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Do Juries See Beyond a Reasonable Doubt? A Historical View

By Larry King

There are countless articles that emphasize the heavy burden that the "beyond a reasonable doubt" standard for conviction in criminal cases places on the prosecution. Far less noted is the even heavier burden that the "beyond a reasonable doubt" standard places on jurors.

In a country that is so divided that even the most innocuous issue causes opposing sides to gird their loins for battle, there is virtual unanimity that the heavy burden of making the Government prove a defendant's guilt beyond a reasonable doubt should remain inviolate. There are respectable mainstream people who advocate keeping certain people convicted of sex crimes incarcerated after their prison term has ended. There is presently a respectable mainstream Administration that alleges that certain people accused of being linked to terrorism should be denied the right to have either lawyers or a trial. Yet even the proponents of those radical proposals have never advocated changing the burden of proof for the Government in a criminal trial.

There is no reason why the "beyond a reasonable doubt" standard should be so sacrosanct. A person's life is usually far more impacted by the financial havoc that can be wrought by the Internal Revenue Service or other Government agencies than it would be by spending one day in a jail. Yet, various government agencies have the power to

pound a life's work to smithereens by meeting the low bar civil standard of proving that the Government was "more likely than not" correct. Yet, if the Government wants to prove that you disturbed the peace by urinating on your neighbor's lawn or on your neighbor, the Government must meet the heavy burden of proving its case beyond a reasonable doubt. In many jurisdictions, if the potential penalty is less than six months in prison, the Government need not even afford the defendant a jury trial; but even in trial before a judge without a jury the "beyond a reasonable doubt" standard remains inviolate.

A perceived sense of something being part of the American heritage provides a free pass through hostile territory for certain traditions of ours. Three quarters of the provisions of the Bill of Rights are designed to protect persons accused of crimes. In a time of terror where one cannot find much sympathy for protecting individual rights from a Government with both a real and perceived need to protect the greater community from sinister outside forces, there would be little support for those provisions of the Bill of Rights today if it were not a part of our Constitutional heritage.

The strange thing about the "beyond a reasonable doubt" standard is that it is thought of as being an anchor of our freedoms, but those words never appear in our Constitution or the Bill of Rights. It, like the "presumption of innocence," benefits from a perceived belief in the public that attacking either the Government burden of proof or the presumption of innocence is somehow un-American. Most of the public and probably most attorneys think that both of those provisions are found in our Constitution. They are not.

It was not until 1970 that the United State Supreme Court determined that the "beyond a reasonable doubt" standard was required by the Due Process Clause of the United States Constitution. With predictable regularity, each Supreme Court case, which finds a right not explicitly found in the Constitution, is met with a cacophony of denunciation and a stack full of proposed constitutional amendments to undo the Court decision. What was the reaction to the Supreme Court decision, which read into the Constitution a right to make the Government prove a defendant

guilty beyond a reasonable doubt by those who adamantly oppose "coddling" criminals? Silence. Nor did we hear a word from the strict constructionists who viciously attacked every other Supreme Court decision that read into the Constitution mandates that were not clearly and explicitly spelled out in the document.

Nor have we ever heard anyone complain about the presumption of innocence, a concept twined with the concept of the Government burden of proving guilty beyond a reasonable doubt. Like the "beyond a reasonable doubt" standard, the presumption of innocence is always treated as an unassailable hallmark of our freedom and heritage. We never stop to ask why. Why shouldn't we have the same standard for a criminal case as we have in a civil case—both sides starting from a level playing field? Instead of tilting the field against the Government why don't we just make certain that every potential juror has a totally unbiased mind before the trial starts...neither thinking the person guilty nor innocent but rather awaiting the evidence to determine the outcome.

How realistic is it to demand that jurors presume everyone innocent? When asked during questioning, every potential juror will tell a defense counsel or judge, that he has no problem presuming that the defendant is innocent. Yet, how many jurors really glance over at that man sitting at the defense table and say to themselves, "Ah, there sits an innocent man?" Shouldn't it be enough and more consistent with human nature and logic, merely to instruct the jurors to keep an open mind and to always remember that it is the government that has the burden of proving the defendant's guilt beyond a reasonable doubt?

Why has no one ever argued that the burden on the Government of proving a case beyond a reasonable doubt makes the presumption of innocence supernumerary? If the Government has any burden in the case, then if it fails to meet that burden, the defendant will be acquitted even if he does nothing at trial. The burden of proof on the Government in a criminal case is a presumption of innocence. Why give the defendant a second bite at an apple already chewed to the core with a heavy burden of proof?

How did these two aspects of our criminal law become so exalted as to render them immune from even questioning their viability when apparently equally important "rights," some even anchored in the Constitution, such as the right to an attorney, have always been open to discussion and, now, even assault? Even the right against self-incrimination, firmly anchored in the Constitution, has been chipped away over the years allowing, for example, the Government to extract incriminating blood or hair samples from a target of an investigation. And there are very cogent and reasoned advocates who claim that the right against self incrimination can be further circumscribed without doing damage to the original intent of the framers of the Constitution. But these same people do not advocate taking even a flake of brick off the wall of separation between presumption of innocence and the State, or between the "beyond a reasonable doubt" burden and the State. Why are we willing to discard the requirement of unanimous juries in some criminal cases but unwilling to even discuss eliminating the presumption of innocence or the "beyond a reasonable doubt" standard in the same type of cases?

Even the legal tsunami known as the Patriot Act and its yearly accretions has left the presumption and the burden of proof untouched even as it overflows countless other rights that had been thought of as being inviolate. Why have the presumption and the burden always been ceded the high ground by even the "criminal rights" harshest critics? It is certainly a beneficial thing for any democracy when any individual right can weather the harshest storms created by a sometimes understandably and sometimes baselessly frightened public. But it is still a mystery why some "rights" are immunized from the flood waters of public rage and others get submerged in a mere high tide. It can't all be because the presumption and the Government burden of proof had better PR agents than countless other rights which are always under attack.

The presumption of innocence is nowhere to be found in the Constitution. It is merely an evidentiary rule that says that a criminal defendant is presumed to be innocent. Hence, if the Government puts on insufficient evidence to overcome that presumption, the presumption

stands and the person is acquitted without having to put on any evidence. It is one of a countless number of presumptions embedded in our laws. Yet, even the most far right commentator prefaces his attack on an accused person by saying, "I know we have to presume him innocent at this point, but..." Why? The presumption of innocence is merely a garden-variety rule of evidence to be applied in a courtroom. There is no reason why a person sitting in the comfort of his home has to presume anyone innocent. A juror has to presume the defendant innocent, but that is no more remarkable than a juror having to follow a myriad of other laws that apply to a particular case. If we really had a presumption of innocence like the public thinks we have, no one would ever be held in prison or jail before his or her trial commenced. After all, in the United States we do not knowingly keep innocent people in prison. Yet, not even the ACLU has ever claimed that no one can be held in prison before trial. So much for the presumption of innocence. It makes us a better country that every talking head or news person commenting on legal matters feels the obligation to preface every remark about a suspect or arrested person with "of course we must presume he is innocent until he is proven guilty," but there really is no legal basis for such a caveat. And many times, what we are all really thinking is that the guy definitely did it.

Somehow, the "presumption of innocence" has been changed from a simple rule of evidence into a hallmark of the American way, to the extent that commentators get their hands slapped for talking as if a person is guilty when he has not yet been tried. The same transformation of the "beyond a reasonable doubt" standard has also occurred in our society. It began as a courtroom rule of law that was transformed into a public rule of etiquette and later, much later, elevated by the Supreme Court to the level of a due process right.

The beatification of the "beyond a reasonable doubt" standard and the presumption of innocence are certainly beneficial occurrences. They are just strange occurrences in that the American public has ended up embracing substantive protections for people accused of crimes because it mistakenly mistook them for being part and parcel of American scripture. They were not part of the original canon, but

they are part of it now. And so, people feel free to advocate for the elimination of the right of certain accused to have lawyers or even to have a trial, but they dare not tamper with that heavy burden of proof in criminal cases.

When a jury is being selected for a criminal trial, each potential juror is asked if there is any reason why he or she cannot be fair and impartial as a juror in the trial. If you gather together a group of prosecutors and defense attorneys with thousands of cases under their belts, they will tell you that they have heard just about every reason imaginable why a juror could not be fair and impartial and even some reasons that were theretofore unimaginable. But we have never once heard from any seasoned criminal trial attorney from either the prosecution or defense side, of a potential juror who said he could not be fair and impartial in the case because he could not accept the heavy burden placed on the Government by the "beyond a reasonable doubt" standard. However it is that we have arrived at this juncture, America is now all about mother, apple pie and beyond a reasonable doubt.

This now brings us back to the original assertion that the "beyond a reasonable doubt" standard places a greater burden on the jury than it does on the Government. Why should that be? The jurors, after all, are being asked to follow a standard that, for all appearances, they and all of their neighbors accept. So what's the problem?

The reason that the "beyond a reasonable doubt" standard is so emotionally and practically difficult to apply is because it forces a person to act in a manner contrary to logic and human nature. The civil standard of proof of "more likely than not" tells a juror to decide the case for the side that you think has the better of the argument. The "beyond a reasonable doubt" standard tells a juror that if you think the Government is probably right, or even most likely right, you still must cast your vote for the side that you think has the weaker argument on the issue. And by acting against the normal instincts of a logical mind, you realize you are likely releasing a toxin into the societal bloodstream.

We are asking our fellow citizens in their capacity as jurors to be able to say to themselves, "Yeah, well I think he probably raped

those little girls, but I am not convinced beyond a reasonable doubt, so I will let him go." The instinct of most people, even liberals, is to give the benefit of the doubt to keeping someone who might be a rapist in prison.

So, how do jurors cope with their heavy burden? Consciously, jurors almost always try to do the right thing even if their verdicts are not always rational. There is some incredible transformation that comes over even the most opinionated citizen once he or she becomes a juror. People make decisions as jurors that they never in a million years would have made watching the trial tracked by their favorite cable television station. By and large, one of the greatest successes of the American legal system is the seriousness with which jurors take their responsibilities to be fair and follow the law as the judge gives it to them. But I used the word "consciously" for a purpose. Jurors do their best to be fair, but the truth is that jurors often deal with the almost impossible demands that the "beyond a reasonable doubt standard" puts on them by subconsciously, adjusting the rigor with which they follow that standard according to the case before them.

Any prosecutor, defense counsel or judge will tell you that different types of cases require a different weight of evidence. For instance, jurors will be looking for reasons to convict someone accused of being a big time drug dealer while the Government better have an extremely strong case if it intends to obtain a perjury conviction. In reality, the drug dealer is less of a threat to our way of life than the perjurer because the drug dealer is a fungible passing menace while perjury is a dagger aimed at the heart of our legal system. Yet, juries feel threatened by the former and not by the latter. If a juror is thinking of acquitting an accused major drug dealer, he will probably think to himself, "If I let this guy go, he's liable to involve a whole bunch of young kids in drugs and destroy countless neighborhoods." On the other hand, a juror about to acquit an accused perjurer is unlikely to be thinking to himself, "Oh my gosh, if I let this guy go, there is going to be a liar walking the streets of my community."

Truth be told, while the Government's burden never changes legally, as a practical matter, it changes dramatically according to the

type of case it is and where it is being tried. It would take a very courageous juror to vote to acquit someone accused of having a direct involvement in the 9/11 massacres. And one thing you could take to the bank...no jury will hold the Government as rigorously to its burden in such a case as they would in a case involving a person accused of shooting a drug dealer.

So is the heavy burden of proof on the Government in a criminal case a mere buncombe that has no real effect at all? There is a kind of jury nullification that lessens that burden in cases that either greatly repulse or greatly threaten the community at large. But even in those cases, it is important that the Government be given the burden even if it does not actually have to shoulder it. The principle that the Government must prove a defendant's guilt and that it must do so beyond a reasonable doubt has beneficial reverberations beyond the confines of the legal system. The fact that the public at large feels it is un-American to presume someone guilty, even someone being accused only in the media, is a healthy development in an age where the Internet every day proves the aphorism that a lie can travel half way around the world before the truth can lace up its shoes.

The beyond a reasonable doubt burden on the Government also has an unintended benefit for the most ardent purveyors of law and order at all costs. The burden serves as a perfect beard for the words in the legal system that dare not speak their name...the nullification verdict. The nullification verdict is relevant to a discussion about the "beyond a reasonable doubt" burden because the latter is an enabler of the former.

A nullification verdict is a verdict delivered by a jury, which acquits the defendant even though the jury knows that the defendant is guilty of the charges leveled against him. The nullification verdict is historically based, legally binding, and can result in no legal retaliation against the jurors who rendered it. Every jury has the right to render a nullification verdict and no defense lawyer or judge is allowed to inform the jury that it has that right. Ham handed defense lawyers attempt unsuccessfully to directly inform juries that they may acquit the defendant even if the Government has proved its case beyond a

reasonable doubt. More skilled practitioners will try to sneak the message in through the back door by reminding the jurors that "your verdict is final and cannot be second guessed by anybody, and nothing can happen to you for rendering your verdict."

There are several ingredients that are often found in the mix of a nullification verdict. Often, the defendant is someone who is greatly admired by or greatly charms the jury. Often, the victim is someone who the jury finds to be unpleasant or even vile. In Texas, this type of case is called the "he needed killin'" defense. The most explosive ingredient in a nullification verdict is the desire of a jury to send a message by their verdict. The message can be that the jury did not like how the Government conducted itself with regard to this particular case, or it can be a more overarching message involving disfavored laws or Government conduct in general.

The reason juries are not to be told of their right to nullify a verdict is that the nullification verdict is a slippery slope that ends up in anarchy and a country ruled by jurors and not laws. Hence, jurors are told that they must follow the law as it is given. What is left out of that charge is the following, "but if you don't, it is perfectly legal."

One of the best kept secrets in our legal system is how many nullification verdicts do occur. We don't usually read about them because they are called by a different name...reasonable doubt. The strongest criminal case imaginable has many "doubts" in it. Juries are told it is wrong not to adhere strictly to the law, and those running the legal system do not want the word to get out that juries sometimes do otherwise. Hence, jurors rarely explain their acquittal in terms of a nullification verdict. They usually claim they had a reasonable doubt because this or that fact was uncertain or that perhaps Mother Teresa's glasses were a bit fogged up when she witnessed the murder.

Some times for better and some times for worse, the nullification verdict is as American as apple pie and the presumption of innocence. Public school students are often taught about the case of John Peter Zenger, prosecuted unsuccessfully for seditious libel during our colonial days in 1735. Ask anyone about the case, and they will respond automatically that the Zenger case established freedom of the

press in the colonies, and hence later in the United States. In actuality, the Zenger case only indirectly established freedom of the press in America. A nullification verdict directly brought about the freedom of the press. No law or extra legal protection for the press arose directly out of the Zenger case.

John Peter Zenger was a publisher who published attacks against Governor William Cosby, a corrupt, self serving knave of a politician...in other words, a man ahead of his times. John Zenger was indicted for seditious libel, but it was not certain that the Government could prove he published the materials. The Governor appointed the two judges to sit on the case, the greatest conflict of interest imaginable short of going on a hunting trip with one of the judges sitting on the case. One of those judges appointed by the Governor promptly disbarred both of Mr. Zenger's attorneys. Fortunately, Mr. Zenger was able to obtain a real Philadelphia lawyer, a Mr. Andrew Hamilton.

Mr. Hamilton opened the trial by, in effect, conceding guilt. He admitted that Mr. Zenger published the articles in question. The issue of libel was to be decided by the judges. And, at that time, truth was no defense to a claim of libel. The only defense Peter Zenger had to the jury was that it was not proven that he published the alleged libelous statements. And now his lawyer had conceded that he had published the statements at issue. There was really nothing for the jury to do but return a ministerial verdict of "guilty."

Mr. Hamilton gave an eloquent speech to the jury and judges about the importance of a free press, and the unfairness of not allowing truth as a defense to a libel suit and in the unfairness of not allowing the jury to decide the issue of libel. Well crafted words, beautifully spoken, but as the jury was informed, the law was the law, and they had to abide by the law. The jury retired to deliberate...and, well, the rest is history.

The "not guilty" verdict rendered by the Zenger jury did not establish the right of a free press or even truth as a defense in a libel case. What the verdict did was to scare the authorities into allowing a freer press for fear that they would face an unending series of nullification verdicts which would generate more discontent and weaken

respect for authority. Nowhere is the Zenger case taught as a template for the value of nullification verdicts. Too many people have too much to fear if nullification verdicts become too routine. There will never be a verdict sheet in our legal system that gives the jury three choices: Guilty, Not Guilty, Guilty But Who Cares.

When a nullification verdict occurs, we prefer to treat it as a case involving reasonable doubt when often it would be better to call it by its real name. After all, the Southern nullification verdicts endemic to the South in the early and mid 20th century were proudly rendered without any varnish. When those all-white juries acquitted some racist murderer of a black, you didn't hear them trying to justify their verdict by pointing to some reasonable doubt they had. They let 'em go because he was white and the decedent was black. The fact that those verdicts were seen as nullification verdicts and not cases of jurors mistakenly hung up on reasonable doubt proved to be of great benefit to this country. Those verdicts were seen as nullification verdicts throughout the country, and stirred a complacent country to a rage against such blatant racism it never would have felt over a verdict based on even unreasonable reasonable doubt.

The nullification verdicts did send a message to the country, but not the one the jurors intended. The message sent to the country reverberated far beyond the cases themselves. The Southern nullification verdicts awoke the country to the un-American terrifying daily harm being done to African-Americans, harm that had largely occurred beneath the radar of the public sensibility before the nullification cases splashed sunshine onto the dark corners of American life in the South.

Much of the fuel for the great Civil Rights Movement of the 1960s came from Southern nullification verdicts. Nullification verdicts on the eve of our Revolution, when activists of the day were let off for politically based crimes by sympathetic juries, brought attention to the complaints of the colonists. The Civil War was presaged by nullification verdicts in the North, freeing those who "unlawfully" helped runaway slaves. In the Vietnam era, the difficulty of obtaining

guilty verdicts in some areas of the country for Draft Evasion cases, sounded the alarm bell that the war was rapidly losing support.

Even one of America's modern heroes, Rudy Giuliani was sent a strong message through a nullification verdict. When Rudy Giuliani was a deservedly much praised United States Attorney, he indicted Bess Myerson and Judge Hortense Gable on the very strained allegations of bribery and conspiracy. A former Chief Judge of New York, named Sol Wachtler, once stated that a prosecutor could get a Grand Jury to indict a ham sandwich. What he failed to add was that sometimes that prosecutor ended up wishing that he had remained kosher.

The Bess Myerson case had all of the ingredients of a nullification verdict. The defendants were very sympathetic people. Bess Myerson, the first Jewish Miss America had spent a lifetime building up good deeds in her bank account...this case would allow her to draw down on that account. Judge Gable was an aged sick woman who had always treated people honorably and fairly in her court. The transgression was not one that would make people feel threatened. The Judge had sat on a divorce case of a person who was Bess Myerson's lover at the time and Bess Myerson was a friend of Judge Gable. The borderline ethical transgression was, at most, deserving of a complaint to the Judicial Oversight Commission against Judge Gable and some nasty publicity for Ms. Myerson. But the only way to criminalize the behavior was to secure the testimony of a very emotionally disturbed, almost pathetic daughter of Judge Gable. The fact that both Judge Gable and Ms. Myerson had always treated the daughter with great kindness and understanding only made the nullification brew more volatile. When the acquittal was delivered, everyone knew that the jury was not finding reasonable doubt so much as sending Mr. Giuliani a message...you don't turn an emotionally unstable daughter on a caring and sympathetic mother in order to gain a high publicity conviction of a famous person whose "crime" was hardly a threat to the commonweal, particularly when there were no pay-offs or evidence of direct interference in the divorce trial itself. Our fiercely independent citizen-jurors have the great sense and courage to know just when to slap the overreaching hand of Government.

This very parochial nullification verdict sent an important message to Mr. Giuliani. Rudy Giuliani had made his bones as a prosecutor by courageously and brilliantly loosening the grip Organized Crime had on the City's economy by being a tougher guy than the mob men he was facing. But the Myerson jury sent a message that what might be acceptable Government hard ball tactics to take down the heads of the Five Mob families would not be acceptable to take down two very sympathetic people who had a lifetime of good deeds to their credit. For all of Mr. Giuliani's many strengths, he had a problem husbanding the awesome power of the prosecutor...and later of the Mayor's office. He attacked hot dog vendors with the same zeal, and unbending intransigence, as he did the heads of Organized Crime. Every once in a while prosecutors with limitless power need to be reminded that certain Government conduct will not be tolerated, even if it is technically legal. Without the heavy burden of the "beyond a reasonable doubt" standard, jurors would be deprived of a safe harbor in which to shelter their nullification verdicts.

Today jurors are far more cautious than those arrogant Southern juries of the early and mid-20th century. They will always feel compelled to claim that it was only reasonable doubt that spurred their verdict. It is in some ways good that jurors feel compelled to at least state they followed the law, but sometimes, it probably would have been better had they just admitted that they were delivering a nullification verdict. No verdict better illustrates that point than the quintessential modern day nullification verdict—the O.J. Simpson case.

Any sentient attorney would know that if the jury decided the O.J. Simpson case on the evidence, there would be no chance of acquittal. Even a mediocre attorney would have realized that the only chance for O.J. Simpson was a nullification verdict. Yet, that same attorney would realize that jurors try to act responsibly, and certainly would not admit they did not follow the law, so an attempt would have to be made to make them feel as comfortable as possible with their verdict by developing as much "reasonable doubt" for them to cling to as possible. Johnnie Cochran was no mediocre attorney. He knew where the prize was, and he kept his eye on the prize. As Johnnie

Cochran knew, O.J.'s only ticket to freedom was race, even though race had absolutely nothing to do with these murders.

It is difficult to discern a case with stronger direct and circumstantial evidence than the O.J. Simpson case. The acquittal had no legal justification. But that being so, it is still difficult to understand the over-the-top furious reaction from white America over the verdict. The families of the deceased were justified in having an over-the-top furious reaction to the verdicts, but why was the country so inflamed? After all, this was not a case of nullification that had broader implications for the country as a whole such as the white nullification verdicts that freed racist lynchers of American blacks. Stripped to its essence, O.J. Simpson was simply an otherwise very nice and caring person who got away with murder. He was no threat to the community at large and there were then, and are today, countless murderers who never even get tried for their offense. So, what caused the uproar?

The furious backlash against the Simpson verdict was based to a great extent on the jurors' feeling they had to justify their verdict in lawful terms. They had to claim that they found reasonable doubt because they knew they were not allowed to acquit if they were convinced beyond a reasonable doubt that O.J. Simpson was guilty. The heavy burden of proof placed on the Government in criminal cases provides ample refuge to any nullifier. The countless and mutually contradictory theories about the assassination of President Kennedy proves that if you put any case under a strong enough microscope, you will find so many flaws that any person looking for doubt will find it.

Midway through the O.J. Simpson case, all of the defense lawyers, black and white, Christian and Jewish, walked in wearing ties made of African Kente cloth. Can you imagine the uproar if the jury had been predominantly Jewish, and Johnnie Cochran and his cohorts had walked in to court wearing yarmulkes? When Johnnie Cochran kept telling the jury in summation to keep their eye on the prize, he was intentionally invoking the iconography of the Civil Rights Movement to a predominantly African-American jury. What he was trying to convey was "keep your eye on the prize and not on the

evidence." By using the Civil Rights motto as his rallying cry to the predominately minority jury, he was telling them to decide this as a civil rights case for blacks, not as a murder case.

When supporters of the verdict tried to justify the case on the lines of "reasonable doubt," it infuriated many people who would likely have accepted a nullification explanation. According to the defense in the O.J. Simpson case, The District Attorney's investigators made Jesus' turning water into wine look like a simple parlor trick, since their negligent collection techniques apparently managed to turn some drug dealer's DNA into that of O.J. Simpson.

At the trial and afterwards, O.J. Simpson denied ever owning Bruno Magli shoes, the kind of rare shoes worn by the killer. Later at O.J. Simpson's civil trial, the Plaintiff's attorneys discovered pictures of O.J. Simpson published several months before the murders in which he was wearing Bruno Magli shoes. When one of the criminal case O.J. Simpson jurors was contacted about the newly found evidence, she responded that it's easy to superimpose things on pictures. Well, yes, that's true. But in order to follow her reasoning, one must conclude that someone stated, "Hey, when we publish this newspaper, let's superimpose some Bruno Magli shoes on O.J. Simpson, so if in a few months someone murders his wife and is wearing Bruno Magli shoes, we can frame O.J. Simpson." In short, the attempts to justify the verdict by references to reasonable doubt were an affront to the American intelligence and, to some, infuriating. It is very possible that an honest explication of the verdict would have gone down far better with the majority of the American public.

Let us look at the testimony of Detective Mark Fuhrman. Mark Fuhrman committed perjury at the trial, had constantly made racist comments to people, and had even asked to be let out of the police department because he had developed racist feelings from his interaction with the black community. Yet, any assertion that his testimony was enough for an acquittal based on reasonable doubt defies all logic. Is such a man capable of planting a glove on O.J. Simpson property to frame a black man...particularly a black man married to white woman? Of course he is. But did he do it here? Of course not

At the time Mark Fuhrman "found" the glove, nobody knew where O.J. Simpson was. Everyone from that area knew that O.J. was usually out of town. If Fuhrman was planting the glove, he had to know O.J. was innocent. And if O.J. was innocent, he was not at the murder scene, which meant he likely had an airtight alibi. When they found O.J. in Chicago giving a speech on the night of the murders, Fuhrman would be a dead duck. When police plant evidence, it is usually on the person of the target. There is no way Fuhrman would have planted the glove when O.J., if innocent, likely would have had an airtight alibi to the murder. Moreover, Fuhrman did not make O.J. bleed from the same right side as the murderer, nor did he leave blood in O.J.'s house or code O.J.'s DNA into the recovered blood, etc. Hence, when the jurors and supporters of the verdict stated that the Fuhrman testimony created "reasonable doubt," it infuriated much of the American public. Fuhrman's testimony proved only that he was a perjurer, a racist, and a hot head who found a fairly inconsequential piece of evidence in the case. (Any prosecutor with functioning radar would have kept Fuhrman off the stand even if it meant sacrificing the glove evidence. Johnnie Cochran did what any good attorney would do. He assumed that God sent him Mark Fuhrman for a reason and he took full advantage of the gift from the heavens.)

Now, what if the jurors had talked about Mark Fuhrman in a different way? What if they said they are sick and tired of the L.A. Police Department putting admitted racist and lying cops back into the police department, even when they had reason to know of the man's racist views? If you, the Government wants to make Fuhrman the messenger of your case, we will send you back a message of acquittal. Like in the Peter Zenger case, the nullification message might have had a far greater influence in how the black areas of Los Angeles are policed than to conjure up some transparently strained justification based on reasonable doubt.

There might even have been some value to white America feeling the sting of a nullification verdict so they could better understand that what most of white America views as the distant past—the white nullification verdicts that benefited racist murders and a

segregated society—is still such a festering wound in the African-American community. We will never know if white America would have accepted the O.J. Simpson verdict better if it had been an honest verdict. By feeling an obligation to state that they followed the law, the only message the O.J. Simpson jury delivered was that they were either easily duped or not very intelligent. They were very likely neither of those things. They may have even convinced themselves that they found reasonable doubt, but if they scoured their souls, they would know that they were perhaps delivering a much needed message with their verdict, but by justifying the verdict by claiming reasonable doubt, the only message they delivered was that the verdict was an outrage.

Perhaps, then, one reason why even strong advocates of law and order at any cost do not attack the heavy "beyond a reasonable doubt" burden put on the Government is because they know that lowering the standard would not only expose more nullification verdicts, but might actually generate a backlash that generates more nullification verdicts. Once the word got out that nullification verdicts were legal and safe for the practitioner, all hell would break loose with the court system. Nullification verdicts are an essential part of our legal heritage. They have, by and large, served a good purpose even when they have sent a bad message...they have brought problems out into the harsh glare of public scrutiny. Yet, if nullification verdicts became the norm or even a known accepted alternative for a verdict, the legal system would collapse under the weight of free lancing juries. As with many other matters in our society, the American public appears to have gotten it about right—nullification verdicts are rare, but occur often enough to help keep all-powerful prosecutors within the boundaries of acceptable Government behavior. That delicate balance could never have been struck, absent the burden of proving a case beyond a reasonable doubt that has been put on the Government in criminal cases.

It has been a blessing for this country that it stumbled blindly into raising the "beyond a reasonable doubt" burden on the Government in criminal cases and the presumption of innocence into

icon status. It is good for our legal system that those concepts are so sacrosanct. They do less damage to law and order than one would think because of the massive below the radar jury nullification that takes place as jurors adjust the application of that standard to the type of crime involved.

The burden and presumption also allow us to preserve our rich and valuable tradition of nullification verdicts without destroying the rule of law by cloaking the verdicts in the rule of law by claiming a nullification verdict was really a reasonable doubt verdict. And perhaps most importantly, our raising the presumption and the burden to icon status has greatly enriched society as a whole because it has made even the floodtide of public rage and opinion give due deference to a presumption that a person is innocent of accusations made against him, and that if the Government wants to take your freedom, they should have to do it with a heavy burden of proof. That does not mean that someone should not feel free to question the continued unaltered use of the presumption and the burden. People should feel free to express their doubts...so long as they don't express beyond reasonable doubts.

SOL WACHTLER served as a Justice of the New York Supreme Court (1968-1972) and Judge of New York's highest court, The New York Court Of Appeals (1973-1992). In 1985 he was appointed Chief Judge of that court and Chief Judge of the State of New York. He was Chairman of the National State/Federal Judicial Council. An honor graduate of Washington and Lee University and its law school, he has been awarded thirteen honorary Doctor of Law Degrees and has been a scholar in residence at several law schools, as well as lecturer abroad on behalf of the United States Information Service. He authored the book *After the Madness* (Random House) and was a critic at large for *The New Yorker* magazine and recently authored a section in the book, *Serving Mentally Ill Offenders* (Springer). He is a co-author of the recently released novel, *Blood Brothers*. He is currently a Professor of Law at Touro Law School and served as Chairman of the 2002 Wannsee Seminar held in Berlin, Germany.

He has served on the Board of Trustees of the Albany Law School, Long Island University, and the Judicial College of the University of Nevada. He currently serves as a member of the Board of Overseers of The Touro Law School and is a member of the Executive Committee of the North Shore Long Island Jewish Health System. In the 2003-2004 issue of the *Syracuse Law Review* there appeared a compendium of Judge Wachtler's opinions while on the Court of Appeals. The article concluded with the following: "Judge Wachtler's role in shaping new York law puts him in select company in the state's rich judicial history. Wachtler showed imagination when needed, restraint where called for, and a clear sense of expression always."

Do Juries See Beyond a Reasonable Doubt? A View from the Bench

By Sol Wachtler

The story is told of the Mayor from the fabled Village of Chelm, in which dwelled all of the world's fools. The Mayor had set himself to the task of determining what kind of prison should be built in Chelm. When he returned he told the Chelmites of his travels and his conclusion: "After speaking to many persons in many prisons," he reported, "I have been told by half of those persons in prison that they are guilty, and the other half say they are innocent, so here in Chelm we should build two prisons.... One for those who are guilty, and one for those who are innocent."

Thankfully our jurisprudence was not developed in Chelm. In the United States we believe that those who commit crimes should be found guilty, and those who do not commit crimes should not be charged at all. Unfortunately, given the fact that any prosecutor who wanted to can use the grand jury to indict innocent people, or even a ham sandwich, we must see to it that those innocent people who are charged with the commission of a crime are not convicted. Or, as was said in the 18th Century by William Blackstone in his *Commentaries on the Laws of England*: "It is better that ten guilty persons escape, than that one innocent suffer."

Recognizing that those who are responsible for determining facts during the course of a trial were not present when some earlier event occurred, the law has fashioned various bases upon which a

conclusion as to what happened can be drawn. This is called "the burden of proof," and it is imposed on the person who asserts the claim. In civil cases we say the jury must determine the facts "by the preponderance of the evidence," so that in order for a person to win his case, he has only to prove his claim by the modest burden of presenting sufficient evidence to support that claim.

The next level of "burden of proof" was fashioned by the New York Court of Appeals when confronted with several "right to die cases." Writing for the majority of our court I noted that: "Clear and convincing proof should...be required in cases where it is claimed that a person, now incompetent, left instructions to terminate life sustaining procedures when there is no hope of recovery." This standard was later adopted by the United States Supreme Court in the Cruzan case and has been applied by most states, including Florida, in the recent Schiavo case. "Clear and convincing," of course, is a higher evidentiary standard than is typical of civil cases; however, it does not reach the significant burden imposed by the "beyond a reasonable doubt" standard, which has been uniformly adopted for criminal cases. This standard imposes the burden on the prosecutor to prove the guilt of an accused beyond a reasonable doubt.

As has been noted, the words "beyond a reasonable doubt" are not to be found in our Constitution; however, the principle articulated by Blackstone's *Commentaries* about not allowing an innocent person to suffer, even if it means letting a guilty person go free, found fertile soil in our colonial past.

The concept of requiring the prosecutor to meet this high burden had its beginnings in a trial held in 1770. At 9:00 p.m. on a bitterly cold evening during March of that year a lone sentry posted in front of Boston's Custom House was the only visible sign of the British occupying force, but his presence was enough to attract a large crowd, brandishing sticks and clubs. When several hundred of the mob began attacking the lone guard, eight British soldiers came to his rescue with loaded muskets and drawn swords. The hated Redcoats were pelted with rocks, oyster shells, and pieces of ice, but this was no match for the British muskets, which opened fire killing five men.

Paul Revere characterized this as the "slaying of the innocent" and historians were quick to mark this "Boston Massacre" as a symbol of British tyranny.

Because there was no one else to take the case, the task of representing these eight British soldiers fell to the then 34-year-old John Adams. Although reluctant to represent the enemy, Adams felt strongly that if we were to be a free land, no man should be denied a fair trial—and to be certain the trial was a fair one, Adams told the jury that guilt must be proven beyond a reasonable doubt: "because it is of more importance to community, that innocence should be protected than it is, that guilt should be punished." The jury felt, at least in the case of six of the Redcoats, that the prosecutor had not proven their guilt beyond a reasonable doubt.

The burden of proving a defendant's guilt beyond a reasonable doubt has been the prosecutor's burden since that trial in Boston; however, it was not until 1970 that the United States Supreme Court was to embrace this standard as a constitutional imperative. Its development was considered as a fair way to express the belief that only when the jury is very certain of a defendant's guilt should they convict. "In the administration of criminal justice, our society imposes almost the entire risk of error upon itself." Justice Warren Burger wrote: "this is accomplished by requiring under the Due Process Clause (of the United States Constitution) that the state prove the guilt of an accused beyond a reasonable doubt."

Of course, establishing this burden of proof was one thing—but a judge's obligation of instructing a jury how to determine if that burden has been met, is quite another. There has been a fierce debate among academics, lawyers, and judges as to whether "reasonable doubt" should be defined for the jury and, if so, how it should be defined. All are in agreement that a definition given by a New York trial judge in 1974 missed the mark when he said:

> It is not a doubt based upon sympathy or a whim or prejudice or bias or a caprice, or a sentimentality, or upon a reluctance of

> a weak-kneed, timid, jellyfish of a juror who is seeking to avoid the performance of a disagreeable duty, namely, to convict another human being of the commission of a serious crime.

The New York State Court of Appeals ruled that a conviction based on that instruction had to be set aside because it violated the defendant's right to due process.

Although trial judges generally stay away from the "weak-kneed, timid, jellyfish" analogues, there remains a tendency on the part of many of these judges to minimize the prosecutor's burden of proof by rendering the judges' own special definitions of "reasonable doubt." Some of these variations have passed appellate review (i.e., "Reasonable doubt can be defined as something which is substantial and actual rather than doubt based on mere possibility or speculation.") and some of these jury instructions have been ruled improper (i.e., "It must be such a doubt as would lead you to believe that it would be close to impossible for the defendant to have committed the crime charged.").

Many judges refuse to risk defining the phrase "reasonable doubt" on the ground that it is self-defining and that there is no equivalent phrase more easily understood. Reviewing the O.J. Simpson trial, where it would appear that guilt was indeed proven beyond a reasonable doubt, many, including Simpson's own attorney, Alan Dershowitz, have concluded that his acquittal was due in large measure to Judge Ito's charge on reasonable doubt.

In fact a study of the O.J. Simpson trial illustrates, according to some commentators, the need for a unique kind of jury instruction, which would prevent the distortion of exactly what "beyond a reasonable doubt" means. Much of this distortion comes from reading books and watching television where the public—potential jurors—somehow feel that the accused defendant has some sort of an obligation to create reasonable doubt by punching holes in the prosecutor's case. Of course, in a criminal case, the defendant has no burden at all so that it

becomes incumbent upon the judge to see to it that this preconception must be dispelled.

Just as the reasonable doubt standard can disadvantage an innocent defendant who can't come up with an alibi or who cannot meet his perceived "burden" of creating doubt, so too it can also aid the wealthy defendant whose canny lawyer can raise remote theories in the case that are entirely unconvincing but are capable of creating some small doubt. If the jury feels that any doubt at all compels acquittal, it has not applied the proper reasonable doubt standard. Just because the glove doesn't fit, there really must not be a need to acquit.

The argument has been made that to avoid the necessity of defining "reasonable" and "doubt" and to prevent the contortion of its meaning and use by judges and lawyers, we should do what England did decades ago: the jury is simply instructed that they should convict only if they are satisfied "that they are sure." The French Code of Criminal Procedure provides that there be posted in the jury room the single standard that they, as jurors, be "thoroughly convinced of the guilt of the accused."

We need not abandon the phrase "beyond a reasonable doubt," but we must be certain that the use of the words do not cause the jury to focus its attention on whether the defense has come up with reasonable alternative explanations to respond to the prosecutor's case. To follow that course would be to place an impermissible burden on the defendant to, in effect, prove his innocence.

One solution would be for our courts to adopt the language of the Federal Judicial Center in its pattern instruction: which is directed toward explaining how strongly the government must prove its case. The words "beyond a reasonable doubt" are used, but the jurors are told that they must be "firmly convinced" by the prosecution that the defendant is indeed guilty.

Governor George Romney of Massachusetts, in his effort to convince that state's legislature to adopt a death penalty statute, has proposed yet another rung on the burden of proof ladder. He has proposed that before a defendant can be sentenced to death in Massachusetts he must be found guilty "beyond any doubt." I would assume this would require more proof than a glove that fits.

DAVID S. GOULD, the son of the Pulitzer prize winning composer Morton Gould, graduated cum laude from both Princeton, where he served as Editor and Principal writer of the *Yearbook*, and Harvard Law School, where he served as an Editor of the *Harvard Civil Rights-Civil Liberties Law Review*. He served as the Staff Director of the Presidentially appointed National Institute for Consumer Justice. He later became an Assistant United States Attorney for the Eastern District of New York. After going into private practice as a top rated criminal and civil litigator and appellate advocate, Mr. Gould served as Special Consultant to the Chief Judge of the New York Court of Appeals, Sol Wachtler. Mr. Gould was named as the sole public representative on the Committee to Establish an Individual Assignment System in the New York State Court System. He also served as Chairman of the Ethics Commission for the Unified Court System.

Do Juries See Beyond a Reasonable Doubt? The View of a Former Prosecutor

By David S. Gould

I was an Assistant United States Attorney for the Eastern District of New York from 1974-1978. I tried more cases than any other Assistant in the office during that time. I put my experience to good use by helping to train new federal prosecutors. One of the points I drilled home to them was not to be defensive about the "heavy" burden of the beyond a reasonable doubt standard that we had to meet to prove our case. Rather than be defensive about the burden, a good prosecutor should turn the burden on its head and emphasize to the jury that the key to that jury charge about the Government burden was the word "reasonable." Too many jurors come into the case thinking the Government has to prove the case beyond all doubt. In fact, commentators every day characterize the burden on the Government in just such a manner. Take the offensive and point out that all the defendant was doing was showing that there is nothing in this life that is free of doubt. What the defendant has not done is demonstrate that there is any reasonable doubt in the case.

There is an old aphorism which states that sometimes you can't see the forest for the trees. What it means is that sometimes we get so involved in the details of an issue that we lose sight of the big picture. The defense in a criminal case always wants the jury to be fixated on the trees while the prosecutor must back them up so they can view the forest. I often told juries that it is like looking at one of

those French pointillism paintings. If you stand close, all you see are a lot of dots which seems unrelated and unconnected. But when you back up, an understandable clear picture suddenly comes into focus.

In their summations, good defense counsel find the opportunity to refer to "beyond a reasonable doubt" as often as possible, usually about twice in every sentence. Every case in the history of criminal law is shot through with pieces of evidence that don't seem to make sense or witnesses that have some inconsistencies in their testimony or possible bias in their backgrounds. Good defense counsel will cherry pick the problematic testimony, and after each recitation state to the jury, "There's reasonable doubt right there." Piece of evidence by piece of evidence, the jury hears "there's some more reasonable doubt." By the end of the summation, it will seem like the case is drowning in reasonable doubt.

The prosecutor must make it clear to the jury that the "beyond a reasonable doubt" standard applies to the elements of the crime not to every piece of evidence in the trial. Then the prosecutor must connect all of the dots that the defense counsel had tried to isolate. One of the greatest weapons in the prosecutor's arsenal is an element that is too easily overlooked in the hunt for clues and in the inspection of evidence...common sense. Take the O.J. Simpson case for example. There were countless points of doubt in that case.... Why wasn't there more blood? How can anyone rely on the testimony of Mark Fuhrman to reach a decision beyond a reasonable doubt? The blood samples were negligently collected and even more negligently preserved. The glove didn't fit. There was no eyewitness to the crime. There were countless other people with a possible motive to kill Mr. Simpson's wife. (This assertion is always a favorite of defense counsel. You can take any murdered person on earth, even a Mother Teresa, and you can conjure up a laundry list of other people who could have had a motive to kill the person.) There were numerous contradictory statements and crime scene evidence that didn't always make sense. Picked apart, the case was, as a defense counsel would put it, full of more holes than a piece of Swiss cheese.

Rather than spending most of the Government summation trying to refute or explain each point the defense made about a weakness in the case, the prosecutor should put his principal emphasis on taking the jury out of the trees so they can look at the forest. This is where common sense becomes the prosecutor's greatest ally. As often as the defense counsel mentioned the "heavy" burden of proof on the Government, the prosecutor should keep the jury tethered to the word "reasonable." In the real world things don't happen like the defense wants you to believe happened here. Instead of looking at the evidence in isolation, the jury must be shown it as part of a whole picture. For instance, in the O.J. Simpson case, the sole exhibit I would have used in summation would have been a huge oak tag exhibit showing all of the coincidences that would have had to have happened in order for O.J. Simpson to be innocent. And as the prosecutor ticked them off, instead of following the discussion of each piece of evidence with "that's reasonable doubt," each discussion should be followed by a comment about how long the odds are that each individual coincidence could have taken place. When the odds of the coincidence are low, you are showing the jury that there is no REASONABLE doubt. Without going through the countless list of coincidences that should have been on the O.J. Simpson prosecutor summation chart, let's just run through a few:

1) The evidence that O.J. Simpson was out of town for more days of the year than he was home was not contradicted. By an unfortunate coincidence for him, he was in town at the time of the murders. What were the chances of that?

2) Just think of the numerous perfect alibis he could have had if he was not the murderer. He could have been on the phone with someone all night. He could have spent the day of the murders at his children's sports events. He could have been on the phone long distance with the Pope...now there's a great alibi witness. But, no there was no evidence that O.J. Simpson was doing anything with anyone at

the time of the murders. There's that lousy luck of his again. The odds of his being totally alone without anyone to vouch for him were minimal, but poor O.J., the coincidence got him again. (While the prosecutor cannot comment on the failure of O.J. Simpson to testify, it is perfectly proper for the prosecutor to point out that there was no evidence that he was with anyone else or doing anything else at the time of the murder.)

3) The person who was murdered just happened to be a person whom O.J. attacked and threatened in the past. That darn luck again.

4) The killer was bleeding from his right hand, and poor O.J. just happened to have cut his right finger at the same time as the murders took place. Could a guy have worse luck than that? That must be a million-to-one shot.

5) There was blood in O.J.'s house, not in your house or my house. Think of the number of times O.J. had blood on the carpet of his house. Once a year? Once in two years? So that's once out of every 770 days? Well, poor O.J. had that blood in his house just when the murders occurred. Came up short on a 770-to-1 shot there.

6) And when the so-called incompetent investigators screwed up the collection of the blood samples, did it turn the DNA test into Arnold Schwarzenegger's blood? Nope, you got it, O.J. again.

At the time of the trial, I wrote out 45 different coincidences that had to have taken place for O.J. Simpson to have been innocent of this crime. When I got through detailing them all, I would have noted that the possibility of any one of those coincidences happening was remote, and the chances of all of them happening was virtually impossible. I would have told the jury that either O.J. Simpson was guilty or he was the unluckiest man on the face of the earth. Even Job felt badly for him.

Now, of course, no amount of argument or evidence would have swayed the O.J. Simpson verdict because that jury would not have convicted if there was a videotape of O.J. doing the killing. ("Oh those things can be manipulated.") A nullification verdict might have been justified either as payback for all of the white nullification verdicts against clearly guilty racists in the pre-civil rights era or to send a message to the L.A. police department that the community would not tolerate the department keeping in its employ police officers like Mark Fuhrman who had demonstrated and even admitted in writing to racial bias. But it was not a justifiable verdict based on reasonable doubt. However, for instances when the jury really is in play, the O.J. Simpson case is a good teaching tool for prosecutors. Johnnie Cochran brilliantly steered the jury into the trees and the prosecution never backed them up to look at the forest.

Nullification is not the only fly in the ointment that can derail even a well tried prosecutor's case. Reasonable doubt can arise from forces exogenous to the trial. When I was a federal prosecutor, there were no cable television channels. The number of movies shown on television were finite and there was no internet or video games to suck up peoples' leisure time. So when a movie was shown on television, even late at night, it was likely to be seen by at least a couple of the jurors. The movie that was the prosecutor's kryptonite in the early 1970s was *Twelve Angry Men*. That movie, which took place in the jury deliberation room, was centered on what is reasonable doubt. The jury in that film was all ready for a quick conviction until the "hero" started leading the other jurors back into the trees. We all know how that turned out. Whenever that movie was shown on television, the hung juries spiked through the roof. At our office, we used to assign a different prosecutor each week to what we called the TAM watch. TAM stood for *Twelve Angry Men*. The TAM watcher's duty was to check the TV Guide for the week to see if *Twelve Angry Men* was going to be on television. If it was, we all scrambled for excuses to get our trial adjourned. If a prosecutor found out during questioning that a juror had seen *Twelve Angry Men*, he would use one of his challenges to get that person off the jury even before the prosecutor challenged the social worker.

Truth be told though, the burden of proof of beyond a reasonable doubt was not really that onerous back three decades ago. I had only one acquittal in my four years at the prosecutor's office. Back then as soon as you called to testify an FBI Agent or even a local policeman, you were pretty much on your way to a conviction. That is why I and my colleagues took our screening job extremely seriously. We would only bring cases for which we had no doubt about the guilt of the defendant.

The world is very different today. For better or for worse, the public is far more cynical today than it was back when I was a prosecutor. One jury charge that had to be given when I was prosecuting was the one that stated that just because a witness was an FBI Agent or a police officer, did not mean the jury should give his testimony more credibility than other witnesses. Today, the judges practically have to tell the jurors that just because the witness is a cop or an FBI Agent, that doesn't necessarily mean he's lying.

What all of that underlines is that the Zeitgeist might change, jurors' attitudes and expectations ebb and flow with the decades, but that the one thing that has remained inviolate through all of the upheavals in American society is the Government has always been held to the heavy burden of proving guilt beyond a reasonable doubt. As I once told a very frustrated FBI Agent, there is no harder job than being in law enforcement in a democratic and free society...and that is the way it should be. Law enforcement officers' and prosecutors' only burden, in autocratic and dictatorial societies, is to figure out who they want to be found guilty. What helps make this country so great and unique is that we make it very hard for the Government to deprive a citizen of his freedom. And may it always be so.

VINCENT BUGLIOSI received his law degree in 1964 from UCLA Law School, where he was president of his graduating class. In his career as a prosecutor for the Los Angeles County District Attorney's office, he successfully prosecuted 105 out of 106 felony jury trials, including twenty-one murder convictions without a single loss. His most famous trial was the Charles Manson case, which became the basis of his true crime classic, *Helter Skelter*, the biggest selling true crime book in publishing history. But even before the Manson case, in the television series *The DA*, actor Robert Conrad patterned his starring role after Bugliosi.

Bugliosi has uncommonly attained success in two separate and distinct fields, as a lawyer and an author. Three of his true crime books: *Helter Skelter*, *And the Sea Will Tell*, and *Outrage, The Five Reasons Why O.J. Simpson Got Away With Murder*, reached number 1 on *The New York Times* hardcover bestseller list. No other American true crime author has ever had more than one book that has achieved this ranking.

As a trial lawyer, the judgment of his peers says it all. "Bugliosi is as good a prosecutor as there ever was," Alan Dershowitz says. F. Lee Bailey calls Bugliosi "the quintessential prosecutor." Harry Weiss, a veteran criminal defense attorney who has gone up against Bugliosi in court, says, "I've seen all the great trial lawyers of the past thirty years and none of them are in Vince's class." Robert Tanenbaum, for years the top homicide prosecutor in the Manhattan District Attorney's office, says, "There is only one Vince Bugliosi. He's the best." Perhaps most telling of all is the comment by Gerry Spence, who squared off against Bugliosi in a twenty-one hour televised, scriptless "docutrial" of Lee Harvey Oswald, in which the original key witnesses to the Kennedy assassination testified and were cross-examined. After the Dallas jury returned a guilty verdict in Bugliosi's favor, Spence said, "No other lawyer in America could have done what Vince did in this case."

Bugliosi lives with his wife in Los Angeles and is working on a book about the assassination of President John F. Kennedy.

ALAN M. DERSHOWITZ is a Brooklyn native who has been called "the nation's most peripatetic civil liberties lawyer" and one of its "most distinguished defenders of individual rights," "the best-known criminal lawyer in the world," "the top lawyer of last resort," and "America's most public Jewish defender." He is the Felix Frankfurter Professor of Law at Harvard Law School. Dershowitz, a graduate of Brooklyn College and Yale Law School, joined the Harvard Law School faculty at age 25 after clerking for Judge David Bazelon and Justice Arthur Goldberg. While he is known for defending clients such as Anatoly Sharansky, Claus von Bülow, O.J. Simpson, Michael Milken and Mike Tyson, he continues to represent numerous indigent defendants and takes half of his cases pro bono.

Dershowitz is the author of 20 works of fiction and non-fiction, including 6 bestsellers. His writing has been praised by Truman Capote, Saul Bellow, David Mamet, William Styron, Aharon Appelfeld, A.B. Yehoshua and Elie Wiesel. More than a million of his books have been sold worldwide, in numerous languages, and more than a million people have heard him lecture around the world. His most recent nonfiction titles are *Preemption: A Knife That Cuts Both Ways* (2006, W.W. Norton), *The Case For Peace: How the Arab-Israeli Conflict Can be Resolved* (August 2005, Wiley), *Rights From Wrongs: A Secular Theory of the Origins of Rights* (November 2004, Basic Books), *The Case for Israel* (September 2003, Wiley), *America Declares Independence*, *Why Terrorism Works*, *Shouting Fire*, *Letters to a Young Lawyer*, *Supreme Injustice*, and *The Genesis of Justice*. His novels include *The Advocate's Devil* and *Just Revenge*. Dershowitz is also the author of *The Vanishing American Jew*, *The Abuse Excuse*, *Reasonable Doubts*, *Chutzpah* (a #1 bestseller), *Reversal of Fortune* (which was made into an Academy Award-winning film), *Sexual McCarthyism* and *The Best Defense*.

When are Doubts Reasonable?

By Alan M. Dershowitz

The dilemma of reasonable doubt is among the most perplexing challenges faced by our legal system. How a society resolves inevitable doubts about fault or innocence tells us a great deal about that society's values.

Under what circumstances is a doubt "reasonable" in the U.S.? The U.S. Supreme Court, in an act of abject intellectual cowardice, has declared that the term "reasonable doubt" is self-explanatory and, essentially, incapable of further definition. "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury," the Court has declared, which brings to mind Talleyrand's quip that "if we go on explaining, we shall cease to understand one another." Judge Jon Newman of the U.S. Court of Appeals for the Second Circuit recently criticized this approach as follows: "I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it." Such a lazy attitude toward the central concept underlying the constitutional presumption of innocence is a bit like the late Justice Potter Stewart's approach to the interpretation of hardcore pornography: I can't define it, but "I know it when I see it."

The problem with "reasonable doubt," however, is that juries do not necessarily know it when they see it because legislatures and the courts have been utterly unwilling to tell them what it is, beyond

a few unhelpful clichés. Courts are quite willing to tell juries what reasonable doubt is not. A standard instruction reads as follows:

> Proof beyond a reasonable doubt does *not* mean that the state must prove this case beyond all doubt.... *Nor* [must the state] prove the essential elements in this case beyond the shadow of a doubt; it does *not* mean that at all.... [N]o defendant is ever entitled to the benefit of any or all doubt [italics added].... The oath that you took requires you to return a verdict of guilty if you are convinced beyond a reasonable doubt. And, members of the jury, equally, your oath requires you to return a verdict of not guilty if you are not convinced beyond a reasonable doubt.

Courts further insist that "reasonable doubt is *not* a speculative doubt, a feeling in your bones. [I]t is *more than* a doubt based on guesswork or possibilities [italics added]."

Some courts that do define a reasonable doubt do so in a way that virtually shifts the burden of proof to the defendants. These courts tell the jury that the doubt must be "based on reason," thus excluding a deep feeling of uncertainty, or a generalized unease or skepticism about the prosecutor's case. Other courts instruct the jury that the case must be proved with "the kind of certainty that you act on in making your most important personal decisions." This instruction fails to tell the jurors that they are supposed to err on the side of freeing the guilty rather than convicting the innocent. In personal decisions there is no comparable rule. A rational decision-maker goes with the preponderance of the evidence in most instances.

Judge Newman, who surveyed the social science literature on the traditional reasonable-doubt instruction, came to the following disturbing conclusion: "These studies suggest that the traditional charge might be producing some unwarranted convictions. At the very least, the conclusion one draws from such studies is that the current charge in use is ambiguous and open to widely disparate interpretations by jurors." He proposed a simple definition of "beyond a reasonable doubt" as "proof that leaves you firmly convinced of the defendant's guilt."

It is because the typical instructions given by judges on reasonable doubt are so pro-prosecution that many defense attorneys, citing the Supreme Court's dictum, ask that the term not be defined. They prefer to leave its meaning to the common understanding of jurors and to the analogies they can come up with during closing argument. One common example used by lawyers to illustrate that reasonable doubt can come from the gut as well as the mind involves a hunter who sees a distant object that looks like a deer. He takes aim, but then he experiences a sudden uneasiness in the pit of his stomach. He doesn't know why, but he hesitates. Something tells him not to pull the trigger. As he is deciding what to do, the distant object moves and the hunter sees that it is a little girl.

For me the reasonableness of the doubt required to acquit should depend on the seriousness of the crime and the severity of the punishment. No doubt is reasonable if the punishment is death. Very little doubt should be deemed reasonable if the punishment is life imprisonment. But if the punishment is merely a fine or a suspended sentence, the required degree of doubt might be greater.

We should rethink the concept of reasonable doubt and make it fluid rather than static.

the system of legal protections and assurances that we enjoy—the thickly planted forest of which reasonable doubt is a crucial part—is what preserves us from the nightmare of religious and political totalitarianism in which indictment equals conviction and all are guilty until and unless they can prove otherwise.

FREDERICK FORSYTH, born in 1938, is a British author and occasional political commentator, best known for his thrillers *The Day of the Jackal*, *The Dogs of War*, and *The Odessa File*. He was born in Ashford, Kent, and attended Granada University in Spain. At 19, he became one of the youngest-ever pilots in the Royal Air Force, where he served until 1958. He then became a reporter and spent three-and-a-half years working on a provincial newspaper before joining Reuter, the international news agency.

As a foreign correspondent he covered Paris, Bonn, East Berlin, Prague, Budapest, Madrid, Brussels and Rome, leaving after four years to join the BBC. Here he became assistant diplomatic correspondent. As such he was sent to cover the Nigeria-Biafra war on the rebel side. He returned, resigned and went back to the jungle for two more years. He stuck it to the end, then came back to London to write his first novel, *The Day of the Jackal*, based on things he had eye-witnessed in Paris seven years earlier. This became an international bestseller and was later made into a movie with the same title.

In this novel, the Organisation de l'Armée Secrète hires an assassin to kill Charles de Gaulle. His second novel, *The Odessa File*, was published in 1972 and depicts a reporter attempting to track down a network of ex-Nazis in modern Germany. *The Odessa File* was also made into a hit movie. In 1974, he wrote *The Dogs of War*, in which a mining tycoon hires a group of mercenaries to overthrow the government of an African country so that he can install a puppet regime that will allow him cheap access to its substantial mineral wealth. Forsyth's latest book, *The Afghan* (2006), is about a Canadian millionaire who hires a Vietnam veteran to bring his grandson's killer to the U.S.

Forsyth eschews psychological complexity in favor of meticulous plotting based on detailed factual research, and his novels read like investigative journalism in the guise of fiction. Forsyth's books are full of information about the technical details of such subjects as money laundering, gun running, and identity theft. His is a harsh moral vision in which the world is made up of predators and prey, and only the strong survive.

Reasonable Doubt—But Whose?

By Frederick Forsyth

Two hundred and thirty years ago thirteen very small British colonies, strung out from north to south down the eastern seaboard of a huge but almost wholly unexplored continent, entered into a state of rebellion.

It is often overlooked that back then the British homeland belonged to the people, who had their representatives in the world's first imperfect but nevertheless elected Parliament. But colonies belonged to the monarch as personal fiefdoms. The monarch at the time was George the Third.

Americans to this day choose to overlook something odd that happened next. When King George petitioned Parliament for funds to fight what was widely seen as "his" war against "his" rebels, the answer was a flat "No." That was why he had to beg and borrow impressed farmboys—unwilling mercenaries—from his kinsfolk scattered across what is modern Germany. He bankrupted himself trying to pay for them. But impressed farmboys are not good soldiers. Unsurprisingly, they lost.

The inhabitants of the thirteen colonies then faced a choice. They could stay separate from each other, declare a chain of mini-republics and become one day the Nicaraguas and San Salvadors of the Atlantic coast of the New World. Or they could be united by volition into one federal republic. They chose the latter, and it worked. But why did it work?

I am convinced that it was because, and only because, they shared the six pillars of commonalty. They shared the same ethnicity; back then far over ninety-five percent were of the same Anglo-Saxon and Celtic stock that had come over from the British Isles. They shared the same history: for the same reason.

They shared the same culture and faith, an immensely crucial factor in the building of a nation. An educated man in Vermont and another in Georgia would have been educated in the same way, have read the same Classics, have studied the same Shakespeare and Milton. And they would go on Sunday to the same Christian church or chapel.

They shared the same dream of government. It is (again) forgotten that they did not rebel because they loathed and repudiated the parliamentary democracy of the British and all those freedoms granted and guaranteed in the English Bill of Rights of 1689. Just the reverse. They wanted all those things and resented the King for denying them. One day they would incorporate those same freedoms in their own Bill of Rights.

There were two more of the six pillars. They spoke the same language and they were accustomed to the same jurisprudence. In short, they inherited because they wished to inherit the basic principles of English Common Law.

Within two decades of the drawing up of the American Constitution a dictator had conquered almost all Europe; the "almost" means he failed to invade and conquer the British Isles. He would eventually be defeated but he left behind him a quite different legal code to that of the British and the Americans.

The first of the three precepts that tower over Anglo-American law is the idea that the citizen is supreme and the state is his servant. As such, he is free to do whatever he wants unless it is specifically forbidden.

But Bonaparte was a tyrant. He loathed and despised the idea of democracy. The Code Napoleon, still the basis of Euro-law to this day, decrees that the state is supreme and the citizen its servant. All is therefore forbidden unless it is specifically permitted.

Precept Two is that any man, accused of whatever it may be, is presumed innocent until proven guilty beyond a reasonable doubt. Napoleon decreed the reverse. Arraigned before a court, the accused must be able to prove his innocence.

But the Anglo-American insistence on guilt "beyond a reasonable doubt" posed a quandary. Who should adjudicate? Who should decide whether guilt had, or had not, been proved beyond a reasonable doubt? To respond to the quandary Anglo-Saxon law, going back over centuries, insisted that an accused man had the right to be judged by a jury. This concept was utterly alien to the Code Napoleon where judgment is decreed by a professional judge, or a judge and lay assessors qualified in the law.

Long before Napoleon, the English reasoned thus: the judgment cannot be left to defending counsel, for he is bought and paid for. Nor can it be left to prosecuting counsel for the same reason. And even the judge, wise though he may be, is still an employee of the State and thus a paid-up member of the Establishment. So they came up with the idea of "twelve good men and true."

And that is a jury, based on the idea of that deeply marvelous creature, the reasonable man. He may be the short-order cook who serves your eggs over-easy. He may be the janitor of the local school. Or a professor, or a bond trader. But for one small time, enclosed with eleven others in a pen, impassive, a bit over-awed but aware of his solemn duty, he will decide whether your guilt has been proved beyond a reasonable doubt.

Advocates earning huge fees must nevertheless plead with him. On the issue of verdict the judge must defer to him. He must sit mute for days listening and watching as evidence is paraded before him. He must study charts, examine artifacts, tolerate outbursts, and keep his opinion to himself.

But when the captains and the kings have sat down; when the ushers have called for order; when the judge has summed up; then that reasonable man, with his eleven fellow jurors, will retire to privacy to decide one thing. Has the guilt of the frightened man or woman in the dock been proved beyond a reasonable doubt?

The miracle is not so much that the system works but that it works so remarkably well. Juries make mistakes, but so do professionals. Juries are rarely bribed or intimidated; they do not seek preferment or political office. Their careers are not on the line. They will not create learned papers. They will go back to the skillet, the boiler room, and the trading floor. But for one brief hour they will do their duty to judge fairly between a fellow citizen and the power of the state. And whatever the mighty state may think of them and their verdict there is nothing it can do to them, no sanction it can invoke, no punishment it can inflict to express its displeasure.

"Reasonable doubt" is just an idea, just a phrase. The important thing is: whose reason? Whose doubt? To answer that our forefathers created a truly remarkable phenomenon. Twelve good men and true.

Back then in the war two hundred and thirty years ago the New Americans won at Albany, and at Saratoga, and at Yorktown. But the greatest victories of all were those of freedom under law, the presumption of innocence and trial by jury.

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Mr. Howard served as the United States Attorney for the District of Columbia from August 2001 until June 2004. He was a tenured, full professor at the University of Kansas School of Law from 1994 until his appointment as United States Attorney. Mr. Howard has also twice served as an Associate Independent Counsel in the investigations of Samuel R. Pierce, Secretary of Housing and Urban Development under President Reagan and A. Michael Espy, Secretary of Agriculture under President Clinton. Mr. Howard previously served as an Assistant U.S. Attorney in the District of Columbia from 1984 to 1987, and in the Eastern District of Virginia from 1987 to 1991 in both the Richmond and Alexandria offices.

Mr. Howard served as a Staff Attorney for the Federal Trade Commission's Bureau of Competition from 1981 to 1984 and was an Associate in two District of Columbia law firms after his graduation from the University of Virginia School of Law in 1977. He served as a law clerk to the Honorable Raymond L. Finch of the Territorial Circuit in St. Croix, U.S. Virgin Islands immediately following law school. He is a 1974 graduate of Brown University and a 1970 graduate of Culver Military Academy in Culver, Indiana.

Mr. Howard is a member of the Editorial Board of the National Law Journal and is a member of the Virginia and District of Columbia Bars. He is currently on the Board of Directors for the Canada-United States Fulbright Committee and Roger Williams University School of Law in Bristol, Rhode Island. Mr. Howard was named as one of Washington's Top Lawyers, by *Washingtonian* magazine in December 2004, and was honored as one of America's Top Black Lawyers in *Black Enterprise* magazine in November 2003.

Reasonable Doubt
in a Nation of Immigrants

By Roscoe C. Howard, Jr.

We are a nation of immigrants. Yet, immigration has become a matter of intense social and political focus in America; nonetheless, its effects in our criminal justice system have received little attention. The task is not to enact more laws to criminalize the drive to become a contributing citizen; it is to assure that our justice is truly blind to their origins when they are forced to confront accusation of a crime.

As millions of individuals from a vast array of backgrounds, cultures, races and educational backgrounds continue to flock to this country, they inevitably come into contact with our criminal courts. Fair assimilation of new arrivals in those circumstances is not only uncertain, it is sadly improbable; for our history manifests a persistently unbalanced burden on minorities confronted with our criminal law. We are, therefore, challenged to overcome the inertia of imposing that burden on new arrivals who are wholly unaware of their rights in the face of investigation or prosecution. We have endured shameful periods in our history. Too often we have endured legally abhorrent institutions predicated on ethnicity and origin—slavery, racial segregation, "Jim Crow" Laws, lynchings—a murderous act named for a judge—and the World War II internment camps. The trappings of law won't do. The question is whether the protections enjoyed by our longer-term residents will be a reality to our new ones.

If you don't speak English, and come from a country lacking the common law—to say nothing of the elements of the Bill of Rights and western democracy—you have no concept of the predominant protecting principle of our criminal law—that the government cannot impose any criminal sanction upon you unless it can prove—without any assistance from you—that you are guilty of a specifically defined offense beyond a reasonable doubt. Concepts of reasonableness, doubt, relative levels of proof and the right of an accused to put the government to its proof are natural to those of us raised, trained and skilled in our system. How do we pass on those crucial precepts to someone faced with a criminal charge who has no grasp of their meaning?

Immigrants often believe courts serve a very different purpose than seeking truth and determining guilt. As an individual is faced with the prospect of prosecution in this country, the question he or she often asks is how do I prove my innocence? Or, more importantly, how do I make a jury, in this country, understand my values? As the United States Attorney for the District of Columbia, I investigated violence between married individuals who came to Washington, D.C. from other countries. It was often "explained" to me that the type of violence we prosecuted was tolerated and even taught in the native lands of some defendants. Recently, I listened to a radio interview of a Muslim man who had recently immigrated to the United States. The man stated that he will not tolerate a woman who disobeys the wishes of her husband or father, or who works, or appears in public without certain clothing. He said that he was raising the "standards" of his adopted country and he would not abide by the laws of the United States.

The challenge with such defendants is to use the tools of the accused's protection while allowing her or him to express their cultural values. Where those values conflict with our laws, the task is particularly difficult.

I do not write to defend these positions, or condone them. However, in any criminal trial, it is the job of the attorneys to ensure that their clients are understood. It is the prosecutor's task to determine what constitutes a crime and to gauge what the appropriate

disposition or punishment should be. As we become a more diverse society, our halls of education do not follow. In making a judge or jury understand a potential foreign born defendant, we often have lawyers who have no clue what many immigrants in this country have faced, have been taught or believe in, trying to guide them through our judicial system.

Just after the horrific day of September 11, 2001, federal prosecutors and agents across this country were asked to go into Muslim neighborhoods to talk to the communities, interview its residents and learn what they could about individuals who might be pursuing the same goals as the September 11th hijackers. Our ranks were woefully thin of any person who could inform me or my colleagues of what to expect once we entered such a community. How should we approach these individuals? Will they speak English since we did not speak Arabic? Will they trust us or turn on potential targets? We were ill equipped for this assignment, and had no guide for our efforts.

Our burden of proof in the criminal justice system is a heavy one: beyond a reasonable doubt. Nevertheless, that standard is appropriate for a government that professes fairness and equality. However, for those people who are caught in the system, the struggle is how to make oneself understood and how to explain one's actions?

We must understand that one way to make the criminal justice system responsive to the society we are becoming, is to recognize our obligation to enrich the ranks of attorneys and law enforcement with those who now make up our society.

The result will be a more just criminal justice system. When I was a law professor, just before my appointment as United States Attorney, I often asked my students to imagine that they found themselves in an African-American neighborhood where they were the only white person. You are arrested by a group of African-American police officers and charged with a horrendous crime in which the victim is an African-American child. Immediately, you are taken to jail and then a courtroom, where you are confronted by an African-American judge, faced with an all African-American jury, and appointed an African-American attorney to represent you. You are then told your trial is

about to start. My question to my students was: "Do you think you will get a fair trial?"

That scene is played out many times over in this country, but only in reverse. The African-Americans could be replaced by almost any racial minority. When you live in a country where unfairness to minorities has been documented and proven, it is hard for minorities to believe that justice will prevail when they encounter a system devoid of diversity.

An easier case can be made in the context of gender diversity. A female rape victim will not want to come forward to tell her story when the person that is listening to her, embarrassing, terrifying experience is a male. It is imperative that women populate the ranks of prosecutors. Therefore, another reason to encourage diversity is to increase the chance that all factors bearing on a case have a reasonable chance to come out in a courtroom.

In the same vein, it is important that all minorities have options when seeking counsel. Individuals should have the chance to explain to law enforcement, a judge, or a jury the circumstances that brought them before the court. They will feel that their stories have been told, if they can be represented by competent counsel who come from their background.

By the same token, minorities should be encouraged, prodded and recruited to join the ranks of prosecutors so that individuals who wish to explain their actions by pointing to the values they were taught in a far different culture have that opportunity. When the putative defendant comes from a "diverse" background, the "whys" of many crimes can be better understood when the prosecutor shares that background.

A more diverse justice system will not, and should not, change what constitutes a crime under the laws of this nation. But when "reasonable doubt" is the applicable standard, a system that allows a potential defendant the opportunity to be represented by someone whom he or she trusts and understands, and who understands him or her and can explain his or her plight, is a more just system. In turn, prosecutors who also share the background of a defendant, and can

even sympathize, may make it easier for a jury to understand why the prosecution, nevertheless, is necessary.

We talk about assimilation of newly transported immigrants to this country, but if we are to be a "justice" system, some of the assimilation should be taken on by us. We are a long way from a perfect justice system, and we must heed the lessons of the past. Bringing people of diverse backgrounds into our criminal justice system will provide more comfort that when a jury finds guilt "beyond a reasonable doubt" it truly means it.

The Criminal Justice System: Stronger than Human Fallibility

By Reid H. Weingarten

I have been a trial lawyer in the criminal justice system for almost 30 years—about half on the prosecution side and half as a defense attorney. At times, I have appeared before arrogant judges, political judges and ignorant judges. There have been occasions when I have been up against ambitious prosecutors, lazy prosecutors and unethical prosecutors. There also have been times when I have been in court with unprepared defense attorneys, incompetent defense attorneys and egomaniacal defense attorneys.

And yet, I believe in our judicial system. I love working in it and I believe that it produces a fair and just result in almost every case. How can that be given my experience? Our justice system works despite the imperfections of its human participants. The reason it does is that over many, many years, protections have been built into our criminal justice system that allow for and correct when necessary the inevitable human errors. These protections are the cumulative work of the legal community—judges, practitioners, scholars and lawmakers—all dedicated to the proposition that justice must be done in every case. The ignorant judge gets reversed on appeal. The ambitious prosecutor runs for governor. The unprepared defense counsel gets disciplined by the bar association. Wrongs wrought by human imperfections are regularly righted by the justice system.

There are always new pressures that threaten the system and there are some powerful ones at play today. September 11th has produced an environment in which the federal government holds suspected terrorists for years without charges and with no access to lawyers, judges or any process at all. The Enron/WorldCom environment has produced monstrous prison sentences that have caused defendants to plead guilty to avoid lengthy prison exposure even when they believe they have not committed crimes.

I also believe, beyond a reasonable doubt, that we have a responsibility to right these wrongs and to continue the centuries-old tradition of making our justice system stronger than the human imperfections of our day.

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New Age
Cross-Examination

By Lynne Bernabei

Cross-examination of a hostile witness is a mystery, even to trial lawyers who do it quite effectively. The lawyer needs to establish a rapport with the witness so that he or she tells you his illegal motivation in acting against your client.

How do you do that? How do you learn how to know what answers you are going to get from a witness before he gives it? Trial lawyers say it is instinct and studied preparation. Both are needed for those magical moments when a witness makes the case for the opposing side by confessing something terrible.

Malcolm Gladwell calls this ability to read minds "thin-slicing" or the "ability of our unconscious to find patterns in behavior based on very narrow slices of experience," in his popular book *Blink*. However, I believe that it is not that an observation of a small number of factors that help a trial lawyer pose the right question at the right time. It is connecting to the witness' energy in a way that can be done before you ever see him.

While this sounds very New Age, we do it all the time. One needs to get into the present, aware of all your senses. You close your eyes, become aware of the sounds that come to you, the smells you pick up, the air on your face, what you are sitting on, and when you open your eyes, let the colors, sensations and sights come to you. Once you are in the present with a vibrant sense of what surrounds you,

you'll be able to sense the person's energy and what the witness wants to tell you. Once you key into the witness' energy and not your own, it becomes fairly easy to know what he wants to tell you.

Despite the imposition of legal rules designating that the witness is on the opposite side of the case from you as the lawyer, the underlying harmony or connections between you as human beings do not disappear. Once you learn to access those, you can easily communicate on a level with the witness where he will want to tell you exactly why he did the things he did, which often reveals the illegality of his actions.

The following is an excerpt from the deposition of Dr. Raymond Patterson, a psychiatrist who was head of forensic services for the District of Columbia public mental health hospital. Our client claimed Dr. Patterson destroyed her career as a psychologist, because as the primary mental health professional treating John Hinckley, Jr., she was prepared to testify that Hinckley's disease was in remission, and he was ready for unsupervised visits with his parents. Her superiors, under pressure from the United States prosecutors, pressured her to change her testimony. She refused, and later reported to the media their attempts to force her to perjure herself. Dr. Patterson, as the chief witness for the U.S. government, sought to discredit her by bringing a series of false disciplinary and ethical charges against her. Her suit settled for $800,000, and a dismissal of all the charges against her in late 2005.

Dr. Patterson testified in his deposition that he had falsified his application for employment at the hospital, a federal crime. The following are my questions and his answers:

> Q: Dr. Patterson, take a moment to look at Patterson Exhibit 4.... This is a document from Howard University College of Medicine that indicates the class rank you held during the four years you were there, is that correct?

A: It looks like it. Yes.

Q: It says the first year you were 97 in a class of 109, is that correct?

A: That is what it says.

Q: So, that would indicate that you were approximately in the bottom ten percent?

A: ...That seems about right.

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Q: Then we have the second year you were 97 in a class of 111, is that correct?

A: That is what it says.

Q: So, that would be approximately the bottom ten percent again?

A: Some improvement.

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Q: Well, if we did it [the math] and it turned out to be approximately 10, 15 percent, would you argue with that?

A: Not if you did the math....

***

Q: Now, in the fourth year it indicates you were 73 in a class of 98, is that correct?

A: That is correct.

Q: So, that would be approximately the bottom 30 percent, is that correct?

A: ...That is probably about right.

Q: ...So, if these figures are correct, it would indicate that you were never above the bottom third of your class, is that right?

A: That is probably what it indicates.

***

Q: Take a look at the next document that follows. This is a Personal Qualifications Statement.

A: Yes.

Q: If you take a look at the last page, your signature appears below that, May 1, 1983, is that right?

A: Yes.

Q: And you understood when you were signing...that a false answer might be punishable by fine or imprisonment?

A: That is what it says.

***

Q: Now, if you take a look at the top...it asks you about the professional training you have, the type of degree

and your class rank or standing, is that correct?

A: Yes.

Q: Then it asks for your class rank and standing, and you put top 50 percent, is that correct?

A: That is what is says.

Q: Now, that is in fact not accurate, is that right?

A: Well, based on what we just looked at....

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Q: ...you answered the question you were in the top 50 percent, even though you didn't know what your rank was at that time?

A: That is what I thought.... Because I had a difficult start to medical school with punching, as we called it, failing two courses, but I had a great deal of success in my clinical clerkships the third and fourth year. ...So, I thought that they thought highly enough of me for me to come and work for them.... Which made me feel that my class rank must be in the top half of my class.

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Q: In fact, you didn't know at the time you said you were in the top

50 percent, you didn't know what your rank was?

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A: I did not know the fact.

***

Dr. Patterson, a very experienced and sought after expert witness, has testified hundreds of times in court. So, why did he testify to a federal crime? Because in his way of seeing the world, the correct answer to any important question is not factual, i.e., what his grade point average was, but is a measure of his charm, popularity, or ability to manipulate the system. This way of seeing the world is the reason he destroyed our client's—not because she had done anything wrong or unethical, but because he needed to destroy her credibility to bolster his public standing as the only mental health professional who really knew Hinckley. He was being truthful in explaining why he lied on his application for federal employment, and thought I would understand why he did it.

In an early AIDS discrimination case I litigated, the head of a start-up telemarketing firm admitted that he stole commissions owed to our client, an HIV-positive employee. He testified that he did that because, he would rather use the commissions to grow his business than have them go to our client's estate. In that one moment, the witness revealed his entire world view, and made our case. He testified truthfully because he thought I would understand and sympathize with him. While I did understand his testimony, I certainly did not sympathize, and found his actions despicable. It was by connecting to his energy as a human being that I could get him to open up and tell the truth.

It is the same practice as that of tae kwon do masters. If one is able to access the energy of an opponent and repel it back toward him, one can vindicate an important public interest, using the opposing force to do it. This is what I believe beyond a reasonable doubt.

STEVE DETTELBACH is an attorney and a partner with the law firm of Baker & Hostetler, LLP., where he counsels and defends corporations and individuals that being investigated by regulatory and law enforcement officials. Previously, as a federal prosecutor for over 12 years, Mr. Dettelbach served as Deputy Chief of the United States Attorney's Office for the District of Maryland, Southern Division, as acting Deputy Chief of the Civil Rights Division, Criminal Section and on the Organized Crime Strike Force. During his time as a prosecutor, Mr. Dettelbach handled numerous high-profile matters, including the El Monte Slavery case, hate crime matters and public corruption and fraud cases involving elected officials and corporate executives.

Mr. Dettelbach has also worked in the United States Senate, serving as Counsel to the Senate Judiciary Committee from 2001-2003. There, he worked extensively on policy matters, including the Sarbanes-Oxley Act relating to corporate misconduct and the oversight of law enforcement activities after the 9/11 terrorist attacks. Mr. Dettelbach graduated from Harvard Law School and Dartmouth College and began his career as a law clerk to the Honorable Stanley Sporkin in federal court in Washington, D.C. He is married and has two children.

When the State Helps the Underdog— The Promise of Power in the United States

By Steve Dettelbach

As Americans, we are fond of pointing out that "power corrupts." Indeed, during my career as a federal prosecutor, I heard constantly that the power of the government must be checked at every turn. While true, I believe that such adages can obscure another fundamental point—that at least here in the United States, the power of the state is often brought to bear in the most positive way and on behalf of the most powerless in our society. In those cases, I believe beyond a reasonable doubt that power does not corrupt—power purifies. It makes things as they should be, so that the good guys—not the powerful guys—win.

Indeed, it is an ironic quirk that as Americans, the most powerful and most privileged people on earth, we love to root for the underdog, even knowing that it will likely cause us heartache in the end. That is why it is such a wonderful thing when not only can we root for the underdog, but when we can bring the immense power of the state to the side of the weak to fight against the strong. Then we can tip the scales in favor of justice in a way that people in many nations cannot fathom.

Why is it that the American legal system lends itself to the government protecting the weak against the strong? After over a decade of trying cases all over our nation, one answer seems clear to me. The United States is blessed with a key institutional advantage—

its strong jury system. That system, where any individual from the community can decide the case—even cases involving CEO's and Congressmen—transports the American ethos of underdog rights into the courtroom itself. I have found, in fact, that there is nothing more frightening to a rich, self-dealing executive or a corrupt politician than the specter of facing a jury. Thus, our jury system creates a powerful incentive for law enforcement not to blindly take the side of the establishment, but to pursue investigations that help the vulnerable to stand up to power. As a prosecutor, I saw many examples of this, but one case sticks out in my mind.

Believe it or not, the case was a slavery action that I prosecuted in El Monte, California. The facts were shocking. In a predawn raid, the INS had uncovered a horrific situation just outside of Los Angeles. Over 70 Thai nationals, mostly women and all illegal aliens, had been found in a town house complex living in sub-human conditions. These people had been held against their will for years and forced to work over 18 hours a day, 7 days a week in a sweatshop. They lived on top of each other and just feet from their sewing machines. They were surrounded by barbed wire and constantly watched by armed guards. They spoke no English and many had been denied basic medical care for years. In short, it was a true nightmare.

Coming on this scene, the INS had no earthly idea what to do with these people. These women were victims by any common sense definition. On the other hand, they were illegal aliens and there was tremendous pressure on the INS to stem the tide of illegal aliens coming into California. In short, the Thai workers did not fit neatly into any legal category. Furthermore, the "owners" of the sweatshop were rich business people, also from Thailand, who were supplying clothing to very reputable manufacturers. They had the implicit backing of the Thai government and they hired reputable and capable attorneys to sort out any misunderstanding with the agents and prosecutors.

From the other side of the fence, the Thai workers also did not know what to do with us. They did not view law enforcement as their

saviors, but as the enemy. From their earliest memories, they had learned that the authorities were tools of the status quo, used to protect the wealthy and to oppress the poor. They had been taught that power was inevitably corrupt. In addition, these Thai workers had been told by their captors that the American authorities were no different than the police at home—a lie that they accepted. After all, they were told, who would possibly take the word of a poor peasant girl, and an illegal alien to boot, over the word of a rich merchant backed by reputable lawyers?

This misunderstanding could have led to disaster. The defendants could have been allowed to skate, and the Thai women could have been quickly deported. Almost as bad, a few "sample witnesses" could have been retained to allow for the prosecution of a criminal case, and the rest of the women could have been shipped back to Thailand as illegal aliens, where they would have faced poverty and likely retaliation.

But that is not what happened. Instead, the United States government marshaled all its power and resources not only to prosecute the wrongdoers, but to help the victims. Although there were surely some setbacks, agency after agency saw past narrow legal definitions and bureaucratic "missions." They treated the Thai women as true victims. Law enforcement agencies and humanitarian groups worked hand-in-hand for endless hours to make sure that the workers were provided food, shelter (and not in some INS holding cell) and even proper authorization to work as the case was resolved.

From the victims' standpoint as well, an equally amazing thing occurred. After countless tearful interviews and court hearings these women slowly realized that, despite their lives on the harsh receiving end of power, this time the government was taking their side against their rich bosses. Slowly, these women began to trust the American police, and even to do the unthinkable, to like them.

For the victims it was a transforming experience. Moreover, I think it was a uniquely American one. The idea that the massive power

of the state could be harnessed to help these vulnerable victims, all of whom were illegal aliens, to stand up to their rich masters was beyond their comprehension.

The women were not alone in being surprised. Even as a hardened prosecutor, earning their trust was transforming for me as well. I still remember that as the prosecution team left the courtroom, the victims lined up and bowed to us in respect. This remains the greatest honor I have ever received as a public servant.

When power intervenes to right the scales, the results are limitless. In this case, not only were the defendants successfully prosecuted (could they have ever won as slaveholders facing an American jury?), but the Thai victims were all accepted into a special immigration program authorized by Congress. They were provided a path to become permanent residents and eventually U.S. citizens. Recently, there was a 10-year reunion of the victims and law enforcement, and the overwhelming majority of these amazing women were contributing members of American society. Their nightmare had been transformed to an American dream, and along with their incredible spirit, it was the government that had made it possible.

I often ask myself why it seemed so impossible to these women that I would be on their side. After all, wouldn't any human being be sympathetic to their plight? The best answer I can manage is that many human beings would want to help, but most governments would not. These stories are all around us in the United States, every time a prosecutor goes to bat for a rape victim or cop risks his life to help a family imprisoned in their neighborhood by gang violence. It is so much a part of our heritage that we often forget the special character of the United States. We love our underdogs here, and once in awhile, with the help of American juries, we can use the government to rig a happy ending. Our government makes mistakes—whoppers—but I believe beyond a reasonable doubt that it is still the most powerful force for good that man has devised.

So when someone tells me that power corrupts or that the free market can handle things just fine without an overbearing govern-

ment, I remember those brave Thai women and the all the good people who used their power to help them. It is true, power can corrupt, but be careful about bashing the government too much—someday you might need it too.

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What do I believe
in "beyond a reasonable doubt"?
Justice.

By Billy Martin

Over my thirty years as a lawyer, I have been involved in a number of high-profile and even history-making cases, including the impeachment of President Clinton, the investigation and trial of U.S. Senators and Congressmen, state and local elected officials, the defense of some of our most famous athletes, and the defense of corporate officers accused of fraud or some other white-collar crime for decisions made relating to their business. Each case comes with its own compelling facts, and the outcome affects the lives of all those involved differently. I feel fortunate to have had the opportunity to act as a participant in our judicial system and not merely an observer because one thing I do believe, beyond a reasonable doubt, is that every person is entitled to a "fair trial," and most importantly, justice.

As a prosecutor, I earned the reputation of being a tough no-nonsense law-enforcement officer whose decisions ranged from whether there was sufficient evidence to charge an accused, to whether or not to seek the death-penalty. The answer to those type of questions was always governed by doing "what was in the best interest of justice." You see, in the end all lawyers, prosecutors and defense attorneys want the same thing, "justice." Like any other complex issue, the devil is always in the details. Defining or finding justice is much more difficult than seeking justice. All of the lawyers who know me personally, or who have been on the other side of a case against me know one thing: I believe in justice and I will fight to find it.

One of my most memorable representations involving a search for justice did not even involve a judge, jury, or a courtroom—at least not yet. In 2001, the family of missing Capitol Hill intern Chandra Levy approached my law firm and me to represent them. The Levy family was understandably grief-stricken over their daughter's disappearance, and they wanted two things above all: to find their daughter, and to find justice.

The Levy investigation was unlike any other trial or investigation I handled as a prosecutor or defense attorney. Chandra's family was concerned that the person responsible for her disappearance might be a Washington power broker and the authorities would be deferential to the powerful to the detriment of the investigation. Our challenge in the Levy investigation was to make sure that every lead was followed, that every witness was interviewed and forced to tell all that he or she knew, and finally to determine whether Chandra was still alive. As time passed, and we began to face the grim likelihood that Chandra had been killed, our goal became finding her body and the person responsible for her death. The Levy family wanted to ensure that Chandra was not forgotten and that her killer or killers were held accountable. After more than a year of searching and following countless potential leads, Chandra's remains were found in a wooded Washington, D.C. park. Five years later, her murder remains a mystery and her killer or killers remain at large. To the Levy family, there has been no justice and there will be no justice until the mystery is solved and the killer punished.

To this day, I am haunted by the fact that the circumstances surrounding Chandra Levy's death are still unknown, and her family's search for justice has not yet come to a close. I firmly believe that the Levys deserve to find justice, and I am hopeful that one day a witness will come forward with the information needed to solve the mystery of Chandra's death and bring her killer to justice.

The Levy case serves as a powerful reminder that justice sometimes is not easy to come by, but that fact only reinforces the importance of fighting for it. I approach all of my cases with that

sentiment in mind and the understanding that there is no greater reward for the struggles along the way than finding justice for my clients in the end.