Beyond a Reasonable Doubt: Juries Don't Get It

By Judge James A. Shapiro

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution require prosecutors to prove criminal defendants guilty beyond a reasonable doubt in order to secure a conviction.

Some jurisdictions require the trial judge to instruct juries on the meaning of beyond a reasonable doubt, some permit it, and others (like Illinois) proscribe it. The Federal Constitution neither requires nor prohibits trial courts from defining the term "reasonable doubt."

The sole requirement is that the trial court accurately instructs the jury on the "concept" that the state has the burden to prove the defendant guilty beyond a reasonable doubt. The Supreme Court deferentially reviews the substance of reasonable doubt definitions and finds error only if there is a reasonable likelihood that the jury in fact understood the instruction to permit conviction based on proof below the reasonable doubt standard.

The prototypical definition of reasonable doubt was set forth by Chief Justice Shaw in *Commonwealth v. John W. Webster,* 59 Mass. 295, 320 (1850):

> 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.

Over a half century later, in *State v. De Lea,* 36 Mont. 531 (1908), the Montana Supreme Court found no error in Chief Justice Shaw's mid-19th century definition, but found the definition of reasonable doubt more complicated than reasonable doubt itself:

> I do not think the words 'reasonable doubt' require explanation. I believe that any juror who has not the mental capacity to understand the words themselves could not possibly comprehend the definition given to them by the courts. How can it be said that a juror could not understand what is meant by a 'reasonable doubt' but would know the meaning of the words 'an abiding conviction to a moral certainty,' used in the definition?

Perhaps jurors of the mid-19th and early 20th centuries were more intelligent than today's, because judging by their jury questions, many (if not most) of them are just not getting it. For example, in the recent trial of Paul Manafort, the jury notoriously requested a definition of reasonable doubt before hanging on a large number of counts while convicting on others.

In *Victor v. Nebraska*, 511 U.S. 1, 27 (1994), Justice Ginsburg's concurrence explicitly endorsed the following definition from the Federal Pattern Criminal Jury Instructions:

> 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.

This may be the best of the definitions, but the mere fact juries have to ask for a definition so often is evidence that "beyond a reasonable doubt" is "beyond" many of their comprehensions.

"Beyond a reasonable doubt" is an epistemological standard that most lawyers and judges can fathom, but most jurors cannot. Descartes used the concept of doubt (whether reasonable or not) to prove existence ("I think therefore I am" follows from "I doubt therefore I am," among other things).

But just the fact that we have to define "beyond a reasonable doubt" suggests the term itself is ambiguous and beyond many jurors' comprehension. Even in jurisdictions that don't permit definition, jury questions asking for one suggest the standard is out of reach for many of them.

While it is impossible to quantify the burden of proof in terms of percentage of certainty, comparison with other burdens of proof helps. The one burden of proof that is easy to quantify is the civil "preponderance of the evidence" standard. That burden is anything—as little as a mill—over fifty percent. Such a standard would be equivalent to the average juror's mere belief that a criminal defendant actually committed the crime.

Then there's the intermediate "clear and convincing" burden used in some administrative and pretrial judicial proceedings. While that burden, like beyond a reasonable doubt, is impossible to accurately quantify in percentage terms, many think of it as approximately 75% certainty. And we know that beyond a reasonable doubt is a significantly higher standard than clear and convincing evidence. Thus, when one compares the beyond a reasonable doubt standard to a factfinder being "clearly convinced" of the truth of something, beyond a reasonable doubt should be upwards of 90% certainty. Yet most jurors invariably minimize this standard because they are reluctant to "let go" a defendant who actually committed the crime. In fact, prosecutors are trained to subtly minimize their burden of proof by purporting to embrace it in opening statement and closing argument, while telling the jury it's "the same burden we have in every criminal case." In other words, if the burden were so high, there wouldn't be any criminal convictions.

The strong suspicion is that many juries are convicting on evidence that is truly less than beyond a reasonable doubt. It is true that a defendant convicted on evidence that is less than beyond a reasonable doubt has the right to appeal on that ground. However, that right is virtually meaningless, as the defendant's burden on appeal is to show that "no rational trier of fact could find guilt beyond a reasonable doubt." That has become a virtually insurmountable burden, as most appellate judges are reluctant to second-guess a jury's verdict by essentially calling it irrational. Consequently, trial juries effectively have the final say on whether the prosecution proved its case beyond a reasonable doubt. The collective subjectivity of what a jury deems to be proof beyond a reasonable doubt essentially dwarfs the more objective "no rational trier of fact" standard on appeal.

One solution is to put the beyond a reasonable doubt standard into terms that the average juror can actually understand (I know, what a novel concept). Since most jurors seem to care only about whether they think the defendant really committed the crime or not ("Did he do it?"), regardless of whether the prosecution actually proved it beyond a reasonable doubt, the first "juror-friendly" question in the analysis could be, "Do you believe the prosecution proved each and every element of the crime it charged the defendant with committing?"

But in order to minimize the danger of convicting the innocent, as the reasonable doubt standard purports to do, we could further instruct the jury, "Keeping in mind the extraordinary injustice in the possibility of convicting an innocent person, are you sure?" Invariably, juries will wonder and even ask the judge how "sure" they have to be. One hundred percent? Ninety-nine percent? Fifty-one percent? The answer will be the

subjective one of however sure they have to be to satisfy their collective conscience that they are not convicting an innocent person. Tell them, “Sure to a moral certainty.”

Thus, the criminal burden of proof would become a two-part standard: (1) “Did the prosecution prove every element of the crime it charged the defendant with committing?” and (2) “Keeping in mind the extraordinary injustice in the possibility of convicting an innocent person, are you sure?” Perhaps with a burden of proof articulated in a way more jurors can actually understand, fewer juries would convict the innocent.

The Honorable James A. Shapiro is a past president of the Decalogue Society and a recently elected judge of the Circuit Court of Cook County.