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Instructing on Reasonable Doubt after Victor v. Nebraska: A Trial Judge's Certain Thoughts on Certainty

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"We were permitted to shriek in the tongue of... demons but pure and generous words were forbidden..."

"The mind abhors the vacuum of uncertainty."

I. INTRODUCTION

In his introduction to a recent edition of the C.K. Ogden & I.A. Richards classic on language, The Meaning of Meaning, Umberto Eco writes admiringly of "the legal world" and the "absolute precision [of] the meaning of the terms" it uses. The renowned semiotician, novelist and essayist apparently never studied the communications morass that entangles judges, lawyers and scholars.
who attempt to define, for jurors or for each other, the government’s burden of proof in criminal trials.

In this Article, I examine the United States Supreme Court’s last significant foray into the reasonable doubt thicket, *Victor v. Nebraska.* Victor presented a review of challenges to two separate reasonable doubt instructions, and resulted in a decision that not only failed to provide guidance to trial judges regarding the components of a charge that would unerringly assure the accused’s constitutional right to a verdict grounded on this high standard, but provided appellate courts with a device to sustain convictions based on instructions that confound jurors and effectively lower the state’s burden. This unhappy—and unnecessary—result is attributable to the decision’s principal elements: (1) the Court adhered to its long-standing posture that “the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course,” and 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;” and (2) the Court reiterated its “totality of the charge” approach for the evaluation of instructions on appeal, thereby granting to a reviewing court absolute and standardless discretion to sustain a misleading and confusing jury instruction so long as the charge, at some point, contains language that refers to the state’s burden as proof beyond a reasonable doubt. The practical, day-to-day effect of *Victor v. Nebraska,* then, is that it permits trial judges to keep jurors ignorant about a crucial part of the Court’s criminal jurisprudence and our nation’s trial practice, namely, the unwavering commitment to the concept that proof beyond a reasonable doubt is proof to a virtual “evidentiary certainty.”

The Court’s result was without logical or historical reason. By the time Victor and Sandoval’s petitions arrived at the Supreme

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5. 114 S. Ct. 1239 (1994). On March 22, 1994, the United States Supreme Court rejected the petition of Clarence Victor (No. 92-8894), as well as that of Alfred Sandoval, whose petition in a companion case was addressed in the same opinion (No. 92-9049).
6. Id. at 1243.
7. Id.
8. Id.
Court, earlier decisions had already defined the meaning of proof beyond a reasonable doubt in terms of its audience, impact and function. In *In re Winship*, the Court held that the government’s proof must leave the factfinder’s mind in a “subjective state of certitude” and that proof beyond a reasonable doubt was the equivalent of proof to an “utmost certainty.” *Jackson v. Virginia* may be read as modifying *Winship* slightly with its declaration that in order to find a defendant guilty, the jurors’ minds must be in a “subjective state of near certitude.” In *Cage v. Louisiana*, the Court spoke of “evidentiary certainty,” while in no way deviating from the tenet that the certainty—or uncertainty—is in the juror’s mind. *Victor* neither retreated from nor attempted to modify the holdings in these cases, and thus, *Winship* continues to stand as the principal modern explication of the meaning of proof beyond a reasonable doubt.

Nevertheless, the Supreme Court scuttled a chance to provide trial judges with clear direction regarding the implementation of this constitutionally mandated standard. The Court missed such an opportunity even though it could have made use of its own doctrinal discussions (which stretch back into the nineteenth century),

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11. Id. at 364.
12. Id.
14. Id. at 315 (emphasis added).
16. Id. at 41.
17. See, e.g., Holt v. United States, 218 U.S. 245, 254 (1910) (upholding trial court’s instruction which had stated, inter alia, “[i]f you then feel uncertain and not fully convinced that the defendant is guilty . . . and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit”); Coffin v. United States, 156 U.S. 432, 456 (1895) (“The presumption of innocence) is a maxim which ought to be inscribed in indelible characters in the heart of every judge and jurymen . . . . To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only of absolute certainty.”) (quoting *McKinley’s Case*, 33 How. St. Tr. 275, 506 (1817)); Dunbar v. United States, 156 U.S. 185, 199 (1895) (approving reasonable doubt instruction that had referenced “strong probability” of guilt because instruction had “emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt”); Hopt v. Utah, 120 U.S. 430, 440-41 (1887) (acknowledging with approval Massachusetts cases that spoke of proof to “reasonable and moral certainty” and evidence that can “so satisfy [the jury] as to leave no other reasonable conclusion possible[,]” while suggesting that “complicated” cases may require illustrations such as reference to “conviction upon which the jurors would act in the weighty and important concerns of life”).
scholarly commentary\(^\text{18}\) and modern decisions unequivocally holding that the state's burden is not satisfied unless the factfinder's mind is in a "subjective state of certitude" or at least "near certitude."\(^\text{19}\) The Court's articulated reason for this—"we have no supervisory power over the state courts"\(^\text{20}\)—is, in my view, an uncharacteristic and cloying restraint relative to the implementation of a constitutional protection. The Court, after all, had no difficulty issuing directives to local school districts in order to implement the Equal Protection Clause of the Fourteenth Amend-


\(^{19}\) See Jackson v. Virginia, 443 U.S. 307, 315 (1979) (stating that factfinder needs to "reach a subjective state of near certitude of the guilt of the accused"); In re Winship, 397 U.S. 358, 364 (1970) (ruling that it is necessary for trier of fact to reach "subjective state of certitude of the facts in issue").

\(^{20}\) Victor v. Nebraska, 114 S. Ct. 1299, 1248 (1994). But see Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983) ("Where Congress has not prescribed the appropriate standard of proof and the Constitution does not dictate a particular standard, we must prescribe one."). The United States Constitution, of course, does not make any reference to proof beyond a reasonable doubt or any other standard relative to the prosecution's burden in criminal cases. This does not mean, however, that the Constitution does not mandate this burden for all criminal trials. As Chief Justice Burger wrote in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980):

Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees.

\textit{Id.} at 579-80 (emphasis added).
delineating what must be told to persons taken into custody by law enforcement officials to effectuate the Fifth Amendment’s privilege against self-incrimination, or defining “actual malice” in order to balance the First Amendment protections of media defendants against the reputational interests of public figures bringing defamation actions. Thus, while it is true that the United States Supreme Court has no general supervisory power over state courts, it is equally true that the Court has spoken volumes regarding the applicability and implementation of federal constitutional guarantees in state courts.

Victor afforded the Court an opportunity to declare that the recitation by the trial judge of the phrase “proof beyond a reasonable doubt” must be accompanied with explanatory words indicating that the evidence adduced at trial must satisfy the jurors subjectively to a state of “near certitude” that the defendant committed the crime with which he or she was charged. Instead, the Court implicitly determined that proof beyond a reasonable doubt as a legal standard is readily understood by laypersons and explicitly vested the phrase with talismanic powers by holding that the words “burden of proof beyond a reasonable doubt” or a facsimile, standing alone, can rescue from constitutional infirmity an instruction that contains misleading and confusing words that suggest a lower standard of proof. Indeed, the talismanic powers of the phrase are seen to be so great that even an instruction containing words, and therefore ideas, that have been rebuffed by past decisions can be saved from constitutional infirmity. For example, though

21. See Brown v. Board of Educ., 349 U.S. 294, 300-01 (1955) (requiring local school system to “make a prompt and reasonable start toward full compliance . . . to effectuate a transition to a racially nondiscriminatory school system”).
22. See Miranda v. Arizona, 384 U.S. 436, 471-72 (1966) (holding that individual held for interrogation must be clearly informed of right to legal counsel and right to remain silent).
23. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (stating that “constitutional guarantees require . . . a federal rule prohibit[ing] a public official from recovering damages for a defamatory falsehood” absent proof that statement was made with actual malice—knowledge of statement’s falsity or reckless disregard of whether or not statement was false).
25. In the trials of both Sandoval and Victor, the juries were instructed that the State’s burden was to prove guilt beyond a reasonable doubt. In Sandoval’s matter, the jury was told, inter alia, “this presumption [of innocence] places upon the State the burden of proving him guilty beyond a reasonable doubt.” Id. at 1244. Victor’s jury was instructed, inter alia, that “[t]he 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.” Id. at 1249. Though words tending to lower the standard were employed in each charge, the Supreme Court determined that the juries did not give the words such import. Id. at 1248-51. For a further
“moral certainty” and “substantial doubt” have been excluded from the lexicon considered by the Court to fairly define the standard.\textsuperscript{26} Victor permits both trial and appellate judges to inject these terms so long as somewhere in the charge on the government’s burden the court makes reference to proof beyond a reasonable doubt.

What we in the criminal justice system needed was a \textit{workable} standard. Instead, the Supreme Court served us an unworkable technique in \textit{Victor}. It is sophisticial to say that we have a standard—proof beyond a reasonable doubt—if those words by themselves do not convey to jurors anything about the subjective state of mind they must have after deliberations in order to return a verdict of “guilty.”

I do not share the confidence of Judge Posner and others that a reference to reasonable doubt is self-defining and readily understood by all laypersons.\textsuperscript{27} To the contrary, the Supreme Court has

discussion of the jury instructions used in the cases involving Victor and Sandoval, and the Supreme Court’s analysis of those instructions, see \textit{infra} notes 43-94 and accompanying text.

\textsuperscript{26} \textit{Victor}, 114 S. Ct. at 1248 (“[W]e do not condone the use of the phrase [moral certainty].”). The Court further stated: “We did say in [\textit{Cage v. Louisiana}] that the words ‘substantial’ and ‘grave,’ as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard.” \textit{Id.} at 1250 (citing \textit{Cage v. Louisiana}, 498 U.S. 39, 41 (1990)).

\textsuperscript{27} Judge Posner has written: “[D]eeply entrenched in the popular culture as it is, the term ‘beyond a reasonable doubt’ may be the single legal term that jurors understand best.” United States v. Hall, 854 F.2d 1036, 1044 (7th Cir. 1988) (Posner, J., concurring). Some courts of appeal discourage, or even prohibit, trial judges in their jurisdictions from providing explanations of the State’s burden. See United States v. Adkins, 937 F.2d 947, 950 (4th Cir. 1991) (“This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof.”); \textit{Hall}, 854 F.2d at 1039 (holding that district courts within circuit should make no attempt to define reasonable doubt); United States v. Headspeath, 852 F.2d 753, 755 (4th Cir. 1988) (“We have frequently admonished district courts not to attempt to define reasonable doubt in their instructions to the jury absent a specific request from the jury itself.”); Thompson v. Lynaugh, 821 F.2d 1054, 1060-61 (5th Cir. 1987) (stating that Fifth Circuit disfavors attempts by district courts to define reasonable doubt). Justice Ginsburg criticized this line of cases in her \textit{Victor} concurrence. \textit{See Victor}, 114 S. Ct. at 1253 (Ginsburg, J., concurring) (stating that “the words ‘beyond a reasonable doubt’ are not self-defining for jurors”). A student Comment recommending an explanation bases its position on federal cases as well as decisions of the highest courts of Illinois, Mississippi, Texas and Wyoming which prohibited jury instructions that attempted to define the standard. \textit{See Diamond, supra} note 18, at 1719-20 (stating that at state level, these courts have held that jury instructions defining reasonable doubt “are not required”). Another student author advocates definition by the jury. \textit{See Note, Reasonable Doubt: An Argument Against Definition}, 108 HARV. L. REV. 1955, 1971-72 (1995) (“[I]f the court defines reasonable doubt, responsibility for making the necessary particularized value judgment is improperly transferred from jury to judge. ... Because reasonable doubt is an inherently amorphous term that demands value judgment in its application, the jury is best suited, as a representative body of the community, to determine its
deemed it necessary to explain the state’s burden further than the nominal definition of proof beyond a reasonable doubt; regrettably, the state of affairs in trial courts since Victor is that the so-called Winship standard still need not be expressed, and this, in my opinion, means there is no standard at all. How can a standard mandating "near certitude" for a conviction require that jurors be told only that the state’s burden is "proof beyond a reasonable doubt" with no explanation of what these words mean or whether the standard is an objective one or one that relates to a state of mind. The

meaning."). There is no more authority for this proposition than there is to permit the jury to define the elements of burglary, consideration, agency, holder in due course or any other term of legal art.

28. In the course of its Victor decision, the Court references its holding in In re Winship as enunciating "the Winship standard." Victor, 114 S. Ct. at 1248. Yet, it may be more apt to characterize it as a rule. A rule will generally brook no exceptions, and in the domain of the criminal trial, there can be no valid conviction unless the jury is instructed that the government must prove its case beyond a reasonable doubt. If, as Judge Posner has written, a standard, in contradistinction to a rule, "gives the trier of fact—the judge or jury—more discretion because there are more facts to find, weigh and compare," then the "certitude" and "utmost certainty" declarations of Winship should be placed most accurately under the rubric of rule because the trial judge has no authority to use language that would allow the jury to reach a subjective commitment less intense than the one mandated in Winship. See Richard A. Posner, The Problems of Jurisprudence 44 (1990) (discussing roles of judge and jury). As it is beyond debate that if the defendant can demonstrate to the appellate court that the instruction on proof beyond a reasonable doubt permitted a conviction on something less than "utmost certainty" or "near certainty," then the conviction must be reversed. See Jackson v. Virginia, 443 U.S. 307, 315 (1979) (requiring factfinder to "reach a subjective state of near certitude of the guilt of the accused").

I discuss elsewhere in this Article how different juries viewing the same set of facts may reach contradictory conclusions relative to guilt or innocence, but this is a natural consequence of diverse groups of people examining the same evidence. For a discussion regarding how different juries may view the same facts, see infra notes and text located in Section VI(C). From the jurors’ perspective, the nature of the evidence in terms of materiality, credibility and the like, can necessarily cause different results on the same set of facts, but this does not mean that the judge’s instruction can lawfully deviate from the due process mandate that the jury be instructed on proof beyond a reasonable doubt. Instructions must be given in such a way that a conviction cannot possibly be returned if the jurors’ minds are less than nearly certain of the defendant’s guilt. I refer to the "Winship standard" throughout this Article because that is the label that has been chosen by the Supreme Court. See Victor, 114 S. Ct. at 1243 (stating that issue Court faced was whether jury understood instructions to permit conviction based on proof insufficient to meet Winship standard); Concrete Pipe and Products of Cal. v. Construction Laborers Pension Trust, 508 U.S. 602, 622 (1993) (calling Winship’s reference to "preponderance of the evidence" as "the most common standard in civil law" (emphasis added)); Jackson, 443 U.S. at 315 (stating "the constitutional standard recognized in the Winship case . . . protects an accused against conviction except on 'proof beyond a reasonable doubt'"). In my view, however, there is more in the Winship holding that bespeaks a rule.

29. The law, of course, is settled that proof beyond a reasonable doubt refers to the subjective state of mind of the factfinder. See Jackson, 443 U.S. at 307 (hold-
problem is compounded in those situations where the trial judge recites the burden without explanation and then proceeds to venture a definition of that separate and troublesome concept—reasonable doubt.

My principal objective in this Article is to analyze the holding of Victor v. Nebraska and the practical consequences in the lower courts of the technique it enunciated. Additionally, I will offer a solution in the form of an instruction that clearly expresses the Winship standard while avoiding the quagmire created by Victor. These objectives necessitate subsidiary explorations into reasonable doubt. The doctrine of reasonable doubt is based upon whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”; In re Winship 397 U.S. 358, 364 (1970) (stating that reasonable doubt standard is “indispensable” because it requires that trier of fact reach “a subjective state of certitude”). There has been controversy as to whether the lower standard applicable in civil trials—proof by a fair preponderance of the evidence—reaches to a subjective state of mind or an objective standard. See McBaine, supra note 18, at 247 (“[C]ommonly . . . [the civil instruction] does not, as it should do, direct the attention of the jury to the degree of belief which the proponent of the proposition must produce in their minds before he is entitled to a finding favorable to him.”). This debate has been resolved, at least in Supreme Court jurisprudence, in favor of the subjective state of mind viewpoint. See Concrete Pipe, 508 U.S. at 622 (stating that common standard requires trier of fact “to believe that existence of a fact is more probable than its nonexistence”) (citing Winship, 397 U.S. at 371-72 (Harlan, J., concurring)). I have not encountered any reported decision discussing the criminal standard that does not refer to the factfinder’s state of mind, either directly or indirectly. Three months after deciding Victor v. Nebraska, the Supreme Court explored the topic of burdens of proof and observed that the “meaning generally accepted in the legal community” was derived from evidence treatises dating to the 1930s and 1940s: “The modern authorities are substantially agreed that, in its strict primary sense, “burden of proof” signifies the duty or obligation of establishing, in the mind of the trier of facts, conviction on the ultimate issue.” Office of Workers’ Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251, 2256 (1994) (citing 1 BURR W. JONES, EVIDENCE IN CIVIL CASES 310 (4th ed. 1938)). The degree of “conviction” varies according to the nature of the proceeding and the interest at stake for the litigants. As one noted evidence scholar has observed, the argument that a juror “cannot be more than convinced” must give way to the common experience “that in the ordinary usage of words there may be properly said to be degrees of conviction or persuasion.” Morgan, Instructing the Jury, supra note 18, at 66; see also Underwood, supra note 18, at 1311 (“There is some evidence, then, that factfinders can distinguish among degrees of belief, and that rules about the burden of persuasion affect the outcome of cases.”). For example, I am very certain that I took my children to the park last Sunday, but I am less certain as to which team won the World Series in 1990.

30. For a complete discussion of the Court’s holding in Victor, see infra notes 49-94, 108-21 and accompanying text.

31. For a discussion of how the holding of Victor has been implemented by lower courts and how it should be implemented in the future, see infra notes 95-100, 123-75 and accompanying text.

32. For the text of a jury instruction that clearly enunciates an appropriate reasonable doubt standard, see infra note 297 and accompanying text.
doubt as a notion separate and distinct from the state’s burden, and an examination of some of the Supreme Court’s pre-Victor decisions that put flesh on the bones of the core democratic value that no person shall be convicted or punished unless the state can prove its criminal accusations beyond a reasonable doubt.

It may be helpful if I disclose in advance some of my premises about reasonable doubt. Taken as a phrase signifying a concept, reasonable doubt does not describe the state’s burden of proof. Rather, it is only a component of the description. Reasonable doubt must be viewed as an effect, not a cause; reasonable doubt cannot be quantified. If all this is true—and I will argue in this Article that it is—then the instruction regarding the government’s burden of proof should not attempt to define reasonable doubt, but rather should focus exclusively on describing for jurors the state of mind they must have in order to convict. Put another way, for clarity grounded on what actually takes place during a criminal trial and in jury deliberations, the government’s burden should be explained in terms of what the government’s proof must do to the collective state of mind of the jurors in order for a guilty verdict to be returned, not what it must fail to show in order for the jurors to acquit.

My thesis is that Winship correctly reflected more than two hundred years of our jurisprudence and criminal practice regarding the standard of proof to be employed in criminal trials, and that the instruction to which the defendant is entitled, and which the jury needs, must be plain and comprehensible in defining the state of mind the trier of fact must have to convict. Therefore, I do not explore the methodology or draw upon the language of probability theory to make my arguments or compose the instruction I be-

[33. For a discussion of reasonable doubt and the idea that it is an effect rather than a cause, see infra notes 198-224 and accompanying text.
34. For a discussion of Supreme Court case law that preceded its holding in Victor, see infra notes 176-97 and accompanying text.
lieve trial judges should give to preserve this historic protection. More than twenty-five years ago, the Supreme Court articulated a definition and gave clear meaning to proof beyond a reasonable doubt as a legal standard, yet the Court has continually refused to mandate specific language for its implementation.\textsuperscript{36} As the Court has neither proscribed nor required any particular explanation of the government's burden, I am hopeful that trial judges and lawyers working in the criminal courts will find sensible and persuasive the arguments presented in support of the use of my proposed instruction.\textsuperscript{97}


Professor Tribe's trenchant rebuttal of arguments recommending that mathematicians and statisticians be permitted to testify to juries regarding the odds of the accused being guilty may not be widely known by the trial bench and bar, but his ideas have carried the day. See Tribe, \textit{Trial by Mathematics}, supra, at 1377 ("With the possible exception of using statistical data to shift the burden of production, and perhaps with the further exception of using evidence as to frequencies in order to negate a misleading impression of uniqueness that expert opinion might otherwise convey, I think it fair to say that the costs of attempting to integrate mathematics into the factfinding process of a legal trial outweigh the benefits."). I am not aware of any reported decisions approving or encouraging instructions telling juries that the level of their certainty must be reducible to a specific percentage. On the contrary, there has been stern criticism of the introduction of mathematical models into the deliberation on guilt or innocence. See, e.g., People v. Collins, 438 P.2d 33, 41 (Cal. 1968) (ruling that mathematical techniques "must be critically examined in view of the substantial unfairness to a defendant"); see also Coolidge v. New Hampshire, 403 U.S. 443, 448 n.2 (1971) (characterizing Professor Tribe's first article, \textit{Trial by Mathematics}, supra, as making "very strong argument" against use of probability theory).

That courts have not embraced probability theory in relation to the factfinder's ultimate task has not stopped the occasional judge from opining, in \textit{dicta}, as to the degree of probability of guilt required to satisfy the State's burden in a criminal trial. See, e.g., Brown v. Bowen, 847 F.2d 342, 345-46 (7th Cir. 1988) ("The reasonable doubt standard is much higher [than 0.5], perhaps 0.9 or better."); United States v. Fatico, 458 F. Supp. 388, 406 (E.D.N.Y. 1978) ("If quantified, the beyond a reasonable doubt standard might be in the range of 95+% probable.").


37. The technique of review, such as it is, put forward in \textit{Victor v. Nebraska}, directing appellate courts to determine whether the reasonable doubt burden was referenced in the instruction in such a way that the use of improper verbiage is nullified, injects, both at trial and on review, a considerable opportunity for what Dean Pound called "magisterial caprice." Roscoe Pound, \textit{Mechanical Jurisprudence}, 8 COLUM. L. REV. 605, 605 (1908). Dean Pound lamented that "our case law at its maturity has acquired the sterility of a fully developed system" and supported his criticism with "abundant examples of its failure to respond to vital needs of present-day life." \textit{Id.} at 614. It is a "sterile" jurisprudence indeed that forsakes the lucid elaborations of beyond a reasonable doubt that we find in \textit{In re} Winship and \textit{Jackson v. Virginia}, in favor of a parsing technique that relies on nothing more stable than the personal predilections of appellate judges to determine whether the use of heretofore disfavored phrases lowered the standard the government must meet in order to obtain a conviction. The decision in \textit{Victor} not only permits
The Victor Court framed the “constitutional question” in the petitions of Clarence Victor and Alfred Sandoval as “whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard.”\textsuperscript{38} Considering that Winship clearly held that a guilty verdict could be returned only if the persuasive force of the evidence was sufficient to cause the factfinder’s state of mind to be one of certitude, it is a mystery why the Court in Victor refused to require the words of the Winship standard—or roughly equivalent ones—to be part of an instruction on reasonable doubt. In a separate opinion, Justice Blackmun eloquently stated: “To be a meaningful safeguard, the reasonable-doubt standard must have a tangible meaning that is capable of being understood by those who are required to apply it. It must be stated accurately and with the precision owed to those whose liberty or life is at risk.”\textsuperscript{39}

My focus is on what judges do when instructing jurors about the state’s burden of proof beyond a reasonable doubt. The nature of this subject, or at least one aspect of it, i.e., determining what judges actually do in the courthouses of this country in instructing jurors and how jurors understand those instructions,\textsuperscript{40} is not sus-

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\textsuperscript{38} Victor v. Nebraska, 114 S. Ct. 1259, 1245 (1994).  
\textsuperscript{39} Id. at 1254 (Blackmun, J., concurring in part and dissenting in part). Justice Souter joined Justice Blackmun’s opinion in part. Id.  
\textsuperscript{40} See, e.g., Stephen Adler, The Jury (1995); Norman J. Finkel, Common-sense Justice: Jurors’ Notions of the Law (1995); Harry Kalven, Jr. & Hans Zeisel, The American Jury (1966). For an interesting discussion of the failure of jurors to understand instructions, especially in the context of criminal trials, see Edward J. Imwinkelried & Lloyd R. Schwed, Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics, 23 CRM. L. BULL. 135, 137 (1987), in which the authors argue that jurors’ inadequate comprehension is not due to their lack of intelligence or sophistication, but rather, owes itself to “certain linguistic features in the instructions . . . [and] problematic structural defects in the wording of the instructions.”

For additional support of the proposition that the judge’s phraseology is critical to the jury’s interpretation of a reasonable doubt instruction, see Norbert L. Kerr et al., Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors, 34 J. PERSONALITY & SOC. PSYCHOL. 282, 291 (1976) (discussing results of study indicating “verdicts may indeed be affected by a judge’s instructions concerning reasonable doubt”). The authors conducted an experiment by submitting different definitions of the State’s burden to mock jurors and concluded: “Definitional variations in reasonable doubt significantly affected both individual and group verdicts.” Id. at 282.
ceptible to easy analysis or tabulation. It does seem, at least in those reported cases where the reasonable doubt charge was presented for review to an appellate court, that the word "certainty" rarely, if ever, appears in a challenged instruction. Can we therefore infer that when the jury is instructed that each member's mind must be in a "subjective state of near certainty" to convict that this part of the charge is generally regarded as acceptable by defendants and their attorneys whatever the outcome of the case? There is no way to determine with what frequency "certainty" is used as a component of the criminal burden of proof instruction. It is evident, however, that despite the numerous pronouncements by the Supreme Court about this high standard, the authors of model charges reject this word as used in Winship for reasons they do not reveal.

Indeed there have been a number of studies which have found that the judge's instruction on proof beyond a reasonable doubt will affect the outcome of the trial. See, e.g., The Jury Project of the London School of Economics, discussed in Juries and the Rules of Evidence, 1973 CRIM. L. REV. 208 (1973) (explaining study of empirical "effect on the factfinder of varying the instruction on the weight of the burden"); see also Underwood, supra note 18, at 1309 (discussing Jury Project of London School of Economics). Mock trials were conducted with varying instructions on the burden of persuasion. Id. In one setting, jurors were held to a preponderance of the evidence standard similar to the instruction given in civil cases. Id. at 1310. For these jurors, the conviction rate was the highest. Id. Jurors were also given a typical reasonable doubt instruction. Id. at 1309. Their conviction rate fell below that of the preponderance of the evidence setting. Id. at 1310. Those jurors who received an instruction more frequently given in England—"Before you convict you must feel sure and certain on the evidence you have heard that the accused is guilty"—had the lowest conviction rate. Id. In her critique of the Jury Project of the London School of Economics, Underwood concluded that the result "suggests that jurors can distinguish between at least two levels of certainty, though it also suggests that the standard instruction on reasonable doubt may not adequately elicit that capacity from them." Id.

Judge Walter B. Wanamaker relied on a survey of actual jurors to assess whether legal concepts were being effectively conveyed in jury instructions. Trial by Jury (Report of the Cincinnati Conference), 11 U. CIN. L. REV. 119, 191 (1937) (remarks of Honorable Walter B. Wanamaker). Of the 843 jurors responding to the survey, 156 reported they had the "most difficulty" with "reasonable doubt," but 232 responded that they were most perplexed by "preponderance of the evidence." Id. at 192 n.18. In any event, Judge Wanamaker's conclusion confirms what I believe to be the case: "[W]hen a jury goes wrong, it is more the fault of the judge than it is the jury . . . ." Id. at 192.

Common sense suggests that instructions varying the degree of the proof necessary to convict will yield different results. The above studies merely indicate the obvious.

41. For a discussion of recommended jury instructions in which "certainty" is rarely, if at all, used as a component of the instruction regarding the criminal burden of proof, see infra note 42 and accompanying text.

42. The Federal Judicial Center recommends the following reasonable doubt instruction:

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

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the charge, 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.

FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 28 (1988). The District of Columbia’s often-cited “Red Book” instruction reads as follows:

Reasonable doubt, as the name implies, is a doubt based on reason, a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say that he has an abiding conviction of the defendant’s guilt. It is such a doubt as would cause a reasonable person to hesitate or pause in the graver or more important transactions of life. However, it is not a fanciful doubt nor a whimsical doubt, nor a doubt based on conjecture. It is a doubt which is based on reason. The government is not required to establish guilt beyond all doubt, or to a mathematical certainty or a scientific certainty. Its burden is to establish guilt beyond a reasonable doubt.

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA No. 2.09 (3d ed. 1978) (the “Red Book”). The Eighth Circuit has approved the following instruction:

A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT 80 (Comm. On Model Criminal Jury Instructions within the Eighth Circuit ed., 1992). The Committee Comments following the instruction indicate that “[t]he instruction must be couched in terms of hesitation to act.” Id.

Compare the Ninth Circuit’s pattern instruction which rejects the hesitate to act analogy but also abjures certainty language. The instruction states:

A reasonable doubt is a doubt based upon reason and common sense, and may arise from a careful and impartial consideration of all the evidence, or from lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced that the defendant is guilty.

If after a careful and impartial consideration of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty. On the other hand, if after a careful and impartial consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant guilty.

MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT 31 (1995). The Committee did away with asking jurors to compare the task before them to decisions they would make in their own lives because such decisions “may involve a heavy element of uncertainty and risk-taking and are wholly unlike the decisions jurors ought to make in criminal cases.” Id.

For a discussion of the instruction in Sandoval’s trial, which was drawn verbatim from CALIFORNIA JURY INSTRUCTION—CRIMINAL 2.90, see infra note 47. For a
II. **Victor v. Nebraska**

A. Victor's Bequest: Parsing the Charge

In *Victor*, the Court considered two first-degree murder, death-sentence appeals challenging jury instructions regarding reasonable doubt. The court held that after considering all the evidence, to convict they must have "an abiding conviction, to a moral certainty... of the truth of the charge" (Sandoval). They also noted that "of the guilt of the accused" (Victor). The charges, and hence Sandoval and Victor's concerns, diverged on definitional aspects of reasonable doubt rather than the use of this venerable phrase.


44. Victor, 114 S. Ct. at 1244, 1249.
45. Id. at 1244.
46. Id. at 1249.
47. The jury in Sandoval's case was given the following instruction:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.

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

Id. at 1244. Victor's charge read as follows:

"Reasonable doubt" is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a 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 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 arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state, as distinguished from a
Sandoval argued that the use of the terms “moral certainty” and “moral evidence,” as understood by “modern jurors,” subjected him to a standard of proof lower than that of proof beyond a reasonable doubt. 48 He buttressed his contention with references to contemporary dictionary definitions, which speak of “strong probability”49 and “convincing grounds of probability.”50 The Court, though it favored us with an overview of the evolution of the terms “moral evidence” and “moral certainty,”51 dismissed this claim and directed the unhappy convict’s attention to a statement by Justice Harlan, concurring in In re Winship: “[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened.”52 Thus, the Court reasoned that Sandoval’s concern should not be that his conviction was based on a notion of probability, but whether he was convicted on “something less than the very high level of probability required by the Constitution in criminal cases.”53

Whatever the logical, or even historical, merits of Sandoval’s reliance on contemporary dictionary definitions of “moral certainty,” the Court held that the juxtaposition of that phrase with “the abiding conviction language, impress[ed] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused.”54 Additionally, the Court held that the charge was saved from what may have been a fatal defect, had the term “moral certainty” stood alone, by the trial judge’s reference to the obligation of the jury to compare and consider all the evidence.55

The Court gave short shrift to Sandoval’s accompanying claim that the charge misled the jury into applying a lower standard by instructing that “a reasonable doubt is ‘not a mere possible
doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Id. at 1249.
48. Id. at 1247.
49. Id. (citing WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY 1168 (2d ed. 1979) (“based on strong probability”)).
50. Id. (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1249 (2d ed. 1983) (“resting upon convincing grounds of probability”)).
51. Id. at 1245-48.
52. Id. at 1247 (citing In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).
53. Id.
54. Id. (quoting Jackson v. Virginia, 443 U.S. 307, 315 (1979)).
55. Id. at 1248. The Court noted that the jury was unlikely to misunderstand the term “moral certainty” as “disassociated from the evidence in the case.” Id.
 doubt." The Court stated that it saw nothing "wrong with that part of the charge," and then interred this portion of Sandoval's argument with reference to one of the law's most famous tautologies: "A 'reasonable doubt,' at a minimum, is one based upon 'reason.'" A non sequitur follows the tautology: "A fanciful doubt is not a reasonable doubt."

The Court bolstered its reasoning by referring to an argument raised by Sandoval's attorney who told the jury: "'[A]nything can be possible. . . . [A] planet could be made of blue cheese. But that's really not in the realm of what we're talking about.'" May a trial judge fairly question the relevance of a comment by counsel in final argument to an appellate court's consideration of the constitutionality of a jury instruction? I am not aware of any jurisdiction

56. Id. (citing Cage v. Louisiana, 498 U.S. 39, 40 (1990)).
57. Id. (referring to jury charge in Cage, which "included an almost identical reference to 'not a mere possible doubt' ").
58. Id. (quoting Jackson, 443 U.S. at 317).
59. Id.

60. Id. (alterations in original) (quoting Sandoval App. No. 92-9049, at 79) (excerpt from closing argument). The Court appears to suggest that a challenged instruction may be saved if counsel correctly distinguishes reasonable doubt during closing argument. Id.

61. In the past, the Supreme Court brought confusion to an issue that I believe most members of the bench and bar had thought was beyond debate. In Taylor v. Kentucky, 436 U.S. 478 (1978), the Court ruled:

Petitioner's right to have the jury deliberate solely on the basis of the evidence cannot be permitted to hinge upon a hope that defense counsel will be a more effective advocate for that proposition than the prosecutor will be in implying that extraneous circumstances may be considered. It was the duty of the court to safeguard petitioner's rights, a duty only it could have performed reliably. Id. at 489 (emphasis added). Compare this language with that used by the Court in Kentucky v. Whorton, 441 U.S. 786 (1979):

In short, the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under Taylor, such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial. Id. at 789 (emphasis added).

Given this ambiguity, if not inconsistency, regarding the role of argument by counsel in setting forward the controlling law to be followed by the jury, the Victor Court was hardly breaking with a tradition of precise analysis in creating a regime that effectively permits the jury to pick and choose which portions of the judge's reasonable doubt charge to accept and which to reject. Professor Allen has written: "It is not quite fair, however, to attribute to the Supreme Court all the difficulties of the constitutional rules governing the process of proof in criminal cases," as he contends that post-Winship litigation "soon highlighted the potential intersection of jury instructions with the reasonable doubt requirement . . . [and t]he resulting crush of cases forced the Court to make some pronouncements without its normal opportunity to let relatively new issues permeate upwards to it." Allen,
in which the judge does not instruct the jurors that the comments of counsel are not evidence and that the judge, not the lawyers, will define and describe the law the jurors must apply to the facts in evidence.62

Having rebuffed Sandoval, the Supreme Court separately examined Victor's petition, which presented a logically and legally stronger claim because the Nebraska trial judge had charged the jury with language expressly condemned in Cage v. Louisiana.63 In Cage, a Louisiana trial judge had "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt.'"64 The Supreme Court overturned Cage's first-degree murder, death-sentence conviction, and stated "that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard."65 The Court reasoned that the trial judge's use of these terms could not be saved because the judge had also instructed the jury that it needed to be convinced of Cage's guilt to a "moral certainty."66 Without elaboration, Cage had obliquely presaged the Court's later disapproval of the term "moral certainty" by declaring

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supra note 18, at 325 n.16. As I argue in this Article, my conclusion is the opposite of Professor Allen's. Problems in the area of reasonable doubt instructions have arisen not due to an unmanageable onslaught of "new" issues, but rather, due to the Supreme Court's refusal to provide comprehensible guidance for the implementation of the standard it defined with such clarity in Winship.

62. See FED. R. CRIM. P. 30 (stating that counsel "may file written requests that the court instruct the jury on the law as set forth in the requests. . . . The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury."). Rule 30 explicitly gives a court the authority to instruct the jury either before or after closing arguments or at both times, and so, effectively gives the court the opportunity to have the last word. Id.


64. Id. at 41.

65. Id.

66. Id. at 40. The trial justice's charge provided in relevant part: "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty."

Id. (quoting State v. Cage, 554 So. 2d 39, 41 (La. 1989), rev'd, 498 U.S. 39 (1990) (per curiam)).
that its meaning was not synonymous with that of the presumably correct "evidentiary certainty." 67

To the undoubted surprise and chagrin of Victor and his counsel, the majority recast what had appeared to be the clear holding of Cage. "[W]e did not hold [in Cage] that the reference to substantial doubt alone was sufficient to render the instruction unconstitutional." 68 The Victor Court declared that the constitutional flaw in the Cage charge was the proximity within the body of the instruction of the terms "substantial doubt" and "grave uncertainty." 69 When we revisit Cage, we see that the Supreme Court assigned "grave uncertainty" and "actual substantial doubt" synonymous meanings and then concluded that the trial judge had improperly equated them both with "reasonable doubt." 70 The use of those two terms in conjunction with "moral certainty" created a fatal juxtaposition. 71 Additionally, the Victor majority held that the trial judge in Cage had used the word "substantial" to convey "the sense of existence rather than magnitude of the doubt." 72

A closer look at the portions of the Cage and Victor instructions on which the Court focused during its dissection exercises reveals how fluid—and standardless—the Court's methodology has become. In Victor, the challenged language was that "[a] reasonable doubt is an actual and substantial doubt arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the state." 73 In Cage, the trial judge had said reasonable doubt "must be such doubt as would give rise to a grave uncertainty, [i.e., an actual substantial doubt] raised in your mind by reasons of the unsatisfactory character of the evidence or

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67. Id. at 41. Justice Blackmun later quoted this distinction with approval. See Victor v. Nebraska, 114 S. Ct. 1239, 1255 (1994) (Blackmun, J., concurring in part and dissenting in part) ("Both instructions [Sandoval's and Victor's] equate 'substantial doubt' with reasonable doubt, and refer to 'moral certainty' rather than 'evidentiary certainty.'").

68. Victor, 114 S. Ct. at 1250. The Cage Court held that "the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." Id. (quoting Cage, 498 U.S. at 41).

69. Id. The Court feared that this would lead to "an overstatement of the doubt necessary to acquit." Id.

70. Cage, 498 U.S. at 41. The Court in Cage determined that "grave uncertainty" and "actual substantial doubt" are commonly understood to "suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." Id.

71. Id.

72. Victor, 114 S. Ct. at 1250.

73. Id. at 1249.
lack thereof."

How and on what articulable and principled bases the Court concluded that the Victor charge spoke only of the existence of reasonable doubt while the Cage charge spoke of magnitude is a question that in my opinion cannot be answered by a reading of the texts. The Court has set adrift trial judges and advocates who have nothing but their common sense and language skills to determine the ratio decidendi of appellate decisions.

If one accepts my contention that the Cage and Victor charges are not significantly dissimilar regarding their pronouncements on "substantial doubt" and the imperative that the jury evaluate all the evidence, or lack of evidence, then the linguistic legerdemain of the Supreme Court becomes a matter of life and death: Tommy Cage left death row because the judge at his trial omitted the words "abiding conviction" from his charge, but Clarence Victor remained under sentence of death because his judge inserted those words in front of "to a moral certainty." This disparate, not to mention fatal, outcome becomes even more incomprehensible because the Victor majority stated early on in its opinion that "moral certainty" in Chief Justice Shaw’s famous instruction from Commonwealth v. Webster "meant a state of subjective certitude about some event or occurrence," and that the term did not "mean[ ] anything different today than it did in the [nineteenth] century." The concession by the Court that "moral certainty," standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt,' seemingly compounds the problem. This is evidenced by the opinion of the Court in Victor that confusion could be eliminated and the guilty verdict saved by the use of


75. For a cogent exposition of this topic, well worth periodic readings by judges, advocates and observers of the trial process, see Arthur Goodhart, Determining the Ratio Decidendi of a Case, 40 YALE L.J. 161 (1930) (outlining rules for determining holding of case).

76. See Cage, 498 U.S. at 40 (analyzing jury instruction that stated "[w]hat is required is not absolute or mathematical certainty, but a moral certainty" (quoting Cage, 554 So. 2d at 41)).

77. See Victor, 114 S. Ct. at 1249 (quoting jury instruction stating that reasonable doubt is "such a 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").

78. 59 Mass. (1 Cush.) 295 (1850).

79. Victor, 114 S. Ct. at 1246 (citing Webster, 59 Mass. at 320).

80. Id. (noting that contemporary dictionaries define "moral evidence" consistently with its original meaning).

81. Id. at 1247.
the talismanic “abiding conviction” language.82 Thus, the problem-
atic “substantial doubt” and “moral certainty” language will not
cause a jury instruction to be rejected if the jury is told that each
member’s state of mind must be, in effect, “settled and fixed.”83

In my view, the Supreme Court reached an absurd and unnec-
essary result by declaring that the jury may be told that its members
can have an abiding, settled state of mind regarding a standard that
many jurors “might not . . . recognize[ ] . . . as a synonym for ‘proof
beyond a reasonable doubt.’”84 Impressing the jury with the need
for certainty about an unclear, if not defective, standard does noth-
ing to transform the confusing or improper standard into the con-
stitutionally mandated one. This illogic respecting the propinquity
or nonpropinquity of important phrases determining the outcome
of what should be a thoughtful due process analysis was a focal
point of Justice Blackmun’s concurrence and dissent.85 Comparing
the Cage instruction with the Victor instruction, Justice Blackmun
rejected the majority’s conclusion “that the ‘moral certainty’ lan-
guage is sanitized by its context.”86 Additionally, Justice Blackmun
criticized the majority for disregarding its own precept demanding
analysis of the instruction as a whole and for engaging in parsing.87

82. See id. (“Although . . . moral certainty is ambiguous in the abstract, the rest
of the instruction given . . . lends content to that phrase. The jurors were told that
they must have an abiding conviction, to a moral certainty, of the truth of the
charge.”).

83. Id. (“‘The word ‘abiding’ here has the signification of settled and fixed, a
conviction which may follow a careful examination and comparison of the whole
evidence.” (quoting Hopt v. Utah, 120 U.S. 430, 439 (1887))).

84. Id.

85. See id. at 1254 (Blackmun, J., concurring in part and dissenting in part)
(“When reviewing a jury instruction that defines ‘reasonable doubt,’ it is necessary
to consider the instruction as a whole and to give the words their common and
ordinary meaning.”).

86. Id. at 1256 (Blackmun, J., concurring in part and dissenting in part).

87. See id. at 1258 (Blackmun, J., concurring in part and dissenting in part)
(“[C]hallenged jury instructions must be considered in their entirety.”). “Rather
than examining the jury instruction as a whole, the majority parses it, ignoring the
relationship between the challenged phrases as well as their cumulative effect.” Id.
(Blackmun, J., concurring in part and dissenting in part). While my central con-
cern is with the Supreme Court’s holding that appellate courts must scrutinize
the reasonable doubt instruction to determine if proper or improper language was
followed by the jurors, Victor v. Nebraska can also be read more narrowly as a vali-
dation of the specific charges used at the trials of Victor and Sandoval. If this latter
approach is adopted by either the cautious judge who is apprehensive about re-
versal or the cynical judge who is reluctant to extend the full protection of due pro-
cess to the defendant, then these charges, or similar charges—acknowledged by
the Supreme Court to have been rejected by other courts as “violation of the Due
Process Clause,” Victor, 114 S. Ct. at 1243—will continue to work their mischief.
Fifty years before Victor was decided, Professor Edmund M. Morgan, a distinguished scholar of the law, noted that appellate judges, with their penchant for parsing and their unstated assumption that jurors would engage in a word-by-word examination of the semantics and syntax of the charge to garner its meaning, would pressure trial justices to tailor their instructions, in both substance and form, to the predilections of an appellate court rather than to the jury seated only several feet away from them at the trial, resulting in "charges so complex that no ordinary body of men could hope to understand them." Professor Morgan's assignment of the blame for confusing, if not incomprehensible, jury charges to the "microscopic examination" and critique of instructions by appellate courts can be applied in many areas of the law, but nowhere is it more appropriate than with the charge regarding proof beyond a reasonable doubt. Trial judges, though they have not been given much direct guidance on specific language, have been told clearly that a faulty reasonable doubt charge can never be harmless error.

88. Professor Morgan stated:
There can be little doubt that some appellate courts adopt a totally unrealistic attitude in construing instructions to the jury, and assume that jurors get not only the general impression which the words convey, but that they make a microscopic examination of each instruction in the light of the strict rules of grammar and rhetoric, with the result that trial judges in self-defense are compelled to formulate charges so complex that no ordinary body of men could hope to understand them. Morgan, Instructing the Jury, supra note 18, at 59-60 n.1. Professor Morgan stated that "it ought not to be difficult for the judge to state the applicable rules in plain and simple language." Id.

The inability of either juries or appellate courts to parse a jury charge on reasonable doubt and extract a constitutionally valid instruction from a text that contains misleading as well as proper language appears to have motivated Justice Blackmun's partial dissent in Victor v. Nebraska. See Victor, 114 S. Ct. at 1258 (Blackmun, J., concurring in part and dissenting in part) (criticizing majority for failing to "[c]onsider[ ] the instruction in its entirety" and noting that "[r]ather than explain [ ] the jury instruction as a whole, the majority parses it, ignoring the relationship between the challenged phrases as well as their cumulative effect."). This appears also to have been a central concern of Justice Frankfurter in Bollenbach v. United States, 326 U.S. 607 (1946), in which he stated that a jury can draw appropriate conclusions only where the judge assumes his responsibility of providing clear statements of relevant legal criteria while removing any difficulties with "concrete accuracy." Id. at 612-14. For a further discussion of Justice Frankfurter's opinion regarding the clarity of jury instructions, see infra notes 92, 236 and accompanying text.

89. Morgan, Instructing the Jury, supra note 18, at 59 n.1.

The Supreme Court's decision in Victor v. Nebraska skews and muddles the roles of the trial judge, the jury and the reviewing court because it attributes to the jury the knowledge and ability to heed those words of the instruction that properly articulate the standard and to disregard any words that tend to lower the constitutional protection. Paradoxically, trial judges are, in effect, granted permission to give a confusing and misleading instruction regarding proof beyond a reasonable doubt, because a reasonable doubt charge that contains language previously labeled "confusing" can be saved by the reviewing court's determination that the charge, taken as a whole, could not have misled the jurors. Concomitantly, appellate judges are bestowed a perspicacity they can never possess, for the jury's deliberations, including discussions about the trial judge's charge on the state's burden, will remain forever hidden from them.

The linguistic exercise the majority undertook in Victor v. Nebraska and passed on to lower courts by example and directive would have been unnecessary had they insisted that the clear language of Jackson v. Virginia and In re Winship be employed to explain the government's burden.

B. The Double Bind: Forget the Record You Know

Having anointed juries and appellate courts with powers they can never possess—the powers to sift out conflicting and contradictory declarations of law and to read minds—the Victor Court invites yet another problem by its adamantine insistence that it need only

91. See Victor, 114 S. Ct. at 1251 ("[T]aken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury." (quoting Holland v. United States, 348 U.S. 121, 140 (1954))).

92. This approach to the trial and review of criminal cases was repudiated sharply in an opinion of Justice Frankfurter:

A conviction ought not to rest on an equivocal direction to the jury on a basic issue. . . . The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks.

Bollenbach, 326 U.S. at 613-14.

93. 443 U.S. 307, 316 (1979) (upholding In re Winship by reaffirming "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense").

94. 397 U.S. 358, 364 (1970) (holding 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").
furnish lower appellate courts with a technique rather than a standard to utilize in scrutinizing the reasonable doubt charge.\(^{95}\) We know that an appeal that challenges the constitutionality of the trial judge's charges on proof beyond a reasonable doubt cannot be subjected to harmless error analysis.\(^{96}\) Accordingly, the appeal must be viewed within only its own four corners and may not be measured against underlying facts developed at trial and now reposing in the record. Nevertheless, it is just as true in the world of appellate practice that a defendant's appeal rarely, if ever, raises only the issue of the constitutional propriety of the judge's charge. Rather, the defendant submits a number of claims that reference the evidence, such as a review of the trial judge's denial of motions for judgment of acquittal or a new trial, not to mention error claimed regarding the admission of evidence. Thus, without a clear standard insisting upon the use of "near certitude" or an equivalent, appellate judges, who will inevitably become familiar with the trial record in the course of their review, are asked to disregard the underlying facts during their parsing exercise, a psychological exercise not unlike that experienced by the naughty child directed to stand in the corner and not think of elephants.

As surely as the child will think of an elephant while struggling not to think of one, appellate judges will be unable to disregard the record evidence, particularly if it was the subject of briefing and oral argument, because issues other than the reasonable doubt charge were before the court on appeal. The temptation to sustain the constitutionality of a dubious charge will assuredly be next to irresistible if the underlying evidence pointing to guilt is clear, even horrific, especially when the justification can be a tacit one, known

\(^{95}\) Victor, 114 S. Ct. at 1248 (noting "we [the Court] do not condone the use of the phrase" moral certainty, "[b]ut we have no supervisory power over the state courts").

only by the reviewing court. In United States v. West, the Eighth Circuit, on an appeal based on an erroneous jury instruction, looked to the entire proceedings of the trial and affirmed the conviction, stating: "[T]he context of the trial also makes unlikely a determination that a jury applied less than a reasonable doubt standard."

My approach may seem like an unwarranted or unfair cynicism, but I prefer to characterize it as a realistic critique of the "doubtful omniscience of appellate courts." My quarrel is cer-

97. For reasons it did not disclose, the Court in Victor elaborated on the factual background of the multiple murders for which Sandoval had been convicted and did the same regarding Victor's conviction for the fatal stabbing of an elderly woman, noting that a lower court had found "the murder in this case ... especially heinous, atrocious, and cruel." Victor, 114 S. Ct. at 1249. These references were superfluous to the Court's analysis, which was confined to the language of the instructions. Nevertheless, this unnecessary recitation of the grizzly factual backgrounds of the crimes may be contrasted with the more restrained approach of Cage v. Louisiana, 498 U.S. 39 (1990), where in that reasonable doubt instruction challenge the Court succinctly stated that the "[p]etitioner was convicted in a Louisiana trial court of first-degree murder and was sentenced to death," sparing us the irrelevant details. Id. at 40. As the Court has noted, "the most important element of the Sixth Amendment is the right to have the jury, rather than the judge, reach the requisite finding of "guilty." Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.

98. See id. at 752 ("Beginning with the voir dire and continuing through the final jury charge, the district court repeatedly and accurately described the government's burden of proof as being beyond a reasonable doubt.").

99. See id. at 752 ("Beginning with the voir dire and continuing through the final jury charge, the district court repeatedly and accurately described the government's burden of proof as being beyond a reasonable doubt.").

100. This cheerfully mordant phrase is taken from Charles A. Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751 (1957) (examining increased power of appellate courts). To put Wright's phraseology another way, after reviewing a trial record and finding it to contain sufficient evidence to warrant rejection of a defendant's challenge to a denial of a motion for acquittal or a motion for a new trial, it will be a strong and focused appellate bench that puts its knowledge of the facts aside and determines that independent of actual innocence a conviction is to be overturned using the Victor technique. See United States v. Olano, 507 U.S. 725, 736-37 (1993) ("An error may seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936))). "Conversely, a plain error affecting substantial rights does not, without more, satisfy the Atkinson standard, for otherwise the discretion afforded by Rule 52(b) would be illusory." Id. at 737. "[T]he standard laid down in United States v. Atkinson, [was] codified in Federal Rule of Criminal Procedure 52(b)." Id. at 736 (quoting United States v. Young, 470 U.S. 1, 7 (1985)). Rule 52(b) states that
tainty not with that portion of the Court's reasonable doubt juris-
prudence holding that harmless error review cannot save a trial that
culminated with a charge lowering the state's burden for convic-
tion. Rather, in my view, it is unrealistic to expect reviewing courts
armed with a technique but without a commitment to a meaningful
and articulated standard to disregard what they know was presented
as evidence at the trial.

Chief Judge Jon O. Newman of the Second Circuit has criti-
cized his fellow federal judges for having "failed to take the [reason-
able doubt] standard seriously as a rule of law against which the
validity of convictions is to be judged."\(^{101}\) He contends that Ameri-
can courts generally refuse "to take this standard seriously and ap-
ply it conscientiously as a rule of law,"\(^{102}\) and "that courts must do
more than verbalize the 'reasonable doubt' standard in jury instruc-
tion; they must make that standard an enforceable rule of law."\(^{103}\)

One approach Chief Judge Newman suggests to ensure that the
due process requirement of *Winship* is realized in the court-
room is to "make the 'reasonable doubt' instruction clearer to ju-

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[plain errors or defects affecting substantial rights may be noticed although they
were not brought to the attention of the court.] Fed. R. Crim. P. 52(b).

(1993). In a critique of the practices of appellate judges that was restrained but
unsparing, Chief Judge Newman defined his thesis: "I believe that the constitu-
tional jurisprudence of this Nation has accepted the 'reasonable doubt' standard
as a verbal formulation to be conveyed to juries in jury charges but has failed to
make the standard seriously as a rule of law against which the validity of convictions
is to be judged." Id. He bemoaned the failure of judges to explain the standard to
juries and took issue with those appellate courts that proscribe definition. Id. at
984. "[W]e have insisted that juries be instructed that they must be persuaded
beyond a reasonable doubt, but we have not insisted on meaningful observance
of this standard as a rule of law for testing the sufficiency of the evidence." Id. at 989.
This being so, Chief Judge Newman necessarily concluded: "Appellate courts
rarely reverse a trial court's ruling that the evidence is sufficient to permit a
finding of guilt beyond a reasonable doubt." Id.

Chief Judge Newman's focus was upon the reasonable doubt standard being
examined by appellate courts in those circumstances where consideration of the
evidence at trial is required, such as appeals from denials of motions for a new trial
or judgments of acquittal, but his observations on the lack of commitment to any
articulable standard resembling the "certitude" declarations of *Winship* and *Jackson*
are apposite for the considerations of this Article. "The Court should have stayed
with only a requirement of 'near certitude.'" Id. at 984.

Chief Judge Newman's article was available to the Supreme Court when it
considered *Victor v. Nebraska*, but it was cited only by Justice Ginsburg, and then
only for Chief Judge Newman's criticism of the "hesitate to act" standard, and a
well-turned comment on the controversy of whether or not to explain the criminal
standard to the jury. See *Victor*, 114 S. Ct. at 1252-53 (Ginsburg, J., concurring) ("I
find it rather unsettling that we are using a formulation that we believe will be-
come less clear the more we explain it.").

103. Id.
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rors by focusing their attention *solely* on the need to be sure of guilt to a high degree." 104 As a workable example, Chief Judge Newman pointed to the "key sentence" of a model charge drafted by the Federal Judicial Center: "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt." 105

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104. *Id.* at 991 (emphasis added). Remaining mindful that Chief Judge Newman's remarks are directed toward sufficiency, as distinguished from plain error review, his other proposals help chart the environment in which any analysis about formulating a proof beyond a reasonable doubt instruction takes place. In addition to clarifying the instruction, he recommended four other changes.

On "Redefining the Appellate Standard," he wrote: "[W]e could return to the genesis of the constitutional standard for assessing sufficiency in *Jackson* and discard the novel 'any rational trier' standard for the more traditional 'reasonable jury' standard." *Id.* (emphasis added). Related to this, Chief Judge Newman called for "Reinvigorating Appellate Review." "My concern," said Chief Judge Newman, "is that federal appellate courts, including my own, examine a record to satisfy themselves only that there is *some* evidence of guilt and do not conscientiously assess whether the evidence suffices to permit a finding by the high degree of persuasion required by the 'reasonable doubt' standard." *Id.* at 993.

Chief Judge Newman also proposed a change that he acknowledged was "moving past the provocative to the heretical," when he suggested that in some cases appellate courts should abandon the prohibition against assessing the credibility of witnesses, especially in those situations where a witness has been "seriously impeached" or where "a witness is indisputably shown to have lied on prior occasions, perhaps under oath, and is currently in a position to save himself years of jail time by accusing the defendant." *Id.* at 997-98. Lastly, Chief Judge Newman recommended "Heightened Scrutiny in Special Categories of Cases," particularly those involving eyewitness identification or a conviction resting primarily "on the uncorroborated testimony of an accomplice." *Id.* at 998-99 (citing Edward Borchard, *Convicting the Innocent: Errors of Criminal Justice* (1992)).

105. *Id.* at 991 (quoting Federal Judicial Center, Pattern Criminal Jury Instructions 21, 28 (1987)). Chief Judge Newman referenced the full text of the instruction, as did Justice Ginsburg, in her *Victor* concurrence: "This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensively." *Victor*, 114 S. Ct. at 1253 (Ginsburg, J., concurring).

I do not think it a semantic quibble to say that while "firmly convinced" is a phrase less sententious and archaic than "abiding conviction," it does not connote the emphasis and specificity of "subjective state of certitude" or "subjective state of near certitude." The preference for these formulations must be resolved, of course, by trial judges and lawyers seeking to implement the constitutional requirement in a criminal trial. If clarity is the goal and if deference to the language usage patterns and practices of the audience, i.e., the jury, is at least one criteria for drafting an instruction, then it is sensible to consider the use of the word "certainty" and its derivatives in everyday speech. For example, is the realtor more likely to say "I have an abiding conviction that we can find a house or apartment in your price range" than "I am firmly convinced" or "I am certain?" Would the television repair person say "I have an abiding conviction your new part will arrive in the next three days" or is the choice of words more likely to be "I am firmly convinced the part will arrive in three days" or "I'm just about certain the tube will be here in the next three days?" My experience convinces me that "certain" or "just about certain" are the preferred words in daily speech.

Equally problematic is the Federal Judicial Center's equating of "reasonable doubt" with "a real possibility that he is not guilty." In addition to meaning "genuine," "real" is a colloquialism that is used as a synonym for "very," as in "he was real
I agree with Chief Judge Newman to the extent that he is advocating a charge that eschews quantifying the unquantifiable and informs jurors of the necessity that their minds be in a state of near certainty in order to convict. I do not share his enthusiasm, however, for the Federal Judicial Center instruction that modestly attempts to articulate an analogue for "subjective state of near certitude"—i.e., "firmly convinced"—and then proceeds to define reasonable doubt as "a real possibility that he [the defendant] is not guilty." The Federal Judicial Center instruction improperly diverts the jury's attention from matters of credibility, demeanor, impeachment and the like, while it invites speculation on objective possibility and the size of a doubt.

cool," or "he's a real good cook" or "she's a real good athlete." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 980 (1988). "Very," WEBSTER's advises us, has a host of meanings: "true," "actual," "real," "unqualified" and "exceedingly." Id. at 1111. Thus, with the use of "real possibility," we have returned to the problem created by the phrase "substantial doubt," which caused confusion because of its dual meanings of "not seeming or imaginary" and "that specified to a large degree," the latter "imply[ing] a doubt greater than required for acquittal under Winship." Victor, 114 S. Ct. at 1250 (quoting WEBSTER's THIRD NEW INTERNATIONAL DICTIONARY 2280 (1981)).

A pre-Victor appellate court decision found the "real possibility" language of Instruction 21 to be "a basis for confusion and may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense," but without elaborating, concluded that in the case under review there was no reversible error. United States v. McBride, 786 F.2d 45, 51-52 (2d Cir. 1986).

No one formulation of the proof beyond a reasonable doubt instruction will satisfy all judges and all attorneys, not to mention the scholarly community, but why should juror confusion be invited by the use of terms that in common parlance have two or more meanings, one of which can create mistaken notions about the government's burden? For a version of an appropriate jury instruction that does not cause such dilemmas regarding reasonable doubt, see infra note 237 and accompanying text.

106. Newman, supra note 101, at 986, 991. Chief Judge Newman noted that the federal courts were influenced by Judge Learned Hand's opinion in United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944). Newman, supra note 101, at 985 (citing United States v. Feinberg, 140 F.2d 592 (2d Cir. 1944)). Judge Hand believed that a judge should require no more convincing evidence in a criminal case than in a civil one before ruling the evidence sufficient for a jury. Feinberg, 140 F.2d at 594. By 1972, that position was abandoned by the federal courts. Newman, supra note 101, at 985. Judge Friendly "ruled that more 'facts in evidence' are needed to persuade a factfinder beyond a reasonable doubt than to persuade by a preponderance." United States v. Taylor, 464 F.2d 240, 242 (2d Cir. 1972) (rejecting reasonable doubt definition previously enumerated by Judge Hand in Feinberg). Chief Judge Newman considered "the heightened burden of requiring evidence of greater persuasive force, not necessarily of greater quantity." Newman, supra note 101, at 986.

C. Hesitate to Act: From Example to Standard

Whatever the confusion, not to mention the number of guilty verdicts based on a standard less than that mandated by due process, resulting from the Court's failure to require language referencing certitude to define the state's burden, as well as its indifference toward the use of language previously viewed as misleading, the Court has added to the muddle by placing its imprimatur on "hesitate to act" language as a standard equivalent to that of the Winship certitude standard.108 In language that can most charitably be characterized as a convoluted vacillation, the Court in Victor first determined that "the context [of the Victor instruction] makes clear that 'substantial' is used in the sense of existence rather than magnitude of the doubt."109 Apparently troubled by the potential dual meanings, the Court enlisted the "hesitate to act" language to explain "substantial" in terms of a connotation it had said the word did not possess only a few lines earlier: "[A]nd to the extent the word substantial denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a common-sense benchmark for just how substantial such a doubt must be."110

The Court for the first time termed the "hesitate to act" language a "standard," indeed one that "provide[s] an alternative definition of reasonable doubt."111 The Court referred the reader to two cases, Holland v. United States112 and Hopt v. Utah,113 in support of its assertion that "[t]his is a formulation we have repeatedly approved."114 In fewer than one hundred words, the Victor majority created a standard out of what had previously been an illustration and provoked sharp criticism from Justice Ginsburg.115

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108. Victor, 114 S. Ct. at 1250 ("[T]he 'hesitate-to-act' standard gives a common-sense benchmark for just how substantial such a doubt must be." (emphasis added)).
109. Id.
110. Id.
111. Id. at 1242.
113. 120 U.S. 430 (1887).
115. Id. at 1252 (Ginsburg, J., concurring). Justice Ginsburg, in discussing the hesitate to act standard, commended criticism leveled by a committee of federal judges and noted the following portion of their commentary:
"[T]he analogy [the hesitate to act standard] uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases."
The *Hopt* Court had considered language in an instruction that explained to the jurors that their state of mind, in order to convict, must be “an abiding conviction . . . , such as you would be willing to act upon in the more weighty and important matters relating to your own affairs.”116 At no point did the instruction refer to a hesitancy to act; what is important for our consideration is that the Court in *Hopt* labeled the trial judge’s reference to matters in the jurors’ lives “an illustration” in express contradistinction to a definition.117 Further, in *Holland*, the Court did not discuss anything remotely resembling a standard tantamount to that which was ultimately discussed in *Winship*.118 Rather, the Court suggested that the trial judge’s definition of reasonable doubt, one that “you folks in the more serious and important affairs of your own lives might be willing to act upon,”119 though tending “to create confusion rather than misapprehension,” nonetheless did not render the charge constitutionally infirmed.120 So much for “a formulation we have repeatedly approved.”121

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117. See id. at 441 (“An illustration given in this case, by reference to the conviction upon which the jurors would act in the weighty and important concerns of life, would be likely to aid them to a right conclusion, when an attempted definition might fail.”).

118. See Holland v. United States, 348 U.S. 121, 138 (1954) (“The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty.”). The Court, in *Holland*, further stated that “settled standards of the criminal law are applicable to net worth cases just as prosecutions for other crimes.” *Id.* This standard should be compared with that adduced in *In re Winship*: “[T]he 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.” *In re Winship*, 397 U.S. 358, 364 (1970).

119. *Holland*, 348 U.S. at 140. Interestingly, the Court in *Holland* made no reference to *Hopt*.

120. *Id.*

121. Victor v. Nebraska, 114 S. Ct. 1239, 1250 (1994). Chief Judge Newman, with considerable courtroom experience as a federal prosecutor and United States District Court Judge, commented on the widespread use by federal trial judges of language referencing “a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life.” *Id.* at 982 (quoting LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS 4.01, Instruction 4-2 (1993)). Chief Judge Newman himself had given the charge regularly, but “was always bemused by its ambiguity.” *Id.* at 983. He viewed the language as an “explanation,” and clearly not as a standard or rule of law. In his insightful article he directs the reader’s attention to a First Circuit decision, *United States v. Noone*, 913 F.2d 20 (1st Cir. 1990), in which that court criticized the “hesitate to act” language as “risking trivialization of the constitutional standard.” Newman, *supra* note 101, at 982 n.14 (quoting *Noone*, 913 F.2d at 28-29); see also State v. Francis, 561 A.2d 392, 395 (Vt. 1989) (finding instruction that defined
Post-Victor cases in the lower courts confirm the continuing use of labyrinthian instructions that are composed to pass appellate review—which they usually do—but which fail to give juries clear guidance about the standard ordained to protect the accused.¹²²

III. Victor v. Nebraska in the Courts: Lowering the Standard to Convict

The influence of Victor v. Nebraska on the lower courts has done nothing to alleviate the long-standing “communication[s] muddle.”¹²³ Yet, this should come as no surprise in light of the Court’s directive that reviewing courts examine “whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard.”¹²⁴ The Court emphasized that the reviewing court must look to the context of the instructions as a whole¹²⁵ for the noxious scent of a fatal departure from this “ancient and honored aspect of our criminal justice system.”¹²⁶

Although the noses as well as the eyes and reasoning power of judges measuring a reasonable doubt instruction against the Court’s pronouncements in Victor may differ, post-Victor decisions

reasonable doubt as “proof . . . so convincing that reasonable people like you would not hesitate to act on it in matters of personal importance in your own life” to be constitutional). “[I]t trivializes the proof-beyond-a-reasonable-doubt standard to compare it to decisions of personal importance in a juror’s life.” Francis, 561 A.2d at 396. Nevertheless, as “the specific language used by the trial court in this case has been approved on numerous occasions,” the charge was upheld. Id. at 397. The Francis court stated, however, that “the better practice for the trial courts is to avoid drawing analogies between the degree of certainty required to convict a criminal defendant and the degree of certainty underlying decisions in matters of personal importance.” Id.

¹²². Take, for example, the following charge:

[Reasonable doubt] doesn’t mean beyond all possible doubt or to an absolute certainty. Simply more evidence. . . . It all boils down to an impartial consideration of all the evidence, and the evidence must leave you firmly convinced that a particular defendant in a given context of a particular charge is guilty.


¹²³. Ball, supra note 35, at 808. Professor Ball was describing the problems courts had in defining the civil as well as the criminal burden.

¹²⁴. Victor, 114 S. Ct. at 1243.

¹²⁵. Id. “[T]aken as a whole, the instructions [must] correctly convey[ ] the concept of reasonable doubt to the jury.” Id. at 1251 (quoting Holland, 348 U.S. at 140).

¹²⁶. Id. at 1242.
by lower appellate courts\textsuperscript{127} reveal eager acceptance of the Supreme Court's invitation to sustain "reasonable doubt" charges that contain otherwise constitutionally impermissible phrases and concepts, so long as one or more acceptable statements of the government's burden are positioned close enough to cast a saving glow.\textsuperscript{128} In this appellate universe there are no juries incapable of first discerning and then following the correct words and phrases
while jettisoning the unlawful ones. Thus, yet another legal fiction is born.

That juries will select and utilize the proper language while rejecting the incorrect and misleading verbiage is a proposition that cannot be empirically examined but which, at the very least, challenges common sense. A necessary concomitant to the sagacity of juries is the unerring ability of trial judges to drop a mantel of constitutionally appropriate language around improper phrases in a manner that will prevent the jurors from relying on them.

The trial judge's charge regarding reasonable doubt is rendered virtually impregnable to defense attack on appeal because any "misdescription"\(^{129}\) of the standard is "neutralized"\(^{130}\) by such bland and nondescriptive declarations as "the state's burden is to prove its case beyond a reasonable doubt," "the burden is a high one and it never shifts to the defendant" and "the defendant is presumed innocent." Put another way, appellate courts are rigidly following Victor's position that a trial judge's reference to the burden of proof, without explanation, will suffice to overcome a defendant's claim that offending, and therefore misleading, words found their way into the "reasonable doubt" portion of the charge.\(^{131}\) I am aware of no decision by a reviewing court that requires anything resembling a Winship-like definition of the burden that uses "certainty"\(^{132}\) or its synonyms to save—or "neutralize"—the charge, though the opening paragraphs of Victor clearly permit explanation.\(^{133}\)

\(^{129}\) Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) ("[T]he essential connection to a 'beyond-a-reasonable-doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings." (emphasis added)).

\(^{130}\) Adams v. Aiken, 41 F.3d 175, 182 (4th Cir. 1994) ("Victor explains that the offending words can be neutralized by words or phrases that preclude the jury from requiring more than a reasonable doubt to acquit." (emphasis added)).

\(^{131}\) Victor, 114 S. Ct. at 1246-51. For example, the Victor trial judge instructed the jury that it "may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of [the defendant's] guilt that is reasonable." Id. at 1249. The Court upheld that portion of the charge, finding that "in the same sentence, the instruction informs the jury that the probabilities must be strong enough to prove the defendant's guilt beyond a reasonable doubt." Id. at 1251.

\(^{132}\) In re Winship, 397 U.S. 358, 364 (1970) ("[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'" (quoting Dorsen & Rezneck, supra note 9, at 1, 26)).

\(^{133}\) Victor, 114 S. Ct. at 1243 ("[T]he proper inquiry is not whether the instruction 'could have' been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury did so apply it." (emphasis added)).
A brief examination of how reviewing courts are employing the tool furnished them by Victor is instructive. In Adams v. Aiken, the Fourth Circuit reviewed a charge in which the trial judge, after giving the usual declaration about the state having the burden of proof beyond a reasonable doubt, proceeded to define reasonable doubt as "a substantial doubt, a doubt for which you can give a reason." The court mimicked the parsing exercises of Victor:

["Substantial doubt"] was directly preceded by two sentences that provided the concrete distinguishing terms "whimsical," "imaginary," "weak," and "slight" doubt. This strong distinction, lacking in Cage, was present in Victor, where the Court held that contrasting a substantial doubt with a doubt arising from "bare imagination" or from "fanciful conjecture" removed any ambiguity from the term "substantial doubt."

Approving the charge, the court stated its operative principle, derived, of course, from Victor. "[T]he offending words can be neutralized by words or phrases that preclude the jury from requiring more than a reasonable doubt to acquit." Apparently, the Fourth Circuit was not concerned that there was no declaration in the charge that the minds of the jurors must reach a state of near certitude to convict.

In similar fashion, the District of Columbia Court of Appeals affirmed the conviction in Minor v. United States, where the "erroneous" language employed by the trial judge was that "[t]he government is not required to establish guilt beyond all reasonable doubt or to a mathematical certainty." Using the English language as it is commonly understood, it would seem that if the government need not prove guilt beyond all reasonable doubt, a conviction could be secured even if there is some reasonable doubt.

134. 41 F.3d 175 (4th Cir. 1994).
135. Id. at 181.
136. Id. (citing Victor, 114 S. Ct. at 1250).
137. Id. at 182.
138. Id. at 181-82. The Fourth Circuit stated:
Nor is the instruction . . . fatally defective because it equates reasonable doubt with proof to a "moral certainty." . . . [T]here was not a reasonable likelihood that the jury believed it could decide the case on anything other than the evidence presented or find guilt on any basis other than proof beyond a reasonable doubt.

Id.

139. 647 A.2d 770 (D.C. 1994).
140. Id. at 773-74.
regarding the state's case. In the District of Columbia, however, this is not a problem if the trial judge, as was done in the trial of Norman Minor, makes the usual benign, non-explanatory references to the state's burden: "Its burden is to establish guilt beyond a reasonable doubt."\textsuperscript{141} The trial judge instructed the jury: "[I]n deciding whether the Government has established the charge against the defendant beyond a reasonable doubt you must consider and weigh the testimony of all the witnesses who have appeared and testified in this trial."\textsuperscript{142} Once again, an appellate court was able to slide the trial judge's reasonable doubt charge under the lubricious rubric of \textit{Victor}, despite the existence of erroneous language: "[W]e believe that, taking the jury instructions as a whole, it is not reasonably likely that the jury applied the instruction in an unconstitutional manner; thus, reversal is not required."\textsuperscript{143}

The Second Circuit, in \textit{United States v. Reese},\textsuperscript{144} preserved a conviction based on a charge that defined reasonable doubt as "a real possibility that [the defendant] is not guilty."\textsuperscript{145} Once again, the saving language was general, and while the jury was told that few things can be known with "absolute certainty," they were not instructed that their minds must repose in the domain of "near certainty" to sustain a conviction.\textsuperscript{146} Nonetheless, using the plain error standard of analysis because no objection had been interposed at trial, the Second Circuit concluded that the "real possibility" language was "potentially confusing," but not fatal.\textsuperscript{147} As a result, another principle appears to emerge: A confused jury is still a fair and effective jury.

\textsuperscript{141} Id. at 774.

\textsuperscript{142} Id.

\textsuperscript{143} Id. at 773. Worthy of note, also, is that the trial judge's charge made no reference to near certainty as a state of mind, either by itself or in contradistinction to clear and convincing evidence or a fair preponderance. See \textit{id.} at 773-74 ("The government is not required to establish guilt beyond all reasonable doubt, or to a mathematical certainty. Nowhere in the instructions did the trial judge compare the criminal versus civil burdens."). Not surprisingly, the District of Columbia model, found in the \textit{RED Book}, does not make any reference to certitude as used in \textit{Winship}. \textit{Id.} For the text of the \textit{RED Book} instruction, see \textit{supra} note 42.

\textsuperscript{144} 33 F.3d 166 (2d Cir. 1994).

\textsuperscript{145} Id. at 170.

\textsuperscript{146} \textit{See id.} ("If based upon your consideration of the evidence you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty." (emphasis added)).

\textsuperscript{147} Id. at 172 (examining language "as a whole and in the context of the entire trial, not separately and in isolation").
The First Circuit acted similarly when called upon to sustain a conviction based upon a charge that contained improper language respecting reasonable doubt. In *United States v. Romero*, the trial judge used the "scale analogy" to describe the difference between the burden of proof required in a civil case and that required in a criminal case:

You will put the evidence of the plaintiff and the evidence of the defendant, if any, on the two sides and you see what happens to the scale. If the scale just moves a little bit to the plaintiff’s side, the plaintiff is prevailing in the context of a civil case. That could be a car accident case, a contracts case, preponderance of the evidence. In the criminal context we say the government must prove each defendant guilty beyond a reasonable doubt. *That implies a heavier burden. Assume, then that the scale must tip more to the government’s side, heavier burden.*

The trial judge continued with the familiar message, albeit a circular one, that "[r]easonable doubt is a doubt based upon a reason and common sense [that] may arise from a careful and impartial consideration of all the evidence in the case, or the lack of evidence in the case." Like their District of Columbia Court of Appeals colleagues in *Minor v. United States*, the First Circuit panel, in *Romero*, was confronted with an appeal of an issue not raised below, and thus reviewed the instructions for plain error pursuant to Rule 52(b) of the Federal Rules of Criminal Procedure. The court found the trial judge’s definition of reasonable doubt to be "harmlessly circular," and also observed:

Although the court’s statement that "the scale must tip more to the government’s side" may, if taken in isolation, suggest a somewhat diluted burden of proof, the court was clear that the reasonable doubt standard was distinct from, and imposed a "heavier burden" than, the preponderance standard used in civil trials.

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148. 32 F.3d 641 (1st Cir. 1994).
149. Id. at 650-51.
150. Id. at 651.
151. Id.
152. Id. at 652.
153. Id. at 651.
Using *Victor* as a guide, the court determined that the instructions, taken as a whole, did not persuade the panel of "a clear and obvious likelihood that the jury would be . . . misled."\(^{154}\)

Decisions of this kind are legion. I resist the temptation to label them unprincipled because the appellate courts are, after all, following the principle of *Victor v. Nebraska*, such as it is. From the vantage point of reviewing tribunals, this principle may be articulated in its shortest form as follows:

1. When the constitutionality of the trial judge's instruction regarding proof beyond a reasonable doubt is appealed by the defendant, first identify the language on which the challenge is based;
2. If the defendant has designated language that is confusing or suspect, or which previously has been declared unacceptable by the United States Supreme Court (or by binding precedent of a lower federal or state appeals court), proceed to examine the entire charge to determine if the trial judge at some point specifically referenced the state's burden as being that of proof beyond a reasonable doubt, regardless of whether any attempt was made to explain this burden;
3. While a terse reference by the trial judge to the burden without elaboration is enough to overcome a challenge grounded on the use of improper phraseology, the reviewing court should consider whether there are any modifiers regarding the nominal definition, such as references to the presumption of innocence, the burden never shifting and the requirement that a conviction be grounded on evidence supporting each element of the charge;
4. Surmise whether the jury selected the offending language over the bare-boned definition required by due process. If not, the appeal fails.

This, at its core, is the "principle" of *Victor*, and reviewing courts are following it in lockstep. I will leave it to the reader to make his or her own conclusion as to whether the almost universal rejection of defense challenges to the reasonable doubt instruction using the "principle" of *Victor* is traceable to any bias of appellate judges bent on doing their share to rid the streets of drugs and violence.

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\(^{154}\) *Id.* at 652.
Appellate courts are keenly aware of the near limitless prerogative they have been handed by Victor respecting the trial court’s instruction on proof beyond a reasonable doubt.\textsuperscript{155} Witness the syllogistic precision of the United States Court of Appeals for the Fifth Circuit as it set forth its formulation of the Victor principle in Bias v. Ieyoub:\textsuperscript{156}

[The appellant] claims that the jury instruction given at his trial was unconstitutional under Cage v. Louisiana, because of the use of the words “moral certainty,” and “actual or a substantial doubt.” The Supreme Court did object to these phrases as used in the jury instructions given in Cage. In a more recent opinion, however, the Supreme Court has explained that the use of these phrases may not result in an unconstitutional jury instruction if the instruction as a whole conveyed the correct standard of proof.\textsuperscript{157}

The Eighth Circuit was so emboldened by the Victor technique that, in United States v. West, it reversed the grant of a new trial by a district court judge who had concluded that his own reasonable doubt charge was constitutionally flawed.\textsuperscript{158} In his instructions to the jury in a drug case, the trial judge had observed: “The law makes no distinction between direct and circumstantial evidence but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.”\textsuperscript{159} This language was challenged in a motion for a new trial, and the judge concluded that his instruction was “structurally defective’ since the instruction seems to clearly allow a rea-

\textsuperscript{155} See, e.g., United States v. Brand, 80 F.3d 560, 566 (1st Cir. 1996). The court in Brand held:

Assessing the instructions as a whole, we conclude that the emphasized portions adequately and ultimately conveyed an accurate, unambiguous and comprehensible description of the government’s burden and the standard for acquittal. Whether or not the “firmly convinced” definition alone would be constitutionally sufficient... the court’s further exposition here left no doubt that the jury’s duty was to convict only upon reaching consensus as to guilt beyond a reasonable doubt.

\textit{Id.} (citing Victor v. Nebraska, 114 S. Ct. 1239 (1994)); \textit{see also} Vargas v. Keane, 86 F.3d 1273, 1277 (2d Cir. 1996) (holding that reviewing court must examine charge as whole and assess whether there exists reasonable likelihood that jury understood instructions to permit conviction based on proof insufficient to satisfy \textit{standard of proof beyond reasonable doubt}) (citing \textit{Victor}, 114 S. Ct. at 1239).

\textsuperscript{156} 36 F.3d 479 (5th Cir. 1994).
\textsuperscript{157} \textit{Id.} at 481.
\textsuperscript{158} 28 F.3d 748 (8th Cir. 1994).
\textsuperscript{159} \textit{Id.} at 749.
sonable jury to do more than find 'subsidiary facts' at a reduced preponderance standard." The appellate bench noted that *Victor* "set out the proper procedure for determining whether a reasonable doubt jury instruction was erroneous," and proceeded to reverse the trial judge's decision using an analysis that went beyond the totality of the charge to the totality of the trial. The Eighth Circuit surpassed the boundaries set forth in *Victor*—indeed entering an area expressly prohibited by *Victor*—when it concluded that "the context of the trial also makes unlikely a determination that a jury applied less than a reasonable doubt standard."

But who knows more about the "context of the trial," the trial judge or the appellate panel? Who communicates with the jurors and observes them during the course of the trial? The answers are obvious. Nevertheless, as a consequence of *Victor*, the Eighth Circuit resuscitated a reasonable doubt instruction that the trial judge himself had repudiated after he became convinced it could have permitted the jury to convict on a standard that equated preponderance of the evidence with proof beyond a reasonable doubt or substituted the former for the latter.

In *Zada v. Scully*, the United States District Court for the Southern District of New York reviewed a state court conviction and gleaned from *Victor* a dangerous principle that is nonetheless consistent with the Supreme Court's opinion: "Jurors can and are expected to apply common sense in evaluating evidence and unless the instructions are egregiously wrong, the outcome is unlikely to be poisoned." How wrong is "egregiously wrong"? Is an instruction ever "egregiously wrong" so long as it refers to proof beyond a reasonable doubt, even though it may include misleading phrases such as the disfavored "moral certainty" or "substantial doubt"?

There are, of course, exceptions to the majority stampede, but their number is infinitesimal. Even the few decisions that have reversed convictions after *Victor* on a challenge to a reasonable doubt

160. *Id.* at 749-50.
161. *Id.* at 750.
162. *Id.* at 752-53. After reviewing the segments of the trial, including the voir dire and the "statements of counsel," the court said: "Viewed within the context of the trial as a whole, it is not reasonably likely that the jury applied [the reasonable doubt instruction] to lower improperly the government's burden." *Id.* at 752.
163. *Id.* I discuss elsewhere how consideration of the evidence in reviewing a reasonable doubt charge is as inevitable as it is unlawful. For a further discussion of consideration of the evidence, see *supra* notes 95-100 and accompanying text.
164. *West*, 28 F.3d at 751.
166. *Id.* at 328.
charge have followed the same "principle" as described above, but the bias of the judges in these cases favors vigorous protection of the historical burden required to convict.\textsuperscript{167}

In \textit{Rickman v. Dutton},\textsuperscript{168} a state prisoner sought federal habeas corpus relief from a first degree murder conviction.\textsuperscript{169} Chief Judge John T. Nixon of the United States District Court for the Middle District of Tennessee examined numerous claims raised by Rickman, including one regarding the reasonable doubt charge. Rickman's trial judge had instructed the jury:

Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.\textsuperscript{170}

Chief Judge Nixon noted that the Court in \textit{Victor} had criticized the phrase "moral certainty" but nevertheless had permitted this

\textsuperscript{167} See, e.g., United States v. Birbal, 62 F.3d 456, 462 (2d Cir. 1995) (holding trial court instruction that "reasonable doubt means only a substantial doubt," to be erroneous since charge did not "benefit from any of the curative language which, in \textit{Victor}, ameliorated the reference to substantial doubt"); United States v. Purvis, 21 F.3d 1128, 1129-30 (D.C. Cir. 1994) (determining that jury instruction equating proof "beyond a reasonable doubt" with "strong belief" is constitutionally deficient); Rickman v. Dutton, 864 F. Supp. 686, 709 (M.D. Tenn. 1994) (holding that "moral certainty" language in conjunction with "mind rest easily" language suggests lower burden of proof than what is constitutionally required). The D.C. Circuit, in \textit{Purvis}, stated that use of the phrase "firmly convinced," as found in the Federal Judicial Center's \textit{Pattern Criminal Jury Instructions}, would have been acceptable. \textit{Purvis}, 21 F.3d at 1129-30; see also Joyner-Pitts v. Maryland, 647 A.2d 116, 124-25 (Md. Ct. Spec. App. 1994) (phrase "nagging reticence" and homey examples regarding hesitating to act created "either a higher degree of doubt than is required for acquittal or a lower degree of proof for a finding of guilt than is required under the reasonable doubt standard").

\textsuperscript{168} 864 F. Supp. 686 (M.D. Tenn. 1994).

\textsuperscript{169} \textit{Id}. at 693. Prior to its decision, the district court granted the defendant's motion for partial summary judgment on the claim that his death sentence was unconstitutional. \textit{Id}. (citing Rickman v. Dutton, 854 F. Supp. 1305 (M.D. Tenn. 1994)). The court held that the trial judge's charge to the jury regarding imposition of the death penalty was unconstitutionally vague because it failed to impose any restraint on the arbitrary and capricious infliction of the death penalty. \textit{Id}.

\textsuperscript{170} \textit{Id}. at 708. The defendant argued that this instruction was similar to the reasonable doubt instruction given in \textit{Cage v. Louisiana}, which was found to be unconstitutional because it contained language referring to moral certainty. \textit{Id}. at 709. For a discussion of the Supreme Court's holding in \textit{Cage}, see \textit{supra} notes 63-67, 74 and accompanying text.
language to be rescued by a contextual reading of the entire charge. Chief Judge Nixon, however, did not provide the state with such a safe haven in the matter of Rickman’s conviction, holding that the use of an “ambiguous phrase” requiring that the minds of the jurors “rest easily” compounded the problem: “The court finds that the ‘moral certainty’ language in conjunction with the ‘mind rest easily’ language suggests to a reasonable juror a lower burden of proof than what is constitutionally required.”

Where could criticism have been levied had Chief Judge Nixon rejected the prisoner’s claim on this issue? It could be argued that the phrase “inability . . . to let the mind rest easily upon the certainty of guilt” is but one way, albeit an infelicitous one, of instructing the jury that they may not convict unless they are virtually certain that the evidence points to the guilt of the accused. Moreover, the trial judge had referred to “all the proof in the case” and that “this certainty is required as to every proposition of proof requisite to constitute the offense.”

Chief Judge Nixon did not favor us—or more importantly, the Court of Appeals for the Sixth Circuit—with an explanation of his conclusion regarding the fatal juxtaposition of the “moral certainty” language with the “mind rest easily” language. Additionally, he did not comment on the trial judge’s instruction that “reasonable doubt does not mean a doubt that may arise from possibility.” While it is axiomatic that a conviction cannot be sustained on the basis of a possibility, it is just as true that doubt regularly arises from a possibility. If the jury—or even one juror—thinks that the key eyewitness in an assault case is motivated by bias against the accused, that juror may conclude that the witness is fabricating his version of the events being presented at trial. The same juror may

172. Id.
173. Id. at 708.
174. Id. at 696. In Cage, the trial judge’s instruction to the jury contained language of “possibility” as well. Cage v. Louisiana, 498 U.S. 99, 41 (1990) (per curiam). The Supreme Court failed, however, to address the effect of such language, focusing instead on the “moral certainty” language. The Court stated:

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

Id.
also accept the possibility that the witness may be truthful and is not letting his testimony be clouded by animus for the defendant. Yet, the contradictory possibility that the witness is lying may certainly give rise to a reasonable doubt in that juror’s mind.

My point here is not to resolve the Rickman analysis or that of any other court. Rather, my aim is to demonstrate that the methodology enumerated in Victor by which appellate courts are to review challenges to reasonable doubt instructions results in an artificial and technical parsing exercise. Such an exercise ultimately is resolved for or against the defendant based upon the reviewing judges’ subjective views on how high the burden of proof in criminal cases should be and how clearly this burden must be articulated to the jury in order to ensure that the accused enjoys this “ancient and honored” protection.\(^{175}\)

IV. *In re Winship*: Ignored but Alive

Those of us determined not to convict and punish persons unless relevant and admissible facts satisfy the minds of factfinders to the “utmost certainty” or at least to a “near certitude” of their guilt are in murky and roily waters. Escape from this unappealing position, in my view, will come through a commitment to use the “certainty” language of Winship to define the state’s burden and to jettison all efforts to describe or explain the unquantifiable “reasonable doubt.”

Though Victor created a vehicle that will inevitably result in convictions based on a standard less stringent than proof beyond a reasonable doubt, the Court never wavered from its prior declarations that to convict, the trier of fact must believe in the “near certitude” of the state’s proof.\(^{176}\) Whatever the linguistic difficulties courts have encountered—or engendered—in defining the standard, that standard clearly references a state of mind that results from the examination of evidence, and which is one of as much certainty as human experience permits to a mind seeking to determine the existence or non-existence of an historical event.

In the midst of the sometimes florid and orotund literary flourishes of the nineteenth century Supreme Court, we find a genuine and fervid commitment to this high standard, which has derived from a respect for the common law tradition and for the earlier jurists who had formulated this protection for the benefit of the

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\(^{176}\) Id. at 1247 (citing Jackson v. Virginia, 443 U.S. 307, 315 (1979)).
accused.177 In a case that examined the relationship between the presumption of innocence and the burden of proof in criminal trials, in 1895, the Supreme Court, in Coffin v. United States,178 traced these protections from Sparta, Athens and Rome to the late nineteenth century United States.179 Along the way, the Court paid homage to Blackstone's declaration that "the law holds that it is better that ten guilty persons escape than that one innocent suffer,"180 and Lord Gillies's reasoning in McKinley's Case.181 "[T]he presumption of innocence] there must be legal evidence of guilt, carrying home a degree of conviction short only of absolute certainty."182 Drawing on its survey of more than two thousand years of the history of burdens and presumptions in criminal trials,183 the Court ventured a definition of reasonable doubt: "It is of necessity the condition of mind produced by the proof resulting from the evidence in the cause. It is a result of the proof, not the

177. See Coffin v. United States, 156 U.S. 432, 453 (1895) (stating that "presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law"); see also Davis v. United States, 160 U.S. 469, 488 (1895) (asserting that vital question for time period ranging from entering of not-guilty plea to return of verdict is whether guilt is established beyond reasonable doubt).

178. 156 U.S. 432 (1895).

179. Id. at 453-56. The proof beyond a reasonable doubt standard pervaded Roman law as "all accusers [were to] understand that they [were] not to prefer charges unless they [could] be proven by proper witness . . . conclusive documents, or by circumstantial evidence which amount[ed] to indubitable proof . . . clearer than day." Id. at 454. Moreover, the noble Trajan held that "no man should be condemned on a criminal charge . . . because it was better to let the crime of a guilty person go unpunished than to condemn the innocent." Id. Although the presumption of innocence was preserved by Roman canon law, exactly when the presumption was stated in precise words is still in doubt. Id. at 455.

180. Id. at 456 (citing 4 William Blackstone, Commentaries *358).

181. 33 How. St. Tr. 275 (1817).

182. Coffin, 156 U.S. at 456 (citing McKinley's Case, 33 How. St. Tr. at 506). For a more recent exposition of the evolution of the proof beyond a reasonable doubt burden, see Anthony A. Morano, A Reexamination of the Development of the Reasonable Doubt Rule, 55 B.U. L. Rev. 507, 527 (1975) ("[T]he rule was a departure from the any doubt test—a standard that afforded defendants greater protection by encouraging acquittals based even on seemingly irrational doubts."). Morano notes that the reasonable doubt rule evolved from the eighteenth century "any-doubt" test, which required jurors to acquit upon any doubt of the accused's guilt. Id. at 512. A typical jury charge required that the jury not find the accused guilty "unless [the jury's] consciences are fully satisfied beyond all doubt of his guilt." Id. (citing Maha Rajah Nundocomar's Case, 20 How. St. Tr. 925, 1078 (India 1775)). The transformation of the "any-doubt" test to the reasonable doubt rule first began to occur in late seventeenth century England when a group of English philosophers—John Wilkins, Robert Boyle, Joseph Glanville and John Locke—rejected the requirement of absolute certainty in favor of a reasonableness standard, thus lowering the burden of proof required for conviction. Id. at 513.

183. Coffin, 156 U.S. at 453-56.
proof itself . . . .”184 Thus, in Coffin there exists a confluence of three notions—(1) a state of mind, (2) of near certainty, (3) resulting from the evidence—which constitutes the standard of proof beyond a reasonable doubt from which the Supreme Court has never retreated.

As its watershed decision in Winship expressly put to rest any doubt “that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt,”185 the Supreme Court noted that this high standard “dates at least from our early years as a Nation.”186 The Court observed the philosophical underpinnings of the standard: The defendant “has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”187 To reiterate the

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184. Id. at 460. The presumption of innocence, however, is considered proof itself. Id. Therefore, because the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises, the presumption is the cause and the reasonable doubt an effect. Id. For a further discussion of the cause and effect relationship, see infra notes 219-24 and accompanying text.

Since its decision in Coffin, however, the Supreme Court has re-examined the “presumption of innocence” and has stated that it is not really a “presumption,” but rather, is an “assumption” that is indulged in the absence of contrary evidence.” Taylor v. Kentucky, 436 U.S. 478, 483 n.12 (1978). In stating that the presumption of innocence was, in fact, an assumption, the Court in Taylor affirmed what one commentator had already addressed: that the “presumption of innocence” is an inaccurate, shorthand description of the right of the accused to ‘remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion.”” Id. (quoting 9 JOHN WIGMORE, EVIDENCE § 407 (3d ed. 1940)). The Court stated that “[t]he principal inaccuracy is the fact that it is not technically a ‘presumption’—a mandatory inference drawn from a fact in evidence,” therefore warranting its finding that the “presumption” is “better characterized as an ‘assumption.’” Id.

185. In re Winship, 397 U.S. 358, 364 (1970). The Court in Winship, as in Coffin, noted that although the demand for a higher degree of persuasion had been expressed since ancient times, its crystallization into the “beyond a reasonable doubt” form did not occur until as late as 1798. Id. at 361 (citing CHARLES T. McCORMICK, EVIDENCE § 321, at 681-82 (1954)).

186. Id. The Court explained that numerous decisions of the Court had previously assumed that the federal Constitution required the charge in criminal prosecutions. Id. at 362 (citing Speiser v. Randall, 357 U.S. 513, 525-26 (1958); Holland v. United States, 348 U.S. 121, 138 (1954); Leland v. Oregon, 343 U.S. 790, 795 (1952); Brinegar v. United States, 338 U.S. 160, 174 (1949); Wilson v. United States, 232 U.S. 563, 569-70 (1914); Holt v. United States, 218 U.S. 245, 258 (1910); Davis v. United States, 160 U.S. 469, 488 (1895); Miles v. United States, 103 U.S. 304, 312 (1881)).

187. Id. at 363. “Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—[the] margin of error is reduced . . . by the process of placing on the other party the burden of persuading the factfinder . . . of his guilt beyond a reasonable doubt.” Id. at 364 (citing Dorsen & Rezneck, supra note 9, at 1, 26).
proposition that proof beyond a reasonable doubt was synonymous with proof to a certainty, the Supreme Court adopted language from a scholarly article on juvenile justice: "To this end, the reasonable doubt standard is indispensable for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'"\(^\text{188}\)

Nearly ten years after \textit{Winship}, the Supreme Court felt no compulsion to cite to the authors from whom it had borrowed the phrase "subjective state of certitude" when it declared that effective implementation of the standard required "impressing upon the factfinder the need to reach a subjective state of near certitude of guilt of the accused."\(^\text{189}\) Contextually, there does not appear to be any great difference between the two pronouncements regarding certitude, as each refers to a subjective state of belief by the trier of fact. One focuses on the "facts in issue,"\(^\text{190}\) the other focuses on the "guilt of the accused."\(^\text{191}\) It is obvious that if the jury is convinced to a "near certitude" about the "facts in issue," it has necessarily been convinced of the "guilt of the accused."

When the Court examined Victor and Sandoval's petitions, it referred with historical accuracy to the proof beyond a reasonable doubt standard as "an ancient and honored aspect of our criminal justice system."\(^\text{192}\) Without criticism or modification, it cited the earlier decisions that had put forward synonyms for the standard.\(^\text{193}\) The Court referred to the "evidentiary certainty" suggested in \textit{Cage v. Louisiana} as well as the language of \textit{Jackson v. Virginia}, which required that the instruction "impress upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused."\(^\text{194}\)

When the \textit{Victor} Court spoke of the factfinder having an "abiding conviction as to guilt,"\(^\text{195}\) it did not diverge from the long-recog-

\(^{188}\) \textit{Id.} (citing Dorsen & Rezneck, supra note 9, at 1, 26).
\(^{189}\) \textit{Winship}, 397 U.S. at 364.
\(^{190}\) \textit{Id.} at 3246-47. \textit{See} Wilson v. United States, 232 U.S. 563, 570 (1914) (reasonable doubt instruction cast in terms of "moral certainty" is valid); Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 317 (1902) (proof to "moral certainty" is equivalent phrase with "beyond a reasonable doubt"); Hopt v. Utah, 120 U.S. 430, 439 (1887) (holding that instruction cast in terms of "abiding conviction" as to guilt, without reference to "moral certainty," correctly states government's burden of proof).
\(^{191}\) \textit{Jackson}, 443 U.S. at 315.
\(^{193}\) \textit{Id.} at 1246-47. \textit{See} Wilson v. United States, 232 U.S. 563, 570 (1914) (reasonable doubt instruction cast in terms of "moral certainty" is valid); Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 317 (1902) (proof to "moral certainty" is equivalent phrase with "beyond a reasonable doubt"); Hopt v. Utah, 120 U.S. 430, 439 (1887) (holding that instruction cast in terms of "abiding conviction" as to guilt, without reference to "moral certainty," correctly states government's burden of proof).
\(^{194}\) \textit{Id.} at 1247.
\(^{195}\) \textit{Id.}
nized principle that what is informed by proof beyond a reasonable doubt is the factfinder’s mind, despite some discussion that the standard required in criminal cases is “a very high level of probability.” On this point, Justice Harlan’s concurrence in *Winship* is illuminating. After discussing the impossibility of determining “unassailably accurate knowledge of what happened,” and concluding that “all the factfinder can acquire is a belief of what probably happened,” Justice Harlan wrote of the varying degrees of belief in relation to the differing standards of proof:

The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases “preponderance of the evidence” and “proof beyond a reasonable doubt” are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

If one accepts the premise that the words “burden of proof beyond a reasonable doubt” standing alone do not define themselves, then a charge that does not expressly employ the phrases a “subjective state of mind” or “abiding conviction” to a level of “near certitude” or “evidentiary certainty” (or synonymous phrases) permits the jury to convict based on a lesser, and therefore unconstitutional, intensity of belief regardless of whether the instruction stated that the state’s burden was to prove guilt beyond a reasonable doubt.

V. RATIONALE FOR PROOF BEYOND REASONABLE DOUBT

We demand “near certitude” before convicting someone, with the attendant exposure to incarceration, fine, public opprobrium, and sometimes death, because of our society’s views about the in-

196. *Id.* The Court in *Victor* indicated that although moral certainty may be understood in terms of probability, “a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases.” *Id.*

herent worth of the individual. This notion, for so long entrenched in our religious, political and cultural traditions, conjoins with a rationalist skepticism about governmental power and the limits of reason to give continuing vitality to the famous axiom that found its way into Blackstone's Commentaries more than 200 years ago: It is better that ten guilty people go free than one innocent person be convicted. Justice Stevens reviewed this tradition not long ago in *Schlup v. Delo* and referred to an 1824 treatise on evidence that embellished Blackstone's statement: "The maxim of the law is . . . that it is better that 99 . . . offenders shall escape than that one innocent man be condemned." In his concurring opinion in *Winship*, Justice Harlan declared that he "view[ed] the requirement of proof beyond a reasonable doubt in a criminal case as 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." In a thoughtful article, Professor Scott Sundby dis-

198. See id. at 371-72 (Harlan, J., concurring) (stating that existence of different standards of proof in civil as opposed to criminal litigation demonstrates fundamental concern as to ramifications of guilty verdict to criminal charges). "In a civil suit . . . we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor," but there is no such equivalency between the disutility of convicting an innocent man and acquitting someone who is guilty. *Id.* (Harlan, J., concurring).

199. 4 William Blackstone, Commentaries *352. "[I]t is better that ten guilty persons escape, than that one innocent suffer." *Id.* Indeed, Blackstone has continuing vitality today. Most recently, the Court alluded to Blackstone's discussion of *in loco parentis* in its decision permitting mandatory drug testing of high school athletes. Vernonia Sch. Dist. 47 v. Acton, 115 S. Ct. 2386, 2391 (1995).


201. *Id.* at 866 (quoting Thomas Starkie, *Law of Evidence* 751 (1824)). In his opinion, Justice Stevens asserted that the "quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Id.*

202. *In re Winship*, 397 U.S. at 373-74 (Harlan, J., concurring). In his concurrence, Justice Harlan argued against the "preponderance of the evidence" standard used in juvenile court proceedings. *Id.* (Harlan, J., concurring). Although the consequences of a guilty verdict in a juvenile proceeding may not carry the weight of a guilty verdict in a typical criminal case, the possibility of confinement and stigmatism that attaches when one is found guilty of a crime tend to accompany a guilty verdict in any criminal proceeding. *Id.* at 373 (Harlan, J., concurring). Moreover, Justice Harlan recognized that a reasonable doubt standard does not hinder the State's purpose behind the creation of juvenile courts because it does not "(1) interfere with the worthy goal of rehabilitating the juvenile, (2) make any significant difference in the extent to which a youth is stigmatized as a 'criminal' because he has been found to be delinquent, or (3) burden the juvenile courts with a procedural requirement that will make juvenile adjudications significantly more time consuming or rigid." *Id.* at 375 (Harlan, J., concurring).

203. Sundby, *supra* note 18, at 457. In his article, Professor Sundby explores the differences between substantive and procedural applications of the reasonable doubt standard. *Id.* at 463-87. Under the substantive approach, the reasonable doubt rule only applies to those facts with which the State could not dispense in
cussed this proposition and noted criticism from some commentators. While Professor Sundby himself seemed to join those who say that "the greater injustice is almost universally seen in the conviction of the innocent," he took the position that "[a]lthough one injustice is avoided [when an] innocent individual is acquitted, an injustice also occurs [when] ten guilty defendants escape punishment." 

To me, an abstract notion of justice colored by considerations of the ontological innocence or guilt of someone who stands trial is not a determinative principle of whether the trial was conducted fairly or the instruction on the government's burden was formulated properly. It is not the business of a trial judge to examine, let alone worry about, whether the truly innocent was convicted or the truly guilty acquitted so long as the trial was conducted in a fair and impartial manner. Lest this sound callous, I emphasize the inability of the judge presiding over a jury trial to determine in some infallible way whether the defendant truly committed the crime with which he or she was charged.

We must recognize that although the indictment is labeled State v. John Jones or People v. Mary Smith, the terms State and People defining and punishing crime. Id. at 475. This approach is premised on the notion that not all of the facts which the legislature includes in the definition of a crime are necessary to constitute the crime charged. Id. The procedural approach requires that the State prove all of the elements of the crime, as defined by the legislature, beyond a reasonable doubt. Id. at 463-64. Expansive proceduralists have gone further, however, requiring that the State also prove beyond a reasonable doubt that the defendant does not have any defenses available to him or her, such as self-defense or "heat of passion." Id. at 465.

204. Id. at 460 n.15 (citing R.A. Duff, Trials and Punishments 107 (1986) ("a mistaken acquittal at a criminal trial is a matter of injustice"); Peter Stein & John Shand, Legal Values in Western Society 81-82 (1974) (noting Criminal Law Revision Committee's view that "it is as much in the public interest that a guilty person should be convicted as it is an innocent person should be acquitted").

205. Id. at 461. Sundby argues for an expansive procedural approach that would require the State to prove all elements of a crime, including the lack of any defenses, beyond a reasonable doubt. Id. at 505. Recognizing, however, the need for some limitation, Sundby recommends that a quasi-substantive restriction be incorporated, requiring proof beyond a reasonable doubt for only those defenses which would serve as a complete bar to culpability. Id. at 508-09. Therefore, the State would have to prove beyond reasonable doubt that the defendant did not act in self-defense, but would not carry such a burden for defenses such as heat of passion, which only affect the degree of culpability. Id. at 487.

206. Id. at 460. Sundby also points out that although the "beyond a reasonable doubt" burden reflects an interest in protecting innocent individuals, the fact that the burden is not "beyond all doubt" demonstrates that society is not prepared to advocate that "it is better to let one million guilty people go free than to convict one innocent person." Id. at 460-61 (quoting Carlton K. Allen, Legal Duties and Other Essays in Jurisprudence 255, 286-87 (1931)).
(and Commonwealth, and United States, and the like) are reifications that have no real, fungible existence. A criminal trial, then, is nothing more and nothing less than one or two attorneys employed by the state and assisted by other individuals—fact witnesses, police officers, a forensic scientist or two—who attempt to convince the factfinder that the evidence in a file drawer, if deemed relevant and otherwise admissible by the trial judge, establishes to a near certainty that the accused committed the crime with which he or she was charged. Naturally, the defendant, usually assisted by counsel, will try through cross-examination to discredit the testimonial evidence, and through argument to prevail upon the judge to exclude irrelevant or prejudicial tangible evidence. If the defendant chooses, he or she may present testimony and tangible evidence tending to rebut the state’s case or to present a plausible alternative explanation of the events at issue.

As observed by a prominent American legal scholar, Zechariah Chafee, popular views to the contrary notwithstanding, “a trial is not an abstract search for truth, but an attempt to settle a controversy between two persons without physical conflict.”207 Nearly fifty years after Professor Chaffee’s observation, the American Bar Association submitted an equally circumscribed definition of a criminal trial and the judge’s role within it: “The only purpose of a criminal trial is to determine whether the prosecution has established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.”208 This view has been recognized and implicitly approved by the United States Supreme Court.209 Consequently, the trial is not to be used as the bully pulpit for political or philosophical agendas of either the prosecutor or the defendant, nor should the attorneys be permitted to importune the jury to “send a message” to an audience beyond the courtroom. The function of the trial is to produce a determination of whether the prosecution has presented enough

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209. Taylor, 436 U.S. at 489 n.17 (citing ABA Project, supra note 208, § 1.1(a)). In Taylor, the Commonwealth argued that the jury was instructed adequately on reasonable doubt and presumption of innocence since defense counsel had argued the presumption of innocence in his opening and closing arguments. *Id.* at 488. The Court rejected this argument and stated that the defendant’s right to a fair trial should not hinge on the hope that defense counsel will be a more effective advocate on the topic of presumption of innocence than the prosecutor. *Id.* at 489.
relevant and credible evidence to persuade the factfinder that the defendant committed the crime charged. It should be of no consequence to the trial judge after a verdict is returned whether particular constituencies—be they sexual abuse victims, families of murder victims, or business people criminally defrauded—are content or unhappy.

The conviction of a drug dealer does not eliminate drug trafficking and substance abuse, and the conviction of a child molester does not eradicate pedophilia, even though it can be argued that incarceration of these individuals will spare some potential victims. Conversely, the acquittal of the accused drug dealer or child molester—assuming that the accused were not actually innocent—will not measurably increase the criminal activity of the kind with which the fortunate defendants had been charged. Moreover, the factfinder that renders a "not guilty" verdict, be it a judge or jury, cannot be said to have done an injustice to other members of society, because its role never was to solve a crime or ameliorate social conditions. Rather, the factfinder's duty was simply to determine whether the state had proven its case.210

Assuming a proper and understandable instruction is given to the jury, where is the injustice if the evidence available to the prosecution and placed before the jury could not satisfy the jurors' minds to a "near certitude" that the defendant had committed the crime set forward in the indictment or information? The acquittal in such a situation should, at the very least, give those who observed or read about the trial a sense of security that their liberty is well-protected against the arbitrary use of state power, and if ever accused of a crime they will not be in jeopardy of conviction and incarceration unless the high burden in a criminal case can be satisfied by prosecuting officials.

Additionally, the acquittal cannot reasonably be ascribed as creating more criminal activity—or injustice—in society at large. The trial was simply a weighing of the evidence regarding one, or perhaps several, specific episodes. In any event, the dikes stemming the tide of criminal activity will not be breached by any use of a fair and understandable "beyond a reasonable doubt" instruction be-

210. I belabor this point to rebut Professor Sundby's and others' contention that "an injustice . . . occurs [when] ten guilty defendants escape punishment." For a discussion of this contention by Sundby, see supra notes 203-06 and accompanying text.
cause it is likely the majority of crimes will continue to go unsolved and probably unreported.\textsuperscript{211}

The judge, then, has discharged his or her role by properly applying the rules of evidence and giving a charge on the controlling law. If this is done, justice is served, whatever the \textit{true} guilt or innocence of the accused. Naturally, the defendant may seek review of a conviction, hoping to convince the appellate court that the trial judge erroneously admitted key evidence or instructed improperly on the law, while the prosecutor unhappy with an acquittal must live with the results of the risk the state has imposed upon itself.\textsuperscript{212}

There always remains the possibility that the truly innocent individual will not prevail on appeal and will serve hard time in prison, the \textit{victim} of a scrupulously fair trial. This is as much the result of the impossibility of quantifying\textsuperscript{213} reasonable doubt as it is

\textsuperscript{211}For a discussion of crime statistics, see \textsc{Federal Bureau of Investigation, Crime in the United States} 1994 (1995). For example, of 12,586,277 crimes reported, only 21.4\% were "cleared by arrest." Some of the breakdown figures show: of 21,331 murders reported, 64.4\% were "cleared by arrest"; of 89,766 forcible rapes, 51.9\% were "cleared by arrest"; for 2,420,928 burglaries, the clearance figure was 13.4\%; and for 98,967 arsons, 15.4\%. \textit{Id.} at 208, Table 25.

"[L]aw enforcement agencies clear or solve an offense when at least one person is arrested, charged with the commission of the offense, and turned over to the court for prosecution." \textit{Id.} at 206. No figures are kept for clearances regarding drug offenses, nor could such figures be compiled, as these crimes have no "victims" to report a violation of the criminal law.

\textsuperscript{212}See Addington v. Texas, 444 U.S. 418, 423-24 (1979):

In a criminal case, . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself.

\textit{Id.}

\textsuperscript{213}For a discussion of the arguments presented in scholarly journals regarding the applicability of probability theory to jury instructions as it relates to burdens of proof, see supra note 35 and accompanying text. No matter how provocative the arguments and stimulating the debate in scholarly journals regarding the applicability of probability theory, and hence percentiles, to jury instructions regarding burdens of proof may have been, there is no American case holding that language quantifying reasonable doubt is required or even permitted. The contrary view is entrenched in our jurisprudence. In his concurring opinion in \textit{In re Winship}, Justice Harlan noted the problem of quantification and how the factfinder's subjective state of certainty was affected by this: "Although the phrases 'preponderance of the evidence' and 'proof beyond a reasonable doubt' are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions." \textit{In re Winship}, 397 U.S. 358, 370 (1970) (Harlan, J., concurring); see also Allen, supra note 18, at 340 n.73 ("Because of the inability to quantify the evidence, reasonable doubt may very well be whatever a jury says it is."); Nesson, supra note 35, at 1197 ("The closer reasonable doubt comes to ex-
of any other cause, such as the fabrication or planting of evidence by a rival or a dishonest police officer, not to mention the jury's choices regarding credibility and its undisclosed use of inferences.

VI. SOME PROBLEMS ABOUT REASONABLE DOUBT

A. The Doubt is Not the Burden

The possibility of lowering the state's burden is increased and the jury further misled if the trial judge not only omits from the charge a reference to certitude but also submits a definition of "reasonable doubt." Reasonable doubt is a term that can stand alone and which signifies something quite distinct from the burden itself. It is the unfortunate failure of judges and lawyers to separate these two concepts for the purposes of analysis that so often contributes to confusion in the courtroom.

Indeed, in the opening three paragraphs of Victor, Justice O'Connor, writing for the Court, uses language referencing "proof beyond a reasonable doubt" (or the "beyond a reasonable doubt standard") four times and words referencing "reasonable doubt" four times, and always interchangeably. To the more any notion of it being a shared concept will break down. It is, therefore, not surprising that the rules of the trial system prevent convictions from occurring in situations which lend themselves to quantification of the concept.

To say that "reasonable doubt" or "proof beyond a reasonable doubt" cannot be quantified is not to say that our language is so limited that judges are incapable of communicating clearly to jurors the state of subjective certainty they must possess regarding the evidence submitted in order to return a guilty verdict. Indeed, it is because reasonable doubt cannot be quantified that the instruction must focus on the burden and its relationship to the evidence and the individual juror's state of mind after deliberation with the other jurors.

214. See Victor v. Nebraska, 114 S. Ct. 1239, 1242-43 (1994) which held: The government must prove beyond a reasonable doubt every element of a charged offense. In re Winship, 397 U.S. 358 (1970). Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication. In these cases, we consider the constitutionality of two attempts to define "reasonable doubt."

The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Cf. Hopt v. Utah, 120 U.S. 430, 440-41 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, see Jackson v. Virginia, 443 U.S. 307, 320, n.14 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. Taylor v. Kentucky, 495 U.S. 378, 485-486 (1978). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." Holland v. United States, 348 U.S. 121, 140 (1954).

In only one case have we held that a definition of reasonable doubt violated the Due Process Clause. Cage v. Louisiana, 498 U.S. 39 (1990) (per curiam).
O'Connor's references to language from Holland v. United States, reveals the problem: "[T]aken as a whole, the instruction [must] correctly convey[ ] the concept of reasonable doubt to the jury."\textsuperscript{215} This approach is quite different from telling the jury that the state's burden can be satisfied only if the persuasive force of the credible evidence presented by the prosecution at trial convinces the jury of the guilt of the accused to a near certitude.

The question may be fairly—and simply—asked: Is the central and overarching purpose of instructing the jury on the state's burden in a criminal case to impress upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused? If this question is to be answered in the affirmative, as I believe it must, then the next question is: Must the term "reasonable doubt," as a concept apart and separate from the burden, be defined in order to convey the state's burden of presenting evidence that convinces the trier of fact to a near certainty before a conviction may be had? The answer to this question is no. It is logic and the nature of the idea referenced by this two-word term rather than any Supreme Court authority that directs this answer, although the Supreme Court has held that due process does not require a definition as part of the jury instruction.\textsuperscript{216}

To borrow Justice Harlan's words, reasonable doubt is a "quantitatively imprecise" term.\textsuperscript{217} Two juries viewing the same evidence may reach different conclusions.\textsuperscript{218} When the verdict is "not guilty," the state has failed to meet its burden, usually because a fact deemed crucial by the jury is missing or the sole witness on a central issue was disbelieved. Conversely, if the state is able to produce evidence, including eyewitness testimony where necessary, that is viewed as credible regarding all elements that must be proven, and this evidence withstands attack by the defense, then the jury can say with "near certitude" that the defendant committed the crime.

\textsuperscript{215} \textit{Victor}, 114 S. Ct. at 1242-43 (emphasis added) (citations omitted).

\textsuperscript{216} \textit{Id.}, 114 S. Ct. at 1243 (citing Holland, 348 U.S. at 140).

\textsuperscript{217} \textit{See id.} (stating that although reasonable doubt standard is requirement of due process, Constitution neither requires nor prohibits trial courts from defining reasonable doubt). \textit{Cf. Hopt}, 120 U.S. at 440-41 (noting that reasonable doubt rule is often obscured by attempts at definition, which often serve to create rather than dispel confusion).

\textsuperscript{218} \textit{In re Winship}, 397 U.S. at 370 (Harlan, J., concurring). The term "reasonable doubt" communicates to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions. \textit{Id.} (Harlan, J., concurring).

\textsuperscript{217} For a discussion of differing jury verdicts, see infra notes and text located in Section VI(C).
charged. In either scenario, the verdict turns upon the state of mind of the factfinder, which, directed by the credible evidence, either reaches a subjective commitment to "near certitude" or does not.

B. Reasonable Doubt: An Effect, Not a Cause

Reasonable doubt, after all, is an internal disposition, a subjective state of mind. It is not a cause, but rather an effect,²¹⁹ a result, and a consequence of the impartial examination of the evidence presented at trial. After receiving the evidence, and discussing it with one's fellow jurors, a juror's internal disposition will be either one of belief to a "subjective state of near certitude" that the defendant is guilty as alleged by the state or it will not. If the juror's mind is in a state of less than near certitude regarding the state's allegations, his or her degree of uncertainty is what we commonly label "reasonable doubt."

Reasonable doubt is not an objective standard of measurement existing apart from and capable of observation by a factfinder. Reasonable doubt is not the crossbar placed at six feet in a high jump competition with the jurors standing along side of it, watching to see if the prosecutor, with the state's evidence strapped to her back, can leap over it. The state's case cannot be calibrated nor weighed by any measuring devices or scales.

Many years ago, Coffin v. United States resolved the cause or effect question in favor of the latter, as elementary logic and psychology required it to do given the Court's view of "reasonable doubt" as a term used to describe an internal state that exists after a juror sees and hears evidence.²²⁰ In my opinion, part of the confusion

²¹⁹. See Coffin v. United States, 156 U.S. 432, 460 (1895) (describing reasonable doubt as effect and distinguishing it from cause); Trickett, supra note 18, at 83 (noting that doubt must be caused by something and not "raised' for a particular purpose”).

²²⁰. Coffin, 156 U.S. at 460. The Court's insightful discussion of cause and effect, in the context of the relationship of proof with reasonable doubt, is as valid today as it was a century ago:

Concluding, then, that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is "reasonable doubt." It is, of necessity, the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually
judges and attorneys experience regarding the standard is attributable to their having little or no understanding of whether a reasonable doubt is a cause or an effect. If it is considered a cause, there will be a strong inclination to treat reasonable doubt as something transsubjective and fungible, something that can be located by rummaging through the evidence in the case. The misapprehension caused by such a view is part of the problem with the trial judge's charge in Victor.221

Elsewhere, I submitted my criticism of the Supreme Court's holding regarding Victor's petition,222 but here I wish simply to focus on confusion engendered by viewing "reasonable doubt" as a cause. Victor's trial judge instructed, in part: "Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon."223 The judge here is telling the jury that reasonable doubt exists prior to and separate from the evidence in the case, and that it is to be used much like a magnifying glass or filter; as such, it could "cause" one to "pause and hesitate before taking the represented facts as true."224

This language on its face conveys to the jury that somehow reasonable doubt exists without a nexus to the testimony—"the represented facts"—which will cause them to "pause and hesitate" where

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before them; in other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence, and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views, and indicates the necessity of enforcing the one in order that the other may continue to exist.

Id. (emphasis added).

221. Two years after it decided Coffin, the Supreme Court declared that it was misleading to characterize the presumption of innocence as evidence. Agnew v. United States, 165 U.S. 36, 52 (1897). Later, in Taylor v. Kentucky, 436 U.S. 478 (1978), the Court stated that the "presumption of innocence" was actually an "assumption" rather than a "presumption." Id. at 483 n.12. For a more detailed discussion of the Court's examination of the "presumption of evidence," see supra note 184. Yet, the Court has never changed its position regarding the evidence causing—or failing to cause—a condition of mind. See Victor, 114 S. Ct. at 1249 (defining reasonable doubt as that which would make person "pause and hesitate" before relying on facts in important decision).

222. For a criticism of the Court's holding regarding Victor's petition, see supra notes 63-92 and accompanying text.

223. Victor, 114 S. Ct. at 1249 (emphasis added). The instruction provided further language of causation, as the trial judge explained reasonable doubt as that which "will not permit you . . . to have an abiding conviction . . . of the guilt of the accused." Id. (emphasis added).

224. Id.
what really occurs during deliberations—or what should take place—is an evaluation of the credibility of the witnesses presented. It is the credibility, or lack of credibility, that will *cause* either a "subjective state of near certitude" or "reasonable doubt" about the guilt of the defendant to develop. It is not the other way around. "Reasonable doubt" as a state of mind does not *cause* a witness's testimony to be disbelieved. One could modify the oft used tautology that "reasonable doubt is a doubt based on reason" to say that reasonable doubt is the doubt that remains if the trial evidence has not left the factfinder in a subjective state of near certainty that the defendant committed the crime.

While the language from the charge at Victor's trial may be subject to another, more benign, reading, that the language is susceptible to two or more interpretations—one of which is grounded on an incorrect premise—unmasks another problem in the charge. My purpose here, however, is not to parse the reasonable doubt instruction, but rather to demonstrate that when there exists no clear understanding of whether reasonable doubt is a cause or an effect, the difficult task of communicating clearly with the jury is made even more burdensome.

The trial judge must properly rule on the admissibility of evidence throughout the trial, instruct the jurors that their verdict must be based only on the evidence presented at trial (and not on newspaper reports or extraneous comments received from family members or friends) and provide an informative charge that lays down the guidelines to be followed in evaluating witnesses regarding bias, prior inconsistent statements, criminal records, promises from the state and so on. If the judge has accomplished these tasks, then each juror is placed in a position where he or she can focus on what was presented at trial and evaluate the evidence to make an internal determination as to whether he or she has been convinced of the defendant's guilt to a "near certainty."

C. *Same Facts, Same Standard: Different Juries, Different Verdicts*

It is not difficult to draw scenarios from everyday courtroom experience to demonstrate that two different juries presented with the same set of core facts could reach contradictory results, based upon the weighing of evidence and assessment of witness credibility. A readily available example is that of the eyewitness/victim in a sexual assault case.

Let us say that Theresa testifies that she was raped when she was eighteen years old but waited five years to report the incident to
the police because she was ashamed and frightened. She testifies that she feared her mother’s reaction as well as that of her father, who did not live with Theresa and her mother, who has “old world” values. Theresa gained the strength to come forward as she matured generally and attended some women’s studies courses at the community college. She further testifies that she met the defendant, Sam, at a backyard barbecue party at a friend’s home. After having “a few beers” at the party, and “feeling pretty good, but in total control,” she accepted Sam’s invitation for a ride home and told her girlfriend, Barbara, with whom she had come to the party, that she would not be riding home with her. She tells the jury that Sam had not driven his car more than a quarter of a mile when he pulled into a dead-end dirt road and raped her. It was near midnight and she could see people swimming in a backyard pool through the trees that lined one side of the road.

In his defense, Sam testifies that he knew Theresa, had met her at the party and had “a few beers” with her, and that he did offer to take her home in his car. He testifies that at the party they had “hung out” together for a couple of hours, had danced to the music played by an “amateur DJ” and had begun to exchange affectionate touches—“we would hold hands between the dances, and during the slow dances we kissed a little bit on the cheeks.” Sam admits pulling into the dark road, but insists that this was a mutual decision. He states that they stayed there for “45 minutes to an hour” and there was “touching, petting, and fondling underneath our clothes, but there was absolutely no sexual intercourse.” Sam is able to let the jury know that he is presently married, employed as a buyer at a department store and is the father of a two-year-old child. He has seen Theresa “five, maybe six times” since the barbecue party, “once at the friend’s house, and then a few times around, like at the mall or movie theater I think.”

In those jurisdictions where corroboration of sexual activity is not required in rape or sexual assault cases, it is not implausible to envision either a conviction or an acquittal after a trial upon the foregoing facts. One jury may fasten upon the five-year hiatus between the alleged sexual assault and Theresa’s report to the police, and conclude that in such circumstances the victim is not worthy of belief, despite any arguments made by the prosecution that her claim of fears and immaturity were plausible. Conversely, another jury may believe her explanation for the delay and disbelieve the defendant’s testimony that the entire encounter was voluntary and included only sexual touching and caressing. In either event, an
instruction to the members of the jury, that to convict their minds
must be satisfied to a "near certitude" or "evidentiary certainty" that
Sam committed the crime, will impress upon them the seriousness
of their task and the State's high burden of proof.

Moreover, by defining the burden while avoiding any defini-
tion or description of the unquantifiable "reasonable doubt," the
jury is necessarily directed to focus on the weight and credibility of
evidence central to the charge, and not the amount of evidence
presented by either party. Indeed, even if Theresa's girlfriend, Bar-
bara, testified to corroborate the fact that Sam and Theresa left the
party together, the deciding factor would still be the credibility of
Sam and Theresa, as Sam did not deny that he left the party with
Theresa.

If the jury collectively believes to a "near certitude" that The-
resa is telling the truth and that Sam is not, then the State has met
its burden, and Sam would be convicted. If the jury disbelieves
Theresa or finds that both Theresa and Sam are credible, thereby
leaving their minds in a state of equipoise, then the burden has not
been met and Sam should be found not guilty. In either case, just-
tice has been done.

So long as the jury is told that proof beyond a reasonable
doubt is, as we have learned—or thought we had learned—in *In re
Winship*, proof to a "subjective state of certitude"225 or "utmost cer-
tainty,"226 there is no need to describe "reasonable doubt" as real,
substantial, not fanciful, a doubt based on reason, or the like. If
each juror votes to acquit Sam after hearing Theresa's testimony
and observing her demeanor on the stand, who is to question this
and by what criteria? Similarly, if the same jurors each vote to con-
 vict Sam, also on the basis of Theresa's testimony and demeanor,
who is to question this conclusion and by what criteria? If the in-
struction to the jury includes the obligatory charge that evidence is
only what has been presented in the courtroom and that the State's
burden is measured against the credible evidence—or lack of evi-
dence—then any doubt about whether the State proved an element
of the crime will necessarily be a reasonable one. As one early com-
mentator asked: Has anyone ever entertained a doubt that he or
she believed to be unreasonable?227 The doubt is not "a state of the

225. *In re Winship*, 397 U.S. 358, 364 (1970) (quoting Dorsen & Rezneck,
supra note 9, at 1, 26).
226. Id.
227. Trickett, supra note 18, at 81.
case" or "the state of the evidence," but rather "a state of the mind."

Another type of case that regularly surfaces in criminal courtrooms is that in which the state's case rests on the shaky and unsavory shoulders of an informant or a co-participant in the criminal activity who has now decided that a governmental promise of reduced jail time is more precious than loyalty to a former confederate. Such situations typically arise in indictments for drug trafficking where an informant is frequently the lynchpin of the State's case.

Even fledgling defense attorneys realize that their principal, and perhaps only, hope for obtaining an acquittal in such cases is to demolish the informant's credibility on cross-examination. Cross-examination will generally spread before the jury the star witness's criminal record as well as any agreement reached between the witness and the government regarding immunity, leniency or money.

For our purposes, let us assume that defense counsel is able to show that the witness, John, has six prior convictions, three of which are drug related, one assault with a dangerous weapon, and two credit card crimes, and that John served time for one of the drug offenses and for assault with a dangerous weapon. Additionally, the defense attorney is able to show that John has pending against him two separate charges of receiving stolen goods and one charge of possession of narcotics with intent to deliver, wholly unrelated to the trial at which he is testifying. John acknowledges on cross-examination that he struck a "deal" with the State and hopes to stay out of jail by obtaining a recommendation from prosecuting officials for suspended sentences and probation on his pending charges in return for his cooperation in providing evidence against the defendant and testifying at the trial.

The defendant, a twenty year-old part-time college student, part-time assistant cook, does not take the stand, but presents one witness, his former high school track coach and English teacher.

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228. Id. at 85.
229. See, e.g., Hoffa v. United States, 385 U.S. 293, 311 (1966) (stating that cross-examination of informant can be rigorous); United States v. Fallon, 776 F.2d 727, 734 (7th Cir. 1985) (same); United States v. Dailey, 759 F.2d 192, 196 (1st Cir. 1985) (same).
230. See Fallon, 776 F.2d at 734 (stating that due process requires that jurors be informed of terms of witness/informant's deal); Dailey, 759 F.2d at 196 (holding that jury should be informed of exact nature of agreement between witness and government).
who testifies as to his character and reputation: 231 "All the other kids and the teachers and coaches thought he was a real straight arrow. He wouldn't even drink a beer. He was into health and fitness. He was never connected with drugs or anything like that." On cross-examination, the prosecution is permitted to question the coach about the apartment in which the defendant lived with two other students. The coach's description squares with that given by the informant, who testified that he had met with the defendant at the dormitory suite for a drug buy.

In argument to the jury, defense counsel hammers at the informant's lack of credibility, pointing out that his drug and credit card convictions show a sneaky and deceptive personality not worthy of belief. Moreover, the pending charges demonstrate the same character flaw and, soaring with eloquence, counsel implores the jury not to allow the wholesome young college student to be convicted on the testimony of such a sleazy individual who seeks to exchange the defendant's liberty for his own.

The prosecutor counters by pointing out that law enforcement officials must sometimes deal with disreputable characters to combat the nation's drug epidemic. The jury, implores the prosecutor, can use its common sense and experience as adult members of the community—they know that drugs are used and sold by college students as well as other segments of society. The prosecutor attempts to persuade the jury that the informant's story was plausible—how could John describe the defendant's dormitory room if he had not been there?

Again, the issue for the jury is one of credibility. In sifting through and weighing the evidence, one jury may have persons on it who convince their colleagues that the informant has a motive to lie and that without independent evidence pointing toward the guilt of the defendant, the jury should not hand down a conviction based on the testimony of an individual whose life has been replete with dishonesty. Meanwhile, another jury looking at the evidence presented could wholeheartedly accept the State's argument that it is a regrettable necessity that people like the State's witness are necessary tools of law enforcement and that John, despite his considerable baggage, told a believable story highlighted by a detailed description of the defendant's living quarters.

231. See Michelson v. United States, 335 U.S. 469 (1948) (discussing admissibility of testimony as to defendant's general reputation); see also Fed. R. Evid. 404, 405 (stating that character evidence is inadmissible with some specified exceptions).
In both of these scenarios it is impossible to quantify "reasonable doubt," as we are talking about subjective states of mind. If the jurors follow the judge's instructions to consider only the evidence presented at trial, they will either believe the informant or they will not. If their belief in his testimony reaches the point of "near certitude," then they have reached a level that permits the return of a guilty verdict. If they reject his testimony completely or believe only parts of it, and then only with considerable skepticism engendered by his criminal record and the bargain he struck with the state, then their minds will not be in a subjective state of "near certitude" and they must acquit. This lack of "near certitude," this uncertainty, is reasonable doubt.

Because the deliberations are secret and the verdict is a general one of either guilty or not guilty, there is no way for the external observer to assess the reasonable doubt—or lack of certainty—that led to an acquittal or the intensity of the "near certitude" that resulted in a conviction. Similarly, prior to the deliberations, the trial judge has no linguistic tools available to communicate to the jury the amount of "near certitude" they must have in order to convict. All that can be said is that the evidence must lead to that state of mind.

If the jury follows the judge's instructions and confines its search for an answer to the only question it must resolve—whether the state has proved the charge beyond a reasonable doubt by the evidence admitted at trial in the form of testimony and things—then any doubt or uncertainty it has will flow from either the absence of evidence or the presence of evidence that the jury finds not worthy of credit. The doubt will necessarily be a reasonable one because it is the effect of a study of the evidence. It is gratuitous, if not insulting, to tell jurors, after they have been instructed throughout the trial and at the close of the case, to consider only that which was presented to them in the course of the trial, that a reasonable doubt is not a fanciful one or that they are not free to speculate that the crime may have been committed by Martians.

VII. INSTRUCTING ON PROOF BEYOND A REASONABLE DOUBT: BURDEN OF PROOF, YES—QUANTUM OF DOUBT, NO

If one agrees with my contentions thus far, especially that reasonable doubt cannot be defined in terms of quantity, that the words "proof beyond a reasonable doubt" are not self-defining, and that Winship and Jackson remain vital and authoritative, then the Supreme Court's pronouncement in Victor that "the Constitution
neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."232 should be seen at once as imposing an obligation upon and issuing a challenge to the trial bench and bar to formulate an instruction that is comprehensible to jurors and which fits squarely into the tradition of the Supreme Court's holdings.

In crafting an instruction it is important to remain mindful of the nature and composition of the principal audience, which is of course the jury, not an appellate court. I agree with Professor Morgan's observations that much of the confusion in the area of jury instructions in general is attributable to the propensity of the trial judge to write for the benefit of the reviewing court that may be called upon to scrutinize his or her charge rather than for the individuals who must apply the charge to the facts that are fresh at hand.233 At the very least, the charge should be in the vernacular and not the jargon of the profession. While the average appellate judge should be able to comprehend everyday usage of legalese, the same cannot be said for jurors. Moreover, at a time when social planners and commentators are concerned with declining literacy and the depreciation of critical reasoning skills within the general population,234 forces within the legislative and legal systems—osten-

233. For a discussion of Professor Morgan's observations, see supra note 88 and accompanying text.
234. See Jane M. Healy, ENDANGERED MINDS: WHY CHILDREN DON'T THINK AND WHAT WE CAN DO ABOUT IT 13-26 (1990) (discussing problems facing America's youth—they have lower SAT scores, many cannot understand text beyond elementary school level and NAEP report determined that only 5% of high school graduates could satisfactorily master material traditionally used in colleges—and noting additional problem that Americans do not want to take time to read, in large part due to lack of necessary mental organization and sustained effort demanded by reading); Jonathan Kozol, ILLITERATE AMERICA (1985) (discussing extent of illiteracy in America and proposing solutions); REPORT OF THE NATIONAL COMMISSION ON EXCELLENCE AND EDUCATION, A NATION AT RISK (1983) (discussing declining educational standards in America). All of these studies draw upon statistics and commentary by educators, business leaders, government officials and scholars to chronicle a society whose increasing numbers of illiterate and functionally illiterate people constitute a threat to economic productivity and self-government. B. Sanders, A IS FOR OX: VIOLENCE, ELECTRONIC MEDIA, AND THE SILENCING OF THE WRITTEN WORD 36-48 (1994) (discussing how commentators have evaluated effects of television on America's children, including fact that children have lost desire to read, resulting in lower SAT scores and educational development). For example, A NATION AT RISK recites a dismal litany:

Some 23 million American adults are functionally illiterate by the simplest tests of everyday reading, writing, and comprehension. About 13 percent of all 17-year-olds in the United States can be considered functionally illiterate. Functional illiteracy among minority youth may run as high as 40 percent. . . . The College Board's Scholastic Aptitude Test (SAT) demonstrates a virtually unbroken decline from 1963 to 1980. Av-
visibly motivated by goals of inclusion and increased diversity—are expanding jury pools from those individuals who have expended the effort and time to place their name on the voting roles to those who have simply been able to muster that minimal amount of energy required to obtain a driver's license.255 Bluntly, the educated and the uneducated, the voracious reader and the functionally illiterate, the citizen activist and the shirker, are all called upon to serve on juries, and the role of the trial judge is to address the spectrum with clarity.256

Toward that end, I submit the following as a charge that is true to our nation's jurisprudence and commitments regarding the high threshold placed between the state's criminal accusation and the

average verbal scores fell over 50 points and average mathematics scores dropped nearly 40 points.... Many 17-year-olds do not possess the "higher order" intellectual skills we should expect of them. Nearly 40 percent cannot draw inferences from written material; only one-fifth can write a persuasive essay; and only one-third can solve a mathematics problem requiring several steps.

A Nation at Risk, supra, at 8-9. A Nation at Risk concludes, among other things: The people of the United States need to know that individuals in our society who do not possess the levels of skill, literacy, and training essential to this new era will be effectively disenfranchised, not simply from the material rewards that accompany competent performance, but also from the chance to participate fully in our national life. A high level of shared education is essential to a free, democratic society and to the fostering of a common culture, especially in a country that prides itself on pluralism and individual freedom.

Id. at 7. Additionally, in a comment probably directed more at citizen participation in public debate than the electoral process, the National Commission spoke in words apposite to jury trials: "For our country to function, citizens must be able to reach some common understandings on complex issues, often on short notice and on the basis of conflicting or incomplete notice." Id.

The judge presiding over a criminal trial is in no position to ameliorate the social and political conditions causing a decline in the literacy or reasoning powers of the nation's population, but it is surely both a challenge and an obligation for trial judges—and trial attorneys—to communicate clearly with the people selected for jury service, some of whom will necessarily be in the categories that cause concern to the authors cited above.

235. See, e.g., CAL. CIV. PROC. CODE § 197 (West 1982 & Supp. 1994) (stating Department of Motor Vehicles (DMV) records appropriate source for juror list); FLA. STAT. ch 97.057 (Supp. 1996) (mandating DMV must provide opportunity for persons to register to vote); 705 ILL. COMP. STAT. 305/1 (West 1995) (authorizing use of DMV lists for jury pool); WASH. REV. CODE § 2.36.054 (Supp. 1996) (same).

236. In an earlier decision, the Supreme Court, through Justice Frankfurter, articulated the imperative need for clarity on the part of trial judges instructing juries:

Particularly in a criminal trial, the judge's last word is apt to be the decisive word. ... Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.

individual's potential loss of liberty. The reader should keep in mind that at the time the instruction on proof beyond a reasonable doubt is given, the jury should have already been instructed on the elements of the crime or crimes at issue, the presumption of innocence, the difference between direct and circumstantial evidence and the overriding stricture that their decision must be based only on the evidence put forward at trial. Thus, a proper charge would be:

The government must prove each and every element of the crime beyond a reasonable doubt. This is a very high burden of proof. It means that you may find the defendant guilty only if, after reviewing all the evidence and discussing the evidence with your fellow jurors, you are convinced in your mind that it is just about certain—or nearly certain—that the defendant committed the crime. If after reviewing the evidence, your mind is in such a state that you are not just about certain—or nearly certain—that the defendant committed the crime, you must return a verdict of not guilty.237

This charge, in my opinion, speaks plainly and simply to the jury while explicating the principal points of the constitutional protection. The jurors are told that whatever the ultimate outcome of their deliberations, their individual and collective decisions must be based on the evidence. Their decision is a belief or state of mind flowing from the persuasive force of the evidence. The charge explains to them that their belief or state of mind must be one of "near certainty."

"[I]t is not necessary to explain to the jury the impossibility of acquiring absolutely accurate knowledge concerning any fact of history."238 Whatever educational and literacy problems there are in our society, I do not believe that we are so benighted as a people that the obvious has to be pointed out. Surely the words "near" or "nearly" and "just about" convey that absolute, one hundred percent certainty is not required. A dangerously problematic corollary to the attempt to inform the jury that absolute certainty is not required for the government's burden to be satisfied is the frequent statement by trial judges about the necessity of a juror being physi-

237. I believe that this proposed charge not only correctly describes the State's burden in criminal trials, but also adheres to the language and principles set forth by the Supreme Court in Winship and Jackson.

238. Morgan, Instructing the Jury, supra note 18, at 63.
cally present at the scene of the crime if the juror is to be able to view the facts with absolute certainty. In so instructing, the trial judge is saying, in effect, that absolute certainty is within the province of eyewitnesses, but we know—or should know by now—that this is simply not the case. Eyewitnesses can be wrong and eyewitness testimony must be viewed critically.\textsuperscript{299} Indeed, in criminal cases involving eyewitness identification, judges regularly instruct jurors to consider, among other things, the witness's vantage point, lighting, opportunity for observation and emotional state, so that an independent evaluation may be made.\textsuperscript{240}

It should come as no surprise to the reader who has journeyed with me to this point that the "hesitate to act" language has no place in the charge I recommend.\textsuperscript{241} The "hesitate to act" language—and the homey examples that usually accompany it—invites jurors to make value judgments regarding what they consider to be of significance in their lives while embarked upon the difficult and unique task of deciding upon a verdict in a criminal case. However, "[t]he decision a juror is called upon to make as to the fate of a criminal defendant is . . . unlike most of our other important decisions."\textsuperscript{242} In my view, the defendant is entitled to have the un-


\textsuperscript{240} The United States Supreme Court has noted the criteria regarding eyewitness identification that judges should utilize regarding admissibility and that juries may consider when assessing credibility. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977) ("These [factors] include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."). Brathwaite involved a pre-trial identification, but can be tailored to any situation involving identification testimony. Cf. United States v. Telfaire, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (applying factors to trial identification).

\textsuperscript{241} For a further discussion of the "hesitate to act" language, see supra notes 108-22 and accompanying text.

\textsuperscript{242} People v. Cubino, 655 N.Y.S.2d 625, 626-27 (App. Div. 1995) (Murphy, P.J., dissenting). Presiding Justice Murphy developed this position:

While we would, of course, like to be sure that our choice of a doctor, or a school for our children, or a car, or a retirement investment is the best that can be made, I should think it obvious that decisions such as these, although undeniably "important," are almost never premised, much less conditioned, upon the absence of all reasonable doubt; judgment in these vital areas is virtually always accompanied by some entirely rational qualms. There is, in fact, no correlation between rationally unassailable assuredness and importance when it comes to decision making in our daily lives or, for that matter, when it comes to decision making in the courtroom when criminal liability is not at issue.
divided attention of the jury focused on the evidence presented at trial. The defendant's ultimate fate should not be measured against the risk-taking propensities of jurors regarding the change of a career, a residence or a spouse.

The charge I propose—and one that I continue to use—is a concrete expression of the doctrinal declarations of the United States Supreme Court on the meaning of the State's burden in criminal trials. I cannot envision it being challenged by a defendant; and should the charge be presented to an appellate court by way of a cross-appeal by the State, I cannot envision the charge being rejected unless the reviewing court is somehow able to demonstrate that *Winship* and *Jackson* are no longer controlling precedent.

VIII. CONCLUSION

In *In re Winship* and in *Jackson v. Virginia*, the United States Supreme Court explained, in language leaving no room for quibble, that proof beyond a reasonable doubt means proof to an "utmost certainty," to "certitude" and to "near certitude," and that the persuasive force of the government's proof must be so compelling as to leave the states of mind of the jurors convinced to these levels. In *Victor v. Nebraska*, the Supreme Court was presented with an opportunity to direct lower courts to formulate reasonable doubt instructions in terms of the doctrinal declarations of *Winship* and *Jackson*. The Court, however, declined to make such a command, and opted instead to offer a parsing technique, the effect of which is to permit appellate courts to sustain reasonable doubt instructions that contain previously criticized and confusing language so long as the charge—in the opinion of the appellate court—makes some reference to the high burden of proof the law imposes on the prosecution. This means that trial judges need not incorporate the certainty language of *Winship* and *Jackson*, but may give charges that contain misleading and confusing verbiage so long as

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243. Anecdotally, I can report that the use of this charge, or a facsimile, in trials over which I have presided has resulted in both acquittals and convictions. Based upon my review of questionnaires submitted to jurors by the personnel of the court on which I sit, as well as my own informal conversations with jurors after the verdict, jurors do not appear to have any difficulty understanding this instruction.


246. *Id.*
some general reference is made to the State's burden being proof beyond a reasonable doubt.

While the refusal of the Supreme Court to require a specific instruction on proof beyond a reasonable doubt in all criminal trials is understandable, its refusal to require the use of words reflecting the Winship/Jackson "near certitude" standard, or appropriate synonyms, creates more problems than it solves. Additionally, the Court's holding fosters an environment in which the government's burden can regularly be lowered by trial judges, and renders elusive, if not impossible, the ability to create uniformity in the administration of criminal justice.\textsuperscript{247}

Absent an authoritative directive from the United States Supreme Court to instruct on the government's burden in a particular way, the responsibility falls upon trial judges, with the assistance of the trial bar, to formulate an appropriate instruction. To develop a charge that accurately states the government's burden in a manner that is clear and comprehensible to jurors requires an examination of the historical use of the standard and the meaning and analysis given to it by our tradition, through both courts and scholarly commentary.\textsuperscript{248}

The Supreme Court has never wavered from its present position that proof beyond a reasonable doubt means proof to a virtual certainty. Regrettably, in Victor v. Nebraska, in addition to creating what I believe is an unworkable and unfair parsing technique, the Supreme Court elevated the heretofore illustrative "hesitate to act" language to a standard that enjoys the same constitutional status the certainty language of Winship and Jackson does for the purpose of explaining proof beyond a reasonable doubt.

Reasonable doubt must be understood as a concept distinct from the government's burden of proof beyond a reasonable doubt, though it is obvious that reasonable doubt is a phrase reflecting a concept that is a component of the burden. Reasonable doubt, properly understood, is an effect, not a cause. Moreover, it is not quantifiable. Reasonable doubt need not be defined once

\textsuperscript{247} Also, despite Winship and Jackson, it appears that most trial courts, as well as the authors of model instructions, have not incorporated the concept of evidentiary certainty into their charge. For a discussion of post-Winship and Jackson cases in which appellate courts have had to consider jury charges that failed to incorporate the concept of evidentiary certainty, see supra notes 134-75 and accompanying text. For the text of model trial instructions that have not incorporated evidentiary certainty, see supra note 42.

\textsuperscript{248} For a discussion of ways in which the government's burden in a criminal trial has been expressed by courts and commentators, see supra notes 17-19 and accompanying text.
that term is understood as the state of mind a juror has if the State's proof has not been of such persuasiveness that the juror can say that his or her mind is in a subjective condition of near certitude after viewing the evidence.

What should be defined is the State's burden. The burden is of course explained in terms of the subjective state of mind of the jurors; and if the evidence has not left the state of mind of the jurors in a condition of near certitude, then there is necessarily a reasonable doubt. My recommendation, therefore, has been to define the burden and to abandon all attempts to define as a quantum that which we know to be unquantifiable. It is also pointless and redundant to define reasonable doubt as something that is neither fanciful, illogical or otherwise unconnected to the evidence, for the jurors should have been told more than once that their verdict must be based on the evidence presented during trial and on nothing else.

It may be hyperbolic to say in the language of the poet, Czeslaw Milosz, that trial judges often instruct juries in the "language of demons," but it is no exaggeration to use the poet's words in saying that the charges are rarely "pure and generous." If we as trial judges, advocates and scholarly critics are serious about the purpose and limitations of a criminal trial in our democracy and the tradition of a high burden of proof being imposed upon the prosecution, then we must speak to juries as purely and generously as the Constitution permits.

249. Milosz, supra note 1, at 231.
250. Id.