NOTE

Reasonable Doubt: In Law the Highest Burden—In Fact Barely a Burden

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ABSTRACT

For hundreds of years, the legal field has disagreed about whether to define the criminal burden of proof "beyond a reasonable doubt," and if so, how best to define it. As a result, courts have traditionally left the phrase undefined—an approach endorsed by the Supreme Court. It seems odd that one of the fundamental components of our criminal justice system is treated inconsistently across the nation's courts. This inconsistency is particularly bizarre given that empirical studies have shown that both state and federal judges have a uniform understanding of the protection reasonable doubt affords defendants. Unfortunately, empirical studies of potential jurors have demonstrated that some definitions of reasonable doubt, and the failure to define reasonable doubt at all, lead jurors to believe that the burden of proof is much lower than judges believe the burden is. For example, studies suggest that juries, given no definition of reasonable doubt at all, find the burden to be almost half as strong as what judges believe it to be. Jury verdicts reached under this misunderstood standard can potentially lead to false convictions and deny defendants the protection of the Due Process Clause. This Note advocates that defining reasonable doubt is the best way to effectuate the protection defend-

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ants are owed under the Due Process Clause. Alternatively, courts can effectuate reasonable doubt's protection through a "principle conferring" approach—by informing jurors of the principles behind reasonable doubt that have been accepted by the Supreme Court.

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Introduction

Located within Rock Creek Park, Boundary Bridge spans the creek that marks the border between Washington, D.C., and Chevy Chase, Maryland. Suppose that on your Sunday stroll someone attempts to mug you on the bridge. Defending yourself, you kill the assailant. With no eyewitnesses to confirm your story, an uncompromising prosecutor charges you with first-degree murder, which is punishable by at least life in prison. Adamant about your innocence, you

go to trial. Whether or not you are convicted hinges on whether this attack occurred on the eastern half, in Washington, D.C., or the western half of Boundary Bridge, in Maryland.

You would be lucky if the altercation occurred in Maryland. After closing arguments are given, the Maryland trial judge would take her time to inform the jury about the government's burden.[1] Like all trial judges in Maryland, she would closely adhere to a model instruction when explaining reasonable doubt.[2] She would read the following to the jury:

> The defendant is presumed to be innocent of the charges. This presumption remains throughout every stage of the trial and is not overcome unless you are convinced beyond a reasonable doubt that the defendant is guilty. . . . A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs. If you are not satisfied of the defendant's guilt to that extent for each and every element of a [the] crime charged, then reasonable doubt exists and the defendant must be found not guilty of that [the] crime.[3]

If the altercation occurred in Washington, D.C., however, the jury would not be afforded such guidance. D.C. courts have not only held that defining reasonable doubt is not mandatory, they have discouraged attempts to define the standard.[4] The judge is required to tell the jury only that it must "find the defendant[] guilty beyond a reasonable doubt."[5] Even when a D.C. judge provides a definition of reasonable doubt, she need not conform to a vetted model instruction.[6] In one case, a judge provided the jury with an instruction of reasonable doubt that prompted the jury to ask for "a clearer" and "simpler" definition.[7] The judge responded by repeating the same definition.[8]

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1 *See* Ruffin v. State, 906 A.2d 360, 371 (Md. 2006).

2 *See id.* ("[T]he trial court is required to instruct the jury on the presumption of innocence and the reasonable doubt standard of proof which closely adheres to [Maryland's Model Instruction]. Deviations in substance will not be tolerated.").

3 MARYLAND CRIM. PATTERN JURY INSTRUCTIONS, MPJI-Cr No. 2:02 (MARYLAND STATE BAR ASS'N, INC., STANDING COMM. ON PATTERN JURY INSTRUCTIONS, 2d ed. 2018) (alterations in original).

4 *See* United States v. Taylor, 997 F.2d 1551, 1557–58 (D.C. Cir. 1993).

5 *See id.* at 1557 (citing Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979)).

6 *See id.*

7 *See* Evans v. United States, 883 A.2d 146, 150 n.2 (D.C. 2005).

Unfortunately, the D.C. approach is not unique in declining to define reasonable doubt in a way that actually conveys the standard to be applied. Other jurisdictions have discouraged defining reasonable doubt,[9] even in the face of mounting evidence that juries grossly misunderstand the standard.[10] In the Seventh Circuit, trial judges may refuse to define reasonable doubt, even when requested by the jury.[11] Other jurisdictions leave trial judges with full discretion, and little guidance, to determine when and how to define reasonable doubt to juries.[12]

A few jurisdictions even retain separate lines of case law that encourage and discourage defining the standard, neither of which have

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8 *Id.*

9 *See, e.g.*, United States v. Hornsby, 666 F.3d 296, 310–11 (4th Cir. 2012) ("[A]ttempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only the words themselves." (quoting United States v. Lighty, 616 F.3d 321, 380 (4th Cir. 2010))); United States v. Hatfield, 591 F.3d 945, 949 (7th Cir. 2010) (noting its longstanding instruction that district judges should not try "to explain to a jury the meaning of 'beyond a reasonable doubt'"); United States v. Mejia, 597 F.3d 1329, 1340 (D.C. Cir. 2010) (noting criticism of the Federal Judicial Center's Pattern Instruction, and recognizing it may be best "to leave to juries the task of deliberating the meaning of reasonable doubt" (quoting United States v. Taylor, 997 F.2d 1551, 1557–58 (D.C. Cir. 1993))). As of publication, the cases cited in this footnote and *supra* notes 11–15 contain the most recent published cases in each jurisdiction that directly address the issue of defining reasonable doubt.

10 *See infra* Section I.B.

11 United States v. Shaffner, 524 F.2d 1021, 1023 (7th Cir. 1975) (noting that attempting to define reasonable doubt is "equivalent to playing with fire").

12 *See, e.g.*, United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987) ("[A]n instruction which uses the words reasonable doubt without further definition adequately apprises the jury of the proper burden of proof."); United States v. Hernandez, 176 F.3d 719, 728 (3d Cir. 1999) (determining a district court is required to instruct the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt but need not define reasonable doubt); United States v. Clay, 618 F.3d 946, 953 (8th Cir. 2010) (per curiam) (same); United States v. Petty, 856 F.3d 1306, 1309 (10th Cir. 2017) (same); Johnson v. Alabama, 256 F.3d 1156, 1190–91 (11th Cir. 2001) (same).

been overruled.[13] Some jurisdictions support defining reasonable doubt,[14] and a few mandate it.[15]

The divergent approaches taken across jurisdictions can be traced to the Supreme Court's refusal to require a definition of reasonable doubt.[16] In 1970, the Supreme Court first recognized that the Due Process Clause[17] protects a criminal defendant from conviction unless the government has proven all facts "necessary to constitute the crime with which [the defendant] is charged" beyond a reasonable doubt.[18] Although the Supreme Court has held that jurors can convict a criminal defendant only if they are convinced of the defendant's guilt beyond a reasonable doubt, it has declined to define "beyond a reasonable doubt" because the term "defies easy explication."[19] In *Victor v. Nebraska*,[20] the court held that "the Constitution neither pro-

13 The Fifth Circuit is a particularly noteworthy example. *Compare* United States v. Hunt, 794 F.2d 1095, 1101 (5th Cir. 1986) (encouraging district courts to define reasonable doubt per pattern instructions), *with* Thompson v. Lynaugh, 821 F.2d 1054, 1061 (5th Cir. 1987) (warning against attempts to define reasonable doubt). The existence of these contradictory cases is even more perplexing given the following facts: (1) neither case has been overruled; (2) each case seems equally influential, as *Hunt* and *Lynaugh* have each been cited seventy-five times, *see United States v. Hunt, 794 F.2d 1095: Citing Decisions*, LEXIS+, https://plus.lexis.com/zhome?crid=1cb8fc72-9dec-47f2-b4f8-474b3371378e [https://perma.cc/V62G-6UQ2] (search "United States v. Hunt, 794 F.2d 1095" and click "Citing Decisions" on right); *Thompson v. Lynaugh, 821 F.2d 1054: Citing Decisions*, LEXIS+, https://plus.lexis.com/zhome?crid=1cb8fc72-9dec-47f2-b4f8-474b3371378e [https://perma.cc/V62G-6UQ2] (search "Thompson v. Lynaugh, 821 F.2d 1054" and click "Citing Decisions" on right); and (3) each case has continued to remain relevant for decades, as *Hunt* and *Lynaugh* were last cited in 2020 and 2019, respectively, *see* Allen v. Stephan, No. No. 0:18-cv-01544, 2020 U.S. Dist. LEXIS 51722 (D.S.C. Mar. 25, 2020); Carpenter v. Dir., TDCJ-CID, No. 4:16cv552, 2019 WL 3956140 (E.D. Tex. July 9, 2019).

14 *See, e.g.*, Brown v. Greene, 577 F.3d 107, 113 (2d Cir. 2009) (urging trial courts to use the model jury instruction regarding reasonable doubt); United States v. Rios, 830 F.3d 403, 434 (6th Cir. 2016) ("[D]epartures from pattern instructions regarding the reasonable-doubt standard tend only to muddy the waters further."); People v. Aranda, 283 P.3d 632, 641 (Cal. 2012) (holding that the use of a standard instruction for reasonable doubt is preferred, but not mandatory); State v. Addison, 87 A.3d 1, 86 (N.H. 2013) (per curiam) (instructing trial courts to use a model charge on reasonable doubt, but noting that the usage of such a charge is not "constitutionally required").

15 *See, e.g.*, State v. Portillo, 898 P.2d 970, 974 (Ariz. 1995) (en banc) (instructing every criminal trial court to define reasonable doubt to the jury with a pattern instruction); Ruffin v. State, 906 A.2d 360, 371 (Md. 2006) (requiring usage of a pattern instruction); State v. Bennett, 165 P.3d 1241, 1243 (Wash. 2007) (en banc) (requiring jury instructions to define reasonable doubt, but not requiring any specific wording).

16 *See* Victor v. Nebraska, 511 U.S. 1, 5 (1994) (declining to define reasonable doubt).

17 U.S. CONST. amend. XIV, § 1.

18 *In re* Winship, 397 U.S. 358, 364 (1970). Although not explicitly recognized until *In re Winship*, 397 U.S. 358 (1970), the Court recognized that it had "long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required." *Id.* at 362.

19 *See Victor*, 511 U.S. at 5.

20 511 U.S. 1 (1994).

hibits trial courts from defining reasonable doubt nor requires them to do so."[21] Instead, the Constitution requires that the instructions must, "as a whole, . . . correctly conve[y] the concept of reasonable doubt to the jury."[22] Determining what jury instruction, if any, may best convey the "correct" concept of reasonable doubt is no easy task, yet many believe defining reasonable doubt is the only way to adequately ensure the protections of the standard.[23]

To determine the best way to ensure defendants receive the protection of the reasonable doubt standard, Part I of this Note examines reasonable doubt as understood by judges, reasonable doubt as misunderstood by jurors, and why judges and juries do not have congruent understandings. Part II of this Note analyzes the arguments for and against defining reasonable doubt to the jury. Part II also discusses how the standard in *Victor* fails to provide criminal defendants the protection they are owed under the Due Process Clause and argues that, as a consequence, action must be taken to protect defendants. Part III submits that defining reasonable doubt to jurors is the best way to effectuate the protection of the Due Process Clause and analyzes some proposed model definitions of reasonable doubt. Alternatively, jurisdictions should adopt a consistent approach that increases the probability that jurors apply reasonable doubt correctly. Hence, Part III of this Note examines a novel approach that may effectuate reasonable doubt's protection—a "principle conferring" approach whereby jurors are informed of the principles that underlie reasonable doubt.

I. Evidence of Jury Misunderstanding of Reasonable Doubt

At first glance, the principles that form the basis of reasonable doubt seem clear. The Sixth and Fourteenth Amendments guarantee that defendants are entitled to a "speedy and public trial, by an impar-

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21 *See id.* at 5.

22 *See id.* (second alteration in original) (quoting Holland v. United States, 348 U.S. 121, 140 (1954)).

23 *See, e.g.*, Ruffin v. State, 906 A.2d 360, 371 (Md. 2006) (noting that every defendant in a criminal trial is entitled to a presumption of innocence and finding that a uniform definition of reasonable doubt ensures the presumption of innocence); Irwin A. Horowitz & Laird C. Kirkpatrick, *A Concept in Search of a Definition: The Effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 Law & Hum. Behav. 655, 669 (1996); David M. Mayo, Note, *Reasoning Beyond a Reasonable Doubt*, 16 Trinity L. Rev. 55, 68–69 (2011); Henry A. Diamond, Note, *Reasonable Doubt: To Define, or Not to Define*, 90 Colum. L. Rev. 1716, 1736 (1990).

tial jury"[24] and that no person shall be deprived of "life, liberty, or property, without due process of law."[25] Taken together, these constitutional rights "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[26] The Amendments incorporated centuries of common law into the Constitution that recognized the importance of "guard[ing] against a spirit of oppression and tyranny on the part of rulers," and the value of sustaining "the great bulwark of . . . civil and political liberties."[27] Courts and scholars recognize that the greater the stakes of a trial, the greater the burden of proof should be.[28] As a result, the standard of proof in criminal cases is "beyond a reasonable doubt" because the liberty of the defendant is at stake, whereas in civil cases the burden is a "preponderance of the evidence" because "money is [generally] at stake."[29] In *In re Winship*,[30] Justice Harlan stated that reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[31] Informing jurors that they can convict a defendant only if they are convinced of the defendant's guilt beyond a reasonable doubt is essential because it saddles the jury with the importance of their responsibility and allows verdicts to "command the respect and confidence of the community."[32] The heavy burden is supposed to focus the juror's attention solely on the facts of the case before them, and away from "mere sentiment, conjecture, sympathy, passion, prejudice, [or] public opinion."[33] Ideally, the burden of reasonable doubt serves all these purposes.

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24 U.S. CONST. amend. VI.

25 U.S. CONST. amend. XIV, § 1.

26 Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (alteration in original) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

27 *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

28 *See e.g.*, Richard Seltzer, Russell F. Canan, Molly Cannon & Heidi Hansberry, *Legal Standards by the Numbers: Quantifying Burdens of Proof or a Search for Fool's Gold?*, JUDICATURE, Spring 2016, at 56, 60.

29 *Id.* at 60–61.

30 397 U.S. 358 (1970).

31 *Id.* at 372 (Harlan, J., concurring).

32 *See id.* at 364 (majority opinion).

33 *See* Victor v. Nebraska, 511 U.S. 1, 13 (1994) (quoting trial court jury instructions).

A. Judges' Consistent Understanding of Reasonable Doubt

To determine the success of reasonable doubt, researchers have sought to determine whether reasonable doubt can be understood as a numerical value.[34] Assuming reasonable doubt can be properly quantified as a numerical value, then there must be a correct quantification. Is it necessary for a fact finder to be 100% certain of a defendant's guilt before they convict under the reasonable doubt standard? Alternatively, would 90%, 80%, or even 70% certainty in a defendant's guilt be sufficient to convict under the standard? To answer these questions, researchers have sought to determine judges' understanding of reasonable doubt.[35] Between 2007 and 2012, 124 judges, 121 of whom were state judges, were asked what numerical rate of certainty they would attribute to reasonable doubt.[36] On average, their responses indicated that 90.1% certainty of the defendant's guilt, with a standard deviation of 7%, is sufficient to convict.[37] This first survey was similar to an earlier survey sent to all federal judges in 1981.[38] On average, the judges' responses to that earlier survey indicated that 90.28% certainty is sufficient to convict with a standard deviation of 6.8%.[39] This is just some of the evidence that suggests judges' quantification of reasonable doubt has been stable over the last several decades.[40]

A range of quantification greater than 90% has also been approved in courts.[41] This Note does not suggest that courts should de-

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34 *See* Seltzer et al., *supra* note 28, at 62; C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1325–26 (1982); Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 LAW & SOC'Y REV. 319, 319–20 (1971); Hal R. Arkes & Barbara A. Mellers, *Do Juries Meet Our Expectations?*, 26 LAW & HUM. BEHAV. 625, 631 (2002).

35 *See, e.g.*, Seltzer et al., *supra* note 28, at 62.

36 *See id.*

37 *Id.*

38 *See* McCauliff, *supra* note 34, at 1324–25; Seltzer et al., *supra* note 28, at 62 (showing a 6.8% standard deviation for the McCauliff study).

39 *See* McCauliff, *supra* note 34, at 1332. Of the 255 useful responses received from that survey, 171 judges attributed a numerical rate of certainty to beyond a reasonable doubt. *Id.* at 1325; *see also* Seltzer et al., *supra* note 28, at 62 (including the standard deviation of the McCauliff study).

40 *See* Seltzer et al., *supra* note 28, at 62; *see also* Simon & Mahan, *supra* note 34, at 324 (average certainty sufficient to convict beyond a reasonable doubt given by sample of judges averaged out to 8.9/10).

41 *See* Lord v. State, 806 P.2d 548, 552 (Nev. 1991) (finding prosecutor's suggestion that 90–95% certainty sufficed to convict beyond a reasonable doubt was not prejudicial); Brown v. Bowen, 847 F.2d 342, 345–46 (7th Cir. 1988) (stating the reasonable doubt burden is quantifiable as a 90% or higher certainty of guilt); United States v. Fatico, 458 F. Supp. 388, 406 (E.D.N.Y. 1978) (quantifying beyond a reasonable doubt as about 95% certainty).

fine reasonable doubt through quantification. Such an approach has recently been explored elsewhere,[42] and serious concerns still exist regarding the approach's viability.[43] Instead, in this Note the approximately 90% range of quantification should be viewed as a baseline for reasonable doubt, suggesting any quantification of the burden that is lower than 90% would be incorrect. Given that judges and jurors both use reasonable doubt when serving as the factfinders, a uniform application of reasonable doubt across all jurisdictions would depend on whether jurors understand and apply reasonable doubt similarly to judges—that is, whether they think it requires them to have at least a 90% certainty of the defendant's guilt before they can convict.[44]

B. Juries' Consistent Misunderstanding of Reasonable Doubt

Juries, in contrast to judges, consistently have a different understanding of reasonable doubt, finding its burden to be much lower than courts and commentators do. In a 1996 study, Irwin Horowitz and Laird Kirkpatrick analyzed the verdicts of 480 jury-eligible adults after they were separated into five groups, each made up of eight six-person mock juries, and provided a different instruction of reasonable doubt.[45] The first group was told that proof beyond a reasonable doubt "is proof that leaves you *firmly convinced* of the defendant's guilt" ("FC"); the second group was told it "is proof that leaves you with an abiding conviction, to a *moral certainty*, of the defendant's guilt" ("MC"); the third group was told it "is proof that means that you do not *waver or vacillate* concerning the defendant's guilt" ("WV"); the fourth group was told it is proof that "means that you are not left with a real doubt that the defendant is not guilty" ("RD"); and the fifth and last group was told that "[t]he burden is on the prosecution to convince you beyond a reasonable doubt that the defendant committed the crime," leaving reasonable doubt undefined

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42 *See* Daniel Pi, Francesco Parisi & Barbara Luppi, *Quantifying Reasonable Doubt*, 72 RUTGERS U. L. REV. 455 (2020).

43 First, courts, many of which already discourage defining reasonable doubt, generally oppose any quantification of it to jurors. *See, e.g.*, *Lord*, 806 P.2d at 552 (cautioning parties to "assiduously avoid . . . attempts to quantify the concept of reasonable doubt"). Second, definitions based on quantifying reasonable doubt to jurors may end up reraising similar problems of murkiness the phrase "reasonable doubt" exhibits to begin with (i.e., is "90% certainty" any clearer to a juror than "reasonable doubt"?). For a discussion of effective jury instructions and sources of miscomprehension, see *infra* Section I.C.

44 *See* Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. L. REV. 469, 470–71 (2005).

45 *See* Horowitz & Kirkpatrick, *supra* note 23, at 659.

("UD").[46] At the time of the study, each of those definitions had been found partially or entirely acceptable by courts.[47] Each of the five groups was then assigned to a weak case (one where the evidence was calibrated to favor a not guilty verdict, with the evidence providing for 50% certainty of guilt) or a strong case (one where the evidence was calibrated to provide for 85% certainty of guilt, just below the minimum 90% threshold of reasonable doubt accepted by judges).[48]

At the conclusion of a simulated trial, each juror was asked to provide the "minimum probability (0% to 100%) of the defendant's [guilt that would be sufficient for] the juror [to] vote . . . guilty."[49] The jurors were asked this question before and after deliberations.[50] None of the five groups, in either the strong or weak case, or before or after deliberations, rated the certainty sufficient for them to convict as 90% or above.[51] The first group (FC) provided the highest numerical value, rating the threshold sufficient to find guilt as 75.94% (averaging all scenarios together).[52] The second (MC), third (WV), fourth (RD), and fifth (UD) groups rated the threshold sufficient to find guilt as 57.72%, 58.06%, 66.97%, and 59.25%, respectively.[53] These quantifications are not only far lower than judges' quantifications of reasonable doubt, but they are far more varied.[54] The standard deviation for the first (FC), second (MC), third (WV), fourth (RD), and fifth group (UD) were 10.29%, 7.69%, 8.56%, 12.02%, and 9.52%, respectively.[55]

These results show that these commonly used instructions do not effectively communicate reasonable doubt to jurors.[56] Other studies

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46 *Id.* at 660–61.

47 *See id.* at 661.

48 *See id.* (explaining that the second version of the trial "contained evidence strongly indicating guilt, [but] there remained enough uncertainty that not all mock juries would find the defendant guilty"); *supra* Part I.A.

49 Horowitz & Kirkpatrick, *supra* note 23, at 662.

50 *Id.*

51 *See id.* at 664.

52 *See id.* By "averaging all scenarios together" this author means the average reasonable doubt rating from the sum of the jurors' (1) weak case/predeliberations rating, (2) weak case/postdeliberations rating, (3) strong case/predeliberations rating, and (4) the strong case/postdeliberations rating, all found in Table II. *See id.* at 664. This average is used because Horowitz and Kirkpatrick found no statistically significant difference between the predeliberations and postdeliberations ratings and because all twenty of the original ratings fell below the judicial consensus that reasonable doubt can be quantified as 90% certainty in guilt. *See id.* at 663. Hence, a detailed presentation of the article's findings is unnecessary for this Note. *See id.* at 663–64.

53 *See id.* at 664.

54 *See id.*

55 *See id.* Similar to the quantifications, the standard deviations were also averaged together. *See supra* note 52 (describing "averaging all scenarios together").

56 *See id.* at 669.

have similarly found that many other common jury instructions fail to properly communicate reasonable doubt to jurors.[57] Even a seemingly minor addition to an instruction, such as truth-related language, has been found to "not only reduce[] the government's burden of proof but actually eviscerate[] it."[58]

This evidence has failed to promote the reform necessary to address the consistent misunderstanding of reasonable doubt by juries.[59] This may be due to the concern that such simulations, no matter how realistic, fail to capture the behavior of real juries.[60] Recognizing the soundness of such concern, a group of researchers examined the ability of real juries to recognize the law in cases they decided in 1989.[61] With the consent of a circuit court in Michigan, the researchers examined a pool of 558 citizens during the course of their jury duty on both civil and criminal cases.[62] Unlike prior studies using simulations, these jurors went through voir dire, received formal and informal instructions from judges and attorneys respectively, and were "responsible for the fates of the people on trial."[63] After the termination of their jury service, jurors were mailed a questionnaire that tested their knowledge of the law.[64]

A disturbing trend emerged from the jurors' responses to the questionnaire: just like simulated jurors, real jurors fail to understand the law.[65] Of those who heard criminal cases, jurors correctly under-

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57 *See, e.g.*, Chantelle M. Baguley, Blake M. McKimmie & Barbara M. Masser, *Deconstructing the Simplification of Jury Instructions: How Simplifying the Features of Complexity Affects Jurors' Application of Instructions*, 41 LAW & HUM. BEHAV. 284, 285 (2017) (noting mock jurors typically only understand 50% to 70% of instructions). In England, research shows that jurors find anywhere from 51% to 92% certainty of guilt sufficient to convict, with under a quarter of them believing that reasonable doubt means "pretty likely" or "very likely." *See* Adrian Keane & Paul McKeown, *Time to Abandon "Beyond a Reasonable Doubt*," OUPBLOG (Nov. 1, 2018), https://blog.oup.com/2018/11/time-abandon-beyond-reasonable-doubt/ [https://perma.cc/AVT2-P5PJ].

58 Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICH. L. REV. 1139, 1166 (2015) (finding an instruction that told jurors to search for truth and not doubt increased convictions in a sample group from 16% to 29%).

59 *See, e.g.*, Alan Reifman, Spencer M. Gusick & Phoebe C. Ellsworth, *Real Jurors' Understanding of the Law in Real Cases*, 16 LAW & HUM. BEHAV. 539, 541 (1992).

60 *Id.*

61 *Id.* at 542–43.

62 *Id.* at 543–44.

63 *Id.* at 543.

64 *Id.*

65 *See id.* at 546–47.

stood their duties and the procedural rules less than half of the time.[66] Alarmingly, less than a third of those who served on criminal juries understood that the prosecution had the burden of proof in a criminal trial.[67] Given their consistent confusion, many jurors turned to the judge for assistance.[68] When testing the jurors' understanding of the elements of the crimes charged, the researchers found that jurors who asked the judge for clarification had a correct understanding 54% of the time, whereas jurors who did not ask for assistance were correct 31% of the time.[69] Yet jurors who asked questions about the burden of proof and reasonable doubt did not have a significantly better understanding of those concepts than jurors who did not ask.[70]

Like in other jurisdictions, some of the Michigan judges responded to requests for clarification by simply repeating the previous instructions.[71] Simply repeating instructions helped improve juror understanding by 14% as compared with jurors who did not receive help.[72] Other judges provided supplemental information, often in the form of a written copy of the instructions or a simpler oral explanation of the law.[73] Providing supplemental information improved juror understanding by 36% as compared with the jurors who did not receive help.[74]

In summation, jurors, in simulations and in reality, consistently struggle to understand and apply the law, particularly when it comes to reasonable doubt. Yet not all attempts to clarify the law for jurors are futile. Defining reasonable doubt in reference to being "firmly convinced" or "not left with a real doubt" pushes jurors' understanding of reasonable doubt closer to that of judges'.[75] In contrast, jurors given no guidance find the burden of reasonable doubt to be significantly weaker than those who were adequately instructed.[76] Accompa-

66 *Id.* at 546 (noting that of the ten questions asked to jurors regarding their duties and procedural rules, the jurors answered an average of 4.78 correctly).

67 *Id.* at 546–47.

68 *See id.* at 549.

69 *Id.* In this study "substantive law" refers to the specific instructions for each of the elements of the crimes charged. *See id.* at 544.

70 *See id.* at 549. The source mentions that jurors who asked and received answers to questions about procedural law did not better understand said concepts than jurors who did not ask. *Id.* In this study "procedural law" refers to, among other things, the burden of proof and reasonable doubt. *See id.* at 544.

71 *See id.* at 549.

72 *Id.* at 550.

73 *See id.* at 549–50.

74 *Id.* at 550.

75 *See* Horowitz & Kirkpatrick, *supra* note 23, at 660, 664.

76 *See id.* at 660–64.

nying the issue of definitions themselves, judges can play an important part in clarifying legal concepts for jurors through responses to juror questions, although not all attempts at clarification are successful.[77] Judges should recognize that already confusing legal jargon may not necessarily be made more clear by a bare recitation of the jargon, and should consider a wider range of responses when addressing questions.[78]

C. The Source of Jury Miscomprehension

The knowledge that juries misunderstand reasonable doubt, by itself, does not give rise to an easy solution. Without some understanding of *why* juries misunderstand reasonable doubt instructions, attempts to rectify any confusion might increase it, as previously shown by deficient definitions.[79] An inquiry into the source of jury miscomprehension reveals that a correct application of instructions strongly depends on two factors: (1) juror comprehension of the instructions; and (2) motivation to apply the instructions.

A good instruction is designed to reduce the likelihood that juries "rely on irrelevant information or biases" in reaching their verdicts.[80] The less that jurors understand the instructions, the more they will rely on other factors to decide their verdicts.[81] To determine how well jurors understood instructions, a group of researchers collected "121 independent instructions from 63 articles, 75 studies, and 12,184 participants."[82] Each instruction was coded for five features of complexity: (1) linguistic complexity; (2) conceptual complexity; (3) amount of information; (4) proportion of supplementary information; and (5) presentation format.[83] Two legally trained coders (an author and an independent coder) individually evaluated each instruction to determine if they favored acquittal or conviction, subsequently giving each instruction a "punitiveness" rating.[84]

The analysis apparently confirmed what many legal practitioners and judges thought: the complexity of legal concept, and not the com-

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77 *See* Reifman et al., *supra* note 59, at 549.

78 *See id.* at 549–50; *cf.* Evans v. United States, 883 A.2d 146, 150 n.2 (D.C. 2005) (describing a situation in which a judge repeated the same instruction when met with a jury request for a clearer definition of reasonable doubt).

79 *See* Reifman et al., *supra* note 59, at 549–50.

80 *See* Baguley et al., *supra* note 57, at 284.

81 *See id.* at 285.

82 *Id.* at 287 (citation omitted).

83 *Id.*

84 *See id.* at 294–95.

plexity of language, is the primary cause of miscomprehension.[85] Reducing the number of legal concepts in an instruction is associated with an increase in correct application of the instructions.[86] This positive increase only occurs if the amount of supplementary information is also decreased.[87] The researchers also discovered a previously overlooked, negative effect of simplification—an increase in verdict punitiveness.[88] Mock jurors have previously reported greater ease in rendering a decision when the quantity of information in the trial decreased.[89] Likewise, the authors theorize that jurors are more confident in rendering a punitive verdict when provided meager instructions, independent of the instruction's content.[90] The authors stated that this increase in verdict punitiveness "raises serious concerns for upholding the principles of fair process that underlie the judicial system, as simplifying instructions should not directly affect the punitiveness of verdicts, independently of the instruction content."[91] Hence, a model reasonable doubt instruction cannot focus on brevity at the expense of other features.[92] Instead, a model reasonable doubt instruction must achieve a careful balance of highlighting the key principles of reasonable doubt while reducing supplementary information and conceptual complexity.[93]

In order to correctly apply instructions, a juror must also "accept (agree with) and remember instructions" in addition to comprehending them.[94] Jurors will only pay attention to "and think deeply

85 *Id.* at 296.

86 *See id.* A legal concept "was defined as a definable term or phrase used in a legal context to tell jurors what something is or means." *Id.* at 293. The authors listed "insanity, burden of proof, and preponderance of evidence" as examples. *Id.*

87 *See id.* at 294. Independent key principles were identified in each instruction. *Id.* "An independent key principle was defined as any statement that directly described the process to evaluate the evidence and decide a verdict." *Id.* (emphasis removed). Information not identified as an independent key principle was considered supplementary information. *Id.* Supplementary information was information that summarized the trial, provided factual examples of the key principles, provided statements about why the key principle is provided, or reinforced the key principles. *Id.* The distinction between independent key principles and supplementary information is made clear in the sample instructions listed in the article's appendices. *See id.* at 303–04. The bolded text within those sample instructions denotes independent key principles and the nonbolded text denotes the supplementary information. *See id.*

88 *Id.* at 298.

89 *Id.*

90 *See id.*

91 *Id.*

92 *Id.*

93 *See id.* at 299.

94 Chantelle M. Baguley, Blake M. McKimmie & Barbara M. Masser, *Re-Evaluating How*

about instructions if they have the motivation and ability to do so."[95] Sometimes jurors lack motivation because instructions are presented after trial.[96] Jurors might also lack motivation to attend to instructions when they believe that instructions are unnecessary.[97] Such lack of motivation is common when "jurors have already decided a verdict based on the evidence presented, their common sense and/or personal beliefs, or their own definitions of legal concepts and verdict categories."[98] Jurors often cannot remember instructions because of the quantity and complexity of information provided to them during trial.[99] Providing instructions in written form can alleviate this issue, assuming jurors actually refer to them during deliberations.[100] Some psychologists have posited that special verdict forms—which require the jury to answer a series of questions concerning all factual issues in a case—may best be able to draw attention to reasonable doubt instructions.[101] Furthermore, usage of such forms may reduce the punitiveness of jurors' verdicts.[102]

Jurors must notice, comprehend, and agree with reasonable doubt instructions to correctly apply them. An ideal instruction is useless if no one reads it; hence, special verdict forms, or any other method that focuses jurors' attention on the instructions, should be used in conjunction to ensure that jurors' concentrate on reasonable doubt definitions.[103] A model reasonable doubt instruction must highlight the key principles of reasonable doubt while reducing distracting supplementary information and conceptual complexity.[104] If key principles of reasonable doubt are successfully highlighted, such as reasonable doubt's role in "guard[ing] against . . . oppression and tyranny on the part of rulers,"[105] jurors may agree with reasonable doubt instructions more.[106]

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to Measure Jurors' Comprehension and Application of Jury Instructions, 26 PSYCH. CRIME & L. 53, 58 (2020).

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.*

99 *Id.*

100 *See id.* at 58–59.

101 *See* Baguley et al., *supra* note 57, at 299.

102 *See id.*

103 *See id.*

104 *See id.*

105 Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 2 STORY, *supra* note 27, at 540–41).

106 *See* Stoltie v. California, 501 F. Supp. 2d 1252, 1261 (C.D. Cal. 2007).

In the face of evidence indicating consensus on the weight of reasonable doubt's burden among legal experts, and confusion among jurors, one might believe there is a consensus on how to ensure juries correctly grasp reasonable doubt.[107] Unfortunately, courts and academics still disagree over whether reasonable doubt should be defined to juries in the first place, and when they do agree to define it, there is disagreement over the best definition.[108]

II. The Weak Case for Leaving Reasonable Doubt Undefined

The courts and commentators who oppose defining beyond a reasonable doubt generally ground their opposition in the belief that the phrase "reasonable doubt" is self-explanatory, and that any attempt to define it is both unhelpful and unnecessary.[109] For example, the Second Circuit discourages defining reasonable doubt for fear that definitions create more confusion than the term itself.[110] The Fourth Circuit has held that reasonable doubt has a "self-evident meaning comprehensible to the lay juror" and that defining it is more confusing than illuminating.[111] The Seventh Circuit has held that "beyond a reasonable doubt" is clear because of "the very commonness of the words . . . [and] making the clear more clear has the trap of producing

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107 *See supra* Sections I.A–.B.

108 *See, e.g.*, Steve Sheppard, *The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence*, 78 Notre Dame L. Rev. 1165, 1234 (2003); Victor v. Nebraska, 511 U.S. 1, 5 (1994) ("Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof." (citation omitted)); United States v. Ricks, 882 F.2d 885, 894 (4th Cir. 1989) (repeating its general condemnation of attempts to define the term); State v. Miller, 477 S.E.2d 915, 923 (N.C. 1996) ("Absent a specific request, the trial court is not required to define reasonable doubt, but if the trial court undertakes to do so, the definition must be substantially correct."); Lord v. State, 806 P.2d 548, 552 (Nev. 1991) (cautioning parties to "assiduously avoid . . . attempts to quantify the concept of reasonable doubt," but finding prosecutor's suggestion that 90–95% certainty suffices to convict beyond a reasonable doubt was not prejudicial). *But see, e.g.*, Ruffin v. State, 906 A.2d 360, 371 (Md. 2006) ("We hold that in every criminal jury trial, the trial court is required to instruct the jury on the presumption of innocence and the reasonable doubt standard of proof . . . . Deviations in substance will not be tolerated."); United States v. Fatico, 458 F. Supp. 388, 406 (E.D.N.Y. 1978) (quantifying beyond a reasonable doubt as about 95% certainty).

109 *See, e.g.*, Holland v. United States, 348 U.S. 121, 140 (1954); People v. Brigham, 599 P.2d 100, 117 (Cal. 1979) (Mosk, J., concurring); Barnes v. State, 532 So. 2d 1231, 1235 (Miss. 1988); Note, *Reasonable Doubt: An Argument Against Definition*, 108 Harv. L. Rev. 1955, 1955–56 (1995).

110 *See* United States v. Desimone, 119 F.3d 217, 226 (2d Cir. 1997).

111 *See* Murphy v. Holland, 776 F.2d 470, 474 (4th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986) (mem.).

complexity and consequent confusion."[112] Other courts and commentators fear that defining reasonable doubt would only confuse jurors by defining reasonable doubt in terms that themselves require definition.[113] Moreover, they consider a definition unnecessary because there is no constitutional requirement to define reasonable doubt in the first place.[114]

The case for leaving reasonable doubt undefined depends on (1) the claim that reasonable doubt is self-explanatory and (2) the claim that there is no constitutional requirement to define reasonable doubt. Although these claims have merit, they do not necessarily lead to the conclusion that courts should avoid clarifying the concept of reasonable doubt to the jury. Part II examines the first claim's (A) reliance on flawed case law, (B) failure to account for empirical evidence, and (C) foundation on the fallacy of composition. Section II.D. examines how empirical evidence discredits the key assumption that forms the basis of the second constitutional claim.

A. The Claim that Reasonable Doubt Is Self-Explanatory Relies on Flawed Case Law

The claim that reasonable doubt is self-explanatory is rooted in an early line of cases. In 1880, the Supreme Court noted in *Miles v. United States*[115] that "[a]ttempts to explain . . . 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."[116] Other courts in the early 1900s accepted and repeated this rhetoric when asked to define reasonable doubt.[117] Some modern courts have relied on *Miles* to hold that reasonable doubt is self-explanatory, with-

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112 United States v. Lawson, 507 F.2d 433, 442 (7th Cir. 1974), *overruled on other grounds by* United States v. Hollinger, 553 F.2d 535 (7th Cir. 1977).

113 *See, e.g.*, United States v. Langer, 962 F.2d 592, 600 (7th Cir. 1992) ("Any attempt to define [reasonable doubt] requires use of additional terms which themselves require definition. And that would tend to confuse, rather than clarify, matters for a jury."); Thompson v. Lynaugh, 821 F.2d 1054, 1061 (5th Cir. 1987); State v. Levitt, 2016 VT 60, ¶ 14, 202 Vt. 193, 148 A.3d 204 ("[A]ttempting to define reasonable doubt is a 'hazardous undertaking' . . . ." (quoting State v. Francis, 561 A.2d 392, 396 (Vt. 1989))); Edmund M. Morgan, *Instructing the Jury Upon Presumptions and Burden of Proof*, 47 HARV. L. REV. 59, 63–64 (1933).

114 *See* Victor v. Nebraska, 511 U.S. 1, 5 (1994).

115 103 U.S. 304 (1880).

116 *Id.* at 312.

117 *See, e.g.*, People v. Barkas, 99 N.E. 698, 702–03 (Ill. 1912) ("[I]t is very questionable whether any good purpose is ever served by giving involved and labored definitions of the words 'reasonable doubt' . . . . [There is no] better definition of the term . . . than the words themselves."); Boutwell v. State, 143 So. 479, 483 (Miss. 1932) ("Reasonable doubt defines itself; it therefore needs no definition by the court."). *But see* Bridgeman v. United States, 140 F. 577, 592 (9th Cir. 1905) (noting it may sometimes be proper to explain reasonable doubt to the jury).

out revisiting the soundness of this seminal case.[118] Normally, stare decisis supports those relying on it.[119] In the case of constitutional law, however, stare decisis receives less deference because "correction through legislative action is practically impossible" given the difficulty in amending the Constitution.[120] Stare decisis is most binding in property and contract rights cases because reliance interests are at stake.[121] Cases involving procedural and evidentiary rules, such as the evidentiary burden embodied by the reasonable doubt standard, do not prioritize these same interests.[122]

Modern courts would be wise to reconsider the *Miles* standard because there is strong evidence that reasonable doubt is understood differently today than it was when the *Miles* line of cases were decided. After analyzing reasonable doubt's usage and interpretation through history, Steve Sheppard noted that reasonable doubt has changed over time.[123] He found that the seventeenth century view of reason, which held that "reason" has a fixed, objective meaning, has been questioned by modern academics.[124] He warns that the change in interpretation may have undermined the presumption of innocence by improperly shifting the burden to the defendant.[125] The only thing that has remained consistent since the *Miles* line of cases has been the disagreement between and among courts and commentators over whether to define reasonable doubt.[126] Reasonable doubt's changing meaning is at odds with the protection it was designed to provide to defend-

118 *See, e.g.*, Holland v. United States, 348 U.S. 121, 140 (1954) (citing *Miles*, 103 U.S. at 312); United States v. Campbell, 874 F.2d 838, 843 (1st Cir. 1989) (citing *Miles*, 103 U.S. at 312), *abrogated on other grounds by* Godinez v. Moran, 509 U.S. 389 (1993).

119 *See* Payne v. Tennessee, 501 U.S. 808, 827 (1991) (noting that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

120 *See id.* at 828 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting)).

121 *See id.*

122 *See id.*

123 *See* Sheppard, *supra* note 108, at 1239.

124 *Id.* at 1236.

125 *Id.* at 1239 ("[C]ourts have moved the jurors' goal from a vote for the state if the state can convince them of a fact to a vote for the state unless the defense can convince them of a certain type of doubt.").

126 *See, e.g.*, Miles v. United States, 103 U.S. 304, 312 (1880); H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 10, at 14–15 (1898) (noting that reasonable doubt has had "innumerable attempts" to define it and that many definitions are more confusing than helpful). *But see* Bridgeman v. United States, 140 F. 577, 592 (9th Cir. 1905) (noting it may sometimes be proper to explain reasonable doubt to the jury).

ants.[127] It would be unjust, therefore, to cling to dated precedent that fails to adequately account for reasonable doubt's current usage.

B. Repeated Attempts to Define Reasonable Doubt Demonstrate the Standard Is Not Self-Explanatory

Although some courts and commentators argue that reasonable doubt is self-explanatory,[128] countless other courts[129] and commentators[130] have noted that reasonable doubt is ambiguous. When interpreting the meaning of the word "reasonable," the Supreme Court has found that "what is reasonable depends on the context," suggesting that concepts couched in terms of being "reasonable" are necessarily ambiguous.[131] Most persuasively, in *Victor* the Supreme Court expressly noted that reasonable doubt "defies easy explication."[132] Yet in that same decision, the Court required that jury instructions must "correctly convey[] the concept of reasonable doubt to the jury."[133] This juxtaposition suggests that although there is one correct definition of reasonable doubt, communicating this definition correctly is the true difficulty of the standard. In the wake of *Victor*, the federal appellate and state supreme courts have taken a variety of approaches to ensure that reasonable doubt is correctly conveyed to jurors. One group of jurisdictions discourages defining reasonable doubt, but still permits district courts to choose to define it.[134] A second group, without encouraging or discouraging definition, gives trial courts the dis-

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127 *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (stating that reasonable doubt is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").

128 *See supra* Section II.A.

129 *See, e.g.*, State v. Morey, 36 P. 573, 577 (Or. 1894) (noting that none of the "innumerable efforts" made by the courts to define reasonable doubt have been universally approved); State v. Williams, 828 P.2d 1006, 1017 (Or. 1992) (en banc) (citing *Morey* and noting that its nearly 100-year-old description of the law surrounding reasonable doubt "is a remarkably apt description of [the law's] current confused state"); Roberts v. State, 394 P.3d 639, 642 (Alaska Ct. App. 2017) ("The concept of proof 'beyond a reasonable doubt' may be familiar to lawyers and judges, but even [they] would concede that this phrase is not self-explanatory.").

130 *See, e.g.*, Sheppard, *supra* note 108, at 1231 ("Reasonable doubt . . . suffers from an inevitable ambiguity.").

131 United States v. R. Enters., 498 U.S. 292, 299 (1991) (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)) (finding Federal Rule of Criminal Procedure 17(c), which provides that the court "may quash or modify a subpoena if compliance would be *unreasonable*," is not self-explanatory because the term *reasonable* depends on the context (emphasis added) (quoting FED. R. CRIM. P. 17(c))).

132 Victor v. Nebraska, 511 U.S. 1, 5 (1994).

133 *Id.* at 22 (alteration in original) (quoting Holland v. United States, 348 U.S. 121, 140 (1954)).

134 *See supra* note 9.

cretion to define reasonable doubt.[135] A third group encourages trial courts to define reasonable doubt through pattern instructions.[136] A fourth group requires trial courts to define reasonable doubt in jury instructions.[137] Some jurisdictions even have actively conflicting precedent within their own jurisdiction.[138] The struggle of courts and legal scholars to define reasonable doubt suggests that lay jurors would experience similar confusion, undermining any claim that reasonable doubt is self-explanatory.[139]

C. Fear of Deficient Definitions Should Not Foreclose Attempts to Define the Standard

Some commentators oppose defining reasonable doubt because they view reasonable doubt as inherently ambiguous and view the ambiguity as a positive. Charles Nesson argues that so long as reasonable doubt remains ambiguous, "members of the observing public may assume that they share with jury members common notions of the kinds and degree of doubt that are unacceptable," thereby legitimizing the imposition of punishment.[140] Nesson goes on to argue that precise attempts to define reasonable doubt thereby "undercut its function."[141] Nesson fears that a clearly defined version of reasonable doubt would cause outside observers to closely scrutinize jury verdicts, jeopardizing the finality of their verdicts.[142] Nesson's view seems to focus on only one principle motivating the reasonable doubt requirement—the ability for verdicts to "command the respect and confidence of the community"[143]—to the diminishment of the other principles, the most important being the heavy burden on the government to prove their case.[144] Nesson's view also ignores that jury verdicts, regardless of whether reasonable doubt is defined, would still be scrutinized by an

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135 *See supra* note 12.

136 *See supra* note 14.

137 *See supra* note 15.

138 *See supra* note 13.

139 *See* Ruffin v. State, 906 A.2d 360, 368–70 (Md. 2006).

140 Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1196 (1979).

141 *Id.* at 1197.

142 *See id.* at 1198–99.

143 *Id.* at 1195 n.20 (quoting *In re* Winship, 397 U.S. 358, 364 (1970)).

144 *See, e.g.*, United States v. Lawson, 507 F.2d 433, 443 (7th Cir. 1974) (notifying the jury of the heavy burden of persuasion on the government is "ultimately . . . the real purpose of a defining instruction"), *overruled on other grounds by* United States v. Hollinger, 553 F.2d 535 (7th Cir. 1977).

appellate judge who is required to give deference to the initial verdict.[145]

Although it seems that reasonable doubt cannot seriously be considered self-evident or unambiguous, the fear of confusing juries by defining reasonable doubt is not without merit. Empirical studies have shown some definitions of reasonable doubt appear to confuse juries and increase juries' willingness to convict.[146] One particular definition challenged by studies is the kind of "doubt that would make a reasonable person hesitate to act."[147] This definition has been found to obscure juror's understanding of the certainty required for conviction while also increasing their overall likelihood of convicting, suggesting that such definitions may lead to false convictions.[148] Other definitions have been found to be problematic as their comprehension requires jurors to "perform linguistic acrobatics, juggling multiple double-negatives."[149] In *Victor*, the Supreme Court noted that instructions that inadequately define reasonable doubt violate the Due Process Clause when they "lead the jury to convict on a lesser showing than due process requires."[150] Other studies have shown that definitions emphasizing truth,[151] defining reasonable doubt in terms of moral certainty,[152] or in terms of wavering or vacillating,[153] improperly cause juries to convict defendants where due process should have otherwise protected them.

Although concerns about confusing definitions are certainly valid, it does not follow that *all* attempts at defining the standard must be rejected.[154] To the contrary, evidence shows providing no definition

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145 FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . .").

146 *See, e.g.*, Mandeep K. Dhami, Samantha Lundrigan & Katrin Mueller-Johnson, *Instructions on Reasonable Doubt: Defining the Standard of Proof and the Juror's Task*, 21 PSYCH. PUB. POL'Y & L. 169, 173–74 (2015).

147 *See id.* at 172–74; *see also* United States v. Leaphart, 513 F.2d 747, 750 (10th Cir. 1975) (admonishing the trial court for defining reasonable doubt differently); United States v. Williams, 505 F.2d 947, 947–48, 948 n.1 (8th Cir. 1974) (per curiam) (approving of such a definition, although not requiring it).

148 *See* Dhami et al., *supra* note 146, at 173–74 (noting jurors have vastly different understandings of the certainty required for conviction under this definition versus other definitions of reasonable doubt); Sheppard, *supra* note 108, at 1231.

149 Stoltie v. California, 501 F. Supp. 2d 1252, 1260 (C.D. Cal. 2007).

150 Victor v. Nebraska, 511 U.S. 1, 22 (1994).

151 *See* Cicchini & White, *supra* note 58, at 1166 (finding an instruction emphasizing the juror's focus on truth increased convictions in a sample group from 16% to 29%).

152 Horowitz & Kirkpatrick, *supra* note 23, at 664.

153 *Id.* at 664, 668.

154 Just because some definitions of reasonable doubt are confusing does not mean that all

of reasonable doubt to a jury is just as harmful to due process interests as deficient definitions.[155] If courts and commentators fear that deficient definitions cause jurors to misinterpret reasonable doubt, they cannot ignore that failing to define reasonable doubt leads to the same misinterpretation.[156] Some definitions, although not perfect, do a better job of ensuring defendants receive reasonable doubt's protection.[157]

D. Victor v. Nebraska*'s Holding that Reasonable Doubt Need Not Be Defined Fails to Effectuate the Protection Defendants Are Owed Under the Due Process Clause*

Opponents of defining reasonable doubt point out that a definition is not required under the Constitution.[158] The Supreme Court first held that the Constitution does not require reasonable doubt to be defined in *Victor*.[159] In a separate concurring opinion, Justice Ginsburg noted that "contrary to the Court's suggestion, [the Court has never] held that the Constitution does not require trial courts to define reasonable doubt."[160] In declaring this rule in *Victor*, the Court cited four prior Supreme Court cases for support: *Hopt v. Utah*,[161] *Jackson v. Virginia*,[162] *Taylor v. Kentucky*,[163] and *Holland v. United States*.[164] An examination of these four cases reveals that courts are not constitutionally required to provide a definition of reasonable doubt *under the assumption* that the prosecution's burden of proving guilt beyond a reasonable doubt was properly communicated to the jury.

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of them are. *See* JACOB E. VAN VLEET, INFORMAL LOGICAL FALLACIES § 1.2 (2011) ("The fallacy of composition involves an assumption that the characteristics of the parts are identical to the characteristics of the whole.").

155 *See* Horowitz & Kirkpatrick, *supra* note 23, at 668.

156 *See id.* at 669.

157 *See id.* (noting that jurors found a 75.94% belief in guilt was sufficient to convict under a "firmly convinced" reasonable doubt definition; a 57.72% belief in guilt was sufficient to convict under a "moral certainty" reasonable doubt definition; a 58.06% belief in guilt was sufficient to convict under a "do not waiver or vacillate" reasonable doubt definition; and a 59.24% belief in guilt was sufficient to convict when reasonable doubt was left undefined).

158 *See* Victor v. Nebraska, 511 U.S. 1, 5 (1994).

159 *See id.*

160 *See id.* at 26 (Ginsburg, J., concurring in part and concurring in the judgment) (citations omitted).

161 120 U.S. 430, 440–41 (1887).

162 443 U.S. 307, 320 n.14 (1979).

163 436 U.S. 478, 485–86 (1978).

164 448 U.S. 121, 139–40 (1954); *see Victor*, 511 U.S. at 5 (citing *Hopt*, 120 U.S. 430, *Jackson*, 443 U.S. 307, *Taylor*, 436 U.S. 478, and *Holland*, 348 U.S. 121).

For example, although the Court in *Hopt* stated that in many cases providing no definition of reasonable doubt to the jury may be appropriate, it noted that "in many instances, especially where the case is at all complicated, some explanation . . . of the rule may aid in its full and just comprehension."[165] Likewise, in *Jackson*, the Court noted that "failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt" would always deny a defendant due process, whereas due process is not denied when the jury is "*properly* instructed on the prosecution's burden of proof beyond a reasonable doubt."[166] In *Taylor*, the Court held that the Due Process Clause must be applied to protect against the "dilution of the principle [of] guilt . . . beyond a reasonable doubt" even though no particular phrase or form of words was constitutionally required.[167] In *Victor*, the Supreme Court held that jury instructions violate the Due Process Clause when they "lead the jury to convict on a lesser showing than due process requires."[168] Finally, in *Holland*, the Court held an instruction on circumstantial evidence was "confusing and incorrect" so long as the jury was "properly instructed on the standards for reasonable doubt."[169]

All of these cases assume that despite leaving reasonable doubt undefined, it is possible for the court to effectuate the protection that is required under the Due Process Clause. Yet, as discussed above, leaving reasonable doubt undefined does not guarantee the protection owed to defendants.[170] When reasonable doubt was left undefined, mock jurors thought it acceptable to convict defendants if they were only 59.24% certain of their guilt.[171] In one jurisdiction, less than one third of actual jurors knew that the prosecution bore the burden of proof, even though many of those jurors had just concluded jury service.[172] Under *Jackson*, trial courts are required to ensure that jurors are "*properly* instructed on the prosecution's burden of proof beyond a reasonable doubt."[173] In light of the evidence that current methods do not properly instruct jurors of the prosecution's burden,[174] courts

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

166 *Jackson*, 443 U.S. at 320 n.14 (emphasis added).

167 *Taylor*, 436 U.S. at 485–86 (quoting Estelle v. Williams, 425 U.S. 501, 503 (1976)).

168 *Victor*, 511 U.S. at 22.

169 *Holland*, 348 U.S. at 139–40.

170 *See supra* Sections I.A–.B.

171 *See* Horowitz & Kirkpatrick, *supra* note 23, at 664.

172 *See* Reifman et al., *supra* note 59, at 546–47.

173 Jackson v. Virginia, 443 U.S. 307, 320 n.14 (1979) (emphasis added).

174 *See supra* Sections I.A–.C.

should take steps to increase jurors' comprehension of reasonable doubt.[175]

III. Ensuring Defendants Are Appropriately Protected by Reasonable Doubt

In the wake of the decisions in *In re Winship* and *Victor*, the legal field considered not only whether to define reasonable doubt,[176] but also how to do so.[177] The many attempts to define reasonable doubt have been met with severe disagreement, in many instances causing frustrated courts and commentators to reject any attempt to define the concept.[178] Yet those who aim to define the concept are motivated by the empirical studies that have shown the significant confusion jurors experience with an undefined standard.[179] Reconsidering dated precedent that eschews definitions would allow courts more flexibility to ensure reasonable doubt is properly understood by jurors.[180]

Courts that wish to effectuate the protection of the Due Process Clause but do not wish to define reasonable doubt can reconcile these two views with something everyone can agree on: the principles underlying reasonable doubt.[181] In a principle-conferring approach—informing the jury about the principles underlying reasonable doubt—courts can avoid the confusing language of an imperfect definition. The principles can impress upon the jury the purpose of reasonable doubt as a protection from overzealous prosecution. This Note addresses both solutions below.

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175 This proposal assumes the standard is still workable. It is worth noting that similar problems with reasonable doubt in England have prompted some to advocate abandoning the standard all together. *See* Keane & McKeown, *supra* note 57.

176 *See* Diamond, *supra* note 23, at 1716–17.

177 *See supra* Section II.B.

178 *See, e.g.*, State v. Levitt, 2016 VT 60, ¶ 14, 202 Vt. 193, 148 A.3d 204; United States v. Langer, 962 F.2d 592, 600 (7th Cir. 1992); People v. Brigham, 599 P.2d 100, 116 (Cal. 1979).

179 *See, e.g.*, Horowitz & Kirkpatrick, *supra* note 23, at 664.

180 *See* Sheppard, *supra* note 108, at 1239; Francis C. Dane, *In Search of Reasonable Doubt: A Systematic Examination of Selected Quantification Approaches*, 9 Law & Hum. Behav. 141, 152 (1985).

181 United States v. Pepe, 501 F.2d 1142, 1143 (10th Cir. 1974) ("[W]e recognize that the reasonable doubt standard is a constitutional cornerstone of the criminal justice system."). This "constitutional cornerstone" has many underlying principles. For example, William Blackstone once proclaimed that "the law holds that it is better that ten guilty persons escape than that one innocent suffer." 4 William Blackstone, Commentaries *358. This principle has been affirmed by "[a] multitude of judges, lawyers, and scholars." Pi et al., *supra* note 42, at 457.

A. The Ideal Definition of Reasonable Doubt

A plausible ideal reasonable doubt definition should: "(1) define 'proof beyond a reasonable doubt,' emphasizing the prosecutor's burden; (2) be worded in simple, clear language; and (3) clearly convey the requirement that the jury be subjectively certain of the defendant's guilt in order to convict."[182] Another element is standardization—ensuring consistency and eliminating confusion among "defendants, the state, and jurors alike."[183] Scholars have found an instruction charging the jury to be "firmly convinced" to be better than alternative definitions.[184] Many courts approve such "firmly convinced" definitions.[185]

Looking to satisfy these requirements, the Federal Judicial Center proposed a definition of reasonable doubt that is, in the words of Justice Ginsburg, "clear, straightforward, and accurate."[186] That proposed jury instruction reads as follows:

> [T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that

182 Stoltie v. California, 501 F. Supp. 2d 1252, 1261 (C.D. Cal. 2007).

183 State v. Portillo, 898 P.2d 970, 974 (Ariz. 1995) (en banc).

184 *See* Horowitz & Kirkpatrick, *supra* note 23, at 664.

185 *See, e.g.*, United States v. Conway, 73 F.3d 975, 980 (10th Cir. 1995) (holding that a "firmly convinced" instruction, along with an instruction to acquit if there is a "'real possibility' that the defendant is not guilty, is a correct and comprehensible statement of the reasonable doubt standard"); United States v. Nelson, 66 F.3d 1036, 1045 (9th Cir. 1995); United States v. Taylor, 997 F.2d 1551, 1556–57 (D.C. Cir. 1993).

186 Victor v. Nebraska, 511 U.S. 1, 26 (1994) (Ginsburg, J., concurring in part and concurring in the judgment).

> he is not guilty, you must give him the benefit of the doubt and find him not guilty.[187]

Justice Ginsburg noted that regardless of what the Constitution requires, "the argument for defining [reasonable doubt] is strong" because reasonable doubt is not self-explanatory.[188] Justice Ginsburg noted that the fear of imperfect definitions does not warrant the refusal to define reasonable doubt because the alternative of leaving it undefined is much worse.[189]

Empirical studies have convinced some courts, reinforcing Justice Ginsburg's view. A uniform definition of reasonable doubt has been found to reduce mistrials, freeing up scarce judicial and public resources.[190] As a result, a handful of state supreme courts require criminal trial courts to provide a definition of reasonable doubt to juries.[191] Arizona, in particular, has adopted the "firmly convinced" standard as their uniform definition.[192] Further exploration of the "firmly convinced" standard may be warranted, especially given that it has been one of the only instructions found to significantly increase juror's comprehension of reasonable doubt as compared with no instruction.[193] Although the "firmly convinced" standard has not been shown to get jurors all the way to 90%, getting them to around 75% certainty is significantly better than alternative definitions.[194]

B. Principle-Conferring Approach to Reasonable Doubt Instructions

Even if jurisdictions eschew a mandatory pattern definition of reasonable doubt, jurisdictions can still effectuate the protection of the Due Process Clause through alternative means. So long as the jurors' attention is properly focused on the prosecutor's burden, rather

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187 PATTERN CRIM. JURY INSTRUCTIONS 28 (FED. JUD. CTR. 1987); *accord Victor*, 511 U.S. at 27.

188 *Victor*, 511 U.S. at 26.

189 *See id.*; *see also* Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. REV. 979, 984 (1993) ("I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.").

190 *See* State v. Portillo, 898 P.2d 970, 973 (Ariz. 1995) (en banc).

191 *See, e.g.*, State v. Bennett, 165 P.3d 1241, 1243 (Wash. 2007) (en banc) (requiring jury instructions to define reasonable doubt, but not requiring any specific wording); Ruffin v. State, 906 A.2d 360, 371 (Md. 2006) (requiring usage of a pattern instruction); *Portillo*, 898 P.2d at 973–74 (instructing every criminal trial court to define reasonable doubt to the jury with a pattern instruction).

192 *See Portillo*, 898 P.2d at 974.

193 Horowitz & Kirkpatrick, *supra* note 23, at 668–69.

194 *Id.*

than on the sufficiency of the jurors' own belief of the defendant's innocence, the due process requirements of the burden can be successfully met.[195] Commentators have noted that instructions are most effective when the jurors are provided an explanation of the reasons for such an instruction in the first place.[196] Psychological evidence confirms that a model reasonable doubt instruction would highlight the key principles of reasonable doubt while reducing distracting supplementary information and conceptual complexity.[197] To that end, conferring the principles underlying reasonable doubt onto jurors should be able to ensure jurors apply the standard in conformity with due process more so than the status quo.[198]

After noting some of the problems with the current treatment of beyond a reasonable doubt, a Senior District Court Judge suggested an instruction that contains the essential principles that one would want the jury to hear.[199] His instruction read as follows:

> The burden of proof on the government is beyond a reasonable doubt. Why do we have such a burden? The law prefers to see that guilty persons go free rather than an innocent be convicted.
>
> What is the height of the burden? That will vary. It may depend on your evaluation of the nature of the crime charged, the dangers of letting the guilty go free, the great unfairness in convicting the innocent, and other factors you find appropriate. But you may not change the balance to convict on a lesser burden because of the particular gender, age, religion, place of origin, or other personal characteristics of the defendant.
>
> In general we can all agree that convicting the innocent is a great harm that should be avoided. That is why we have a presumption of innocence about which I've talked to you already. It is also one of the reasons why we require proof beyond a reasonable doubt. A reasonable doubt may arise from the evidence, the lack of evidence, or the nature of the evidence. Were I the trier of fact, I would require a probability of guilt of no less than 95%. But it is for you to decide how high the burden should be as long as it is much

195 *See* Stoltie v. California, 501 F. Supp. 2d 1252, 1260–61 (C.D. Cal. 2007).

196 *See* Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 534 (1992).

197 *See* Baguley et al., *supra* note 57, at 299.

198 *See* Jack B. Weinstein & Ian Dewsbury, *Comment on the Meaning of 'Proof Beyond a Reasonable Doubt*,' 5 LAW PROBABILITY & RISK 167, 172–73 (2006).

199 *See id.*

> higher than the highest civil standard—"clear and convincing evidence," which is itself much higher than "more probable than not."[200]

Applying what we know about the kind of instructions that tend to clarify or confuse jurors,[201] we can modify this instruction to present key principles of reasonable doubt while reducing distracting information:

> The burden of proof on the government is beyond a reasonable doubt. Why do we have such a burden? The law prefers to see that guilty persons go free rather than an innocent be convicted.
>
> You may not convict on a lesser burden because of the particular gender, age, religion, place of origin, or other personal characteristics of the defendant. Under the Constitution a defendant is guaranteed Due Process Rights that protect them from mere sentiment, conjecture, sympathy, passion, prejudice, or public opinion.[202]
>
> We can all agree that convicting the innocent is a great harm that should be avoided. That is why we have a presumption of innocence about which I've talked to you already. It is also one of the reasons why we require proof beyond a reasonable doubt. Before rendering your decision you must remember that reasonable doubt is an essential check on the oppression and tyranny that may result from overzealous government prosecution.[203]

This modification leaves us with an instruction that seems to say very little about reasonable doubt itself. This is intentional, as such an instruction might be palatable to jurisdictions that refuse to define reasonable doubt.[204] Furthermore, this instruction minimizes the amount of judicial fiction that jurors must accept and removes unnecessary supplemental information—such as analogies or lists—that may actually obfuscate the standard rather than clarify it.[205] Some

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200 *Id.*

201 *See supra* Sections I.B–.C.

202 *See* Victor v. Nebraska, 511 U.S. 1, 13 (1994) (quoting trial court jury instructions).

203 *See* People v. Brigham, 599 P.2d 100, 115 (Cal. 1979).

204 *See*, *e.g.*, United States v. Taylor, 997 F.2d 1551, 1557–58 (D.C. Cir. 1993); United States v. Langer, 962 F.2d 592, 599–600 (7th Cir. 1992); United States v. Ricks, 882 F.2d 885, 894 (4th Cir. 1989); Commonwealth v. Hudson, 578 S.E.2d 781, 785 (Va. 2003).

205 *See* Baguley et al., *supra* note 57, at 294; *cf. Brigham*, 599 P.2d at 115 (noting that attempts to define reasonable doubt can fail because of overexplanation). Inclusion of information not identified as an independent key principle, such as information that provided factual examples of the key principles, provided statements about why the key principle is provided, or rein-

traditional reasonable doubt instructions merely tell jurors that they cannot consider the fact that the defendant is on trial as evidence that he might have committed the crime.[206] Many courts only require that jurors are instructed "on the necessity that the defendant's guilt be proved beyond a reasonable doubt."[207] Evidence suggests that such short instruction may increase punitiveness by being too sparse, causing jurors to rely on their personal beliefs when rendering a verdict.[208]

To prevent an unintentional increase in punitiveness,[209] the above instruction could be bolstered by including additional, nonredundant principals. For example, courts may find that telling jurors that reasonable doubt is intended to "guard against . . . oppression and tyranny . . . [from] rulers," and sustain a "great bulwark of . . . civil and political liberties" is more helpful than describing reasonable doubt as moral certainty.[210] Informing a juror that the fear of the potential risk of an erroneous result is what led to the creation of the great burden of proof that is reasonable doubt seems more beneficial than telling them nothing at all.[211] Principles endorsed by the Supreme Court can be used in this regard: "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[212] Instructing the jury that reasonable doubt is their guide away from "mere senti-

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forced the key principles, was found to increase the punitiveness of verdicts. *See* Baguley et al., *supra* note 57, at 296.

206 *See*, *e.g.*, Peter Tiersma, *Asking Jurors to Do the Impossible*, 5 TENN. J. L. & POL'Y 105, 110 (2009) (noting that such instructions are a "bedrock principle in the common-law system of justice").

207 Victor v. Nebraska, 511 U.S. 1, 5 (1994); *accord* United States v. Clay, 618 F.3d 946, 953 (8th Cir. 2010) (per curiam); United States v. Petty, 856 F.3d 1306, 1309 (10th Cir. 2017); United States v. Olmstead, 832 F.2d 642, 646 (1st Cir. 1987) ("[A]n instruction which uses the words reasonable doubt without further definition adequately apprises the jury of the proper burden of proof."); United States v. Hernandez, 176 F.3d 719, 728 (3d Cir. 1999) (holding that a district court is required to instruct the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, but need not define reasonable doubt).

208 *See* Baguley et al., *supra* note 57, at 298; Baguley et al., *supra* note 94, at 58.

209 *See* Baguley et al., *supra* note 57, at 298; Baguley et al., *supra* note 94, at 58.

210 Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting 2 STORY, *supra* note 27, at 540–41); *see* Horowitz & Kirkpatrick, *supra* note 23, at 664 (finding that jurors who received an instruction defining reasonable doubt in terms of moral certainty rated the threshold sufficient to find guilt as 57.72%).

211 *See* Seltzer et al., *supra* note 28, at 60; Horowitz & Kirkpatrick, *supra* note 23, at 664.

212 *In re* Winship, 397 U.S. 358, 363–64 (1970).

ment, conjecture, sympathy, passion, prejudice, [or] public opinion"[213] might be more helpful than telling them to "find the truth."[214]

Undoubtedly, a principle-conferring approach would be informed by a comprehensive list of principles essential to reasonable doubt, as well as empirical studies confirming the efficacy such an approach.[215] In theory, a principal-conferring approach conforms with psychological evidence and offers much more promise than currently unsuccessful approaches.[216] In practice, a reform similar to the principal-conferring approach was, amongst other things, recommended to address issues with the inherent suggestiveness of pretrial eyewitness identifications by the Justice Department in 1999.[217] The jurisdictions that refuse to define reasonable doubt may well be an ideal testing ground for a principal-conferring approach. As evidence has shown, inaction already fails to accomplish due process's goals.[218]

Conclusion

Although reasonable doubt has been an elusive standard, courts and commentators have made progress over the decades in clarifying it to the jury. It is now clear that leaving reasonable doubt undefined is unacceptable. Empirical evidence suggests that the adoption of either a pattern definition of reasonable doubt or a principle-conferring approach is required by jurisdictions to ensure defendants receive the protection owed to them under the Due Process Clause. This Note demonstrates that defining reasonable doubt or informing jurors of reasonable doubt's underlying motivations—the latter of which is an approach that is capable of implementation in any jurisdiction without conflicting with precedent—are two evidence-backed approaches courts can take that are assuredly better than the status quo.

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213 Victor v. Nebraska, 511 U.S. 1, 13 (1994) (quoting trial court jury instructions).

214 *See* Cicchini & White, *supra* note 58, at 1143 (finding an instruction emphasizing the juror's focus on truth increased convictions in a sample group from 16% to 29%).

215 *See* Baguley et al., *supra* note 57, at 299 (emphasizing key principles is linked to increased juror comprehension of instructions).

216 *See id.*; Horowitz & Kirkpatrick, *supra* note 23, at 664 (finding that jurors presented with various reasonable doubt definitions—i.e., moral certainty, not wavering or vacillating, not leaving them with any real doubt—rated the threshold sufficient to find guilt, on average, as 57.72%, 58.06%, 66.97%, and 59.25%, respectively).

217 Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure: Investigative 932 (11th ed. 2018) (stating that the Justice Department published guidelines which recommended providing "[c]autionary instructions to the witness . . . that 'it is just as important to clear innocent persons from suspicion as to identify guilty parties.'" (quoting U.S. Dep't of Just., Eyewitness Evidence: A Guide for Law Enforcement 32 (1999))).

218 Horowitz & Kirkpatrick, *supra* note 23, at 664.