

Summer 2017

Reasonable Doubt: Is it Defined by Whatever is at the Top of the Google Page?, 50 J. Marshall L. Rev. 933 (2017)

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REASONABLE DOUBT: IS IT DEFINED BY WHATEVER IS AT THE TOP OF THE GOOGLE SEARCH PAGE?

BOBBY GREENE

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I. *PEOPLE V. DOWNS*: A JURY’S CONFUSION ABOUT REASONABLE DOUBT

A. “A Real Bind”

Imagine, as the judge, you receive a note from the jury asking, “What is your definition of reasonable doubt, 80%, 70%, 60%?”¹ You are well aware that this is a standard less than reasonable doubt.² Furthermore, it is your duty as a judge to determine what the particular confusion is and to provide further instruction when the

1. See *People v. Downs*, 2015 IL 117934, ¶ 1, 69 N.E. 3d 784, 784 (holding that court’s response of “We cannot give you a definition [of reasonable doubt] it is your duty to define” to jury question asking for definition of “reasonable doubt” did not violate the admonition against defining the term).

2. See *People v. Downs*, 2014 IL App (2d) 121156, ¶ 28, 11 N.E. 3d 869 *rev’d & remanded* *People v. Downs*, 2015 IL 117934, 69 N.E. 3d 784 (reasoning “this question proves that the jury was considering the concept of ‘beyond a reasonable doubt’ to be a level of confidence in the evidence somewhere between 60% and 80%. The question, at best, suggests that the jury was predisposed to use a standard less than reasonable doubt. . .”).

jury delivers a particular question or requests clarification.³ On the other hand, Illinois has a 100-year precedent providing no definition of reasonable doubt is to be given to the jury.⁴ So, what are you left to do? Let the jury decide a man's fate in a murder trial using a standard below that for reasonable doubt?⁵ Or, risk committing reversible error and aid the jury with its plea by providing them an understanding of the elusive concept of reasonable doubt?⁶

These were the facts before the trial court judge in *People v. Downs*.⁷ There, the court responded to the jury, "We cannot give you a definition [of reasonable doubt] it is your duty to define."⁸ Remarkably, the jury returned a verdict of guilty of first-degree murder after further deliberation.⁹

The defendant appealed and Second District Court of Appeals reversed finding that the lower court's reasonable doubt instruction was deficient and resulted in plain error.¹⁰ The Second District acknowledged only in a footnote in its opinion that "[t]he jury's question put the trial court in *a real bind . . .*"¹¹ The court further explained the only answer that it could think of was "to tell the jury that reasonable doubt is not defined as a percentage, but rather is the highest standard of proof known in law . . ." ¹² However, in the same breath, the appellate court admitted that after hearing the oral arguments, the only recommended instruction that the court suggested, would have also been error.¹³

As a result, the State appealed and the Illinois Supreme Court reversed, holding that the trial court's response to the jury's question (asking for a definition of "reasonable doubt") did not violate the well-established rule, barring the courts from defining the term for a jury.¹⁴ In this holding, the Illinois Supreme court resolved the appellant court split, whether it was error *per se* to ever

3. See *Hunter v. Smallwood*, 28 Ill. App. 3d 386, 391 (1975) (reasoning "[e]ven where a situation is relatively clear to a trial court, in most cases it would probably be more consistent with the ends of justice if the trial court makes an attempt to clarify the instructions for the jury, or at least attempting to understand the problem which is confusing the jurors.").

4. See *Downs*, 2015 IL 117934 at ¶ 24 (holding "In decisions dating back more than 100 years, this court has consistently held that the term "reasonable doubt" should not be defined for the jury, that the term, in fact, needs no definition because the words themselves sufficiently convey its meaning.").

5. *Downs*, 2014 IL App (2d) 121156.

6. See *People v. Pledge*, 2016 IL App (1st) 132200 at ¶ 10 (holding, "An instruction on the concept of reasonable doubt is reversible error if the instruction improperly minimized the State's burden of proof or attempted to shift that burden to the defendant.").

7. *Downs*, 2014 IL App (2d) 121156.

8. *Downs*, 2015 IL 117934 at ¶ 7.

9. *Id.*

10. *Downs*, 2014 IL App (2d) 121156 at ¶ 32.

11. *Id.* at ¶ 29. (emphasis added).

12. *Id.*

13. *Id.*

14. *Id.*

instruct the jury about reasonable doubt if a jury asked the court to define it.¹⁵

B. How Bound Are We?

This Comment addresses the State of Illinois' minority view that the term "reasonable doubt" is "self-defining" to a jury and that "the words themselves sufficiently convey its meaning" in a society that has easy access to Google.¹⁶ Part I of this Comment analyzes *People v. Downs* to illustrate both a jury's confusion as to reasonable doubt and the inability for the court to aid the jury with a description when needed. Part II of this Comment assesses the historical perspective of reasonable doubt and the authority governing Illinois, which has led Illinois courts to determine "it is for the jury to collectively determine [or define] what reasonable doubt is."¹⁷ Part II will also look to the professional responsibility of both judges and counsel in their attempt to deal with the absence of a definition and the ambiguity of the term "reasonable doubt." This Comment will then discuss the impact the absence of a definition has had on jurors in the jurisdictions like Illinois, while illustrating how the advancement of technology has fundamentally changed this issue. Part III analyzes whether the term "reasonable doubt" is self-defining, and whether technological advances have required Illinois courts to provide a jury instruction when the jury asks for a definition of reasonable doubt. Finally, Part IV proposes Illinois courts should advise juries what Illinois Supreme Court Chief Judge George Cooke astutely pointed out over 100 years ago; "the term 'reasonable doubt' has no other or different meaning in

15. See *People v. Franklin*, 2012 IL App (3d) 100618, ¶ 4, 970 N.E. 2d 1247, 1249 (holding that by the trial judge and the prosecutor telling the jurors: "Beyond a reasonable doubt means beyond a reasonable doubt. It's what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt. . . ." is plain error); accord. *People v. Turman*, 2011 IL App (1st) 091019, 954 N.E. 2d 845; contra *People v. Thomas*, 2014 IL App (2d) 121203, ¶ 28, 15 N.E. 3d 943, 949 (holding "[i]t remains the law in Illinois that defining 'reasonable doubt' is discouraged but is not reversible error *per se*").

16. *Downs*, 2015 IL 117934 at ¶ 19 (noting "Illinois is among the jurisdictions that do not define reasonable doubt.").

17. See *Turman*, 2011 IL App (1st) 091019 at ¶ 19 (citing the trial court holding, "The trial court then proposed the following: 'reasonable doubt is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is.'"); see *Franklin*, 2012 IL App (3d) 100618 at ¶ 4 (citing the trial court, "During jury selection, the trial judge told the potential jurors: 'Beyond a reasonable doubt means beyond a reasonable doubt. It's what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt.'"); see *Thomas*, 2014 IL App (2d) 121203 at ¶ 1 (holding, "trial court's response to question from jury, that definition of reasonable doubt was for jury to determine, did not violate due process.").

law than it has when used in any of the ordinary transactions or affairs of life.”¹⁸

II. THE COURT’S VIEW, PROFESSIONAL RESPONSES, AND POTENTIAL PROBLEMS WITH THE (ABSENCE) OF A DEFINITION

An overview of the historical perspective of reasonable doubt and the authority governing the Illinois courts is essential to the understanding of the dilemma today. To illustrate the issue, a comparison of jurisdictions with and without instructions for reasonable doubt will be set out. Further, the summary will discuss the professional response of the courtroom workgroup’s attempt to deal with the absence of a definition, and conclude with a look at the effect on jurors in those jurisdictions that do not have a definition, including Illinois, and how the advancement of technology, especially smartphones, has fundamentally changed this issue.

A. *The Historical Perspective and Governing Authority in Illinois*

Illinois has struggled with the concept of defining reasonable doubt since shortly after admission into the Union and prior to its own passing of the State Constitution.¹⁹ As early as 1846, in one of his State Supreme Court opinions, Justice Young discussed a “technically incorrect” definition of reasonable doubt beginning the long road of disapproval for defining the term reasonable doubt.²⁰

Just a few years later in 1850, Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court crafted a well-known

18. See *People v. Barkas*, 99 N.E. 698, 702-703, 255 Ill. 516, 225 (1912) (reasoning “The term ‘reasonable doubt’ has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves.”).

19. *Pate v. People*, 8 Ill. 644, 661 (1846).

20. See *id.* at 661.

That there should be more than a bare probability of the defendant's innocence; that they should have a reasonable doubt of his guilt, growing out of the unsatisfactory nature of the evidence; such a doubt as would induce a reasonable man to say, I am not satisfied that the defendant is guilty.’ This instruction, as it reads, is not technically correct, but by inserting the word ‘possibility’ in the place of ‘probability,’ it would not be obnoxious to any just exception. It is most likely that the court in giving the explanation made use of the former word, and that in copying the instructions in the bill of exceptions, the latter word was by mistake inserted in lieu of it.

Id.

definition for reasonable doubt, which served as a foundation for more than a century as basis for most jurisdictions' reasonable doubt jury instructions.²¹ Justice Shaw posed the question of what is reasonable doubt in his opinion of *Commonwealth v. Webster*:

Then, *what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined.* It is not mere possible doubt; because every thing relating to human affairs, and depending on *moral evidence*, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty*, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and *moral certainty*; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of *a moral nature*, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.²²

It was not until 1994, 144 years later, that the United States Supreme Court suggested that “moral certainty,” which was a term used in Justices Shaw’s definition, had a different common meaning than it did during Shaw’s coinage and cautioned courts away from such “antiquated” language from the 19th century.²³ Even though the Supreme Court ultimately upheld Shaw’s definition, the Illinois Supreme Court reasoned because a deficient reasonable doubt instruction may warrant reversal,²⁴ it is better left undefined.²⁵ The

21. MCCORMICK ON EVIDENCE 517 (John W. Strong ed., 5th ed. 1999) (citing *Com. v. Webster*, 59 Mass. 295, 296 (1850)).

22. *Com.*, 59 Mass. at 320 (1850) (emphasis added).

23. See *Victor v. Nebraska*, 511 U.S. 1 (1994) Reasoning:

Words and phrases can change meaning over time: A passage generally understood 1850 may be incomprehensible or confusing to a modern juror. [W]e do not condone the use of the phrase [moral certainty]. As modern dictionary definitions of moral certainty attest, the common meaning of the phrase has changed since it was used in the Webster instruction, and it may continue to do so to the point that it conflicts with the Winship standard.

Id.

24. *People v. Downs*, 2015 IL 117934, ¶ 32, 69 N.E. 3d 884, 794 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 113 (1993)).

25. *Id.*

Illinois Supreme Court noted in *Downs* that there is a danger in defining reasonable doubt.²⁶ The Illinois Supreme Court reasoned that it violates a defendant's due process rights to give any instruction that defines reasonable doubt with "a reasonable likelihood" that the jury understood the definition to permit a conviction of "proof less than beyond a reasonable doubt."²⁷

B. How the United States Supreme Court and the Model Penal Code Have Addressed Reasonable Doubt

The Supreme Court has visited the issue of reasonable doubt in several cases for varying reasons. The Court first opined in 1954, explaining that defining reasonable doubt does not aid the jury because defining the term usually does not make it any clearer in the minds of the jury.²⁸

In 1962, the Model Penal Code arguably appeared to follow this rationale and described the burden of proof for the prosecution as proof beyond a reasonable doubt; however, it purposely excluded any definition of the reasonable doubt standard.²⁹

In 1970, the Court mandated that the Due Process Clause of the Constitution requires proof beyond a reasonable doubt of every element of a charged offense in criminal proceedings.³⁰ The *Winship* standard,³¹ which is regarded by some as protecting a principle as

26. *Id.* at *3 (citing *Victor*, 511 U.S. at 1).

27. *Downs*, 2015 IL 117934 at ¶ 18.

28. *Holland v. United States* 348 U.S. 121 (1954), *reh'g denied*, 348 U.S. 932 (1955).

29. See Matt Nichols, *Victor v. Nebraska: The "Reasonable Doubt" Dilemma*, 73 N.C. L. REV. 1709 (1995) (citing Brief for the United States at 9, *Victor*, 511 U.S. at 1) (quoting Model Penal Code § 1.12 cmt. 190 (1985) ("An amicus curiae brief filed by the Solicitor General pointed out that the American Law Institute specifically did not define reasonable doubt in the Model Penal Code because it believed that defining the term "can add nothing helpful to the phrase.") *Id.*

30. See *In re Winship*, 397 U.S. 358 (1970) (holding that "the reasonable-doubt standard of criminal law has constitutional stature and that juveniles, like adults, are constitutionally entitled to proof beyond reasonable doubt when they are charged with a violation of a criminal law.").

31. See *id.* at 362.

Expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required. [] The reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue. [] Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. [] Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

old as 1769, explains William Blackstone's idea that "the law holds that it is better that ten guilty persons escape than that one innocent suffers."³² There, the Court found that the reasonable doubt standard is critical because it requires the jury to appreciate that they must subjectively reach a level of certainty about the essential facts to find the defendant guilty.³³

In 1979, the United States Supreme Court revisited the issue in *Jackson v. Virginia*, expanding the *Winship* standard to include not only the inquiry of whether the jury was appropriately instructed on the reasonable doubt standard, but also whether the evidence on record could reasonably support those findings.³⁴ In 1990, *Cage v. Louisiana* marked the first time that the Supreme Court overturned a reasonable doubt instruction as being inadequate under the *Winship* standard.³⁵ The Court was asked to analyze the wording used in reasonable doubt jury instructions under the *Winship* standard, which did not use Shaw's classic definition. Just a few years later in *Sullivan v. Louisiana*, the Court held that reasonable doubt instructions that are deficient under the *Winship* standard, like that in *Cage*, are not harmless error.³⁶

In 1994, the Court combined two cases in *Victor v. Nebraska* regarding instruction on reasonable doubt.³⁷ The instructions given in both cases had their genesis based upon Shaw's classic definition delivered in *Webster*.³⁸ The Court held that both instructions issued were adequate and correctly instructed the jury on the concept of reasonable doubt.³⁹ The Court reasoned that it is not

which he is charged.

Id.

32. Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45 (1999).

33. See *Winship*, 397 U.S. 358 at 364 (reasoning, "[t]o this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'").

34. *Jackson v. Virginia*, 443 U.S. 307 (1979).

35. See *Cage v. Louisiana*, 498 U.S. 39 (1990) (reasoning "[I]t 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.").

36. *Sullivan v. Louisiana*, 508 U.S. 275, 113 (1993).

37. *Victor v. Nebraska*, 511 U.S. 1, 6 (1994).

38. *Id.* at 8.

The instruction given in Sandoval's case has its genesis in a charge given by Chief Justice Shaw of the Massachusetts Supreme Judicial Court more than a century ago. The instruction given in Victor's case can be traced to two separate lines of cases. Much of the charge is taken from Chief Justice Shaw's *Webster* instruction.

Id.

39. See *id.* at 7.

Reasonable doubt is defined as follows: It is *not a mere possible doubt*; because everything relating to human affairs, and *depending on moral*

constitutionally required to define reasonable doubt to the jury and that it is a term that is not easily defined.⁴⁰ However, the Court also noted that the Constitution does not prohibit defining reasonable doubt and Justice Ginsburg's concurrence strongly advocated for defining the term reasonable doubt to aid the jury.⁴¹ Justice Ginsburg cited the Federal Judicial Center's proposed definition for reasonable doubt that she argued was straightforward and accurate.⁴²

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.

'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* reasonably 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 doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

Id. (emphasis in original).

40. *Id.*

41. *Id.*

42. *See id.* at 27.

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

Id.

C. *The State Court Dilemma: Whether to Define Reasonable Doubt for the Jury*

Currently, the state courts are split on the issue of whether to define reasonable doubt. Illinois is in the minority of jurisdictions that admonish trial courts from defining the term reasonable doubt, even when asked by the jury for guidance.⁴³ Only 10 other states find themselves in agreement with Illinois' position.⁴⁴ As for the remaining 39 states, they leave the decision to define the term up to the trial court if there is no pattern jury instruction.⁴⁵ The Federal Courts are also split as to defining reasonable doubt.⁴⁶

Policy reasons behind the decision not to define the term is grounded in the idea that it defies an easy explanation.⁴⁷ At least one study suggests the language used to describe the rationale of reasonable doubt may sway mock jurors to find that the reasonable doubt standard was met, given the same case facts.⁴⁸ This seems to support the idea that some of these courts' reasoning in attempting to define reasonable doubt is "the equivalent to playing with fire" because any general definition will lend itself to favor one side more than another in our adversarial system.⁴⁹ Some believe that the words themselves, provide the meaning needed for a jury.⁵⁰

43. Timothy P. O'Neill, *Instructing Illinois Juries on the Definition of "Reasonable Doubt": The Need for Reform*, 27 LOY. U. CHI. L.J. 921 (1996).

44. *Id.* (citing (1) Kentucky, (2) Mississippi, (3) Oklahoma, (4) Texas, (5) Wyoming, (6) Oregon, (7) South Carolina, (8) Vermont, (9) Virginia and (10) West Virginia, as states that do not define reasonable doubt to the jury).

45. *Id.*

46. *Id.*

47. *See Victor*, 511 U.S. at 5 (reasoning "Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication."); *accord* *United States v. Hall*, 854 F.2d 1036, 1038 (7th Cir. 1988) (citing "[T]his court reasoned that defining reasonable doubt is often more confusing than illuminating. An attempt to define reasonable doubt presents a risk without any real benefit.").

48. *See* Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICH. L. REV. 1139 (2016) (finding "The conviction rate among jurors who were instructed to 'search for the truth' was nearly *double* the conviction rate for jurors who were instructed to evaluate the government's evidence for proof beyond a reasonable doubt.").

49. Casey Reynolds, *Implicit Bias and the Problem of Certainty in the Criminal Standard of Proof*, 37 LAW & PSYCHOL. REV. 229, 236 (2013) (citing *United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975)).

50. *See* *People v. Thomas*, 2014 IL App (2d) 121203, ¶ 1, 15 N.E. 3d 943 (citing *People v. Moses*, 288 Ill. 281 (1919) (reasoning "because there is no better definition of the meaning of the words 'reasonable doubt' than the words themselves.")).

*D. Recent Illinois Cases Suggest Reasonable Doubt Is
Not Understood by Juries*

Several recent cases demonstrate that juries are questioning the term reasonable doubt before making their decision in reaching a verdict. In 2011, *People v. Turman* involved a jury asking the trial court judge for a “more explicit, expansive definition of reasonable doubt.”⁵¹ The trial court responded, “reasonable doubt is not defined under Illinois law. It is for the jury to collectively determine what reasonable doubt is.”⁵² On appeal, the trial court decision was reversed and the court reasoned that the jury, if applying their own standard, could unknowingly apply a standard lower than that of reasonable doubt.⁵³

Then in 2014, *People v. Thomas* called the same issue into question when a jury sent a note to the judge asking, “What is the legal definition of reasonable doubt?”⁵⁴ The judge replied, “It is for you to determine.”⁵⁵ The appellate court upheld the trial court’s statements to the jury holding, “[T]he trial court’s instruction that the meaning of ‘reasonable doubt’ is for jurors to determine is a[n] [unquestionably] correct statement of Illinois law.”⁵⁶ Later that same year, the trial court in *People v. Downs* similarly received a letter asking, “What is your definition of reasonable doubt, 80%, 70%, 60%?”⁵⁷ The court declined, “We cannot give you a definition it is your duty to define.”⁵⁸ On appeal, the court opined that the trial court issued a deficient reasonable doubt instruction, resulting in plain error.⁵⁹ The *Downs* case made it all the way up to the Illinois Supreme Court in 2015.⁶⁰ The Court noted that while the lower courts in Illinois should not define reasonable doubt, it is not *per se* plain to do so.⁶¹ Unanimously, the Illinois Supreme Court explained it historically prohibited judges and lawyers from defining reasonable doubt because it is self-defining and therefore, does not need a further definition.⁶² The Court stressed the point by reiterating, since 1968 the Committee Note accompanying IPI Criminal No. 2.05,⁶³ has plainly provided that jurors should not

51. *People v. Turman*, 2011 IL App (1st) 091019, ¶ 19, 954 N.E. 2d 845, 850.

52. *Id.*

53. *Id.*

54. *Thomas*, 2014 IL App (2d) 121203 at ¶ 14.

55. *Id.*

56. *Id.* at ¶ 47

57. *People v. Downs*, 2015 IL 117934, ¶ 17, 69 N.E. 3d 784, 788 *reh’d denied* *People v. Downs*, No. 117934, 2015 Ill. LEXIS 779 (2015)

58. *Downs*, 2015 IL 117934 at ¶ 17

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at ¶ 19

63. Illinois Pattern Jury Instructions, Criminal, No. 2.05 (4th ed. 2000). “The Committee recommends that no instruction be given defining the term

receive a reasonable doubt definition.⁶⁴ Furthermore, the Court clarified the trial court's answer to the jury, "we cannot give you a definition [of reasonable doubt]; it is your duty to decide," did not constitute a definition of reasonable doubt and was 'unquestionably' a correct statement of the law."⁶⁵

E. How Professionals Have Responded to Defining Reasonable Doubt

Several recent cases illustrate the various responses to the absence of a definition of reasonable doubt to the jury. In at least three separate occasions, during *voir dire* a trial court judge used his hands as scales to help illustrate the term reasonable doubt to the jury, while telling the jury:

Somebody may have served on civil juries[.] [T]here the burden of proof is a preponderance of the evidence and that's defined as more likely than not that the event occurred. If you take a scale, all you have to do is tip it, and that is what preponderance of the evidence is. Illinois does not define reasonable doubt, but if you use the analogy in a criminal case the burden of proof is beyond a reasonable doubt, if you use the analogy of the scale, it would be like this.⁶⁶

In each of these cases, the appellate court found that the statements by the trial courts did not constitute plain error.⁶⁷ However, in *People v. Pledge*, which was decided after *Downs*, the court of appeals admonished the practice of the trial court explaining, "While again we would prefer that the scale analogy not be used, we trust this practice is no longer in use."⁶⁸

In *People v. Jenkins*, the trial court judge was deemed to have erroneously defined reasonable doubt to the jurors by using a demonstration.⁶⁹ There, the judge placed a rubber band around a

"reasonable doubt." In *People v. Malmenato*, 14 Ill.2d 52, 61, 150 N.E.2d 806, 811 (1958), the Illinois Supreme Court stated: "Reasonable doubt is a term which needs no elaboration and we have so frequently discussed the futility of attempting to define it that we might expect the practice to be discontinued. (*People v. Schuele*, 326 Ill. 366, 157 N.E. 215; *People v. Rogers*, 324 Ill. 224, 154 N.E. 909); see also *People v. Bowlby*, 51 Ill. App. 2d 51, 201 N.E. 2d 136 (4th Dist.1964).

64. *Id.*

65. *Id.*

66. *People v. Pledge*, 2016 IL App (1st) 132200-U at ¶ 7; *People v. Gill*, 2014 IL App (1st) 123159-U at ¶ 3; *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 52, 994 N.E. 2d 962, 971.

67. *Id.*

68. *Pledge*, 2016 IL App (1st) 132200 at ¶ 44.

69. See *People v. Jenkins*, 89 Ill. App. 3d 395, 396 (1st Dist. 1980).

By way of example, I'll use this glass of water. If you can see the glass without this rubber band around it. That rubber band represents beyond a reasonable doubt. The defendant is like a chip of wood in the bottom of the glass. In order to prove the defendant guilty, the State must pour in

glass of water and told them that the rubber band represented reasonable doubt.⁷⁰ He then explained metaphorically, the defendant is like a chip of wood in the bottom of the glass and the prosecution must pour in enough evidence, like water, to float the defendant to the rubber band to prove his guilt.⁷¹

In *People v. Max*, the court reviewed the statements made by the prosecution in closing arguments. In closing arguments, the prosecutor said “Now, beyond a reasonable doubt, there’s—there’s no dictionary definition of that. I would suggest to you that if you imagine a balance—”.⁷² At that point, the defense counsel objected, and the trial court sustained the objection.⁷³ Later, during the rebuttal portion of closing argument, the prosecutor spoke again about reasonable doubt noting, “We all know better in our heart of hearts exactly what went on here. And when you know inside your heart of hearts, you know we have met our burden of proof of proving Billie Max guilty beyond a reasonable doubt.”⁷⁴ After reviewing the prosecution’s remarks in the totality of the circumstances, the appellate court found no due process violation occurred, citing *Victor*.⁷⁵

Only a couple months before *Downs*, the Third District Court of Appeals overturned a conviction due to the plain error of the prosecutor’s remarks in closing argument.⁷⁶ In that case, the prosecution told the jury in closing arguments, “Reasonableness, ladies and gentlemen. That is our standard. Beyond a reasonable doubt. It’s not all doubt and it’s not a hundred percent certainty. It’s beyond a reasonable doubt.”⁷⁷ The court viewed the prosecution’s

enough water to float the defendant to the line of reasonable doubt, represented by the rubber band. If they don’t float the defendant that high then they fail and you must find the defendant not guilty. If they float the defendant to that line, then they have met their burden of proof beyond a reasonable doubt. And you must find her guilty. You must not require the State to fill the glass. They don’t have to prove it to a mathematical certainty. But to a reasonable doubt. I hope the illustration is helpful to you. It is a sometimes confusing concept. And I want to be sure you understand it before we go on.

Id.

70. *Id.*

71. *Id.*

72. *People v. Max*, 2012 IL App (3d) 110385, ¶ 40, 980 N.E. 2d 243, 253

73. *Id.*

74. *Id.* at ¶ 42.

75. *Id.* at ¶ 55 (citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (“Due process is violated only if, under the totality of the circumstances, there is a reasonable likelihood that the jury understood that the instructions allowed it to find the defendant guilty based upon a standard of proof that was less than beyond a reasonable doubt.”)).

76. *People v. Cole*, 2015 IL App (3d) 120992-U at ¶ 43.

77. *See id.* at ¶ 27.

Reasonableness, ladies and gentlemen. That is our standard. Beyond a reasonable doubt. It’s not all doubt and it’s not a hundred percent

comments as “an attempt to shift and diminish the burden of proof.”⁷⁸ There, it was the prosecutor who was trying to play on the word “reasonable” and relate it to the standard of reasonable doubt.⁷⁹ In that sexual assault case, the prosecutor argued about whether the defendant could have left any physical evidence from the sexual assault because he had a vasectomy and the reviewing court viewed this argument as burden shifting.⁸⁰

Just a few months after *Downs*, the First District Court of Appeals again found itself reviewing reasonable doubt when it was asked to review the remarks made by the State during closing arguments in *People v. Thompson*.⁸¹ In *Thompson*, the State explained to the jury that it need not prove guilt beyond all doubt. In addition, the State pointed out to the jury that traditionally juries across the country find evidence in other cases sufficient to meet the burden.⁸² In this case, the court pointed out the prosecution’s comments were in rebuttal to the defense attorney’s closing arguments, where the defense argued that the evidence did not meet the standard of proof beyond a reasonable doubt.⁸³ The court cited *Downs* noting that for more than 100 years the Illinois Supreme Court “has consistently held that the term reasonable doubt should not be defined for the jury, that the term, in fact needs

certainty. It's beyond a reasonable doubt. Is it reasonable to think that some other person who didn't have a vasectomy somehow got the rest of his sperm to disappear? Isn't it more reasonable that the guy post-vasectomy left one?

Id.

78. *Id.* at ¶ 28. “We consider that the State's comments constituted an attempt to shift and diminish the burden of proof.” *Id.*

79. *Id.*

80. *Id.*

81. *See* *People v. Thompson*, 2015 IL App (1st) 122265, ¶ 35, 37 N.E. 3d 931, 939. (holding the “prosecutor's comment during rebuttal argument regarding reasonable doubt standard did not improperly minimize state's burden of proof; [and] under plain error review, no prejudice resulted to defendant from prosecutor's comment during rebuttal argument regarding reasonable doubt standard.”).

82. *See id.* (explaining, “And with respect to reasonable doubt, that's a burden that's met in courtrooms across the country every day. It's not proof beyond all doubt, it's not prove any doubt [*sic*], it's proof beyond a reasonable doubt. And you are the ones that determine what a reasonable doubt is.”).

83. *See id.*

[U]nder the plain error standard], we find no error. During her closing, defense counsel mentioned “reasonable doubt” in several contexts. During rebuttal, the State may respond to statements made by defense counsel in closing argument that invite a response. We consider comments in the proper context by examining the entire closing argument of both sides. Our review of the record reveals that defense counsel's argument invited the prosecutor's comments.

Id.

no definition because the words themselves sufficiently convey its meaning.”⁸⁴

The Supreme Court held that the lower courts are not required to define reasonable doubt,⁸⁵ the Illinois Supreme Court has steadfastly held that Illinois courts should not define reasonable doubt to juries.⁸⁶ In addition, there are solid policy rationales for, and against, defining the reasonable doubt standard to lay jurors as made evident by the split among the states and federal jurisdictions.⁸⁷ The absence of a pattern jury instruction that defines reasonable doubt,⁸⁸ and the Illinois Supreme Court’s prohibition of both judges and counsel from describing the standard,⁸⁹ has arguably led to juror confusion illustrated by recent cases such as *Turman, Thomas, and Downs*.⁹⁰

III. HOW TECHNOLOGY HAS CHANGED THE GAME: THE PREVALENCE OF THE SMARTPHONE

Part III begins by analyzing whether the term “reasonable doubt” is self-defining to a lay juror. It will discuss the belief some jurors have that reasonable doubt is a legal term of art, and why it is dangerous to leave a jury to self-define reasonable doubt. Finally, it will explain the importance of “lifting the veil” from the jury’s eyes so they have a better understanding of the highest burden required by the law.

84. See *People v. Downs*, 2015 IL 117934, ¶ 24, 69 N.E. 3d 784, 789 *reh’g denied* *People v. Downs*, No. 117934, 2015 Ill LEXIS 779 (Ill. Sept. 28, 2015).

In decisions dating back more than 100 years, this court has consistently held that the term ‘reasonable doubt’ should not be defined for the jury, that the term, in fact, needs no definition because the words themselves sufficiently convey its meaning. This restriction applies to both the trial court and counsel.

Id.

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

86. *Downs*, 2015 IL 117934 at ¶ 24.

87. O’Neill, *supra* note 43.

88. Illinois Pattern Jury Instructions, Criminal, No. 2.05 (4th ed. 2000).

89. Raymond J. McKoski, *The Ups And Downs Of Defining Reasonable Doubt*, THE CHI. BAR ASSOCIATION RECORD 32 (2015). “Neither judges nor attorneys should attempt to define, explain, or illustrate the concept of reasonable doubt in jury instructions, in voir dire, in answer to jury questions, or during any other part of the trial.” *Id.*

90. Timothy P. O’Neill, *Clearing The Fog Of “Reasonable Doubt” Important For Due Process*, CHI. DAILY LAW BULLETIN (Sept. 4, 2014), <http://news.jmls.edu/wp-content/uploads/2014/09/16642-LB-reprint-JMLS-Sep04-2014-C-O'Neill.pdf>.

A. *Is Reasonable Doubt Self-Defining?*

Some legal scholars believe reasonable doubt is self-defining.⁹¹ The self-defining concept is the idea that the words themselves convey a sufficient meaning to the jurors, who will ultimately employ its definition in a criminal trial.⁹² This idea of self-defining carries the belief that by separating the terms “reasonable” and “doubt,” the jurors already know what these words mean separately because they are already familiar with them from everyday usage.⁹³ And those same jurors can combine the words, and their individual, “every day” meanings, to discern the concept of the legal standard of reasonable doubt.⁹⁴

This self-defining concept goes even further; the notion that the words “reasonable doubt” cannot be adequately defined with a standardized definition, and that any attempt to define the words, would actually hinder or confuse a juror.⁹⁵ The confusion comes from the inability to explain all the incidents of “reasonable doubt” that the jury has encountered in their everyday life occurrences, and any attempt to try to define that concept is more confusing than insightful.⁹⁶

91. See BARBARA E. BERGMAN, NANCY HOLLANDER & THERESA M. DUNCAN, WHARTON'S CRIMINAL EVIDENCE § 2:4 (15th ed. 2015) (concluding “Most of these courts have reached the conclusion that reasonable doubt need not be defined on the grounds that the term is self-explanatory, and a definition would tend only to confuse the jury.”); see also *People v. Moses*, 288 Ill. 281, 284 (1919) (reasoning “because there is no better definition of the meaning of the words ‘reasonable doubt’ than the words themselves”).

92. *People v. Downs*, 2015 IL 117934, ¶ 19, 69 N.E. 3d 784, 788 *reh'g denied* *People v. Downs*, No. 117934, 2015 Ill LEXIS 779 (Ill. Sept. 28, 2015) (reasoning, “The rationale behind this rule is that “reasonable doubt” is self-defining and needs no further definition.”).

93. See *United States v. Glass*, 846 F.2d 386, 387 (7th Cir.1988) (reasoning, “Reasonable doubt’ must speak for itself. Jurors know what is ‘reasonable’ and are quite familiar with the meaning of ‘doubt.’”).

94. See *Downs*, 2015 IL 117934 at ¶ 24 (reasoning, “In decisions dating back more than 100 years, this court has consistently held that the term ‘reasonable doubt’ should not be defined for the jury, that the term, in fact, needs no definition because the words themselves sufficiently convey its meaning.”).

95. See *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (reasoning, “Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication.”); see also *U.S. v. Hall*, 854 F.2d 1036, 1038 (7th Cir. 1988) (citing, “In so ruling, this court reasoned that defining reasonable doubt is often more confusing than illuminating.”).

96. See *U.S. v. Witt*, 648 F.2d 608, 610 (9th Cir. 1981) (reasoning, “Courts have recognized in recent years that the legal concept of the term is one of common usage and acceptance.”); see also *U.S. v. Bardin*, 224 F.2d 255, 261 (7th Cir. 1955) (citing, “The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly to a jury a sound method of self-analysis for one's belief.”).

Some judges embrace this concept since any attempt at defining could lead to a deficient definition in the law.⁹⁷ Also, the inherent danger in defining the term would give one side of the adversarial system an advantage, however slight, thus tipping the scales of justice.⁹⁸ Some of these scholars believe that there has yet to be a single definition that entirely captures the true meaning of reasonable doubt in words that would effectively convey its proper meaning to the jury without possibly confusing the jury.⁹⁹ The self-defining concept fosters the idea that the individual jurors must deliberate as individuals and then collectively, as a jury, come to a belief of what reasonable doubt means based on their own individual experiences in life.¹⁰⁰ This line of thought is arguably how the Illinois Supreme Court held that a circuit court's response, "We cannot give you a definition [of reasonable doubt;] it is your duty to define it" was a correct statement in the law.¹⁰¹

On the other hand, it has also been argued that lawyers and judges only believe the concept of reasonable doubt is self-defining simply because they themselves already have a good understanding of the reasonable doubt standard.¹⁰² Some self-definer advocates may have forgotten that it is because of their legal education that

97. See *United States v. Hall*, 854 F.2d 1036, 1038 (7th Cir. 1988) (reasoning, "At best, definitions of reasonable doubt are unhelpful to a jury, and, at worst, they have the potential to impair a defendant's constitutional right to have the government prove each element beyond a reasonable doubt.").

98. Casey Reynolds, *Implicit Bias and the Problem of Certainty in the Criminal Standard of Proof*, 37 LAW & PSYCHOL. REV. 229, 236 (2013) (citing *United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975)).

99. *Downs*, 2015 IL 117934 at ¶ 31 ("The underlying premise in all of our cases is that trying to explain things will confuse matters, and we cannot see why a jury request should change this premise. If there is a definition that can clarify the meaning of reasonable doubt, common sense suggests that such a definition be offered to all juries, even those that do not venture a request. But until we find a definition that so captures the meaning of 'reasonable doubt' that we would mandate its use in all criminal trials in this circuit, we cannot hold that it is error to refuse to give some definition.") (citing *United States v. Reives*, 15 F.3d 42, 46 (4th Cir. 1994)).

100. *People v. Franklin*, 2012 IL App (3d) 100618, ¶ 4, 970 N.E. 2d 1247, 1249 ("Beyond a reasonable doubt means beyond a reasonable doubt. It's what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt.").

101. *Downs*, 2015 IL 117934 at ¶ 23.

102. *Victor v. Nebraska*, 511 U.S. 1, 25 (1994) (Ginsburg, J., concurring in part and concurring in the judgment).

While judges and lawyers are familiar with the reasonable doubt standard, the words 'beyond a reasonable doubt' are not self-defining for jurors. Several studies of jury behavior have concluded that 'jurors are often confused about the meaning of reasonable doubt' t when that term is left undefined. Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative—refusing to define the concept at all—is not obviously preferable.

Id.

has made them aware of how these words fit together to formulate legal terminology. However, some jurors are without this legal education, and they may not have the ability to ascertain a legal concept of “reasonable” and “doubt.” just because they may be familiar with these words in today’s lexicon.¹⁰³

Opponents of the self-defining concept argue even judges do not always agree that their peers correctly advised the jury of the reasonable doubt standard.¹⁰⁴ If judges cannot always come to a full consensus of the meaning of reasonable doubt, it is illogical to believe lay jurors who may have absolutely no legal education or very little education at all could comprehend the concept.¹⁰⁵

Furthermore, juries of vastly different ages, livelihoods, and experiences have a different view of reasonable doubt from not only each other, but especially from legal scholars.¹⁰⁶ Simply put, the legal field must remember that juries are often made up of lay people who lack complex knowledge of legal concepts, legal standards, and importantly, the policies behind all of those concepts and standards.¹⁰⁷ Many of these jurors are, by profession, outside the legal community and rarely actually ever serve on juries.¹⁰⁸

103. *See Victor*, 511 U.S. at 25.

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

Id.

104. *People v. Pledge*, 2016 IL App (1st) 132200-U at ¶ 7; *People v. Gill*, 2014 IL App (1st) 123159-U at ¶ 3; *People v. Johnson*, 2013 IL App (1st) 111317, ¶ 52, 994 N.E. 2d 962, 971.

105. *Reynolds*, *supra* note 98, at 236.

106. *See People v. Fox*, 269 Ill. 300, 304 (1915).

The defendant in a criminal case is entitled to be tried by a jury of 12 drawn from the voters of the county, and under our system of drawing juries the jurors are generally of widely different ages, occupations, experience, and ability. They must all agree on a verdict. What would amount to a reasonable doubt or be defined as a reasonable doubt by one juror would not necessarily be so considered by another, and yet the defendant is entitled, under the law, to have just such a jury pass on his case, is entitled to the verdict of each member of the jury, and has the right to have each one resolve in his own mind whether or not, from all the evidence, he has what he deems to be a reasonable doubt of the defendant's guilt.

Id.

107. *Id.*

108. Susan Saulny, *Jury Duty? Prepare for Rejection; Though Many Are Called, Few Ever Deliberate*, N.Y. TIMES (Sept. 8, 2003), www.nytimes.com/2003/09/08/nyregion/jury-duty-prepare-for-rejection-though-many-are-called-few-e

Given this unfamiliarity, with the legal system and its concepts like reasonable doubt, and the unfamiliarity with actually serving as a juror, it is likely that some jurors would find it confusing not to be supplied with a definition for reasonable doubt.¹⁰⁹

It is only fair to say jurors are often unfamiliar with process of being a juror, and they are looking to the professionals in this arena (the judges and attorneys) for guidance because this is not their chosen profession. However, when these juries look to the legal professionals for guidance, these teachers, construction workers, and business professionals, are instructed, “We cannot give you a definition [of reasonable doubt;] it is your duty to define [it].”¹¹⁰

B. Recent Cases of Jury Misconduct Suggest Reasonable Doubt Is Not Self-Defining

Within the last decade, there have been some cases of jury misconduct that suggest reasonable doubt is not self-defining to jurors.¹¹¹ These cases reveal that the internet and smartphone communications are new temptations for jurors, especially jurors who want a clear-cut answer as to what reasonable doubt means.¹¹²

In one example, a juror used his cellular phone to call his own attorney and ask his attorney to explain the definition of reasonable doubt to him.¹¹³ Another case revealed that at least two jurors Googled the definition of reasonable doubt to find its meaning.¹¹⁴ In that case, at least one of the two jurors who researched the definition of reasonable doubt shared the definition with the rest of

ver-deliberate.html.

109. See *Victor v. Nebraska*, 511 U.S. 1, 26 (1994) (citing studies, “Several studies of jury behavior have concluded that ‘jurors are often confused about the meaning of reasonable doubt’ when that term is left undefined.”).

110. See *People v. Downs*, 2015 IL 117934, ¶ 24, 69 N.E. 3d 784, 788 *reh’g denied* *People v. Downs*, No. 117934, 2015 Ill LEXIS 779 (Ill. Sept. 28, 2015).

We believe that *Thomas* reached the correct conclusion on this point, and hold that here, the circuit court’s response to the jury—“We cannot give you a definition [of reasonable doubt;] it is your duty to define [it]”—was unquestionably correct. There was no error in this response. In decisions dating back more than 100 years, this court has consistently held that the term ‘reasonable doubt’ should not be defined for the jury, that the term, in fact, needs no definition because the words themselves sufficiently convey its meaning.

Id.

111. See *infra* notes, 112, 114, 117, 119.

112. Jerry Markon & Timothy Dwyer, *Juror Looks Up Word and Finds Trouble*, WASH. POST (Apr. 29, 2006), www.washingtonpost.com/wp-dyn/content/article/2006/04/28/AR2006042800845.html.

113. *Id.*

114. *Juror Google Research Results In Granting Motion For A New Trial*, FED. EVIDENCE REVIEW (Oct. 1, 2013), <http://federalevidence.com/blog/2013/september/juror-google-research-results-new-trial>.

the jury so that the juror could “be more comfortable with her decision.”¹¹⁵ This research caused a new trial to be ordered in that case because “the court concluded that the presumption of prejudice resulting from the jury’s exposure to extraneous information could not be rebutted.”¹¹⁶ In another case, a juror looked up reasonable doubt, among other legal terms, and printed them out.¹¹⁷ The juror then brought those pages defining the terms to the other jurors to aid their deliberations.¹¹⁸ Yet in another case, a juror used the internet to research the statute for the pending charge and then he clicked a link for the crime’s penalty.¹¹⁹ Importantly, in this case the juror revealed his motives to conduct the research.¹²⁰ He divulged that turning to Google for information was second nature for some people.¹²¹ This is particularly enlightening because it provides further evidence that some people have found it routine to “Google it when you don’t know it.”¹²² At least one news reporter asserts that nationally, jurors have been internet researching or Googling, a wide range of terms including reasonable doubt.¹²³

These examples illustrate why it is dangerous to allow a confused jury to self-define reasonable doubt themselves. It is particularly problematic because some jurors do not think it is a violation to pick up their smartphones and Google the term reasonable doubt, as demonstrated in these cases.¹²⁴ Many professionals have acknowledged that this type of behaviors is

115. *Id.*

116. *Id.* (citing *United States v. Rand*, 835 F.3d 451, 458 (4th Cir. 2016) (“A new trial was later granted due to juror misconduct.”)).

117. Mary Pat Gallagher, *Juror Is Spared Sanctions For Doing Internet Research In Sex-Crime Trial*, N.J. LAW JOURNAL (2011), www.ediscoverylaw.com/wp-content/uploads/sites/243/2012/02/Link-1A.pdf.

118. *Id.*

119. Ken Armstrong, *Case Of The Curious Juror: When The Web Invades The Courtroom*, THE SEATTLE TIMES, www.seattletimes.com/seattle-news/crime/case-of-the-curious-juror-when-the-web-invades-the-courtroom/ (last visited Apr. 7, 2015 at 3:24 PM CDT).

120. *Id.*

121. *Id.*

122. *I don't know, Google it.*, FACEBOOK (Feb. 7, 2017, 11:06 PM CDT), www.facebook.com/I-dont-know-google-it-333798880092

123. Armstrong, *supra* note 119.

124. See David E. Aaronson & Sydney M. Patterson, *Modernizing Jury Instructions In The Age Of Social Media*, 27 CRIM. JUST. 26 (2013).

Despite instructions from the judge not to conduct research on the case, a juror in a murder trial looked up definitions online for the terms ‘*livor mortis*’ and ‘*algor mortis*’ and the role it might have had in fixing the time of a beating victim’s death. When asked about it, the juror responded, ‘To me that wasn’t research. It was a definition.’; The Court of Special Appeals reversed the conviction and ordered a new trial, finding that the juror’s online search was in direct violation of the trial court judge’s order prohibiting jurors from researching the case.

Id.

almost second-nature today. For example, a judge in Washington suggested that when it comes to researching terms on the internet, “[i]t’s almost reflexive. We want to know something, and we go on the internet.”¹²⁵ But this is no excuse; instead it is evidence that the absence of a definition for reasonable doubt can be more harmful than it is helpful.

Advancements in technology have added another dimension to the problem of allowing jurors to self-define reasonable doubt.¹²⁶ In today’s society almost everyone, including the potential juror, carries an internet-enabled smartphone with them everywhere they go.¹²⁷ Studies suggest that some people feel that these Google-search-capable-devices are just “an extension of [them]selves.”¹²⁸ In 2015, it was found that nearly two out of three people own a smartphone of some kind.¹²⁹

The emergence of the smartphone in the last decade has made it easier for jurors to conduct a Google search for “reasonable doubt” that gives them 7,030,000 results in 0.61 seconds.¹³⁰ It is but a few more seconds to access several websites that will give them a variety of explanations and definitions for reasonable doubt. The effect of leaving jurors to their own devices may lead to reasonable doubt being defined by any number of different sources, including the publicly edited Wikipedia.¹³¹

125. Armstrong, *supra* note 119.

126. *Juror Google Research Results In Granting Motion For A New Trial*, FED. EVIDENCE REVIEW (Oct. 1, 2013), www.federalevidence.com/blog/2013/september/juror-google-research-results-new-trial. (“With increasing frequency, courts have noted concerns over juror research during a jury trial including over the Internet.”)

127. Armstrong, *supra* note 119. (“These days just about everyone carries a smartphone. So judges beseech jurors to keep those phones in their pockets, or at least to avoid the search engine: No Googling the defendant or the attorneys or the law or the meaning of words or anything else related to the case.”)

128. Russell B. Clayton, Glenn Lesner, & Anthony Almond, *The Extended iSelf: The Impact of iPhone Separation on Cognition, Emotion, and Physiology*, JOURNAL OF COMPUTER-MEDIATED COMMUNICATION, (Jan. 8, 2015), <http://onlinelibrary.wiley.com/doi/10.1111/jcc4.12109/full>.

129. Arron Smith, *U.S. Smartphone Use in 2015*, PEW RESEARCH CENTER (Apr. 1, 2015), www.pewinternet.org/2015/04/01/us-smartphone-use-in-2015/.

130. “Reasonable Doubt”, GOOGLE, www.google.com/search?q=reasonable+doubt&ie=utf-8&oe=utf-8. (last visited Feb. 7, 2017).

131. *Wikipedia: Introduction*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Wikipedia:Introduction> (last visited Feb. 7, 2017 at 4:00 PM CDT).

Wikipedia is a free encyclopedia, written collaboratively by the people who use it. It is a special type of website designed to make collaboration easy, called a wiki. Many people are constantly improving Wikipedia, making thousands of changes per hour. All of these changes are recorded in article histories and recent changes. For a more detailed account of the project, see About Wikipedia.

Id.

The danger is some jurors are potentially evaluating the evidence against a standard that has been defined to them from some unreliable website source, and the damage cannot be undone if there is no way for the court to know.¹³² Indeed, one author proposes that criminalization is an alternative solution to address this type of juror misconduct since jury instructions are not capable of preventing jurors from turning to the Internet.¹³³

C. *Contemplating Change in Stare Decisis When Society Changes Because of Technology*

The doctrine of *stare decisis* allows the courts to remain consistent and hold in a “principled and intelligible fashion,” but the courts will deviate if there are reasons that demonstrate new facts that support the change.¹³⁴ The recent advancements in technology and more importantly, the examples of juror misconduct using new technology, suggest reasons for reviewing the 100-year precedent of not supplying the jury with some information about reasonable doubt.

However, any change bears real consequences and instructing the jury that “reasonable doubt’ has no other or different meaning

132. Armstrong, *supra* note 119. (“For judges and lawyers, independent research by jurors poses danger. Information gleaned from the Internet or other sources can be misleading, false, incomplete, irrelevant, unfair or outdated. Bogus material might even be planted. The possibilities seem as endless as the Web. And if the lawyers don’t know what information a jury is relying upon, they have no opportunity to rebut or clarify.”).

133. Matthew Agliandolo, *Criminalization of Juror Misconduct Arising From Social Media Use*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y (2014).

[T]his Essay set out to consider criminalization as an alternative solution to juror misconduct arising from social media use. Jury instructions alone have been far from effective, as is evident from the various ways in which social media has led to misconduct. The unique nature of social media indicates that jury instructions are ill-suited to prevent jurors from using websites such as Facebook or Twitter throughout trial.

Id.

134. *See* Chicago B. Ass’n v. Illinois State Bd. of Elections, 161 Ill. 2d 502, 510 (1994).

The doctrine of *stare decisis* is the means by which courts ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion. *Stare decisis* permits society to presume that fundamental principles are established in the law rather than in the proclivities of individuals. The doctrine thereby contributes to the integrity of our constitutional system of government both in appearance and in fact. *Stare decisis* is not an inexorable command. However, a court will detour from the straight path of *stare decisis* only for articulable reasons, and only when the court must bring its decisions into agreement with experience and newly ascertained facts.

Id.

in law than it has when used in any of the ordinary transactions or affairs of life” is no different. Even though it can be argued that this statement is simplistic and straight forward, it still comes with the dangers that the self-definers caution.

First, telling a jury composed of people from all types of backgrounds ranging from the freshman in college to the retired 30-year veteran police officer, that their own life experiences of reasonable doubt are what they should use to shape their definition of reasonable doubt could be troubling for some. Those jury members would have different life experiences, and that would leave them with a difference in perception of reasonable doubt that they each have encountered.¹³⁵

On the other hand, this variance in life experience is arguably what fosters a healthy debate in the deliberation room.¹³⁶ One study demonstrated deliberations among the jury reduced individual biases and increased the probability that the jury would follow the judge’s instructions.¹³⁷ One judge reasoned that the refusal to give jurors a definition of reasonable doubt requires them to “wrestle with the term’s meaning themselves.”¹³⁸ So then, facilitating a discussion about the juror’s life experiences with reasonable doubt by instructing them that it has the same definition in the law as it does in ordinary life follows the self-defining concept.

135. See *People v. Fox*, 269 Ill. 300, 304 (1915).

The defendant in a criminal case is entitled to be tried by a jury of 12 drawn from the voters of the county, and under our system of drawing juries the jurors are generally of widely different ages, occupations, experience, and ability. They must all agree on a verdict. What would amount to a reasonable doubt or be defined as a reasonable doubt by one juror would not necessarily be so considered by another, and yet the defendant is entitled, under the law, to have just such a jury pass on his case, is entitled to the verdict of each member of the jury, and has the right to have each one resolve in his own mind whether or not, from all the evidence, he has what he deems to be a reasonable doubt of the defendant's guilt.

Id.

136. JURY ETHICS 6 (John Kleining & James P. Levine eds., 2006) (“The purpose of jury decision-making is not democratic majoritarianism, but consensus or at least concurrence achieved after a situation has been scrutinized from a suitably diverse set of perspectives.”).

137. Michael D. Cicchini & Lawrence T. White, *Truth or Doubt? An Empirical Test of Criminal Jury Instructions*, 50 U. RICH. L. REV. 1139 (2016) (“Some studies show that “deliberations sometimes do influence outcomes,” including, for example, a study in which juror deliberations reduced individual juror biases and made them more likely to follow the judge's instructions.”).

138. *People v. Thomas*, 15 N.E.3d 943, 949 (Ill. App. Ct. 2014) (“As a practical matter, the refusal to supply a definition requires jurors to wrestle with the term’s meaning themselves. This is no bad thing: the American legal system is premised on the belief that jurors represent the conscience of the community and will act diligently and thoughtfully in applying the law.”).

Secondly, it is also argued that “reasonable doubt” is comprised of words used in the everyday lexicon of the juror.¹³⁹ Therefore, some courts believe there is no need to instruct the jury on reasonable doubt even if they request guidance from the court.¹⁴⁰ Some courts believe this because the best-case scenario at any attempt to define will be unhelpful and are potentially deficient in the law.¹⁴¹

However, since there are documented incidents where the jury asked the court specifically for a definition, it is difficult to argue that the words “reasonable doubt” successfully convey their meaning to the jury. This notion provides some with cognitive dissonance as the two ideas conflict on their very premise. The words do not convey the meaning of “reasonable doubt” otherwise the jury would not ask for a definition.¹⁴² Jury instructions often provide definitions for many words that are commonly used among the public such as “reasonable belief,”¹⁴³ “actual knowledge,”¹⁴⁴ “unborn child,”¹⁴⁵ “cohabit,”¹⁴⁶ and even “prostitute,”¹⁴⁷ which can

139. See *United States v. Glass*, 846 F.2d 386, 387 (7th Cir.1988) (reasoning “Reasonable doubt’ must speak for itself. Jurors know what is ‘reasonable’ and are quite familiar with the meaning of ‘doubt.’”).

140. See *id.* (reasoning “[R]easonable doubt should not be defined even with request from jury.”).

141. See *United States v. Hall*, 854 F.2d 1036, 1038 (7th Cir. 1988) (reasoning, “At best, definitions of reasonable doubt are unhelpful to a jury, and, at worst, they have the potential to impair a defendant’s constitutional right to have the government prove each element beyond a reasonable doubt.”).

142. Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning To A Critical Concept*, 22 AM. J. CRIM. L. 677 (1995).

Likewise, a set of studies in Florida found that potential veniremen were confused about what was required by the reasonable doubt and presumption of innocence standards. Anecdotal evidence appears to corroborate the results of these studies. In one instance, a Colorado juror went home and consulted a dictionary for the meaning of reasonable doubt. She shared her new knowledge with another juror before both decided that the defendant was not guilty.

Id.

143. Illinois Pattern Jury Instructions, Criminal, No. 4.13 (4th ed. 2000). “The phrases “reasonable belief” or “reasonably believes” mean that the person concerned, acting as a reasonable person, believes that the described facts exist.” *Id.*

144. Illinois Pattern Jury Instructions, Criminal, No. 5.01C (4th ed. 2000). “Actual knowledge is direct and clear knowledge, that is, knowledge of such information as would lead a reasonable person to inquire further.” *Id.*

145. Illinois Pattern Jury Instructions, Criminal, No. 7.24 (4th ed. 2000). “The term ‘unborn child’ means any individual of the human species from fertilization until birth.”

146. Illinois Pattern Jury Instructions, Criminal, No. 9.05A (4th ed. 2000). “The word ‘cohabit’ means the living together of a man and woman in the same manner as if they were married to one another.” *Id.*

147. Illinois Pattern Jury Instructions, Criminal, No. 9.21 (4th ed. 2000). “The word ‘prostitute’ means a person who [(performs) (offers to perform)

arguably be said to be a part of the lay vocabulary because they are in many television shows, movies, and books.¹⁴⁸ Therefore, if the argument is that the jury is already familiar with what reasonable doubt means, then many of these jury instructions may be eliminated if the jury is also familiar with those words.¹⁴⁹

Notably, Illinois has jury instructions defining the burdens for proof for meeting the preponderance of the evidence,¹⁵⁰ and clear and convincing evidence.¹⁵¹ By providing definitions for these lower standards establishes a persuasive argument to provide at least some guidance for reasonable doubt to an inquiring jury. Be that as it may, those that argue for self-defining assert that the risk outweighs any benefit to attempt to define reasonable doubt because any definition runs the risk of being legally deficient.¹⁵² This risk is true of any definition or explanation that is provided to the jury based on the *Winship* standard that “so long as taken as a whole, the instructions correctly convey the concept of reasonable doubt.”¹⁵³

(agrees to perform)] [(an act of sexual penetration) (any touching or fondling of the sex organs of a person by another person for the purpose of sexual arousal or gratification)] for any money, property, token, object, or article or anything of value.” *Id.*

148. Jessica N. Cohen, *The Reasonable Doubt Jury Instruction: Giving Meaning to A Critical Concept*, 22 AM. J. CRIM. L. 677 (1995) stating:

Some have argued that because this important phrase is made up of words commonly used by lay people, it does not need to be defined. But jury instructions frequently define far simpler words and phrases that are part of the lay vocabulary, such as ‘attempt,’ ‘knowingly,’ ‘possession,’ and ‘agreement.’ Model instructions also routinely define ‘conspiracy’ and ‘circumstantial evidence’ -- terms that, like reasonable doubt, have become part of the lay language through television programs, movies, and books. Indeed, if the test is whether terms are used by lay people, then many jury instructions could be eliminated.

Id.

149. *Id.*

150. Illinois Pattern Jury Instructions, Criminal, No. 4.18 (4th ed. 2000). “Definition of Preponderance Of The Evidence, The phrase ‘preponderance of the evidence’ means whether, considering all the evidence in the case, the proposition on which the defendant has the burden of proof is more probably true than not true.” *Id.*

151. Illinois Pattern Jury Instructions, Criminal, No. 4.19 (4th ed. 2000). “The phrase ‘clear and convincing evidence’ means that degree of proof which, considering all the evidence in the case, produces the firm and abiding belief that it is highly probable that the proposition on which the defendant has the burden of proof is true.” *Id.*

152. See *Sullivan v. Louisiana*, 508 U.S. 275, 275 (1993) (holding “that constitutionally deficient reasonable doubt instruction required reversal of conviction.”).

153. See *Victor v. Nebraska*, 511 U.S. 1, 2 (1994) (holding “The Constitution does not dictate that any particular form of words be used in advising the jury of the government’s burden of proof, so long as “taken as a whole, the instructions correctly convey the concept of reasonable doubt.”).

The United States Supreme Court has found in two cases, *Cage* and *Sullivan*, the definition supplied to the jury fell below the *Winship* standard. In both of those cases the court noted that the instructions were nearly identical.¹⁵⁴ Importantly, the Court noted that the words “grave uncertainty,” “moral certainty,” and “actual substantial doubt,” were problematic since the juror could have found guilt without the required proof.¹⁵⁵ Conversely, telling the jury simply that “[t]he term ‘reasonable doubt’ has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life[]” does not create the problems associated with *Cage* and *Sullivan*.

While some may believe that reasonable doubt is self-defining, it is documented that some jurors have not found it easily understood. Although these cases demonstrating the jurors’ confusion about the issue of reasonable doubt are not daily occurrences, they nonetheless demonstrate that the term is not always easily understood. Further, these demonstrations of juror confusion, coupled with the increasing opportunity to use modern technology to conduct research, could create a perfect storm of juror misconduct that leads to misapplication of the reasonable doubt standard.

IV. LIFTING THE VEIL FOR THE CONFUSED JUROR

Many recent cases such as *Downs* have demonstrated that juries often wonder what exactly reasonable doubt means, and will go to many lengths to get a clear-cut definition. As a result, it is apparent that the court needs to guide the jury and answer their questions regarding this legal term of art. If the courts do not aid

154. See *Sullivan v. Louisiana*, 508 U.S. 275, 113 (1993) (reasoning “In his instructions to the jury, the trial judge gave a definition of “reasonable doubt” that was, as the State conceded below, essentially identical to the one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39, 111 S. Ct. 328, 112 L.Ed.2d 339 (1990).”).

155. *Cage*, 498 U.S. at 41.

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

Id.

juries when they make such a request, the courts run the risk of having Google do it for them via a few seconds in the bathroom stall on a cellphone. The fact is, jurors get breaks; they get to call their families and sometimes they can go home before a verdict is reached. While many courts in Illinois prohibit people from entering the court building with their smartphones, this restriction “does not apply to persons reporting for jury service.”¹⁵⁶ If you tell the jury that it must define reasonable doubt itself, then the jurors will use their resources to learn how to apply this legal standard in a few seconds on their smartphone.¹⁵⁷

Due to emergence of smartphone technology, the ability for jurors to consult the internet has made it obvious that courts should assure the jurors that they already know the answer to the definition of reasonable doubt.¹⁵⁸ It is the premise of the self-defining argument that courts should not define reasonable doubt because as Judge Cooke noted in one of his opinions as early as 1912, “[t]he term ‘reasonable doubt’ has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves.”¹⁵⁹

156. State of Illinois, Circuit Court of Cook County, *Frequently Asked Questions, General Questions, What Can I Bring with Me To Jury Service?*, COOK COUNTY COURT, www.cookcountycourt.org/FORJURORS/FrequentlyAskedQuestions.aspx (last visited Feb. 7, 2017 at 5:15 PM CDT).

I have heard there is a courthouse ban on electronic devices such as cellphones and laptops. Does this apply to jurors? The courthouse ban on cellphones and electronic devices was enacted to protect the privacy and safety of persons attending court and to maintain court decorum. It does **not** apply to persons reporting for jury service. You may bring such devices with you when you report for jury service and use them while you are in the jury assembly room. However, they must be turned off when you are in a courtroom. The trial judge will inform you whether you may use such devices to take notes during the trial.

Id. (emphasis in original).

157. Illinois Pattern Jury Instructions, Criminal, No. 1.01A (4th ed. 2000).

Preliminary Cautionary Instructions Before opening Statements[,] [2] You should not do any independent investigation or research on any subject or person relating to the case. . . . [3] For example, you must not use the Internet or any other sources to search for any information about the case, or the law which applies to the case.

Id.

158. *See* People v. Barkas, 99 N.E. 698, 702-703, (1912) (reasoning “The term ‘reasonable doubt’ has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves.”).

159. *See* People v. Downs, No.117934, 2015 WL 3791445, *4 (Ill. June 18, 2015) (reasoning “The rationale behind this rule is that “reasonable doubt” is self-defining and needs no further definition.”) (citing People v. Barkas, 99 N.E. at 702-703 (1912) (reasoning “The term ‘reasonable doubt’ has no other or

The Illinois Supreme Court cited to this case and its exact premise that juries already know what the definition is for reasonable doubt.¹⁶⁰ So, the reason that jurors are looking for the definition is because they are given the definition for many other words and legal concepts during the course of the trial, but when they look for reasonable doubt, they come up empty handed.¹⁶¹ The jurors think that the court is hiding something from them, and when they inquire as to a definition, they are told that they must define it themselves.¹⁶² This is what causes a desire to look to the “extension of themselves” in their smartphone and Google, to give them something that they can use.

The court can “lift the veil,” from the jury’s eyes by telling them that the definition of reasonable doubt is what they have determined by their own life experiences.¹⁶³ Telling the jury that they already know what the definition is based on their life experiences helps quell the need, and desire, to look elsewhere for a “definition” because it is not some elusive concept that “they must define.”¹⁶⁴ This simple idea that Justice Cooke noted back in 1912 may help, at the least, when the jury requests a definition because it gives them guidance to look at their own life experiences to help them understand the critical concept of the highest burden in our court system.¹⁶⁵ Juries are placed in a predicament that they hold a man’s fate before them and they do not want to get it wrong.¹⁶⁶ So,

different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves.”)).

160. *Id.*

161. *See Downs*, No.117934, 2015 WL 3791445, at *4 (Ill. June 18, 2015) (explaining “Consistent with this case law is Illinois Pattern Jury Instructions, Criminal, No. 2.05 (4th ed. 2000). Though it is titled, “Definition Of Reasonable Doubt,” it provides no definition. Instead, it provides a Committee Note stating: “The Committee recommends that no instruction be given defining the term ‘reasonable doubt.’” Illinois Pattern Jury Instructions, Criminal, No. 2.05 (4th ed. 2000). This court’s established precedent and the directive set forth in Illinois Pattern Jury Instructions, Criminal, No. 2 support the conclusion that the circuit court’s response to the jury, “We cannot give you a definition [;] it is your duty to define,” taken by itself, did not violate the admonition against defining the term.” *Id.*

162. *See Downs*, No.117934, 2015 WL 3791445, at *1 (Ill. June 18, 2015). (holding the court’s response of “We cannot give you a definition [of reasonable doubt] it is your duty to define” to jury question asking for definition of “reasonable doubt” did not violate the admonition against defining the term).

163. *See Barkas*, 99 N.E. at 702-703 (reasoning “The term ‘reasonable doubt’ has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves.”).

164. *See Downs*, No.117934, 2015 WL 3791445, at *1 (Ill. June 18, 2015). (holding that court’s response of “We cannot give you a definition [of reasonable doubt] it is your duty to define” to jury question asking for definition of “reasonable doubt” did not violate the admonition against defining the term).

165. *In re Winship*, 90 S. Ct. 1068 (1970).

166. *People v. Thomas*, 2014 IL App (2d) 121203, ¶ 25, 15 N.E.3d 943, 949

when they are confused, especially confused enough to ask the judge for assistance, the court should help them¹⁶⁷ or risk losing them to Google, and the search engine doing it for them instead.

The court should formally instruct the jury with an Illinois pattern jury instruction that states that “Reasonable Doubt is not defined under Illinois Law because the term ‘reasonable doubt’ has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life.”¹⁶⁸

The reason for this instruction is straightforward and simple. First, it is not a confusing or bloated definition that attempts to define people’s life experiences in words. Secondly, the notion that the jury already knows the meaning of reasonable doubt is a bedrock in the over 100-year precedent of the Illinois Supreme Court.¹⁶⁹ Importantly, this instruction tells the jury that no definition is needed for reasonable doubt because they already know it by their own life experiences. Therefore, the jury will not be tempted to look elsewhere for a definition of a legal term of art that they are not sure what it means. This also gives the jury comfort in dispelling any preconceived notions that they do not know what reasonable doubt means. This may reduce the desire to look up what they already know, and lead them to a foundation from which to begin their deliberations. Each juror can speak to the reasonable doubt that they have experienced in their own life and whether the government has met its burden of proving every element beyond a reasonable doubt.

In the alternative, the courts should at least give this definition to a jury who requests a definition of reasonable doubt. When the jury requests assistance, they are demonstrating confusion, and therefore the court has a duty to aid the jury by attempting to clarify the instructions for the jury.¹⁷⁰ Providing this one sentence

(reasoning, “[T]he American legal system is premised on the belief that jurors represent the conscience of the community and will act diligently and thoughtfully in applying the law.”).

167. *See Hunter v. Smallwood*, 328 N.E.2d 344, 348 (Ill. App. Ct. 1975) (reasoning “Even where a situation is relatively clear to a trial court, in most cases it would probably be more consistent with the ends of justice if the trial court makes an attempt to clarify the instructions for the jury . . . or at least attempting to understand the problem which is confusing the jurors.”).

168. *See Barkas*, 99 N.E. at 702-703 (reasoning “The term ‘reasonable doubt’ has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves.”).

169. *See Downs*, 2015 IL 117934 at ¶24 (reasoning “In decisions dating back more than 100 years, this court has consistently held that the term ‘reasonable doubt’ should not be defined for the jury, that the term, in fact, needs no definition because the words themselves sufficiently convey its meaning.”).

170. *See Hunter*, 28 Ill. App. 3d at 391.

Even where a situation is relatively clear to a trial court, in most cases it would probably be more consistent with the ends of justice if the trial court makes an attempt to clarify the instructions for the jury... or at

instruction may still be frustrating to an already confused jury; however, it is arguably better than telling them that they must define it without the context that they already know it.

This instruction would likely have eliminated the issue created in *Downs* completely since the jury would have been instructed beforehand that there is no other meaning in the law than in everyday life. This may have led the jury away from the mathematical percentages mindset they came to in the note to the court.

However, if the court used the proposed instruction after the jury note was sent requesting clarification, then it may be a bit more complicated. In *Downs*, the jury used percentages to define their mathematical level of doubt that was reasonable. The jury used 60%, 70%, or 80% in their note to the court and this provides a context that the jury was not thinking about reasonable doubt in terms of life experiences, but to a degree of mathematical certainty. In this case, the proposed instruction may have helped realign the jury's deliberations away from mathematical percentages and back to the reasonable doubt that they have experienced in their own life.

In the cases preceding *Downs*, such as *Turman*, *Franklin*, and *Thomas*, the jury sent notes to the court asking for a definition for reasonable doubt. These cases represent that the jury may be confused when there is a lack of any type of instruction on reasonable doubt. The proposed instruction could aid the jury in these cases by providing the jury the understanding that the reasonable doubt standard is something that they are already familiar with from their own life experiences. It is not clear whether this proposed instruction would eliminate the juror confusion in these cases; however, at the very least, such instruction would provide the premise and the context for the court when it is forced to tell the jurors that it is up to them to decide the definition of reasonable doubt.

While the opinion in *Downs* clearly shows the reluctance of the Illinois Supreme Court to allow for any formal Illinois Pattern Jury Instruction like the one Justice Ginsburg cited in her concurrence in *Victor*, it is also clear that juries have and will continue to be confused by the term reasonable doubt. Technology advancements, particularly in the smartphone arena, have made it too easy for a confused juror to be tempted to reach out to Google when the court's hands are tied.

Illinois should step out from the shadows of the self-defining mentality to at least acknowledge the real dangers posed by technology and the emergence of the Google-enabled smartphone.

least attempting to understand the problem which is confusing the jurors.

Id.

Many in society see this smartphone as just an extension of themselves, and therefore, it is not really researching to Google it.

Even more, the reasonable doubt standard is only used for criminal trials, in which a lot is at stake for the accused. These trials enable the government to take away an individual's liberty, and these criminal trials allow the government to impose the highest power that it has, to take away one's liberty. Accordingly, it is dire to look at this issue critically and *stare decisis* requires that the law change for good reasons, for instance, the emergence of technological changes in society. With increased technology, the court must reexamine the 100-year holding that the words "reasonable doubt" define themselves. There are many things that have changed in the past 100 years, and some for good reason. Here, the court needs to reject the notion that people are exposed to the same things that they were 100 years; and more importantly, it must acknowledge the fact that it is far easier for the modern juror to gain access to a broad spectrum of information both quickly and easily through modern technology that may cause a mistrial.¹⁷¹ Society today has become ever reliant on technology and it has led to many other problems like the need for instant gratification and increase in communicating via a device instead of human interaction. Things that would encourage deliberations would be helpful for juries. There is nothing better than allowing people to talk about their own life experiences of reasonable doubt to help each other understand the concept. However, it is crucial to give proper context to the conversation by establishing a baseline; that they already know what reasonable doubt really means. That way, hopefully, no one is using their smartphone to search Google allow reasonable doubt to be defined by whatever is found at the top of the results.

IV. CONCLUSION

The law forbidding Illinois courts from instructing the jury on reasonable doubt is in need of review and revision. The court should create an Illinois Pattern Jury Instruction that eliminates the confusion about the definition of reasonable doubt. This instruction should be given at every criminal trial and in the alternative at least

171. Armstrong, *supra* note 119. William Downing, a King County judge who co-chairs the committee, stated:

In the not-so-distant past, the biggest concerns were that a juror might go to a law library to look up legal information, might go to the public library to peruse old newspaper stories about a crime or might go to the scene of an auto accident to check out sightlines. Those steps took work. Now they can just 'pull out a smartphone or tablet.

Id.

when the jury requests aid from the court. The court's instruction should be the simple sentence that Justice Cooke coined over 105 years ago that "Reasonable Doubt is not defined under Illinois Law because the term 'reasonable doubt' has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life."¹⁷²

This simple instruction could potentially eliminate numerous cases of juror misconduct and would no longer tie the hands of the court when asked for assistance from the jury. Furthermore, the term reasonable doubt will no longer be viewed by jurors as a legal term of art, but instead it will be something they can personally relate to by their own life experiences. Finally, this instruction is not likely deficient in the law as it does not provide the jury with a "reasonable likelihood that [they] understood [this] instruction to allow [a] conviction upon proof less than beyond a reasonable doubt."¹⁷³

172. See *Barkas*, 99 N.E. at 702-03 (noting "The term 'reasonable doubt' has no other or different meaning in law than it has when used in any of the ordinary transactions or affairs of life. It is doubtful whether any better definition of the term can be found than the words themselves.").

173. See *Victor v. Nebraska*, 511 U.S. 1, 2 (1994) (holding "The Constitution does not dictate that any particular form of words be used in advising the jury of the government's burden of proof, so long as taken as a whole, the instructions correctly convey the concept of reasonable doubt.").

