30 Cal. 151, 155 (1866) (*quoted in Victor*, 114 S. Ct. at 1244). The Court also notes that the California Supreme Court further endorsed the *Webster* charge in People v. Paulsell, 115 Cal. 151, 155 (1896). 114 S. Ct., at 1244. The California Legislature incorporated much of the *Webster* charge as the statutory definition of reasonable doubt in 1927. *Id.* In 1979 the California Supreme Court urged a reconsideration of this definition, but in 1986 a legislative committee formed to study alternatives recommended that the legislature retain the statute unmodified. *Id.* at 1245. At the time of *Victor*, in 1994, it had not been modified. *Id.*

56. *See* Kenney, *supra* note 33, at 1014-15 (noting that the Supreme Court incorrectly decided *Victor* and *Sandoval*, partially because they relied on the approval of the *Webster* charge by nineteenth-century and early twentieth century courts).

57. 114 S. Ct. 1239 (1994).

took exception to the *Webster* charge.[58] Kenney also notes that the Supreme Court, in the 1887 case *Hopt v. Utah*,[59] criticizes the *Webster* definition,[60] stating that "[t]he difficulty with [the *Webster*] instruction is that the words 'to a reasonable and moral certainty' add nothing to the words 'beyond a reasonable doubt;' one may require explanation as much as the other."[61] Thus, Kenney concludes that the Supreme Court of the 1880's found the use of the term "moral certainty" presented a problem.[62]

Kenney also asserts that the Court in *Victor* does not address the underlying issue: the language in the *Victor* jury instructions, much of which comes from the *Webster* charge,[63] does not adequately convey the concept of reasonable doubt to the modern juror.[64] The Court held that the *Victor* charge, "taken as a whole prop-

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58. *See* Kenney, *supra* note 33, at 1014 (citing May, *supra* note 34, at 663) (noting that Judge May, a contemporary of Chief Justice Shaw, not only characterized the definition as "unsuccessful" and "unfortunate," but also asserted that "the rules of law should be stated with unmistakable precision"). Judge May also criticized the use of the term "moral certainty," asking, "[of w]hat possible end can such a heaping up of undefinable terms serve, but to confuse and baffle rather than enlighten and aid the average juror?" May, *supra* note 34, at 663 *as quoted in* Kenney, *supra* note 33, at 1014-15. *See also* 9 WIGMORE § 2497, at 405-09 (Chadbourn rev. 1981) *as quoted in* Kenney, *supra* note 33, at 1015 n.217. Dean Wigmore states that "when anything more than a simple caution and brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is likely to be confusion, or at the least, a continued incomprehension." *Id.*; Professor William Trickett, *Preponderance of Evidence, and Reasonable Doubt*, 10 FORUM 75, 85 (1906) *as cited in* Kenney, *supra* note 33, at 1015. Prof. Trickett adds that "it is impossible to see how the ordinary juror is to be aided by being told that if he is morally certain of the prisoner's guilt, to convict him." *Id.*

59. 120 U.S. 430 (1887) *cited in* Kenney, *supra* note 33, at 1015 n.225.

60. Kenney, *supra* note 33, at 1015.

61. *Id.* (quoting Hopt v. Utah, 120 U.S. 430, 440 (1887) (quoting Commonwealth v. Webster, 59 Mass. 295, 320 (1850)).

62. *Id.* at 1016.

63. *See* Victor, 114 S. Ct., at 1249 (noting the *Victor* jury instruction is a blending of the *Webster* charge and Nebraska case law). The *Victor* instruction is extrapolated from the *Webster* charge and a series of Nebraska state court decisions which "approv[e] instructions cast in terms of an 'actual doubt' that would cause a reasonable person to hesitate to act." *Id.*

64. *See id.* (spawning the *Victor* trial jury instructions). The trial judge in *Victor* instructed the jury that:

> The burden is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts. "Reasonable doubt" is such doubt as would cause a reasonable and prudent person, in one of the graver and more important transaction in life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that

erly communicated the concept of reasonable doubt to the jury."[65] In addition to language concerning moral certainty, the *Victor* charge also advises the jurors that a reasonable doubt is a doubt which prompts "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."[66]

Judges often use the "hesitate to act" explanation in several slight variations of wording,[67] yet it remains nearly meaningless to many jurors.[68] Chief Judge Jon O. Newman of the United States Court of Appeals for the Second Circuit relates that while

> as a district judge I dutifully repeated that bit of 'guidance' to juries in scores of criminal trials, I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to 'hesitate to act in a matter of importance,' what are they to do then? Should they decline to convict because they have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?[69]

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possibly you may be mistaken. You 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. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or the lack of evidence on the part of the state, as distinguished from a doubt arising from mere possibility, from the bare imagination, or from fanciful conjecture.

Id.

65. *Id.* at 1251 (quoting Holland v. United States, 348 U.S. 121, 140 (1954)).

66. Victor v. Nebraska, 114 S. Ct. 1239, 1249 (1994).

67. *See* Newman, *supra* note 19, at 982-83 n.14 (citing 1 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS X 4.01, Instruction 4-2 (1993)).

68. *Id.*

69. *Id.* Newman notes that not only is the "hesitate to act" advice ambiguous, but most of the other phrasings such as guilt "to a moral certainty," and "a doubt based on reason" are also inadequate. *Id.* He suggests that the "reasonable doubt" instruction would be clearer if courts used the model charge prepared by the subcommittee of the Judicial Conference's Committee on the Operation of the Jury System. *Id.* at 991. This charge states, "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 28, INSTRUCTION 21 (1987) *as quoted in* Newman, *supra* note 19, at 991 n.54. The model charge does not contain any reference to a "doubt based on reason" or "hesitating on important matters." Newman, *supra* note 19, at 991. *See* Victor, 114 S. Ct. at 1252 (stating that to find a defendant guilty "without a reasonable doubt a jury must have proof that leaves them firmly convinced of guilt but not necessarily overcoming every doubt").

Some British jurists also find the "hesitate to act" phrasing unclear.[70] Additionally, Justice Ginsburg, in her concurring opinion in *Victor v. Nebraska*,[71] notes that a committee of federal judges

> criticized the "hesitate to act" 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 own 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."[72]

A. CAGE V. LOUISIANA

Despite the apparent confusion surrounding the terms used to describe reasonable doubt, the Supreme Court has held only once that a definition of reasonable doubt violated the Due Process Clause.[73] In *Cage v. Louisiana*[74] the Supreme court invalidated the trial court's use of the "the words 'substantial' and 'grave,' as they are commonly understood."[75] The court stated that these words "suggest a

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70. Uviller, *supra* note 17, at 36. *See id.* (quoting Lord Goddard in R. v. Hepworth, R. v. Fearnley, [1955] 2 All E.R. 918, at 919-20). Lord Goddard notes that:

> [i]t is very difficult to tell a jury what is a reasonable doubt . . . . To tell them that a reasonable doubt is such a doubt as would cause them to hesitate in their own affairs never seems to me to convey any particular standard; one member of the jury might say he would hesitate over something and another member might say it would not cause him to hesitate at all.

Id. Lord Goddard further argues that, "[t]o tell a jury that [reasonable doubt] must not be a fanciful doubt is something that is without any real guidance." *Id.* Lord Goddard believed that an understandable definition of reasonable doubt could not be developed and indicated his preference for an absolute certainty standard, announcing that, "[a] case is never proved if the jury is left in any degree of doubt." *Id.*

71. 114 S. Ct. 1239 (1994).

72. *Victor*, 114 S. Ct., at 1252 (quoting FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 18-19 (1987) (commentary on instruction 21)).

73. *Id.* at 1243 (stating the Constitution does not prohibit trial courts from defining reasonable doubt or require specific words to be used in the definition as long as the court gives a reasonable doubt instruction).

74. 498 U.S. 39 (1990).

75. 498 U.S., at 39, 40 (1990). The trial court instructed the jurors:

> [A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice or 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 and 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.

higher degree of doubt than is required for acquittal under the reasonable-doubt standard."[76] The Court rendered this instruction unconstitutional because it could induce a reasonable juror to convict on a lower level of guilt than that which is required by the Due Process Clause.[77]

Commentators attacked the *Cage* decision for its undue focus on the technical aspects of the definition.[78] Critics also noted that the opinion failed to clarify whether the unconstitutionality of a jury instruction depended upon the presence of all three critical phrases ("substantial doubt", "grave uncertainty" and "moral certainty").[79] Some courts upheld the necessity of all three phrases,[80] other courts held that the terms' use together or in isolation unconstitutionally lessened the prosecutor's burden of proof.[81]

B. VICTOR V. NEBRASKA

The Court had the opportunity in *Victor v. Nebraska*[82] to eliminate the confusion resulting from *Cage*.[83] Instead, however, the Court conducted a detailed and

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Id. at 40.

76. *Id.* at 41.

77. *See id.* (holding combining instructional words "substantial" and "grave" with the term "moral certainty" rather than "evidentiary certainty" is unconstitutional).

78. *See* Uviller, *supra* note 17, at 35 (criticizing the holding in *Cage* as a highly technical reading of the trial court's instructions) Uviller argues that the conviction was so sound and corroborated by evidence that any distortion in the explanation of the standard could not have affected the outcome of the trial. *Id.*

79. Matt Nichols, Note, *Victor v. Nebraska: The "Reasonable Doubt" Dilemma*, 73 N.C. L. REV. 1709, 1720 (1995). Nichols discussed the *Cage* Court's criticism of the trial court's definition of reasonable doubt. *Id.* He further posited whether the presence of all three phrases is required for a finding of unconstitutionality. *Id.*

80. *See* Coral v. State, 628 So. 2d 954, 984 (Ala. Crim. App. 1992), *cited in* Nichols, *supra* note 79, at 1720 n.96 (stating that "[o]bviously, it was not the use of any one of the terms in *Cage*, but rather the combination of all three that rendered the charge in *Cage* unconstitutional"), *cert. denied*, 114 S. Ct. 1387 (1994); Bradford v. State, 412 S.E.2d 534, 536 (Ga. 1992) (quoting Starr v. State, 410 S.E.2d 180, 182 (Ga. App. 1991) *as quoted in* Nichols, *supra* note 79, at 1720 n..96 (stating that "[i]n *Cage*, it is clear that it was both the definition of reasonable doubt, which impermissibly equated reasonable doubt with 'grave uncertainty' and an 'actual substantial doubt,' coupled with the reference to 'moral and reasonable certainty' that invalidated the jury instruction"); *see also* Smith v. State, 588 So. 2d 561, 568-69 (Ala. Crim. App. 1991) (finding use of the terms "moral certainty" and "actual and substantial doubt" but not "grave uncertainty" in jury instructions constitutes a proper instruction).

81. *See* Nichols, *supra* note 79, at 1720-21 (citing State v. Bryant, 432 S.E.2d 291 (N.C. 1993)) (holding that the crucial term condemned by the Court in *Cage* was "moral certainty") *vacated*, 114 S. Ct. 1365, *on remand*, 446 S.E.2d 71 (N.C. 1994); *see also* Morley v. Stenberg, 828 F. Supp. 1413 (D. Neb. 1993), *rev'd*, 25 F.3d 687 (8th Cir. 1994) (concluding that the phrases "actual and substantial doubt," "moral certainty," and "strong probabilities," when used either together or separately, are unconstitutional because they lessen the level of guilt needed to be established by the prosecutor).

82. 114 S. Ct. 1239 (1994).

83. *See* Brief for the State of Nebraska at 9, Victor v. Nebraska, 114 S. Ct. 1239 (1994)

lengthy historical analysis, relying on eighteenth and nineteenth century cases and texts to determine how a contemporary jury would be likely to understand the meaning of the "reasonable doubt" instructions.[84]

The Court began by explaining that "[t]he government must prove beyond a reasonable doubt every element of a charged offense."[85] It then reaffirmed that the Constitution neither prohibits nor requires that the trial court define reasonable doubt as a matter of routine[86] so long as the trial court instructs the jury that the prosecutor must prove the defendant's guilt beyond a reasonable doubt.[87] The Court also noted 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"[88] so long as "taken as a whole, the instructions correctly convey the concept of reasonable doubt to the jury."[89]

The *Victor* Court did not take the opportunity to provide an acceptable definition of reasonable doubt.[90] In its preoccupation with the legal sufficiency of the instructions, the Court failed to recognize that legally correct instructions may be incomprehensible to the average juror.[91]

C. FEDERAL JUDICIARY CENTER'S MODEL INSTRUCTIONS

In her concurring opinion in *Victor v. Nebraska*,[92] Justice Ginsburg submits an alternative to the choice between leaving "reasonable doubt" undefined so as to give the jury no instruction as to its meaning, or defining the term, using obsolete terminology such as "moral certainty" or the "misplaced analogy of 'hesitation to

(No. 92-8894) (arguing the courts need to solve the confusion caused by *Cage*).

84. *Victor*, 114 S. Ct., at 1245-49. The *Victor* court discussed the evolution of "moral evidence" and "moral certainty," and concluded that the jury's understanding of "moral certainty" as suggesting a lower standard of proof than due process requires, or as allowing conviction on factors other than the government's proof, was unlikely. *Id.* The Court also noted that they did not condone the use of the phrase because the definition of "moral certainty" had changed since it was used in the *Webster* instruction and it may continue to do so until it conflicts with the *Winship* standard. *Id.* at 1248. The Court concluded, however, by noting that they have no supervisory powers over the state courts and could not say that in the context of the whole instruction the use of the term "moral certainty" was unconstitutional. *Id.*

85. *Id.* at 1242 (citing In re Winship, 397 U.S. 358 (1970)).

86. *Id.* at 1243 (citing Hopt v. Utah, 120 U.S. 430, 440-41 (1887)).

87. *Id.* (citing Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979)).

88. *Id.* (citing Taylor v. Kentucky, 436 U.S. 478, 485-86 (1978)).

89. *Victor*, 114 S. Ct., at 1243 (citing Holland v. United States, 348 U.S. 121, 140 (1954)).

90. *See* Kenney, *supra* note 33, at 989 (commenting that Justice O'Connor did not render an ideal jury instruction regarding reasonable doubt and thus did not resolve the confusion regarding the issue).

91. *See id.* at 1013-14 (noting that because the Court relied on early cases to analyze the meaning of reasonable doubt it did not address whether the meanings of key terms had changed over time).

92. *Victor*, 114 S. Ct., at 1252 (Ginsburg, J. concurring in part and concurring in the judgment).

act,'"[93] and thereby completely confusing the jury. Justice Ginsburg notes with approval that the Federal Judicial Center proposed a "clear, straightforward, and accurate" definition of reasonable doubt.[94] The key sentence in this definition is, "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."[95] This definition, like every definition of reasonable doubt before it, has received less than universal acceptance.[96]

Some speculate that the reason many courts have difficulty accepting a definition of reasonable doubt, such as that provided by the Federal Judicial Center,[97] is

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93. *Id.*

94. *Id.* (quoting the FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTION 17-18 (1987) (instruction 21)). The instruction reads in part:

> 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 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.

Id.

95. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTION 17-18 (1987). *See* Newman, *supra* note 19, at 991 (observing that the instruction "contains very useful language").

96. *See* Newman, *supra* note 19, at 991 (musing that "[f]or reasons not clear to me, this authoritatively formulated model instruction has not been widely adopted"); *see also* Nichols, *supra* note 79, at 1734 n.212 (citing a number of cases in which the circuits have been critical of the Federal Judicial Center's Pattern Instruction). *See generally* United States v. Velasquez, 980 F.2d 1275 (9th Cir. 1992) (noting a preference for the "hesitate to act" phrase in jury instructions), *cert. denied*, 113 S.Ct. 2979 (1993); United States v. Barrera-Gonzales, 952 F.2d 1269 (10th Cir. 1992) (stating the court prefers the "hesitate to act" charge). The court notes that use of the phrase "firmly convinced" places a greater burden on the prosecution than "reasonable certainty" or "abiding conviction as to guilt" in reasonable doubt instructions. *Id.* at 1273. *See also* United States v. Porter, 821 F.2d 968 (4th Cir. 1987) (noting non-reversible error in using the phrase "'firmly convinced' of guilt" in reasonable doubt instructions), *cert. denied*, 485 U.S. 934 (1988); United States v. McBride, 786 F.2d 45, 52 (2d Cir. 1986) (suggesting language in the Federal Judicial Center's proposed instruction is confusing and may prompt jurors to mistakenly place burden of proof on the defense); United States v. Gibson, 726 F.2d 869 (1st Cir.) (finding language in the Federal Judicial Center's reasonable doubt instruction confusing as to which side must bear the burden of proof), *cert. denied*, 466 U.S. 960 (1984).

97. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTION 17-18 (1987) (instruction 21).

that the primary goal of some jurists in providing instructions is to avoid being overturned on appeal, rather than to enlighten the jury.[98] In *Sullivan v. Louisiana*[99] the Court held that a judge who gives the jury a constitutionally deficient reasonable doubt instruction commits a constitutional error, and thereby could supply the basis for overturning the conviction on appeal.[100] Thus, the stakes are high, and a deficient instruction will likely result in an automatic reversal.[101]

II. RECURRENT PROBLEMS

A. REASONABLE DOUBT UNDEFINED

If it is so difficult and risky for jurists in the United States to define the concept of reasonable doubt for the members of the jury perhaps it is better to leave the term undefined. This is not a new idea. As previously noted, the Supreme Court observed in 1880, in *Miles v. United States*,[102] that attempts to explain reasonable doubt to the jury are usually unsuccessful.[103] The fact that the definition provided is often incomprehensible, however, does not necessarily mean that the court should not provide a definition.[104]

Commentators point out that the term is capable of definition,[105] and studies show that while the legal language used in jury instructions often results in juror confusion,[106] jurors are frequently even more confused when terms such as reason-

98. *See, e.g.*, Diamond, *supra* note 18, at 1725 (stating that the primary motive for many judges' refusal to define reasonable doubt is a fear that they will be overturned on appeal if the instructions are found constitutionally deficient); Steele & Thornburg, supra note 16, at 98-99. The authors explain that "judges who draft jury instructions . . . are unlikely to risk having a case reversed on appeal because they failed to use language already approved by the appellate court"); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163, 164 (1977). Elwork states "judges are acutely aware of the fact that the presentation of legally inaccurate instructions is a very frequent cause for reversals by appellate courts. Thus they often sacrifice comprehensibility and spend a great deal of time piecing together quotations from statutes and appellate court decisions in order to ensure legal accuracy." *Id.*

99. 113 S. Ct. 2078 (1993).

100. *See* Kenney, *supra* note 18, at 995 & n.46 (citing Sullivan v. Louisiana, 113 S. Ct. 2078, 2082 (1993)).

101. *Id.*

102. 103 U.S. 304 (1880).

103. *Id.* at 312.

104. *See* Diamond, *supra* note 18, at 1724. "[A]lthough reasonable doubt is not a precise concept, its meaning can be made more clear through definition." *Id.* Diamond further notes that some jurists are reluctant to provide a definition of reasonable doubt to the jury because, as the Court observed in *Miles*, efforts to explain the term are usually unsuccessful. *Id.* at 1724 n.78. Nevertheless, Diamond suggests that the Court's observation does not imply that a good definition is impossible, or that understandable definitions do not help the jury. *Id.* at 1724.

105. *Id.*

106. *Id.* at 1723.

able doubt are left undefined.[107] Advocates of leaving reasonable doubt undefined, however, look to the labored efforts of judges over the past one hundred years to construct an adequate definition as evidence of the near impossibility of further defining the term.[108] They conclude that the term is best left undefined because jurors, as representatives of the community, are then free to apply the values of the community to their interpretation of the meaning.[109] Although commentators recognize that "reliance on jury discretion to define reasonable doubt may raise the specter of juries unguided by the rule of law,"[110] some resolve this possibility by noting that instructions that leave reasonable doubt undefined do not leave jurors free to apply any standard.[111] The commentators note that the effect of instructions is to determine "the precise meaning of the standard within the limits of the phrase 'proof beyond a reasonable doubt.'"[112]

B. REASONABLE DOUBT DEFINED

Other commentators are convinced that allowing every juror to interpret the term "reasonable doubt" according to his or her personal definition will result in improper application of the standard.[113] Advocates of defining reasonable doubt

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107. *See Reasonable Doubt, supra* note 16, at 1966-67 (citing Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgements of Mock Jurors*, 34 J. PERSONALITY & SOC. PSYCHOL. 282, 285-86 (1976)) (relating that while providing a definition may decrease feelings of uncertainty for jurors, a false sense of certainty may detract them from their deliberations).

108. *Id.* at 1968-70.

109. *Id.* at 1972. "Because reasonable doubt is an inherently amorphous term that demands value judgment[s] in its application, the jury is best suited, as a representative body of the community, to determine its meaning." *Id.* The author points out that "part of the meaning of the words 'reasonable doubt' is to indicate that a value judgment is required." *Id.* at 1971 n.109 (quoting Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 510 (1994) *as quoted in Reasonable Doubt, supra* note, 16 at 1971 n.109. "Rather than obscuring the need for such Judgments with the 'garbled verbiage' of an attempted definition, courts should require jurors to confront the vagueness inherent in the concept." *Id.* at 1971.

110. *Id.* at 1971.

111. *Id.*

112. *Reasonable Doubt, supra* note 16, at 1971.

113. *See, e.g.*, Diamond, *supra* note 18, at 1728 n.97.

> "For example, some lay jurors probably understand the proof beyond a reasonable doubt standard as being equivalent to proof beyond any doubt, while others may understand it as requiring that guilt be proved as being only more likely than not. Both of these interpretations are incorrect. The first requires a standard of proof that is too high, . . . and the second one requires one which is too low, being equivalent to a legal insider's understanding of the 'preponderance of the evidence' standard that is used in civil cases . . ."

Id. See also 1 L. SAND ET AL., MODERN FEDERAL JURY INSTRUCTION § 4.01 (1989) *cited in* Diamond, *supra* note 18, at 1726 n.87 (stating jurors interpret the reasonable doubt standard as

note that an undefined standard allows the fact-finder an opportunity to invent and manipulate rather than follow a prescribed path.[114] Some of these advocates conclude that subjecting the standard to such inconsistent treatment reduces the standard to "form without substance" that a jury cannot rationally apply.[115]

Both sets of critics, those who favor definition and those who do not, criticize the "beyond a reasonable doubt" standard as unsatisfactory.[116] One side advocates that to define only leads to jury confusion due to a misunderstanding of the definition given to them.[117] The opposition critics counter that to not define may lead to an outcome inconsistent with the evidence because the jurors will not rationally apply the standard of reasonable doubt.[118] One could also make the argument that, regardless of whether a reasonable doubt standard is ill defined or not defined at all, jurors may not rationally apply the standard.[119]

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proof beyond reasonable doubt); *In re* Winship, 397 U.S. 358, 365-66 (1970) (finding other jurors may use too low of a reasonable doubt standard).

114. Uviller, *supra* note 17, at 38. "To a jury, . . . the bare standard is an invitation to clothe it by invention, its flexibility an opportunity to bend it to preconfigured purposes." *Id.* Uviller further notes that "[i]n fact, some efforts by individual judges to clarify the delphic phrase make it more meaningful to the jurors who are forced to use it in a specific case". *Id.*

115. Diamond, *supra* note 18, at 1728. *See* Symposium, *Improving Communications in the Courtroom*, 68 IND. L. J. 1037, 1040 (1993).

> If juries are not understanding instructions, or if they are being biased by instructions, is that the system we have contracted to have? I think juries will often apply commonly accepted norms to come up with the result, but the questions remain: Are they applying the law? And are we as much a society of law as we want to be if the juries do not quite understand what it is they are supposed to be deciding?

Id. (statement of Steven J. Adler, News Editor for Law, WALL STREET JOURNAL). *But see* Uviller, *supra* note 17, at 19 (arguing that defining reasonable doubt usurps juror common sense).

116. *See* Symposium, *supra* note 115, at 1040 (questioning jury understanding of reasonable doubt standard even with instruction); Uviller, *supra* note 17, at 20 (asserting standard reasonable doubt instructions often do not make sense).

117. Diamond, *supra* note 18, at 1720.

118. Symposium, *supra* note 115, at 1020.

119. Mansnerus, *supra* note 6, at A4 (noting that Jeffrey Abramson, a professor of politics and legal studies at Brandeis University, related that, based on the reactions of his students, the Simpson case convinced many that "verdicts are like straws in the wind, blowing with the demographics."). *But see* Jordan, *supra* note 1, at 2 (writing before the verdict in the O.J. Simpson case and noting that lawyers see things "vastly differently than lay people"). Although lawyers see weaknesses in the Simpson defense case, the "arcane concept" of reasonable doubt works because,

> it requires each juror to react viscerally to the nagging question in the back of their minds about guilt. While it may appear artificial to acquit in the face of strong evidence, the instruction forbids such conviction unless the juror has resolved all doubts in favor of the prosecution . . . . the public, if not the jury, certainly seems to have a reasonable doubt about Simpson's guilt.

Id.

III. ALTERNATIVES

Given the shortcomings surrounding existing reasonable doubt jury instructions, it is natural to wonder if there is a better way. Legal systems of other countries may provide an instructive method for determining the guilt or innocence of a criminal defendant that is superior to the method used in the United States. Many commentators note, however, that the United States legal community has shown a distinct historical and ongoing disinterest in the legal structures or methods of foreign countries.[120]

Professors Frase and Weigend associate several problems with using foreign systems of criminal justice as models for the United States.[121] First, they note that often those proposing foreign systems fail to look at the system as a whole, but focus solely on the part they propose to adopt.[122] Second, the proposals tend to focus on the formal conceptualized methods and organizations and generally ignore data which shows how the system actually performs.[123] Third, instead of focusing on more modest, incremental changes, the proposals often advocate major changes that radically differ from the American system.[124]

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120. *See* Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States—Opportunity for Learning from "Civilized" European Procedure Instead of Continued Isolation?*, 42 AM. J. COMP. L. 147, 155 (1994) (noting that lawyers, judges and academics in the United States possess a low level of interest and knowledge in foreign law). Although American lawyers often present the United States system as a model for the formerly Communist countries they do not study the foreign systems to aid in reforming the United States system. *Id. See also* Donald E.J. Mac Namara, 17 FORDHAM INT'L L.J. 825 (1994) (reviewing Paul O'Mahony, CRIME AND PUNISHMENT IN IRELAND (1993)) (Book Review) (listing a number of factors that contribute to the lack of interest in comparative justice in American law schools). Mac Namara argues that the long history of American isolationism has resulted in a "narrow parochialism" that evaluates things against the American paradigm and gives a negative view to those legal issues or structures which are even slightly different than ours. *Id. See also* Carol D. Rasnic, *Making the Criminal Defendant's Punishment Fit the Crime: The Contrast Between German and U.S. Laws of Sentencing*, 7 N.Y. INT'L L. REV. 62, 62 (1994) (noting those in the legal profession often have "tunnel vision" with respect to the law). Rasnic contends that "[l]awyers and professors of law typically disregard as inferior those legal approaches taken by other civilized countries which are distinct from those in the United States." *Id. See generally* Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345 (1994) (writing that "[f]or the last twenty-five years, the Italian criminal justice system has been undergoing a period of major reform, [an occurrence] which has gone largely unrecognized in the American literature.").

121. Richard S. Frase & Thomas Weigand, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 318 (1995) (analyzing common mistakes made in comparing the American criminal justice system with foreign systems).

122. *See Id.* (suggesting that previous American writers failed to accurately analyze foreign criminal justice systems).

123. *Id.*

124. *Id.*

Despite these shortfalls, and the major differences between the criminal justice systems of the United States and Germany, for example, Frase and Weigend conclude that there are many underlying similarities and the two systems are sufficiently compatible to permit certain American reforms based on desirable features of the German system.[125] The lesson is that it is beneficial to study the systems of other countries, so long as one views the reforms from an American perspective.

A. THE ACCUSATORIAL LEGAL SYSTEM

The legal systems of the United States, England, Canada and Australia, the Anglo-American (or common law) systems, are often termed "accusatorial" systems.[126] The accusatorial system developed in England in conjunction with the jury trial[127] and later spread to the United States and throughout the British Empire.[128] The accusatorial system pits a prosecutor against a defense attorney and each argues his case before a neutral adjudicator.[129]

B. CANADA

Keeping the cautions of Professors Frase and Weigend firmly in mind, it is interesting to note how a United States neighbor, Canada's Court of Appeals in British Columbia, recently approached its review of reasonable doubt.[130] The court's conclusions may provide lessons for the United States judicial system.

In *Regina v. Brydon*,[131] decided in 1995, five members of British Columbia's Court reviewed a voluminous amount of material containing numerous articles and previous court decisions to assist them in their review of reasonable doubt.[132] Although one member of the five judge panel expressed some reservations,[133] the

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125. *Id.*

126. Freccero, *supra* note 120, at 348 n.10.

127. Shapiro, *To a Moral Certainty*, *supra* note 9, at 155.

128. *See id.* at 153 (tracing the development of the Anglo-American jury system).

129. Freccero, *supra* note 120, at 348 n.10.

130. *See* Regina v. Brydon, [1995] 95 C.C.C. (3d) 509 (holding reasonable doubt should be based on reason, not speculation, sympathy or prejudice).

131. [1995] 95 C.C.C. (3d) 509.

132. *See* Editorial, *What is Reasonable Doubt?*, VANCOUVER SUN, Feb. 9, 1995, at A17 (noting that lawyers for the appellant and the Crown assembled twelve volumes of material containing numerous articles and more than 100 decisions to assist the judges in determining "what is reasonable doubt").

133. *See Brydon*, 95 C.C.C. (3d) at 512 (noting that the court should not interfere with the independence of the trial judge). Justice Gibbs asserts that "[p]assing on words and phrases and model forms of charges in the abstract overlooks the enormous advantage enjoyed by the trial judge by reason of being present throughout the trial." *Id* The court responds that the reasonable doubt standard of proof is a "principle of fundamental justice" and a

> legally sound instruction on that standard is thus essential to a fair trial. Central to such instruction is a legally accurate definition of what constitutes reasonable doubt. It follows that trial judges must be able to estab-

justices developed a model instruction to the jury concerning reasonable doubt which focuses on the concept that a reasonable doubt is a doubt that "if you asked yourself why do I doubt?—you can assign a logical reason by way of an answer."[134] The court offered that "[a]s an additional instruction on the standard of proof, the jury could be instructed that 'proof beyond a reasonable doubt is proof that leaves the jury firmly convinced of the accused's guilt'."[135] Finally, the court cautioned against equating "proof beyond a reasonable doubt" with "moral certainty," because the latter adds little to a workable definition of reasonable doubt.[136]

> lish with certainty which instructions on the standard are approved and which should be avoided as offering the potential for reversible error. The importance of any guidance this court can offer in that respect seems obvious.

Id. at 516.

134. *Id.* at 511. The court provided a full model charge to the jury which reads:

> A reasonable doubt is exactly what it says—a doubt based on reason—on the logical processes of the mind. It is not a fanciful or speculative doubt, nor is it a doubt based upon sympathy or prejudice. It is the sort of doubt which, if you asked yourself, "Why do I doubt?"—you can assign a logical reason by way of an answer. A logical reason in this context means a reason connected either to the evidence itself, including any conflict you may find exists after considering the evidence as a whole, or to an absence of evidence which in the circumstances of this case you believe is essential to conviction.

Id. The court went on to state that as to the standard of proof, the jury could be instructed as follows:

> You must not base your doubt on the proposition that nothing is certain or impossible or that anything is possible. You are not entitled to set up a standard of absolute certainty and to say that the evidence does not measure up to that standard. In many things it is impossible to prove absolute certainty. If, after a careful consideration of all the evidence in this case, there remains in your mind a reasonable doubt as to the guilt of the accused, the Crown has failed to meet the standard of proof which the law requires, the presumption of innocence prevails and you must—not may—acquit. On the other hand, if a careful consideration of all the evidence leaves you with no reasonable doubt as to the guilt of the accused, the presumption of innocence has been displaced and it is your duty to convict.

Id. at 512.

135. *Id. See id.* at 539 (noting use of the term "firmly convinced"). This represents an adoption of the same term developed by the Federal Judicial Center in pattern criminal jury instruction 17-18. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTION 17-18 (1987). Additionally, the *Brydon* court, a Canadian tribunal, takes notice of Justice Ginsburg's opinion that "[p]roof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt". Victor v. Nebraska, 114 S. Ct. 1239, 1253 (1994).

136. *See Brydon*, 95 C.C.C. (3d) at 514 (finding that the use of the expressions "moral certainty," "feel sure," "real doubt," "substantial doubt" and "serious doubt" in jury instructions insufficiently conveys the level of certitude necessary to convict and may lessen the prosecutor's burden of proof).

The court's thoughtful analysis reviews a number of the definitions of reasonable doubt offered over the years and provides a critique of each.[137] The court

137. *See id.* at 523-40 (discussing and critiquing various definitions of "reasonable doubt" within jury instructions). The first definition of reasonable doubt the court discusses is "a doubt based upon reason as opposed to a doubt based upon imagination or speculation." *Id.* at 524. The court notes that some believe this definition is "dangerously" wrong because it implies a need to articulate a reason for the doubt; others favor it because it accurately describes reasonable doubt as doubt for which a reason can be given. *Id.* Second, the court discusses proof beyond a reasonable doubt as "being achieved when there is moral certainty that the accused committed the offence." *Id.* at 528. The court notes that while instructions equating moral certainty and reasonable doubt have achieved widespread acceptance, it has also been "criticized as antiquated, contradictory, and meaningless in both academic writings and judicial opinions." *Id.* at 529. The court then concludes such instructions could amount to reversible error. *Id.* at 530. Third, the court explains that "if you conclude that the accused probably committed the offence and no more, then you have a reasonable doubt." *Id.* at 531. Although the court supports the use of common language so long as the "legal precision" is maintained, it expresses concern that the word "probably" has evolved into a "belief in guilt far below that which is constitutionally required for a criminal conviction." *Id.* Fourth, the court discusses that, "if you . . . feel sure the accused committed the offenses, you do not have a reasonable doubt." *Id.* at 532. The court expresses concern at the use of the words "feel," deciding it connotes an emotional rather than reasoned response, and "sure," explaining it does not adequately convey the necessary level of certitude. *Id.* Fifth, the court discusses the instruction that, "[o]n the other hand, you must not set up a standard of absolute certainty that the [government] must meet in order to prove guilt." *Id.* at 533. The court acknowledges the long-term use of this instruction without "convincing criticism" and the court remarks on the utility of the construction. *Id.* Sixth, the court explains reasonable doubt as a "real," "substantial," "honest," "sensible," and "serious" doubt, and notes that these are "quantitative modifiers" and "often lead to reversible error." *Id.* Seventh, commenting upon another qualitative definition, the court discusses reasonable doubt as "a doubt that would cause a person to hesitate to act in his/her everyday affairs, or the most important of his/her own affairs." *Id.* at 534. The court also takes notice of the Subcommittee on Pattern Criminal Jury Instructions' 1987 report to the Federal Judicial Center which recommended against the further use of any form of such analogy instructions. *Id.* at 536. The court concludes, in any event, if the instruction is used it should always be equated to the sort of doubt which would cause one to hesitate to act in a most important (as opposed to everyday) affair. *Id.* at 534-36. Eighth, the court discusses reasonable doubt as "a doubt which you the jury decide is reasonable in the circumstances of this particular case." *Id.* at 537. The court acknowledges that this is an approved charge in New Zealand and Australia, but British Columbia has never used it. *Id.* at 538. The use of this instruction would likely constitute reversible error because it assumes that any doubt the jury has in a particular case, which is not necessarily rooted in the evidence, is a reasonable doubt. *Id.* Ninth, the court discusses proof beyond a reasonable doubt as "proof that convinces the mind and satisfies the conscience." *Id.* The court finds while some find this definition a logical explanation, others, including this court, believe this "imports notions of subjectively held values" which cannot legally satisfy an objective standard. *Id.* Further, the court discusses the 1987 Federal Judicial Center, Pattern Criminal Jury Instruction 17-18. The *Brydon* court explains the Federal Judicial Center's depiction of proof beyond a reasonable doubt as "proof that leaves you firmly convinced of the defendant's guilt." *Id.* at 539. Further, the *Brydon* court concurs with Judge Ginsburg's favorable impression of Instruction 17-18. *Id.* at 539-40.

then offers two conclusions which emerge from that analysis.[138] First, there is an objective reasonable doubt. All doubts are not reasonable.[139] Second, qualitative definitions of reasonable doubt are preferred.[140] The court found the quantitative definitions "invite a subjective approach" to the standard of reasonable doubt which presents an "unacceptable risk of reversible error."[141]

Throughout this analysis, the court cited not only Canadian case law, but also cases decided in the United States.[142] Unlike most cases and legal articles in the United States,[143] this court did not restrict its analysis to those concepts used by their fellow Canadian or British citizens.[144] The Court's openness was refreshing and should serve as a model for the United States.

C. ENGLAND

The beyond a reasonable doubt standard represents a keystone of the criminal justice system in both the United States and England over the past two hundred years.[145] The English judiciary, like its American counterpart, despairs of ever

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See supra notes 95-98 and accompanying text (discussing Justice Ginsburg's acknowledgment of Instruction 17-18). Finally, the court discusses the instruction that, "[y]ou must not convict the accused unless you have excluded every reasonable hypothesis consistent with innocence." *Brydon*, 95 C.C.C., at 540. The court takes notice that Canada has used this standard, known as the "Cooper Instruction," for a long time when considering circumstantial evidence, and should continue to use the standard, but only in the context of circumstantial evidence. *Id.* at 540.

138. Brydon, 95 C.C.C. (3d) at 541.

139. *See id.* at 541 (concluding objective definition of reasonable doubt is inferior to qualitative definition). "[T]he concept [of reasonable doubt] is objectively [rather than subjectively] limited. Not all doubts are reasonable." *Id.* The court then fails to provide any further explanation of this point. *Id.* One may argue that while the concept is objectively limited, drawing the line between a reasonable doubt and an unreasonable doubt is a subjective distinction. Different individuals will interpret the definition differently, regardless of the definition of reasonable doubt provided by the court.

140. *See id.* at 541-43 (explaining utility of qualitative definition). Qualitative definitions, such as those which define reasonable doubt as "a doubt based on reason," or "a rational doubt," or "a doubt for which, if you ask yourself, you can give a reason," are preferable to quantitative definitions, such as a "real" doubt, a "serious" doubt, or a "substantial" doubt. *Id.*

141. *Id.*

142. *See id. at* 528-30 & 536-37 (citing, among other United States cases: Commonwealth v. Webster, 59 Mass. 295 (1850), Holland v. United States, 348 U.S. 121 (1954), United States v. Lawson, 581 F.2d 664 (7th Cir. 1978), and Victor v. Nebraska, 112 S. Ct. 1239 (1994)).

143. *See* Mac Namara, *supra* note 120, at 825 (noting the narrow focus of the American legal institution).

144. *See supra* note 142 (citing specific United States case law).

145. *See generally* SHAPIRO, *supra* note 21 (tracing the history of the beyond a reasonable doubt standard through early English and United States history). Furthermore, see David Pannick, *Jurors Who Are in Reasonable Doubt*, THE TIMES (LONDON), Jan. 17, 1995 *available in* LEXIS, News Library, Non-U.S. file, who states that:

> Every jury hearing a criminal trial in the Crown Court is told by the judge that the defendant is entitled to a verdict of not guilty unless the prosecu-

being able to define reasonable doubt.[146] Contemporary English commentators and barristers find it "troubling that a legal concept so central to every criminal trial has been considered by the English judiciary to be so fragile that any attempt to explain it for the benefit of lay people risks confusion and error."[147]

Unlike the United States, however, the British Court of Appeals, in 1976, gave a strong warning to judges not to attempt to put "any gloss on what is meant by 'sure' or what is meant by 'reasonable doubt'."[148] The court noted that in the past twenty years faulty instructions regarding reasonable doubt have provided the basis for appeal in numerous cases.[149] Reasonable doubt remains undefined in English jurisprudence.[150]

D. AUSTRALIA

Australia also employs the reasonable doubt standard.[151] In a recent case, the Supreme Court of South Australia reaffirmed the South Australian rule that any attempt to define the term "a reasonable doubt" for the jury will result in a mistrial.[152] Further, if the jury asks for a definition, the judge should offer only that "a reasonable doubt is one which they, as reasonable persons, are prepared to entertain."[153]

> tion has made the jury sure of the defendant's guilt. Some judges add that being sure of the defendant's guilt means the same as being satisfied of guilt beyond a reasonable doubt.

Id.

146. *See* Regina v. Summers, 36 Crim. App. 14 (Eng. 1952) (opining that the court has yet to hear a true definition of what is "reasonable doubt"). The English court concluded that the better decision would be to discard the expression because attempts at explanation often "result in confusion rather than clarity." *Id.*

147. Pannick, *supra* note 145, at 2.

148. Regina v. Ching, 63 Crim. App. 7, 10 (Eng. 1976).

149. *Id.* at 11. The court concluded, "[w]e point out and emphasize that if judges stopped trying to define that which is almost impossible to define, there would be fewer appeals." *Id.*

150. *See* Pannick, *supra* note 145, at 2 (noting that English law has not adopted a positive definition of reasonable doubt). Pannick asserts that the court is "wedded to the approach" that attempts to explain "reasonable doubt," which often "results in confusion rather than clarity."

151. *See* Regina v. Gebert (1992) 60 S.A. St. R. 110, 1992 AUST SASC LEXIS 461, at *6 (Austl. 1992) (citing The Queen v. Bilick, 36 S.A. St. R. 321 (Austl., 1984)). "The question of law is whether on the evidence as it stands the defendant could lawfully be convicted. He could lawfully be convicted on the evidence only if it is capable of producing in the minds of a reasonable jury satisfaction beyond a reasonable doubt." *Id.*

152. *See id.* at *21 (citing The Queen v. Britten, 51 S.A. St. R. 567, 573 (Austl., 1988)) (acknowledging "[a]n attempt to characterize a reasonable doubt is a misdirection").

153. *See id.* (citing The Queen v. Wilson, 42 S.A. St. R. 203, 207 (Austl., 1986)) (stating "[t]hese cases establish that if some amplification [of reasonable doubt] is desired, the direction should go no further than to tell the jury that a reasonable doubt is 'one which they, as reasonable persons, are prepared to entertain'").

E. THE INQUISITORIAL SYSTEM

As the jury trial system emerged in England,[154] the Roman-canon "inquisitorial system" began to develop on the Continent.[155] The inquisitorial system differs from the accusatorial system in that state officials who have the authority to investigate, initiate, and adjudicate criminal cases control the inquisitorial system.[156] Germany, France, and until recently, Italy,[157] employ inquisitorial legal systems.[158] A recent study concluded that the criminal justice systems of Germany, and to a lesser extent, France, share many similarities with the United States criminal justice system and appear to be heading toward a single model as the inquisitorial systems become more adversarial and due-process oriented.[159]

F. GERMANY

The German criminal justice system is an inquisitorial system[160] that uses a combination of professional judges sharing the bench with lay judges[161] instead of

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154. *See* Shapiro, *To a Moral Certainty*, *supra* note 9, at 155 (tracing the development of the Anglo-American jury system).

155. *See id.* (stating that the Roman-canon inquisition process on the Continent and the jury trial system in England replaced the "irrational proofs" system such as trial by ordeal).

156. Freccero, *supra* note 120, at 348 n.10.

157. *See id.* at 348-49 (stating that Italy's new code of criminal procedure enacted in 1989 transformed its inquisitorial criminal justice system into an accusatorial system).

158. *See id.* (explaining that Italy's prior criminal justice process closely resembled the inquisitorial systems of France and Germany).

159. *See* Frase & Weigand, *supra* note 121, at 359-60 (noting that some criminal justice systems, such as Germany's, are moving faster toward a due process-orientated model than others). Professors Frase and Weigand note that "[t]he increasing similarity of German and American practices suggests that these two systems are sufficiently compatible to permit reform "borrowing" from Germany to the United States, and vice versa." *Id. See also*, Freccero, *supra* note 120, at 347 (explaining that the Italian criminal justice system underwent a period of major reform after more than ten years of study). These reforms attempted to bring the Code of Criminal Procedure "in line with the liberal democratic values and principles of Italy's post-war Constitution." *Id.*

160. *See* MAJOR CRIMINAL JUSTICE SYSTEMS: A COMPARATIVE SURVEY 124 (George F. Cole et al. eds., 2d ed. 1987) [hereinafter MAJOR CRIMINAL JUSTICE SYSTEMS] (noting features of the German system that emphasize its inquisitorial nature). In the German system, prior to trial, the police and prosecutor give a record of the case to the judge who then decides the order in which he will call the witnesses and have the evidence presented. *Id.* In a German courtroom there is no distinction between an examination-in-chief and cross-examination, and the judge questions the witnesses directly to satisfy himself regarding their reliability and accuracy. *Id.* Hearsay evidence is admissible; the theory is that the judge can distinguish the probative value. *Id.* Overall, prosecutor and defense counsel play relatively minor roles. *Id.*

161. Frase & Weigand, *supra* note 121, at 321. *See* JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 141 (1977) (explaining the selection process of German lay judges). Every four years lists of those eligible for selection as German lay judges are compiled; candidates include both men and women who represent a cross section of the population. *Id.* Not included are "wards, ex-convicts, those under 25 or over 70, imbeciles, persons se-

a jury.[162] The court presumes the innocence of the accused until proven guilty.[163] The government must convince the court of the accused's guilt based on an accumulation of factors which "leave no room for reasonable doubt."[164] This is nearly identical to the "beyond a reasonable doubt" standard used in the United States.[165] German law requires that "in evaluating the evidence, the court shall decide according to its free [fieie, 'free' in the sense of 'unrestricted'] conviction, derived from the entire trial."[166] This standard does not, however, permit the court to convict on a hunch or a whim; it is bound by the maxim *in dubio pro reo*: "in doubt, decide for the accused."[167] As an additional safeguard against arbitrary decisions, the German law also requires that the judge submit a detailed written rationale of the court's deliberative process.[168]

Unlike their counterparts in the United States, German lay judges do not receive prior instructions on the various applicable standards of proof or substantive law.[169] Instead, the professional justices on the panel instruct the lay judges informally during *in camera* deliberations.[170] Commentators note that this method may be more efficient than the Anglo-American system.[171]

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verely handicapped, persons who have lived in the locality for less than a year, clergy, law professionals, certain high public officials, and so forth." *Id.*

162. *See* Frase & Weigand, *supra* note 121, at 321.

163. *See* MAJOR CRIMINAL JUSTICE SYSTEMS: A COMPARATIVE SURVEY, *supra* note 160, at 123 (noting that under German law the accused never has the burden either of persuasion or of producing evidence, and if there is more than one judge presiding, a two-thirds majority is needed to convict).

164. *See* Frase & Weigand, *supra* note 121, at 344 (noting that the court must be subjectively convinced of the defendant's guilt and the conviction must be based on persuasive factors leaving no reasonable doubt).

165. *See id.* (stating that the standards used in the United States and Germany are very similar).

166. LANGBEIN, *supra* note 161, at 78 (quoting § 261 StPO). Langbein notes that "this so-called principle of free evaluation of the evidence" is one of the most important principles in the code of criminal procedure and "means that the court decides according to the subjective persuasion of its members." *Id.* Further, when judges examine the evidence and reach a decision "they are not bound by any formal or objective criteria." *Id.* Langbein notes that the free evaluation principle "is the successor to the objective theory of proof that produced the system of judicial torture" to obtain confessions in order to achieve the necessary degree of certainty to convict the accused. *Id.* at 78-9.

167. *Id.* at 79.

168. Frase & Weigand, *supra* note 121, at 344.

169. LANGBEIN, *supra* note 161, at 79.

170. *Id.* (noting that while continental and lay judges sit together, lay judges are not instructed regarding the necessary quantum of evidence and are only advised, if necessary, during *in camera* deliberations).

171. *See id.* at 80 (stating that the jury instructions extend American trials considerably). "Juries have the disadvantage . . . of being treated like children while the testimony is going on, but then being doused with a kettleful of law during the charge that would make a third-year law student blanch." *Id.* (quoting JUDGE CURTIS BOK, I TOO, NICODEMUS 261-62 (1946). Professor Langbein explains that in Germany neither defense nor prosecution counsel are pres-

G. ITALY

In 1989, after an extended period of study and debate, the Italian government implemented a "radically altered" code of criminal procedure.[172] The new system is more accusatorial in nature than the previous inquisitorial system:[173] the prosecutors and defense attorneys are now in an adversarial relationship[174] and the judges assume a more neutral role similar to their American counterparts.[175]

The Italian criminal justice system, like the German system, does not use a jury, but in the intermediate-level court, the *Court d'assise*, the professional judge is assisted by lay judges.[176] Like the German courts,[177] all Italian courts must provide "reasoned" verdicts to explain the rationale used to reach the decision, and the accused can appeal both the factual premises and the legal analysis.[178]

The Italian Constitution guarantees that the government will not consider an accused guilty until there is a "definitive conviction."[179] In his excellent overview of

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ent during the explanation and are therefore unable to object. *Id.* at 79. He then notes that there are several safeguards which may make the practice defensible:

> (1) German judges are lifetime professionals of generally high minimum competence, rather than the political appointees who populate the trial bench in some American cities; (2) in the more serious cases the trial court contains two other professional judges who are present when the third gives informal instructions in camera; (3) the court must write a reasoned judgment explaining its results, including its view of the law, and (4) there is liberal right of appeal from the first-instance judgment.

Id. at 79-80. Regarding Professor Langbein's first point, one must note that prejudices and biases afflict those of "high minimum competence" and "political appointees" alike. *Id.*

172. Freccero, *supra* note 120, at 348.

173. *See id.* at 349 (stating that the new Italian code of criminal procedure incorporated an accusatorial aspect into the former system).

174. *See id.* (explaining that the new code transformed the Italian criminal proceedings into adversarial contests between the accuser and the accused).

175. *See id.* at 348-49 (describing the new Italian system and explaining that the new system transformed the role of judge from performing investigations to supervising and presiding over cases). *But see* Marco Fabri, *Theory Versus Practice of Italian Criminal Justice Reform*, 77 JUDICATURE 211-12 (1994) (asserting the existence of difficulties in changing entrenched habits and practices in the Italian legal community).

176. Freccero, *supra* note 120, at 350-51 (explaining Italy's three-tiered criminal court system). At the lowest level is the *Pretura* in which one professional judge rules in all cases with a penalty of less than four years confinement. *Id.* at 350. The intermediate-level is the *Court d'assise* where a panel of eight judges, two professional and six lay judges, hear serious cases such as murder and espionage. *Id.* at 351-52. The *Tribunale* is composed of three career judges and hears all cases not heard by the other two courts. *Id.* at 352.

177. *See* Frase & Weigand, *supra* note 121, at 344 (discussing the German law requirement for an exhaustive written judgment describing how the court reached its decision).

178. Freccero, *supra* note 120, at 351-52 (stating that Italy's Constitution requires the courts to explain their decisions).

179. *See id.* at 359 (stating the Constitution requires a *condanna definitive* (definitive conviction)). The conviction is definitive when all opportunities for legal review are exhausted or

the Italian criminal justice system, Stephen Freccero notes that "[w]hile this principle effectively serves the same function as the U.S. 'presumption of innocence,' it is not entirely analogous."[180] The Italian declaration is literally a presumption that the accused is not guilty, as opposed to an affirmative statement of innocence."[181] He argues, therefore, that the Italian standard is less protective than the Anglo-American presumption of innocence until proven guilty beyond a reasonable doubt.[182]

H. SWEDEN

Sweden revised its legal code in 1941[183] and, unlike Italy,[184] incorporated ideas and systems from other countries only to the extent that they were compatible with the Swedish legal culture.[185] Even so, the criminal system still has its critics.[186]

Sweden has an adversarial criminal system that presumes the accused is innocent until proven guilty.[187] Like several other European nations, Sweden also uses lay judges, known as *nämnd.*[188] The *nämnd* assist the professional judges in all aspects of the decision and share in the determination of factual issues and questions of law; the judge, however, has the controlling vote.[189] The court is expected to use its own common sense and sound judgment in determining the relative importance of evidence.[190]

Rather than the "guilt beyond a reasonable doubt" standard used in the United States, the proof system in Sweden consists of three principal parts.[191] First, the

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the parties have not utilized further appeals processes. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 351-52.

183. THE SWEDISH CODE OF JUDICIAL PROCEDURE 6 (Anders Bruzelius & Krister Thelin eds., rev. ed. 1979).

184. *See* Fabri, *supra* note 125, at 216 (noting that despite 1988 tensions, the Italian criminal justice system remains inefficient). Fabri argues that this continued inefficiency is due in part to the cultural difficulty in accepting the new adversarial system. *Id.*

185. *See* THE SWEDISH CODE OF JUDICIAL PROCEDURE, *supra* note 183, at 6-7 (noting that those who developed the Swedish legal system not only incorporated the Austrian Code, but also studied the literature of the United States, England, France, and Germany).

186. *See* AN INTRODUCTION TO SWEDISH LAW 138 (Stig Strömholm ed., 2d ed. 1988) (noting that criminal proceedings have been criticized frequently and that there have been proposals for reform).

187. MAJOR CRIMINAL JUSTICE SYSTEMS, *supra* note 160, at 156.

188. THE SWEDISH CODE OF JUDICIAL PROCEDURE, *supra* note 183, at 7-8.

189. *See id.* (noting that the *nämnd*'s opinion will not overrule the judge's contrary opinion unless all three *nämnd* on a panel of three, or at least seven *nämnd* on a full panel of seven to nine, concur upon the final order and the reasons underlying it).

190. *See id.* at 6 (noting the new code abolished limits on the review of evidence). The court was to use its own common sense and judgment to decide the level of importance of various items of proof. *Id.*

191. *See id.* at 10 (stating there are three aspects to the Swedish proof system).

system treats the concepts of relevance and admissibility similarly.[192] Second, the court may evaluate anything that occurs during the course of the trial: witness demeanor, content of the testimony, exhibits, obedience of court rules by the parties, and claims of privilege with respect to testimony.[193] Third, the court must outline the logic of how it reached the verdict in the final judgment.[194]

I. JAPAN

Legal scholars generally recognize Japan's criminal justice system as being both very efficient and generally lenient.[195] Commentators note, however, a likelihood of judges presuming guilt due to the conviction rate of over 99.8%.[196] A Japanese judge is pressed not to issue acquittals.[197] Thus, in Japan, although there is a professed adherence to the concept of "innocent until proven guilty" under the law, in practice, many assume the guilt of the accused.[198] Consequently, under the modern Japanese system, there is considerable intrusion on personal autonomy,[199] and, therefore, the system provides no transferable lessons for the concept of proof beyond a reasonable doubt.

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192. *Id.*

193. *Id.* at 10-11.

194. *Id.* at 11. Thus, in Sweden, the court is not required to find guilt beyond a reasonable doubt, but instead, is required to use common sense and all available evidence to reach a conclusion which is then explained in the final judgment.

195. *See* Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALIF. L. REV. 317, 318 (1992) (noting the disparity between solved crimes, convictions and prison time). In Japan the clearance rate of crimes - the percentage of crimes that are solved - is among the highest in the world, and its conviction rate is over 99.8%, yet fewer than 5% of the adult suspects considered by police to have committed Penal Code offenses are sentenced to prison. *Id. But see* Setsuo Miyazawa, *Looking at the Criminal System Through Numbers*, 427 HOGAKU SEMINA 32, 37 (1990) (contesting Japan's clearance rate because the police do not list all reported crimes).

196. Foote, *supra* note 195, at 371 n.297. "[I]t is probably inevitable that judges enter criminal trials with at least a subconscious assumption of guilt." *Id.*

197. *Id.* (*quoting* Akira Kitani, *The Duties of Judges*, *in* Hogaku Seminar Extra Number, Special Comprehensive Series No. 27, Present Day Trials 243, 247-248 (1984)) (noting that "[t]his unguarded statement has rather sobering implications for the presumption of innocence").

> [When acquitting a defendant,] there must not be any mistakes in one's memory of testimony or reading of depositions, and if there is any looseness in logic, the prosecutors will unquestionably attack it. To issue an acquittal . . . the opinion must be one that will withstand critical review by the higher court.

Id.

198. *Id.* at 344.

199. *Id.* at 332.

IV. RECOMMENDATIONS

Despite the lack of success in finding the "beyond a reasonable doubt 'Rosetta Stone,'" the concept of reasonable doubt requires an explanation and an attempt at definition. The use of archaic terms such as "moral certainty" creates a meaningless definition for the ordinary United States citizen. Furthermore, Justice Ginsburg's analogy of "firmly convinced"[200] is not the panacea either. On a "convinced scale" of one to ten, if "beyond a reasonable doubt" receives a rating of about a nine, and "a preponderance of the evidence" about a six, "firmly convinced" would receive about an eight, and it should be a nine. For example, one may be "firmly convinced" that there is life on other planets, but cannot be convinced of that "beyond a reasonable doubt."

The British Columbian Court of Appeals proposed model instructions centered around the concept that "if you ask yourself why do I doubt?—you can assign a logical reason by way of an answer,"[201] probably provides the most satisfactory explanation. This explanation tells jurors that more than a "hunch" or a "gut-feeling" that someone other than the accused might have committed the crime is necessary; they need to be able to articulate to themselves the reason behind their doubt that the defendant committed the crime.

Drawing largely from the Canadian Model Jury instruction,[202] the following jury instruction provides some relief from uncertainty:

> A reasonable doubt is exactly what it says—a doubt based on reason—on the logical processes of the mind. It is not a fanciful or speculative doubt, nor is it a doubt based upon sympathy or prejudice. It is the sort of doubt which, if you asked yourself, "Why do I doubt?"—you can assign a logical reason by way of an answer. A logical reason in this context means a reason connected either to the evidence which has been presented during this trial, or to an absence of evidence which you believe is essential to conviction. If you have a nagging question in the back of your mind about the guilt of the defendant, you must examine and resolve that question to your own satisfaction one way or the other. In the end you must be convinced of the guilt of the defendant beyond a reasonable doubt.[203]

As to the standard of proof, the court could instruct the jury as follows:

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200. *See supra* notes 95-98 and accompanying text (explaining Justice Ginsburg's concurrence in Victor v. Nebraska, 114 S. Ct. 1239, 1252 (1994)).

201. *See* Regina v. Brydon, [1995] 95 C.C.C. (3d) 509, 511 (providing a model reasonable doubt instruction).

202. *Id.*

203. *Cf. id.* at 509 (noting widespread disagreement in common law jurisdictions throughout the world on actual definition of "reasonable doubt") (Wood, J.A., dissenting).

> You must not base your doubt on the proposition that nothing is certain or impossible or that anything is possible. You are not entitled to set up a standard of absolute certainty and to say that the evidence does not measure up to that standard. In many things it is impossible to prove absolute certainty.
>
> If, after a careful consideration of all the evidence in this case, there remains in your mind a reasonable doubt as to the guilt of the accused, the State has failed to meet the standard of proof which the law requires, the presumption of innocence prevails and you must—not may—acquit. On the other hand, if a careful consideration of all the evidence leaves you with no reasonable doubt as to the guilt of the accused, the presumption of innocence has been overcome and it is your duty to convict.[204]

Most thoughtful jurors should find that explanation fairly straightforward and comprehensible. It incorporates the dual concepts that the jurors should be nearly, but not absolutely, certain of guilt and that they should be able to explain to themselves, but not necessarily to others, the reasons for their doubt. Yet the instruction does not try to explain every possible nuance and legal ramification of the term and thus does not become complex and confusing.

It is important to note, however, that in whatever terms one uses, any instruction should be comprehensible to the target, the average juror, rather than to the jurists and lawyers writing and issuing the instructions.

V. CONCLUSION

No judicial system in any country in the world adequately defines the concept of "innocent until proven guilty beyond a reasonable doubt." Virtually no definition of this concept escapes criticism. The *Webster* charge,[205] hailed by some in its day as a near-perfect definition, had contemporary and subsequent critics. Neither the English, the Canadians, nor the Australians developed a definition that evades criticism throughout their own criminal justice systems. Those systems that use the inquisitorial method do not use the concept of "beyond reasonable doubt," but leave the determination of guilt or innocence largely to the instincts, experience, and common sense of the professional judge. Thus, the professional judge is relatively free to bring his own personal biases and prejudices to bear on the problem.

The suitability of any explanation of the term "reasonable doubt" is in the eye of the beholder; no explanation will be entirely satisfactory to all. The proposed explanation, however, serves to provide at least a basic framework for the average jurors and precludes them from having to invent their own definition.

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204. *Cf. id.* (explaining disagreement in common law jurisdictions regarding the definition of "reasonable doubt standard of proof" creates uncertainty for judges giving jury instructions).

205. Commonwealth v. Webster, 59 Mass 295 (1850). "[Reasonable doubt] is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt..." *Id.* at 320.