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A Proposed Definiton of Reasonable Doubt and the Demise of the Circumstantial Evidence Charge Following Hankins v. State.

Jacquelyn L. Bain

COMMENTS

A Proposed Definition of Reasonable Doubt and the Demise of the Circumstantial Evidence Charge Following *Hankins v. State*

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I. INTRODUCTION

The American system of justice provides extensive safeguards for the accused defendant in a criminal trial because the defendant's life or liberty is in jeopardy.[1] Traditionally, there has been more concern with the possibility of an innocent person being unjustly convicted than with allowing a guilty person to go free.[2] An accused person, therefore, is presumed innocent until proven guilty.[3] In order to rebut this presumption of innocence, the prosecution must prove every element of the crime beyond a reasonable doubt.[4] The elements of the crime may be proved by direct or circumstantial evidence.[5] The judge instructs the jury on the law after the prosecution and defense have each presented their case.[6] An important reason for the instructions is to clarify the law for the jurors so that they will be less likely to convict an innocent person.[7]

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1. *See* U.S. CONST. amend. V (due process, protection against double jeopardy, accused cannot be forced to testify against self); U.S. CONST. amend. VI (speedy trial, impartial jury, right to confront witnesses, right to counsel).

2. *See, e.g., In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (basic American value judgment that it is better to let guilty go free than to convict innocent); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8, at 46 (1972) (public must know innocent not convicted for criminal law to maintain its ethical force); C. MCCORMICK, LAW OF EVIDENCE § 341, at 798 (2d ed. 1972) (societal belief that guilty should go free rather than innocent be found guilty).

3. *See, e.g.,* TEX. PENAL CODE ANN. § 2.01 (Vernon 1974) (presumption of innocence); TEX. CODE CRIM. PROC. ANN. art. 38.03 (Vernon Supp. 1982-1983) (person arrested and indicted presumed innocent); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8, at 44 (1972) (underlying tenet of American law requires prosecution to prove guilt). A foundation for a fair trial under the American criminal justice system is the presumption of innocence. *See* Estelle v. Williams, 425 U.S. 501, 503 (1976).

4. *See, e.g.,* TEX. PENAL CODE ANN. § 2.01 (Vernon 1974) (proof beyond a reasonable doubt required for each element); TEX. CODE CRIM. PROC. ANN. art. 38.03 (Vernon Supp. 1982-1983) (no conviction unless every element proved beyond a reasonable doubt); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8, at 53 (1972) (accused assumed innocent means prosecution has burden of production and burden of proof beyond a reasonable doubt).

5. *See, e.g.,* Holland v. United States, 348 U.S. 121, 140 (1954) (circumstantial evidence intrinsically same as direct evidence to meet standard of proof); Hankins v. State, 646 S.W.2d 191, 199 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (circumstantial and direct evidence have equal probative value to prove guilt beyond a reasonable doubt); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8, at 44 (1972) (either direct or circumstantial evidence meets burden of proof).

6. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1982-1983) (judge required to instruct jury on law in all felony cases and misdemeanor cases tried by jury). The judge must also apply the law to the particular facts of the case. *See* Didion v. State, 625 S.W.2d 436, 438 (Tex. App.—Houston [14th Dist.] 1981, pet. ref'd).

7. *See, e.g.,* Schiesel v. S.Z. Poli Realty Co., 142 A. 812, 815 (Conn. 1928) (function of instruction to guide jury toward just verdict); White v. Kansas City Pub. Serv. Co., 149

The United States Supreme Court, reiterating the position taken by all jurisdictions,[8] has found 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."[9] While the Supreme Court has never explicitly held an instruction on reasonable doubt to be necessary,[10] it may be concluded that a jury instruction on "beyond a reasonable doubt" is required.[11] In an attempt to clarify concepts for jurors, and as a means of protecting the defendant's right to a fair trial, courts have given other instructions to the jury, including an instruction on circumstantial evidence.[12]

The Supreme Court, however, echoing concerns of legal scholars and the judiciary on juror misunderstanding, held in *Holland v. United States,*[13] that when a proper instruction on the reasonable doubt standard

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S.W.2d 375, 377 (Mo. 1941) (jury guidance toward just result main purpose of instruction); Texas Gen. Indem. Co. v. Welch, 595 S.W.2d 205, 207 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.) (instruction's purpose to help jury correctly decide disputed fact questions).

8. *See, e.g.,* State v. Turner, 375 P.2d 567, 568 (Ariz. 1962) (conviction in criminal trial requires proof beyond a reasonable doubt); People v. Gentry, 65 Cal. Rptr. 235, 238 (1968) (prosecution must prove every element of crime beyond a reasonable doubt); State v. Moore, 435 S.W.2d 8, 12 (Mo. 1968) (state must prove case beyond a reasonable doubt). Prior to *In re* Winship, 397 U.S. 358, 364 (1970), the United States Supreme Court frequently referred to the reasonable doubt standard of proof, but never held it a constitutional requirement because all jurisdictions required proof beyond a reasonable doubt in criminal cases. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8, at 46 (1972).

9. *In re* Winship, 397 U.S. 358, 364 (1970) (juvenile court cases also subject to proof beyond a reasonable doubt). The reasonable doubt standard was explicitly given constitutional stature. *See id.* at 365.

10. *Cf.* Dunbar v. United States, 156 U.S. 185, 200 (1895) (court only required to instruct that reasonable doubt not an unreasonable one). The *Dunbar* holding implies a required instruction. *See id.* at 200. Opinions of the United States Supreme Court have often indicated an assumption that proof beyond a reasonable doubt is constitutionally required in criminal cases. *See In re* Winship, 397 U.S. 358, 363 (1970) (proof beyond reasonable doubt presumed requirement); *see also* Holt v. United States, 218 U.S. 245, 254 (1910) (jury instruction correct since prosecution must convince jury of guilt beyond a reasonable doubt).

11. *See, e.g.,* Schneider v. United States, 192 F.2d 498, 503 (9th Cir. 1951) (error for court not to properly instruct on reasonable doubt), *cert. denied,* 343 U.S. 914 (1952); TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1982-1983) (judge must instruct jury on law); 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 8.02, at 245 (3d ed. 1977) (court must instruct jury on all vital questions of law including reasonable doubt). The law requires proof beyond a reasonable doubt for all elements of the crime. *See In re* Winship, 397 U.S. 358, 364 (1970).

12. *See, e.g.,* Nilsson v. State, 477 S.W.2d 592, 598 (Tex. Crim. App. 1972) (insanity); McDonald v. State, 631 S.W.2d 237, 240 (Tex. App.—Fort Worth 1982, no pet.) (manslaughter); Bueno v. State, 630 S.W.2d 333, 335 (Tex. App.—Houston [14th Dist.] 1982, pet. ref'd) (self-defense).

13. 348 U.S. 121 (1954).

is given, a circumstantial evidence instruction is not needed.[14] In most federal courts[15] and many state jurisdictions[16] the proper instruction includes a definition of "reasonable doubt."[17] The Texas Court of Criminal Appeals recently followed *Holland* in *Hankins v. State.*[18] The Texas court reasoned that a circumstantial evidence instruction was confusing to the jury because it incorrectly implied that there was a standard of proof for circumtantial evidence different from that of "beyond a reasonable doubt."[19] Texas, however, is one of the few jurisdictions that does not provide a definition of reasonable doubt to be given to jurors.[20]

Circumstantial evidence and reasonable doubt instructions are distinct concepts, yet they overlap in this discussion because courts have considered the concepts simultaneously.[21] The courts have held that when a proper instruction on reasonable doubt is given, a circumstantial evidence instruction is improper.[22] This comment proposes that a proper instruc-

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14. *See id.* at 139-40. The circumstantial evidence instruction was found to confuse the jury. *See id.* at 139-40.

15. *See, e.g.,* United States v. Wilkerson, 691 F.2d 425, 427-28 n.3 (8th Cir. 1982) (used "hesitate to act" definition); United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) ("hesitate to act" definition preferred); United States v. Breedlove, 576 F.2d 57, 58 (5th Cir. 1978) (reasonable doubt defined as one based on "reason and common sense").

16. *See, e.g.,* State v. Johnson, 152 N.W.2d 426, 431 (Iowa 1967) (reasonable doubt defined correctly); State v. Henderson, 547 S.W.2d 141, 143 (Mo. Ct. App. 1976) ("reasonable doubt does not mean beyond a shadow. . . ."); Hardin v. State, 355 S.W.2d 105, 108 (Tenn. 1962) (reasonable doubt arises from uncertainty concerning guilt).

17. *See* Hankins v. State, 646 S.W.2d 191, 201 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting) (nine federal circuits and majority of states permit or require definition of "reasonable doubt").

18. 646 S.W.2d 191 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing).

19. *See id.* at 199. ("reasonable hypothesis" phrase invites juror confusion concerning standard of proof).

20. *Compare* Young v. State, 648 S.W.2d 2, 3-4 (Tex. Crim. App. 1983) (reasonable doubt definition neither approved nor prohibited by Texas Court of Criminal Appeals) *and* Pigg v. State, 162 Tex. Crim. 521, 523, 287 S.W.2d 673, 674 (1956) (reasonable doubt does not need definition) *with* Merritt v. Commonwealth, 386 S.W.2d 727, 729 (Ky. 1965) (reasonable doubt defined as substantial and real doubt) *and* State v. Hester, 246 S.E.2d 83, 84 (N.C. Ct. App. 1978) (reasonable doubt is one "based on reason and common sense") *and* State v. Pam, 635 P.2d 766, 768 (Wash. Ct. App. 1981) ("doubt for which reason based upon evidence exists" defines reasonable doubt).

21. *See* Holland v. United States, 348 U.S. 121, 139-40 (1954) (circumstantial evidence instruction given with reasonable doubt instruction); Hankins v. State, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (proper instruction on reasonable doubt given with circumstantial evidence charge).

22. *See* Holland v. United States, 348 U.S. 121, 139-40 (1954) (circumstantial evidence instruction improper when jury properly instructed on reasonable doubt); Hankins v. State, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (as long as proper instruction on reasonable doubt given circumstantial evidence charge unnecessary).

tion on reasonable doubt should include a definition of reasonable doubt. As a foundation for this proposition, the comment will trace the development and decline of the circumstantial evidence instruction and evolution of the definition of reasonable doubt, again two separate, yet overlapping, concepts. An interdisciplinary analysis will focus on juror comprehension of the reasonable doubt standard of proof and the instructions which convey this standard. Based on this analysis, the comment will recommend a proposed definition of "reasonable doubt" that should be required in all Texas criminal cases.

II. CIRCUMSTANTIAL EVIDENCE

A. *Difference Between Circumstantial and Direct Evidence*

The elements of a crime may be proved by direct or circumstantial evidence.[23] An example of direct evidence of a homicide is testimony from a witness that he saw the defendant stab the victim with a knife.[24] Circumstantial evidence for this same crime would be testimony that the witness saw the defendant standing over the body holding a bloody knife.[25] The main distinction between circumstantial and direct evidence is the inferential process involved.[26] Circumstantial evidence, unlike direct evidence, requires at least one more inferential step from the fact to which the witness testified and the main fact needed to be established.[27] While circum-

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23. *See, e.g.,* Holland v. United States, 348 U.S. 121, 140 (1954) (same probative value for circumstantial and direct evidence); Crocker v. State, 573 S.W.2d 190, 207 (Tex. Crim. App. 1978) (burden of proof same whether met by circumstantial or direct evidence); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8, at 46 n.14 (1972) (circumstantial or direct evidence meets burden of proof).

24. *See* C. MCCORMICK, LAW OF EVIDENCE § 185, at 435 (2d ed. 1972). Concrete objects, including documents are also direct evidence. *See id.* at 435.

25. *See* Note, *The Circumstantial Evidence Charge in Texas Criminal Cases: A Retrograde Doctrine,* 55 TEXAS L. REV. 1255, 1255 (1977) (classic example of circumstantial evidence); *see also* Hankins v. State, 646 S.W.2d 191, 203 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Onion, J., dissenting) (citing Shakespeare's Macbeth, Act 2, scene 2 (blood smeared on grooms' faces by Lady Macbeth circumstantial evidence of grooms' guilt)).

26. *See, e.g.,* Richardson v. State, 600 S.W.2d 818, 823 (Tex. Crim. App. 1980) (direct evidence directly proves ultimate fact; circumstantial evidence directly proves another fact which is basis for inference to prove ultimate fact); Oliver v. State, 551 S.W.2d 346, 350 (Tex. Crim. App. 1977) (circumstantial evidence shows minor fact which proves main fact directly); C. MCCORMICK, LAW OF EVIDENCE § 185, at 435 (2d ed. 1972) (direct evidence requires one-step inferential process, circumstantial requires two steps).

27. *See* C. MCCORMICK, LAW OF EVIDENCE § 185, at 435 (2d ed. 1972). In direct evidence testimony the only inference needed is that the witness made a true statement. *See id.* at 435. For example, in witness testimony stating "I saw Harold stab Emily" the juror must infer only that the witness is telling the truth. *See id.* at 435. Circumstantial evidence requires an inference from one fact to the truth of another fact which would prove a proposi-

stantial evidence remains distinct from direct evidence,[28] courts have considered their inferential processes functionally equivalent when the facts proved by circumstantial evidence are so closely related to the main fact that the only logical conclusion drawn is that the main fact itself is proved.[29]

Circumstantial and direct evidence, however, are both subject to the same standard of proof.[30] Confusion over the standard applicable to circumstantial evidence has been fostered in Texas by the test traditionally used to measure sufficiency of circumstantial evidence.[31] The test's focus on excluding every hypothesis except guilt suggests a different standard of proof.[32]

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tion. *See id.* at 435. For example, witness testimony stating "I saw Harold standing over Emily's body holding a bloody knife" requires the juror to infer not only that the witness is telling the truth, but also that because Harold had the bloody knife he stabbed Emily. *See id.* at 435. Circumstantial evidence is, therefore, at least one inferential step farther removed from the main fact (Harold stabbed Emily) than is direct evidence. *See id.* at 435. In direct or circumstantial evidence the factual accuracy of the witness's statement itself may be in question. *See id.* at 435. The witness may be lying. *See* 1 F. WHARTON, CRIMINAL EVIDENCE § 6, at 5 (13th ed. 1972). The unreliability of eyewitness testimony may be due to any of several factors affecting the witness's perception or memory, including features in the original situation (such as viewing conditions), the eyewitness's own characteristics (including expectations held before the event), memory distortion or decay over time, and factors at the time the witness is asked to recall (such as methods of questioning). *See* Penrod, Loftus, & Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective,* in THE PSYCHOLOGY OF THE COURTROOM 157-58 (N. Kerr & R. Bray 1982).

28. *See* 1 F. WHARTON, CRIMINAL EVIDENCE § 6, at 4 (13th ed. 1972).

29. *See, e.g.,* Rodriguez v. State, 617 S.W.2d 693, 695 (Tex. Crim. App. 1981) (circumstantial evidence instruction not needed if facts proved by circumstantial evidence so close to main fact that circumstantial evidence becomes equivalent to direct evidence); Frazier v. State, 576 S.W.2d 617, 619 (Tex. Crim. App. 1978) ("close juxtaposition rule" equates circumstantial and direct evidence since facts as basis for inference so similar); Chapin v. State, 167 Tex. Crim. 390, 393, 320 S.W.2d 341, 343 (1958) (refusal to give circumstantial evidence instruction not error when only one conclusion logically possible).

30. *See, e.g.,* Osborn v. State, 154 N.E. 865, 866 (Ind. 1927) (rule that state must prove crime beyond reasonable doubt applies to verdicts supported by direct or circumstantial evidence); Crocker v. State, 573 S.W.2d 190, 207 (Tex. Crim. App. 1978) (standard of proof "beyond a reasonable doubt" whether elements of offense proved by circumstantial or direct evidence); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 8, at 46 n.14 (1972) (circumstantial or direct evidence meets burden of proof); *cf.* State v. Buckingham, 134 A.2d 568, 571 (Del. Super. Ct. 1957) (if case relying solely on circumstantial evidence creates reasonable inference of innocence, presumption of innocence maintained).

31. *See, e.g.,* Barnes v. State, 41 Tex. 342, 344 (1874) (every reasonable hypothesis other than guilt must be excluded); Moore v. State, 532 S.W.2d 333, 337 (Tex. Crim. App. 1976) (test is exclusion of "every reasonable hypothesis other than guilt"); Lewis v. State, 654 S.W.2d 483, 488 (Tex. App.—Tyler 1983, rev. ref'd) ("every reasonable hypothesis other than guilt . . . excluded").

32. *Compare* Bryant v. State, 574 S.W.2d 109, 111 (Tex. Crim. App. 1978) (conviction on proof beyond a reasonable doubt; in "circumstantial evidence case, upon proof excluding

B. *History of the Circumstantial Evidence Instruction Prior to Hankins*

Although direct and circumstantial evidence have equal probative value,[33] circumstantial evidence generally was distrusted by the public as grounds for convicting a defendant.[34] In an attempt to give the defendant the best possible protection, courts gave juries an instruction on circumstantial evidence.[35] In 1850, Massachusetts adopted the "Webster charge" to instruct the jury on the sufficiency of evidence needed to convict by circumstantial evidence.[36] After adoption of the charge by Texas courts in

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all other hypotheses except . . . guilt.") *and* Bonds v. State, 573 S.W.2d 528, 533 (Tex. Crim. App. 1978) (circumstances must "exclude every other reasonable hypothesis except . . . guilt" for conviction on circumstantial evidence) *with* Crocker v. State, 573 S.W.2d 190, 207 (Tex. Crim. App. 1978) ("beyond a reasonable doubt" standard of proof for direct and circumstantial evidence cases). This apparent contradiction may be due also to the confusion promoted by the wording of the circumstantial evidence charge: "[The circumstances] must exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt; and unless they do so, beyond a reasonable doubt, you will find the defendant not guilty." STATE BAR OF TEXAS, TEXAS CRIMINAL PATTERN JURY CHARGES § 0.01, at 3 (1975).

33. *See, e.g.,* Holland v. United States, 348 U.S. 121, 140 (1954) (circumstantial and direct evidence no different in probative value); Hankins v. State, 646 S.W.2d 191, 198 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (general recognition circumstantial and direct evidence equivalent probative value); 1 J. WIGMORE, WIGMORE ON EVIDENCE § 26, at 401 (3d ed. 1940) (psychology and logic mandate equivalent weight for circumstantial and direct evidence). "In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities." Holland v. United States, 348 U.S. 121, 140 (1954).

34. *See* Note, *The Circumstantial Evidence Charge in Texas Criminal Cases: A Retrograde Doctrine,* 55 TEXAS L. REV. 1255, 1256 (1977). Four main criticisms have been raised: 1) less accuracy, 2) past injustices due to conviction by circumstantial evidence, 3) once created, jurors defend unjustified inferences from circumstantial evidence, and 4) jurors may make hasty inferences to convict in sensational or gruesome cases. *See id.* at 1257.

35. *See, e.g.,* Ellis v. State, 551 S.W.2d 407, 412 (Tex. Crim. App. 1977) (error to refuse circumstantial evidence charge when case grounded entirely on circumstantial evidence); Ransonette v. State, 550 S.W.2d 36, 43 (Tex. Crim. App. 1977) (circumstantial evidence instruction needed when case based wholly on circumstantial evidence); Armstrong v. State, 542 S.W.2d 119, 122 (Tex. Crim. App. 1976) (circumstantial evidence charge required); *see also* Hankins v. State, 646 S.W.2d 191, 207 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Onion, J., dissenting) (defendant must be protected from jury speculation).

36. *See* Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 313, 318-20 (1850), *cited in* Henderson v. State, 14 Tex. 503, 514 (1855). The charge states:

> In order to warrant a conviction of a crime on circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.

1855,[37] Texas steadfastly required such an instruction.[38]

Recent Texas cases prior to 1983 have reiterated the traditional Texas position that when a case is based entirely on circumstantial evidence, a circumstantial evidence instruction is needed[39] and the judge, upon the defendant's request, is required to give the charge to the jury.[40] The Texas jury charge on circumstantial evidence has evolved into the following:

> You are instructed that in this case the state relies on circumstantial evidence for a conviction. In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence, beyond a reasonable doubt; all the facts (that is, the facts necessary to the conclusion) must be consistent with each other and, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. But in such cases it is not sufficient that the circumstances coincide with, account for, and therefore render probable the guilt of the defendant. They must exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt; and unless they do so, beyond a reasonable doubt, you will find the defendant not guilty.[41]

Henderson v. State, 14 Tex. 503, 514 (1855). The original "Webster charge" may be found scattered throughout the holding. *See* Commonwealth v. Webster, 59 Mass. (5 Cush.) 295, 313, 318-20 (1850). Mid-nineteenth century courts across the country adopted this charge. *See* Note, *The Circumstantial Evidence Charge in Texas Criminal Cases: A Retrograde Doctrine,* 55 TEXAS L. REV. 1255, 1258 (1977).

37. *See* Henderson v. State, 14 Tex. 503, 514 (1855) (adopting "Webster charge").

38. *See, e.g.,* Flores v. State, 489 S.W.2d 901, 902 (Tex. Crim. App. 1973) (must exclude every reasonable hypothesis except guilt); Burrell v. State, 18 Tex. 713, 735 (1857) (jury needs circumstantial evidence instruction when case based entirely on circumstantial evidence); Hunt v. State, 7 Tex. Ct. App. 212, 235 (1879) (facts supported only by circumstantial evidence must be "absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt").

39. *See, e.g.,* Shippy v. State, 556 S.W.2d 246, 250 (Tex. Crim. App.) (circumstantial evidence instruction not required for nonessential issues supported only by circumstantial evidence), *cert. denied,* 434 U.S. 935 (1977); Ransonette v. State, 550 S.W.2d 36, 43 (Tex. Crim. App. 1977) (circumstantial evidence charge required when case based entirely on circumstantial evidence); Armstrong v. State, 542 S.W.2d 119, 122 (Tex. Crim. App. 1976) (circumstantial evidence charge needed).

40. *Compare* Ellis v. State, 551 S.W.2d 407, 412 (Tex. Crim. App. 1977) (error in refusing circumstantial evidence charge when needed since case based wholly on circumstantial evidence) *with* Mills v. State, 508 S.W.2d 823, 826 (Tex. Crim. App. 1974) (no reversible error for failure to give circumstantial evidence instruction when not requested or needed).

41. STATE BAR OF TEXAS, TEXAS CRIMINAL PATTERN JURY CHARGES § 0.01, at 3 (1975); *see* P. MCCLUNG, JURY CHARGES FOR TEXAS CRIMINAL PRACTICE 260 (1981).

There were two exceptions to the traditionally-held requirement for a circumstantial evidence charge.[42] First, knowledge and intent, mental elements of a crime, cannot be actually demonstrated by direct evidence.[43] A cautionary jury instruction on circumstantial evidence, therefore, was not needed when knowledge or intent were the only elements proved by circumstantial evidence.[44] Secondly, the "close juxtaposition" rule states that the circumstantial evidence charge is unnecessary when facts proved by circumstantial evidence are so closely related to the main fact probative of the defendant's guilt that only one logical inference is possible concerning the defendant's guilt.[45]

Although recent Texas cases prior to 1983 have upheld the traditional position requiring a circumstantial evidence instruction, there was growing concern within the Texas Court of Criminal Appeals on whether the circumstantial evidence instruction itself was needed.[46] Strong dissents ar-

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42. *Compare* Mauldin v. State, 628 S.W.2d 793, 796 (Tex. Crim. App. 1982) (charge not needed when intent only element proved by circumstantial evidence) *with* Landry v. State, 156 Tex. Crim. 350, 355, 242 S.W.2d 381, 384 (1951) (charge unnecessary when close juxtaposition rule applies). There had been a third exception allowing the principal's charge to substitute for the circumstantial evidence charge in aiding and abetting cases. *See* Note, *The Circumstantial Evidence Charge in Texas Criminal Cases: A Retrogade Doctrine,* 55 TEXAS L. REV. 1255, 1273 (1977). However, the law returned to its former position that the principal's charge was not an adequate substitute for the circumstantial evidence charge. *See* Ransonette v. State, 550 S.W.2d 36, 42 (Tex. Crim. App. 1977).

43. *See* Note, *The Circumstantial Evidence Charge in Texas Criminal Cases: A Retrogade Doctrine,* 55 TEXAS L. REV. 1255, 1266 (1977) (recognition that only logical possibility to directly prove mental processes by circumstantial evidence since mental processes themselves not observable). If a defendant confesses his knowledge or intent, however, the confession is considered direct evidence of the mental process. *See id.* at 1266.

44. *See, e.g.,* Mauldin v. State, 628 S.W.2d 793, 796 (Tex. Crim. App. 1982) (instruction unnecessary if intent only element proved by circumstantial evidence); Stearn v. State, 571 S.W.2d 177, 178 (Tex. Crim. App. 1978) (circumstantial evidence charge unnecessary when intent only element proved by circumstantial evidence); Love v. State, 627 S.W.2d 457, 458 (Tex. App.—Houston [1st Dist.] 1981, no pet.) (circumstantial evidence charge not needed if *mens rea* only element proved by circumstantial evidence).

45. *See, e.g.,* Pyeatt v. State, 462 S.W.2d 952, 953 (Tex. Crim. App. 1971) (circumstantial evidence charge unnecessary when main facts so closely related); Byrd v. State, 435 S.W.2d 508, 510 (Tex. Crim. App. 1968) (facts proved by circumstantial evidence in close juxtaposition, therefore circumstantial evidence charge not needed); Chapin v. State, 167 Tex. Crim. 390, 392, 320 S.W.2d 341, 343 (1958) (close juxtaposition rule used). *Compare* Landry v. State, 156 Tex. Crim. 350, 355, 242 S.W.2d 381, 384 (1951) (close juxtaposition rule applied) *with* Coleman v. State, 530 S.W.2d 823, 827 (Tex. Crim. App. 1975) (Roberts, J., dissenting) (abolish close juxtaposition rule).

46. *See* Richardson v. State, 600 S.W.2d 818, 828 (Tex. Crim. App. 1980) (Dally, J., dissenting) (time for Texas to join modern trend abolishing circumstantial evidence instruction); Galvan v. State, 598 S.W.2d 624, 632 (Tex. Crim. App. 1979) (Douglas, J., dissenting) (court should re-evaluate position requiring circumstantial evidence instruction).

gued that the charge was confusing and should be abolished.[47]

C. *Circumstantial Evidence Instruction Abolished in Many Jurisdictions*

In 1954, the United States Supreme Court abolished the circumstantial evidence charge in *Holland v. United States.*[48] The Court found that "the better rule is that where the jury is properly instructed on the standard of reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect."[49] Nationwide, courts have followed the trend established by *Holland;* most lower federal courts have abolished the circumstantial evidence charge[50] and twenty-one states have also followed *Holland.*[51]

D. *Texas Abolishes Requirement for Circumstantial Evidence Instruction in Hankins v. State*

1. Holding in *Hankins*

In *Hankins v. State,*[52] the defendant was convicted of burglarizing a building on the basis of circumstantial evidence.[53] On rehearing, the

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47. *See* Richardson v. State, 600 S.W.2d 818, 827 (Tex. Crim. App. 1980) (Dally, J., dissenting) (United States Supreme Court opposes circumstantial evidence charge); Galvan v. State, 598 S.W.2d 624, 633 (Tex. Crim. App. 1979) (Douglas, J., dissenting) (failure to abolish convoluted charge fosters unintelligible decisions).

48. 348 U.S. 121, 139-40 (1954).

49. *Id.* at 139-40. The Court reiterated that circumstantial and direct evidence are equally probative. They went on to say that a court could demand no more than that the requirement of proof beyond a reasonable doubt be met. *See id.* at 140.

50. *See, e.g.,* Taglianetti v. United States, 398 F.2d 558, 568 (1st Cir. 1968) (quoted *Holland* rule), *aff'd,* 394 U.S. 316 (1969); United States v. Botsch, 364 F.2d 542, 550 (2d Cir. 1966) (charge proper according to *Holland* standard), *cert. denied,* 386 U.S. 937 (1967); Bryant v. United States, 252 F.2d 746, 748 (5th Cir. 1958) (followed *Holland* rule in refusing circumstantial evidence charge).

51. *See, e.g.,* Murray v. State, 462 S.W.2d 438, 442-43 (Ark. 1971) (when correct instruction given on reasonable doubt, refusal to give circumstantial evidence instruction not error); State v. Wilkins, 523 P.2d 728, 737 (Kan. 1974) (abolished need for circumstantial evidence charge when jury properly instructed on reasonable doubt); State v. Turnipseed, 297 N.W.2d 308, 312-13 (Minn. 1980) (followed *Holland).*

52. 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing).

53. *See id.* at 192. There was confusion over evidentiary classification of facts presented at trial. *Compare* Appellant's Amended Brief at 3, Hankins v. State, 646 S.W.2d 191 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (circumstantial evidence instruction needed when no eyewitnesses) *with* Brief for Appellee at 16, Hankins v. State, 646 S.W.2d 191 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (direct evidence of main fact present and close juxtaposition rule also applied). These arguments highlight the problem that there may be disagreement whether particular evidence is direct or circumstantial, and if circumstantial, whether it may be so closely related to the

Texas Court of Criminal Appeals held that the trial court had properly refused to give the circumstantial evidence instruction.[54] The court held that such a charge was improper and unnecessary when the jury had been properly instructed on the reasonable doubt standard.[55] The court reasoned that the circumstantial evidence charge "was inherently confusing to a jury by suggesting that a different burden of proof than the reasonable doubt standard applies in circumstantial evidence cases."[56]

Judge Miller, in his concurring and dissenting opinion, agreed that the circumstantial evidence charge was confusing, but argued that the court had not gone far enough to remedy the jurors' confusion.[57] He would require the court to give a definition of reasonable doubt similar to that given in the federal courts in jury instructions on the standard of proof.[58] In a separate dissent, Judge Onion believed the court should continue to allow the circumstantial evidence instruction as a protection against juror

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main fact that it is considered equivalent to direct. *See* Brief for Appellee at 16, Hankins v. State, 646 S.W.2d 191 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing).

54. *See* Hankins v. State, 646 S.W.2d 191, 200 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing).

55. *See id.* at 197.

56. *Id.* at 199 n.1. The court emphasized that the section of the charge requiring circumstances to "exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt" was the part that implied a standard of proof different from "beyond a reasonable doubt." *See id.* at 200. Psychological research supports the reasoning in *Hankins* that the circumstantial evidence charge incorrectly implies a different standard of proof. *See* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond A Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. PERS. & SOC. PSYCH. 282, 282 (1976). The stringent instructions under which more guilty verdicts were rendered are very similar to those found in the circumstantial evidence instruction. *Compare id.* at 286 ("[T]o a moral certainty . . . [i]f you feel that the facts . . . are compatible with any other theory besides the one in which the defendant is guilty; then you have a reasonable doubt. . . .") *with* P. MCCLUNG, JURY CHARGES FOR TEXAS CRIMINAL PRACTICE 260 (1981) ("[Circumstances] must exclude, to a moral certainty, every other reasonable hypothesis except the defendant's guilt. . . .").

57. *See* Hankins v. State, 646 S.W.2d 191, 203 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting). Judge Miller recommended "perspective coupled with definition." *See id.* at 203 n.6 (Miller, J., concurring and dissenting). He stated that a juror may understand how sure he must be to convict by hearing a definition of proof by preponderance of the evidence, proof by clear and convincing evidence, and proof beyond a reasonable doubt. *See id.* at 203 n.6 (Miller, J., concurring and dissenting). The juror may see the progression as the standard becomes more stringent and thereby gain a clearer perspective on how certain he must be to convict. *See id.* at 203 n.6 (Miller, J., concurring and dissenting).

58. *See id.* at 203 (Miller, J., concurring and dissenting). The "hesitate to act" definition substantially states that a reasonable doubt is one that would make a reasonable person hesitate to act in his important personal affairs. *See id.* at 201 (Miller, J., concurring and dissenting).

speculation,[59] since different inferential processes are required for direct and circumstantial evidence.[60] Additionally, Judge Onion would have upheld the traditional Texas position that a definition of reasonable doubt should not be given because it does not alleviate juror confusion.[61]

2. Implications of *Hankins*

Judge Miller's challenging dissent focused on the major implication of the *Hankins* decision.[62] The Texas Court of Criminal Appeals clearly has abolished the requirement for a circumstantial evidence instruction "where the jury is properly instructed on the reasonable doubt standard of proof."[63] The following argument is raised that the *Hankins* holding abolishes the circumstantial evidence instruction altogether. In every criminal trial the judge is required to instruct the jury on the law.[64] The law states that each element of the crime must be proved beyond a reasonable doubt.[65] The logical conclusion, therefore, is that the judge must instruct the jury on the reasonable doubt standard which is the law.[66] The phrase "where the jury is properly instructed on the standards for reasonable

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59. *See id.* at 217 (Onion, J., dissenting). Judge Onion criticized the majority for leaving no guidance for a test for sufficiency of the evidence in a case relying entirely on circumstantial evidence since the court has abolished the requirement for a circumstantial evidence charge. *See id.* at 217 (Onion, J., dissenting).

60. *See id.* at 215 (Onion, J., dissenting).

61. *See id.* at 208-09 (Onion, J., dissenting). Judge Clinton's dissent also emphasized that Texas courts traditionally have held that the usual charge on the reasonable doubt standard did not remedy an omission of the circumstantial evidence charge. *See id.* at 217 (Clinton, J., dissenting). He noted that the majority had failed to change the usual charge on reasonable doubt, leaving the jury with no guidance. *See id.* at 219 (Clinton, J., dissenting). Judge Teague's dissent echoed Judge Clinton's concerns and lamented the potential chaos in the appellate courts due to the majority's unanswered question of which standard of review to apply. *See id.* at 220 (Teague, J., dissenting).

62. *See* Hankins v. State, 646 S.W.2d 191, 203 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting) (definition of reasonable doubt needed).

63. *Id.* at 200.

64. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1982-1983).

65. *See In re* Winship, 397 U.S. 358, 364 (1970).

66. *See* Schneider v. United States, 192 F.2d 498, 503 (9th Cir. 1951) (error for court not to properly instruct on reasonable doubt), *cert. denied,* 343 U.S. 914 (1952); 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 8.02, at 245 (3d ed. 1977) (judge required to instruct jury on all essential matters of law, including reasonable doubt); *see also* Dauer v. United States, 189 F.2d 343, 344-45 (10th Cir.) (judge required to instruct jury on critical matters of law), *cert. denied,* 342 U.S. 898 (1951); Todorow v. United States, 173 F.2d 439, 445 (9th Cir.) (jury must be instructed on law applicable to important fact issues), *cert. denied,* 337 U.S. 925 (1949).

doubt,"[67] however, gives the illusion that an instruction on reasonable doubt is optional. Since the court is logically required to give a reasonable doubt instruction,[68] it should be considered mandatory. In contrast, the wording of *Hankins* suggests that the circumstantial evidence charge is optional[69] and this contention is supported by the lack of a legal or logical requirement. There is no choice between a mandatory reasonable doubt instruction and an optional circumstantial evidence charge.[70] The wording and logic of the *Hankins* holding, therefore, not only abolish the requirement for a circumstantial evidence instruction, but also foreclose its use.[71]

An important extrapolation from the *Hankins* holding concerns the potential for fundamental error[72] if a circumstantial evidence charge is given in the future.[73] In upholding the trial court's refusal to give the instruction and the defendant's subsequent conviction, the court suggests that the defendant was not harmed and that he received a fair trial.[74] If a future jury convicts a defendant after receiving a circumstantial evidence charge the jury might incorrectly apply a standard of proof different from the consti-

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67. *See* Hankins v. State, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (emphasis added).

68. *Cf.* Dauer v. United States, 189 F.2d 343, 344-45 (10th Cir.) (judge must charge jury on essential matters of law), *cert. denied,* 342 U.S. 898 (1951).

69. *See* Hankins v. State, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (charge improper "where jury . . . properly instructed on . . . reasonable doubt").

70. *Cf.* Schneider v. United States, 192 F.2d 498, 503 (9th Cir. 1951) (error for judge to improperly instruct on reasonable doubt), *cert. denied,* 343 U.S. 914 (1952); 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 8.02, at 245 (3d ed. 1977) (court must charge jury on all critical issues of law, including reasonable doubt).

71. *See* Hankins v. State, 646 S.W.2d 191, 199 n.1 (majority explicitly states charge abolished).

72. *See* Gooden v. State, 576 S.W.2d 382, 383 (Tex. Crim. App. 1979) (fundamental error harms defendant or shows trial not fair and impartial); Ramsey v. Dunlop, 146 Tex. 196, 202, 205 S.W.2d 979, 983 (1947) (fundamental error is "error which directly and adversely affects the interest of the public generally, as that interest is declared in the statutes or Constitution of this state").

73. *See* Hankins v. State, 646 S.W.2d 191, 197 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing). A circumstantial evidence charge might be given in the future if a court interprets *Hankins* as merely abolishing the requirement for a circumstantial evidence instruction, rather than abolishing the charge itself. *See id.* at 197.

74. *See id.* at 200 (trial court correctly denied requested instruction); *see also* TEX. CODE CRIM. PROC. ANN. art. 36.19 (Vernon 1981) (error must harm defendant's rights for judgment reversal). Judgment reversal is also possible if the record shows that the defendant did not receive a fair trial. *See id.* In addition, counsel must make objections to instructions at trial. *See id.*

tutionally-mandated standard of proof beyond a reasonable doubt.[75] If the jury incorrectly applied a more stringent standard, the defendant would not be harmed because proof had met the constitutional minimum.[76] The jury would have been more certain of the defendant's guilt than necessary and the charge would then be harmless error.[77] If the jury incorrectly applied a lesser standard, however, the defendant would be harmed because proof had not met the constitutional minimum.[78] The resulting harm to the defendant would have been fundamental error requiring automatic reversal.[79] The inherent problem in this line of analysis is that the court can never be certain whether the jury instruction incorrectly implied a lesser or greater standard of proof. The court can only infer that the charge implied a *different* standard of proof.[80] If a Texas criminal court gives a circumstantial evidence charge in the future it remains an open question whether appellate courts will consider the error harmless or fundamental.[81]

While the issue of fundamental error when a circumstantial evidence charge is given remains unanswered, the focus of the remainder of this comment returns to the central problem raised in Judge Miller's dissent: that a "proper instruction" on the reasonable doubt standard should include a definition of "reasonable doubt."[82] In the aftermath of *Hankins* Texas has been left with only a reasonable doubt instruction to convey the

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75. *See* Hankins v. State, 646 S.W.2d 191, 199 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (confusion in standard of proof reason charge abolished).

76. *Cf. In re* Winship, 397 U.S. 358, 364 (1970) (due process clause guarantees elements of crime must be proved beyond a reasonable doubt).

77. *Cf.* Hankins v. State, 646 S.W.2d 191, 200 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (no error in trial court's refusal to give instruction).

78. *Cf.* Young v. State, 648 S.W.2d 2, 3 (Tex. Crim. App. 1983) (reasonable doubt charge implying lesser standard of proof fundamental error).

79. *See* Odom & Valdez, *A Review of Fundamental Error in Jury Charges in Texas Criminal Cases,* 33 BAYLOR L. REV. 749, 749 (1981) (automatic reversal required by Texas Court of Criminal Appeals when jury instructions have fundamental error).

80. *See* Hankins v. State, 646 S.W.2d 191, 199 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (circumstantial evidence charge with implication of different standard of proof confuses jurors).

81. *Cf.* Richardson v. State, 600 S.W.2d 818, 825 (Tex. Crim. App. 1980) (fundamental error in trial court's refusal to permit requested jury instruction on circumstantial evidence); Young v. State, 648 S.W.2d 2, 3 (Tex. Crim. App. 1983) (reasonable doubt charge that implied lesser standard of proof fundamental error). Probably the court will determine that the error is fundamental because it cannot really know whether the jury's confusion made them use a less stringent or a more stringent standard of proof, and since the bias should be in favor of the defendant's right to a fair trial, the court would most likely assume the defendant was harmed by the jury's confusion on the proper standard of proof. *See* C. MCCORMICK, LAW OF EVIDENCE § 341, at 798 (2d ed. 1972).

82. *See* Hankins v. State, 646 S.W.2d 191, 203 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting).

required standard of proof for all criminal cases, but the instruction fails to define the concept.[83]

III. "BEYOND A REASONABLE DOUBT"—THE STANDARD OF PROOF IN CRIMINAL CASES

A. *History and Evolution of the Standard*

Society, placing a high value on individual life and liberty, has determined that it is better to free a guilty person than to convict an innocent one.[84] To further this ideal the common law has long recognized that a person may be convicted of a crime only by proof beyond a reasonable doubt.[85] In 1970, the United States Supreme Court gave this standard constitutional stature holding that due process required that each element of the crime be proved beyond a reasonable doubt.[86] The Supreme Court emphasized that the jury must be properly instructed on the reasonable doubt standard when it abolished the circumstantial evidence instruction in *Holland.*[87]

B. *Most Federal and State Courts Permit Definition of Reasonable Doubt*

The United States Supreme Court in *Holland* considered that a "proper instruction" on reasonable doubt included a definition broadly termed the "hesitate to act" definition.[88] Reasonable doubt is essentially defined as

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83. *See* Hankins v. State, 646 S.W.2d 191, 208 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Onion, J., dissenting) (strong Texas precedent that reasonable doubt not defined).

84. *See* C. MCCORMICK, LAW OF EVIDENCE § 341, at 798 (2d ed. 1972). Since mistakes will inevitably be made, the law sets a smaller margin for error in criminal cases because the defendant's life or liberty is at stake. *See id.* at 798.

85. *See id.* at 799.

86. *See In re* Winship, 397 U.S. 358, 369-72 (1970). The court has been criticized for giving uncertain criteria for application of the standard, particularly in the area of shifting the burden of proof. *See generally* Patterson v. New York, 432 U.S. 197, 217 (1977) (defendant has burden of proof of affirmative defenses by preponderance of evidence); Mullaney v. Wilbur, 421 U.S. 684, 705 (1975) (affirmative defenses place burden of persuasion on prosecution when element in affirmative defense included in definition of crime); Allen & De Grazia, *The Constitutional Requirement of Proof Beyond A Reasonable Doubt in Criminal Cases: A Comment Upon Chaos in the Lower Courts,* 20 AM. CRIM. L. REV. 1, 1, 3, 10 (1982) (citing Sandstrom v. Montana, 442 U.S. 510, 523 (1979) (jury instruction created conclusive presumption which removed state's burden of proof of each element beyond a reasonable doubt)).

87. *See* Holland v. United States, 348 U.S. 121, 140-41 (1954).

88. *See id.* at 140 ("hesitate to act" preferable); Hankins v. State, 646 S.W.2d 191, 201 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting) ("hesitate to act" definition approved by *Holland).* The definition is usually stated as:

"the kind of doubt that would make a reasonable person hesitate to act . . . in the most important of his own affairs."[89] The lower federal courts followed *Holland* and nine federal circuits now use this instruction.[90]

A majority of state courts also permit a definition of reasonable doubt be given in the jury instruction on the standard of proof.[91] Their definitions take various forms and lack the consistency of the "hesitate to act" definition used by federal courts.[92] In California, state courts may hold jury instructions erroneous when reasonable doubt has not been defined according to their particular definition.[93]

> A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs.

1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 11.14, at 310 (3d ed. 1977).

89. 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 11.14, at 310 (3d ed. 1977). *See, e.g.,* Holland v. United States, 348 U.S. 121, 140 (1954) (preference for "hesitate to act" definition); United States v. Wilkerson, 691 F.2d 425, 427-28 n.3 (8th Cir. 1982) ("hesitate to act" approved); United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) ("hesitate to act" definition sanctioned).

90. *See* United States v. Wilkerson, 691 F.2d 425, 427-28 n.3 (8th Cir. 1982) ("hesitate to act" preferred); United States v. Miller, 688 F.2d 652, 662 (9th Cir. 1982) ("hesitate to act" upheld); United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) ("hesitate to act" definition approved); United States v. Clayton, 643 F.2d 1071, 1075 (5th Cir. 1981) ("hesitate to act" best explanation); United States v. Magnano, 543 F.2d 431, 436 (2d Cir. 1976) ("hesitate to act" desirable); United States v. Leaphart, 513 F.2d 747, 750 (10th Cir. 1975) (followed *Holland);* United States v. Restaino, 369 F.2d 544, 546 (3d Cir. 1966) (*Holland* definition preferred); United States v. Releford, 352 F.2d 36, 41 (6th Cir. 1965) (followed *Holland* "hesitate to act"), *cert. denied,* 382 U.S. 984 (1966); United States v. Harris, 346 F.2d 182, 184 (4th Cir. 1965) ("hesitate to act" approved).

91. *See, e.g.,* Merritt v. Commonwealth, 386 S.W.2d 727, 729 (Ky. 1965) (substantial and real doubt); State v. Hester, 246 S.E.2d 83, 84 (N.C. Ct. App. 1978) ("based on reason and common sense"); State v. Pam, 635 P.2d 766, 768 (Wash. Ct. App. 1981) ("doubt for which a reason based upon the evidence exists").

92. *Compare* State v. Murphy, 323 A.2d 561, 565 (R.I. 1974) ("actual substantial doubt of a defendant's guilt arising from the evidence or want thereof as distinguished from a mere suspicion or apprehension or imaginary doubt") *with* State v. Poulin, 277 A.2d 493, 496 (Me. 1971) ("doubt . . . for which some good reason may be given").

93. *See, e.g.,* People v. Simpson, 275 P.2d 31, 38 (Cal. 1954) ("reasonable doubt . . . means a doubt which has some good reason for its existence arising out of evidence in the case; such doubt as you are able to find a reason for in the evidence . . . an actual and substantial doubt growing out of the unsatisfactory nature of the evidence"); People v. Smith, 129 P. 785, 791 (Cal. 1913) ("A doubt to justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case"); People v. Huntington, 70 P. 284, 285 (Cal. 1903) ("Moral certainty is described as a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it.").

C. *Texas Does Not Use Definition of Reasonable Doubt*

In Texas a long history of cases states that "reasonable doubt" should not be defined.[94] While the Texas Code of Criminal Procedure provides that "[a]ll persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt,"[95] it does not define reasonable doubt.[96] The Texas Penal Code[97] echoes the requirements of the Texas Code of Criminal Procedure, but also does not define reasonable doubt.[98] The Texas Court of Criminal Appeals, however, has recently emphasized its disapproval of a definition of beyond a reasonable doubt but left the door open for a jury instruction defining reasonable doubt.[99] The Texas jury instruction on the presumption of innocence and reasonable doubt standard usually takes the form:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved by the State beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. In case you have a reasonable doubt as to defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him.[100]

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94. *See, e.g.,* Pigg v. State, 162 Tex. Crim. 521, 523, 287 S.W.2d 673, 674 (1956) (reasonable doubt needs no definition); Bennett v. State, 91 Tex. Crim. 422, 424, 239 S.W. 951, 952 (1922) (reasonable doubt definition unnecessary); Massey v. State, 1 Tex. Ct. App. 563, 570 (1877) (reasonable doubt needs no definition to people with common sense). In contrast, Texas allows a definition of the two other standards or proof: by preponderance of the evidence and by clear and convincing evidence. *Compare* Hankins v. State, 646 S.W.2d 191, 203 n.6 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting) (Texas permits definition of preponderance of the evidence) *and* Dallas Cotton Mills v. Ashley, 63 S.W. 160, 161 (Tex. Civ. App. 1901, writ dism'd) (specific definition of preponderance of the evidence given was incorrect, not giving definition per se) *with* State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979) (clear and convincing evidence defined as firm belief concerning truth of allegation).

95. TEX. CODE CRIM. PROC. ANN. art. 38.03 (Vernon Supp. 1982-1983).

96. *See id.* art. 3.01 (Vernon 1977) (words in code have ordinary meaning unless specific definition given).

97. *See* TEX. PENAL CODE ANN. § 2.01 (Vernon 1974) (presumption of innocence unless guilty of each element beyond a reasonable doubt).

98. *See id.* § 1.07 (Vernon 1974) (definitions do not include "reasonable doubt").

99. *See* Young v. State, 648 S.W.2d 2, 3-4 (Tex. Crim. App. 1983) (Onion, J., concurring). Judge Onion, in a concurring opinion, stated that "[w]hile a charge defining reasonable doubt may pass muster, this court does not condone the giving of such a charge." *Id.* at 3-4 (Onion, J., concurring). *But see id.* at 4-5 (Miller, J., dissenting) (argues strongly for "hesitate to act" definition used in federal courts).

100. P. MCCLUNG, JURY CHARGES FOR TEXAS CRIMINAL PRACTICE 310 (1981).

IV. LEGAL SCHOLARS AND JUDGES DEMAND CLEAR AND ACCURATE EXPLANATION OF REASONABLE DOUBT WHICH JURORS CAN UNDERSTAND

The United States Supreme Court has stated that the function of a jury instruction is to focus juror attention on concepts which must be understood.[101] Once juror attention has been focused, the more difficult task is a clear and correct explanation of the concept in terms a juror can understand.[102] Jurors often have difficulty understanding instructions because of unfamiliarity with words used in their particular legal connotation.[103]

A jury instruction on the reasonable doubt standard must not only state the law[104] but convey it in a format that tells a juror how certain he actually must be in order to convict a person.[105] Since a juror bases his degree of certainty on his own experience and knowledge,[106] commentators lament the lack of guidance in explaining the standard in terms which can be understood and applied in a uniform manner by jurors with diverse backgrounds.[107] Although divided over the issue, the judiciary has also voiced concern with the lack of a clear explanation of reasonable doubt that a

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101. *See* Lakeside v. Oregon, 435 U.S. 333, 340 (1978) (function of jury instruction to direct juror attention to issues that must be understood); *see also* Doyle v. State, 631 S.W.2d 732, 737 (Tex. Crim. App. 1982) (On Rehearing) (judge required to apply law to facts in jury charge).

102. *See* McBaine, *Burden of Proof: Degrees of Belief,* 32 CAL. L. REV. 242, 244 (1944) (correct jury instruction difficult task).

103. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 153 (1982) (syntax and presentation format also affect comprehension).

104. *See* TEX. CODE CRIM. PROC. ANN. art. 36.14 (Vernon Supp. 1982-1983) (in all felony and misdemeanor cases with jury, trial judge must charge jury with the law). All issues in criminal trials have been affected by the United States Supreme Court holding in *In re Winship* that the Constitution mandated each element of the crime must be proved beyond a reasonable doubt. *See* Allen & De Grazia, *The Constitutional Requirement of Proof Beyond Reasonable Doubt in Criminal Cases: A Comment Upon Incipient Chaos in the Lower Courts,* 20 AM. CRIM. L. REV. 1, 1 (1982); *see also In re* Winship, 397 U.S. 358, 368 (1970) (due process requires each element of crime be proved beyond a reasonable doubt).

105. *See* McBaine, *Burden of Proof: Degrees of Belief,* 32 CAL. L. REV. 242, 251 (1944) (no consensus on best method of jury instruction).

106. *See id.* at 246-47. Juror experience and knowledge may form three classes to categorize the probability of an event: "what (a) probably has happened, or (b) what highly probably has happened, or (c) what almost certainly has happened." *See id.* at 246-47.

107. *See id.* at 247-48 (jury instructions on burden of proof do not convey degree of certainty necessary). Juries must be given clear guidance. *See id.* at 248. Confusing rhetoric such as "moral certainty" and "abiding conviction" must be avoided. *See id.* at 258. The judge must explain to the jury how it should apply the reasonable doubt standard. *See* Note, *The Circumstantial Evidence Charge in Texas Criminal Cases: A Retrograde Doctrine,* 55 TEXAS L. REV. 1255, 1278 (1977) (judge required to instruct jury on application of standard); *see also* Comment, *Memory, Magic, and Myth: The Timing of Jury Instructions,* 59

jury can understand.[108] Judicial interpretation of the degree of certainty necessary for the reasonable doubt standard has been reported to be a .90 criterion level; in other words, a nine out of ten chance that the defendant is guilty.[109] Whether the judicial interpretation comports with juror comprehension remains unanswered.

Juror comprehension is not the only factor to be considered in formulation of a proper definition of reasonable doubt.[110] The Texas Court of Criminal Appeals has emphasized that precision must be used in jury instructions.[111] A lack of precision is a basis for reversible error.[112] If the judge does not precisely and properly state the law, the charge will either be prejudicial to the defendant and reversible, or allow a defendant to be acquitted on erroneous grounds.[113] Due to the requirement for legal precision and the effect of appellate reversal, jury instructions have evolved into "convoluted sentence structure, legal jargon, and uncommon words."[114] Although the task of reformulating a legally-precise and understandable instruction is not easy, the legal profession must not settle for less than the best possible solution.[115]

OR. L. REV. 451, 452 (1981) (jury system survival demands reforms improving juror decision-making ability).

108. *Compare* Hankins v. State, 646 S.W.2d 191, 201 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting) (jurors need reasonable doubt explained simply, yet completely) *with* Miles v. United States, 103 U.S. 304, 312 (1880) (explanations of reasonable doubt do not clarify concept for jurors) *and* Hankins v. State, 646 S.W.2d 191, 208 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Onion, J., dissenting) (Texas traditionally refused reasonable doubt definition). Judge Miller pointed out, however, that the consensus outside of Texas is that reasonable doubt requires clarification and is not self-explanatory. *See* Young v. State, 648 S.W.2d 2, 4 n.2 (Tex. Crim. App. 1983) (Miller, J., dissenting).

109. *See* Champagne & Nagel, *The Psychology of Judging,* in THE PSYCHOLOGY OF THE COURTROOM 279 (N. Kerr & R. Bray 1982) (when questioned by researchers, judges frequently report "beyond a reasonable doubt" means 90% certain).

110. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 154 (1982) (accurate statement of law required). Reversal results on appeal if a judge has misstated the law. *See id.* at 154.

111. *See* Galvan v. State, 598 S.W.2d 624, 630-31 (Tex. Crim. App. 1979) (phrase "and no other person" omitted from standard instruction held reversible error).

112. *See id.* at 630-31.

113. *See* McBaine, *Burden of Proof: Degrees of Belief,* 32 CAL. L. REV. 242, 256-57 (1944).

114. Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 154 (1982) (jurors never seem to really understand instructions).

115. *See* McBaine, *Burden of Proof: Degrees of Belief,* 32 CAL. L. REV. 242, 258 (1944) (though language and vocabulary impose limitations, best solution must be sought).

V. Psychological Studies on Juror Comprehension of Different Definitions of Reasonable Doubt

An interdisciplinary approach is often helpful in the solution to problems involving complex human behavior. Psychological studies on juror behavior provide guidance in the search for a comprehensible definition of reasonable doubt.[116] Studies in the fields of psychology and psycholinguistics have focused on many aspects of juror behavior[117] including the effect of jury instructions on juror comprehension.[118] Psycholinguists have demonstrated that jury instructions contain many features difficult to comprehend; including unusual or archaic phrases, many negations, and complex sentence structure.[119] In order to discover a more simple, yet accurate means to convey the concept of reasonable doubt to jurors, psychologists have examined various definitions of reasonable doubt.[120] Two major experiments will be discussed which both indicate

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116. *See* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. Pers. & Soc. Psych. 282, 292 (1976) (meaning of reasonable doubt not apparent to college student mock jurors); Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 Law & Soc. Rev. 153, 194 (1982) (research shows psycholinguistic changes in jury charges aided comprehension). For an extensive treatment on a variety of psychological studies, see generally The Psychology Of The Courtroom (N. Kerr & R. Bray 1982) (psychological studies on juror behavior).

117. *See, e.g.,* Kaplan, *Cognitive Processes in the Individual Juror,* in The Psychology Of The Courtroom 199 (N. Kerr & R. Bray 1982) (judgment formation process); Penrod, Loftus & Winkler, *The Reliability of Eyewitness Testimony: A Psychological Perspective,* in The Psychology Of The Courtroom 156 (N. Kerr & R. Bray 1982) (juror difficulty in discriminating correct from incorrect eyewitness testimony); Stasser, Kerr & Bray, *The Social Psychology of Jury Deliberations: Structure, Process, and Product* in The Psychology Of The Courtroom 253 (N. Kerr & R. Bray 1982) (jury decision-making process).

118. *See, e.g.,* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. Pers. & Soc. Psych. 282, 282 (1976) (juror verdicts significantly affected by differences in reasonable doubt definitions); Lind, *The Psychology of Courtroom Procedure* in The Psychology Of The Courtroom 29 (N. Kerr & R. Bray 1982) (jury instructions currently used create juror comprehension problems); Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 Law & Soc. Rev. 153, 153 (1982) (juror comprehension improved by psycholinguistically and legally correct instructions).

119. *See* Lind, *The Psychology of Courtroom Procedure,* in The Psychology Of The Courtroom 28 (N. Kerr & R. Bray 1982). *See generally* A. Elwork, B. Sales, J. Alfini, Making Jury Instructions Understandable § 7, at 145-88 (1982) (proposed method for re-writing jury instructions).

120. *See, e.g.,* Champagne & Nagel, *The Psychology of Judging,* in The Psychology Of The Courtroom 279 (N. Kerr & R. Bray 1982) ("10 to 1 trade-off"); Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. Pers. & Soc. Psych. 282, 286 (1976) (undefined, lax, and stringent definition); Severance & Loftus, *Improving the Abil-*

that definitions of reasonable doubt significantly affect juror comprehension.[121] The research supports the position that Texas should include a definition of reasonable doubt in its charge to the jury.

A. *The Severance and Loftus Study*

Researchers Severance and Loftus in a unique interdisciplinary approach, examined concepts which confused jurors, including reasonable doubt and intent.[122] Pattern instructions were changed according to psycholinguistic principles,[123] submitted to judges for approval of legal ac-

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ity of Jurors to Comprehend and Apply Criminal Jury Instructions, 17 LAW & SOC. REV. 153, 191 (1982) (revised pattern jury instructions). A major drawback in making conclusions about actual jurors from results of experiments is that experiments used mock jurors with a simulated trial videotape, whereas actual jurors are in a courtroom setting and actually deliberate the fate of another human being. *See* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. PERS. & SOC. PSYCH. 282, 291 (1976) (results considered suggestive rather than conclusive). Experimental results, however, are useful indicators that suggest actual juror behavior. *See id.* at 291.

121. *See* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. PERS. & SOC. PSYCH. 282, 282 (1976) (individual and group decisions affected); Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 194 (1982) (juror comprehension aided by improved instructions). In addition, since juror decisions are made both individually and as a group, the group decision-making process compounds individual juror misunderstanding of the reasonable doubt standard. *See* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. PERS. & SOC. PSYCH. 282, 282 (1976) (group consensus for degree of certainty). While this comment focuses on overall juror comprehension, the distinction between individual and group decision-making must be kept in mind. *See* Johnson v. Louisiana, 406 U.S. 356, 363 (1972) (judicial recognition reasonable doubt is decision-making criterion).

122. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 161 (1982). Actual queries submitted by jurors during deliberation at criminal trials for a one-year period were analyzed and issues with critical legal significance most frequently questioned were used in the experiment. *See id.* at 166-70. Jurors frequently requested clarification of reasonable doubt. *See id.* at 168. Other research indicates that most jurors understand merely half of their instructions. *See id.* at 160.

123. *See id.* at 157-58. Changes were made in words used, sentence structure, and concept organization. *See id.* at 157. Uncommon, abstract words, or those with two meanings (such as respect) were replaced by familiar concrete words. *See id.* at 158. Imbedded or compound sentences and the passive voice were changed to simple active-voice sentences. *See id.* at 158. Concepts were reorganized by breaking down a complex structure into simple components, then integrating them. *See id.* at 158. An alternate concept organization structure requires ordered idea presentation so that comprehension of an idea flows from comprehension of the preceding ideas. *See id.* at 158. Additional changes included the insertion of explanatory phrases (for example, which is . . .), replacement of nominaliza-

curacy,[124] then presented to mock jurors.[125] In one phase of the experiment the standard pattern definition of reasonable doubt significantly improved comprehension compared with a group which only received general jury instructions.[126] In the next phase of the experiment revised instructions were presented to the mock jurors.[127] While the revised instructions for reasonable doubt produced no improvement in comprehension, the revised instructions for intent did improve juror comprehen-

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tions with verbs (for example, "we did" for "the doing of"), reduction of lists to two items, and use of directives to concentrate juror attention (for example, must, may). *See id.* at 159-60.

124. *See id.* at 161. Legal precision is necessary for instructions to pass appellate scrutiny. *See id.* at 184.

125. *See id.* at 176. Mock jurors watched a videotaped burglary trial. *Compare* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 180 (1982) (pattern instructions improved comprehension when jurors saw videotaped trial) *with* Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?,* 1 LAW & HUM. BEHAV. 163 (1977), *reprinted in* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 158-59 (1982) (pattern instructions did not improve juror comprehension).

126. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 180 (1982) (no improvement in ability to apply instructions although comprehension errors reduced). The experiment used the Washington state pattern instruction defining reasonable doubt in the following manner:

> A reasonable doubt is one for which a reason exists. A reasonable doubt is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Id. at 171 n.16. Pattern instructions, however, have been criticized as too general and abstract and containing flaws similar to those found in definitions derived from case law because pattern instruction definitions also flow from case law. *See id.* at 156.

127. *See id.* at 185-86. The revised instruction states:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The defendant is presumed to be innocent and is not required to prove his or her innocence or any fact. This presumption of innocence is present at the beginning of the trial and continues unless you decide after hearing all the evidence that there is proof beyond a reasonable doubt that the defendant is guilty. The state has the burden of proving each element of the crime beyond a reasonable doubt. A reasonable doubt about guilt is not a vague or speculative doubt but is a doubt for which a reason exits. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after that person has fully, fairly and carefully considered all of the evidence or lack of evidence. If, after such thorough consideration, you believe in the truth of the charge, you are satisfied beyond a reasonable doubt. If you are satisfied beyond a reasonable doubt that all elements of the charge have been proved, then you must find the defendant guilty. However, if you are left with a reasonable doubt about the proof of any element, then you must find the defendant not guilty.

Id. at 185-86.

sion.[128] Since there was improvement for one concept, the researchers suggested that better revised instructions for reasonable doubt should produce improved comprehension.[129]

B. *The Kerr, Atkin, et al Study*

Another experiment varied reasonable doubt instructions into three classes: undefined, lax, and stringent.[130] The different definitions had a

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128. *See id.* at 189. There were fewer guilty verdicts, however, with revised instructions. *See id.* at 189. The group decision-making process also produced fewer guilty verdicts. *See id.* at 189. Other researchers have suggested that judges reject revised instructions because they make convictions more difficult. *See* Champagne & Nagel, *The Psychology of Judging,* in THE PSYCHOLOGY OF THE COURTROOM 280 (N. Kerr & R. Bray 1982).

129. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 194 (1982). Severance and Loftus also suggest that misunderstanding evidence may cause part of the juror error. *See id.* at 194.

130. *See* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. PERS. & SOC. PSYCH. 282, 286 (1976). The undefined instruction was as follows:

> Ladies and gentlemen of the jury, by the law of this state the burden is not upon the defendant to prove his innocence, but, on the contrary, the burden is on the prosecution to convince you beyond any reasonable doubt that the defendant committed the crime of rape.

Id. at 286. The lax instruction was as follows:

> You have heard the term reasonable doubt several times here today. A reasonable doubt is not just a possible doubt, not a capricious or trivial doubt, but a serious and well-founded misgiving about the defendant's guilt of this crime. Such a doubt must be based only on the evidence of this case and not upon anything outside of or not included in the evidence. The prosecution does not have to convince you that the defendant is guilty beyond even the possibility of a doubt, nor need they prove that their facts are absolutely true. Of course, everything that has to be proven with evidence is subject to some doubt, but just any doubt is not the same thing as a reasonable doubt. A reasonable doubt about the defendant's guilt must be a substantial one, a fair one, one based on reason, one for which reasons can be given. In summary you need not be absolutely sure that the defendant is guilty to find him guilty.

Id. at 286. The stringent instruction provided:

> The defendant is assumed innocent under the law. To change that presumption of innocence the prosecution must have convinced you to a moral certainty, with absolute and positive proof, that the defendant is guilty. That is, before you can return a verdict of guilty you must be sure and certain that the defendant is guilty. If you are not sure and certain of his guilt, you must find him not guilty. In reviewing the evidence of the case, you may be able to form many theories about what might have occurred. One of those theories of course is that the defendant is guilty, as charged, of the crime of rape. But you may be able to come up with other explanations of the evidence. If you feel that the facts of this case are compatible with any other theory besides the one in which the defendant is guilty, then you have a reasonable doubt about his guilt and must find him not guilty. In order for such a doubt to qualify as a reasonable doubt it is not essential for everyone to agree with you. If you feel any such doubt, you must find the defendant not guilty. If you are certain that you have no such doubt, you should find

significant effect on both individual and group decisions.[131] Comprehension itself was not measured in this experiment;[132] however, the results indicated that different definitions of reasonable doubt affected the degree of certainty jurors felt they must have in order to convict.[133] The researchers suggested that a definition of reasonable doubt should be one that explains the correct degree of proof in a simple format readily comprehensible to jurors both individually and as a group.[134] The overall results of the two experiments suggest that juror comprehension can be improved by receiving a definition of reasonable doubt carefully tailored by psycholinguistic techniques and legal principles.[135]

VI. Proposed Definition of Reasonable Doubt Should Be Required by Texas Courts

Although the majority on the Texas Court of Criminal Appeals still cautions against dangers in defining reasonable doubt,[136] Judge Miller's position advocating a definition of reasonable doubt is supported by federal courts,[137] state courts,[138] legal commentators,[139] and pscyhological re-

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him guilty. In summary, to convince [sic] the defendant, you must believe beyond any reasonable doubt that he is guilty of the crime of rape as I have defined to you.

Id. at 286.

131. *See id.* at 287 (most guilty verdicts with lax definition).

132. *See id.* at 291 (focus on verdicts and comparison of individual with group decisions).

133. *See id.* at 291. The definition did not affect juror understanding of the weight of the evidence because decisions on the probability that the accused committed the offense were not affected by definitional differences. *See id.* at 291.

134. *See id.* at 292 (group factors also important).

135. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 Law & Soc. Rev. 153, 194 (1982). Careful attention must be paid to legal precision. *See* Galvan v. State, 598 S.W.2d 624, 630-31 (Tex. Crim. App. 1979).

136. *See* Young v. State, 648 S.W.2d 2, 4-5 (Tex. Crim. App. 1983) (Miller, J., dissenting) (inherent dangers). The "hesitate to act" definition was at issue in this case, but the majority avoided the issue by holding that the entire jury charge was defective due to a phrase concerning "an abiding belief" which implied a lower standard of proof. *See id.* at 4.

137. *See, e.g.,* United States v. Wilkerson, 691 F.2d 425, 427-28 n.3 (8th Cir. 1982) (defined reasonable doubt according to "hesitate to act" definition); United States v. Drake, 673 F.2d 15, 20 (1st Cir. 1982) (preference for "hesitate to act" definition); United States v. Breedlove, 576 F.2d 57, 58 n.1 (5th Cir. 1978) (reasonable doubt based on reason and common sense).

138. *See, e.g.,* State v. Johnson, 152 N.W.2d 426, 431 (Iowa 1967) (approved correct definition of reasonable doubt); State v. Henderson, 547 S.W.2d 141, 143 (Mo. Ct. App. 1976) ("reasonable doubt does not mean beyond a shadow"); Hardin v. State, 355 S.W.2d 105, 108 (Tenn. 1962) (uncertainty concerning guilt produces reasonable doubt).

139. *See* McBaine, *Burden of Proof: Degrees of Belief,* 32 Cal. L. Rev. 242, 258 (1944) (need for clear words with common usage); *cf.* Comment, *Memory, Magic, and Myth: The*

search.[140] Judge Miller recommends a definition in "substantial compliance" with the "hesitate to act" definition used by *Holland* and the federal courts.[141] This comment, applying psycholinguistic principles suggested by psychological research to the "hesitate to act" definition[142] recommends the following definition of reasonable doubt be required in Texas criminal cases:

> A reasonable doubt is a doubt based on reason and common sense. It is the kind of doubt that would make a reasonable person hesitate to act in the conduct of his or her serious and important business or personal matters. Proof beyond a reasonable doubt is proof that will remove from your mind any reasonable doubt, which is the kind of doubt that would make you hesitate to act in the conduct of your serious and important business or personal matters. If you are satisfied

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Timing of Jury Instructions, 59 OR. L. REV. 451, 452 (1981) (reforms needed in jury instructions).

140. *See, e.g.,* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. PERS. & SOC. PSYCH. 282, 282 (1976) (different definitions affect juror decisions); Lind, *The Psychology of Courtroom Procedure,* in THE PSYCHOLOGY OF THE COURTROOM 29 (N. Kerr & R. Bray 1982) (jury misunderstanding created by jury charge); Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 194 (1982) (comprehension improvement with definition).

141. *See* Young v. State, 648 S.W.2d 2, 4 n.2 (Tex. Crim. App. 1983) (Miller, J., dissenting) (use of substantial compliance criterion adds support of federal holdings).

142. *See* Hankins v. State, 646 S.W.2d 191, 201 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting). The first two sentences are slightly modified portions of the "hesitate to act" definition. *Compare* United States v. Burgess, No. 73-1983 (4th Cir. July 3, 1974), *reprinted in* Hankins v. State, 646 S.W.2d 191, 201 n.3 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting) ("A reasonable doubt is a doubt based upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly in the most important of your own affairs.") *and* Hankins v. State, 646 S.W.2d 191, 203 n.6 (Tex. Crim. App. 1983) (Opinion on State's Motion for Rehearing) (Miller, J., concurring and dissenting) (Judge Miller recommends "[p]roof beyond a reasonable doubt is . . . that degree of proof that will erase in the mind of the jury the kind of doubt that would make a person hesitate to act in the conduct of their more serious and important personal affairs.") *with* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE & INSTRUCTIONS § 11.14, at 310 (3d ed. 1977) ("the kind of doubt that would make a reasonable person hesitate to act . . . in the most important of his own affairs"). Sentence three of the definition personalized the definition so that the juror sees himself or herself as the reasonable person and a reasonable doubt as one that would make him or her hesitate to act. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 159-60 (1982). Sentences four and five are directives essentially derived from experimental research. *See id.* at 185-86.

> beyond a reasonable doubt that all elements of the crime have been proved, then you must find the defendant guilty. However, if you are left with a reasonable doubt about the proof of any element, then you must find the defendant not guilty.

Judge Miller has enthusiastically approved this definition.[143] He noted that this definition conveys the essence of reasonable doubt because "it tells a juror that if he is as sure that the defendant is guilty as he would be about doing something really important in his life, then he is convinced beyond a reasonable doubt as the law requires."[144]

If the Court of Criminal Appeals refuses to require such a definition, at least it should allow judges the discretion to use it.[145] In addition, this comment recognizes the value of interdisciplinary input and invites the Texas psychologists to test juror understanding utilizing this definition.[146] While an experimental test must necessarily be conducted in a simulated situation and the results are merely suggestive rather than definitive,[147] the ultimate decision rests in the hands of the judiciary[148] or the legislature.[149]

VII. CONCLUSION

The demise of the Texas circumstantial evidence instruction in *Hankins* has focused attention and reinforced the need for a proper instruction on the reasonable doubt standard of proof.[150] In order to properly instruct the jury, the reasonable doubt charge should include the proposed defini-

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143. Telephone interview with Judge Chuck Miller, Texas Court of Criminal Appeals (Sept. 30, 1983) (definition as good or better than any he has seen). Judge Miller also welcomed interdisciplinary support from the academic community. *Id.*

144. Young v. State, 648 S.W.2d 2, 5 (Tex. Crim. App. 1983) (Miller, J., dissenting). Judge Miller stated that this quote from *Young* best described the proper focus of a definition of reasonable doubt. Telephone interview with Judge Chuck Miller, Texas Court of Criminal Appeals (Sept. 30, 1983).

145. *See* Young v. State, 648 S.W.2d 2, 5 (Tex. Crim. App. 1983) (Miller, J., dissenting) (judicial discretion recommended if requirement not imposed).

146. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 184 (1982). A paradigm similar to that used in phase three of the study should be designed in which jurors view a videotaped trial situation and receive either no instructions, the reasonable doubt charge currently used in Texas, or the new instruction containing the reasonable doubt definition. *See id.* at 184.

147. *See* Kerr, Atkin, Stasser, Meek, Holt, & Davis, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors,* 34 J. PERS. & SOC. PSYCH. 282, 291 (1976) (jurors in experiment do not decide fate of actual persons).

148. *See* Young v. State, 648 S.W.2d 2, 4 n.2 (Tex. Crim. App. 1983) (Miller, J., dissenting) (rule forbidding definition of reasonable doubt created by judiciary).

149. *See* McBaine, *Burden of Proof: Degrees of Belief,* 32 CAL. L. REV. 242, 259 (1944) (recommends legislation require improved definitions).

150. *See* Hankins v. State, 646 S.W.2d 191, 200 (Tex. Crim. App. 1983) (Opinion on

tion of reasonable doubt which is in substantial compliance with the "hesitate to act" definition and in a format readily understood by jurors.[151] The definition should be required, or, at the very least, left to the judge's discretion as a safeguard to assure progress toward attainment of an American ideal, that an innocent person not be convicted.

State's Motion for Rehearing) (circumstantial evidence instruction improper when jury "properly instructed on the reasonable doubt standard of proof").

151. *See* Severance & Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions,* 17 LAW & SOC. REV. 153, 161 (1982) (interdisciplinary approach applied psycholinguistic principles complying with legal precision).