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by
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In his scholarly, sensitive, and provocative article, *The Reasonable Doubt Rule and the Meaning of Innocence,*[1] my colleague Professor Scott Sundby analyzes the presumption of innocence and argues that it is the premise for the constitutional requirement that criminal guilt be proved beyond a reasonable doubt. Scott concludes, contrary to *Patterson v. New York,*[2] that a state is powerless to shift to the defendant in a murder case the burden of proving an affirmative defense such as "severe emotional distress."

According to Scott, it denies due process to shift to the defendant the burden of proof on any "fact that bears on the individual's guilt and punishment under the legislative scheme," including elements of the crime, defenses, and mitigating factors.[3] Scott rejects "restricted proceduralism" that would extend the presumption of innocence only to "those facts that the legislature has labeled as elements of the crime."[4] He denounces the idea that the requirement of proof beyond reasonable doubt could be circumvented by redefining a crime to remove a troublesome element of the offense, leaving only the easily provable elements. Such legislative game playing, he believes, would allow the state to play hob with the constitutional right not to be convicted when innocent. But Scott also rejects, after thorough and mostly approving consideration, the alternative "substantive approach" that would lodge in the Supreme Court the power and obligation to determine which elements of an offense as defined by a state legislature were constitutionally essential to

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1. 40 HASTINGS L.J. 457 (1989).
2. 432 U.S. 197 (1977).
3. Sundby, *supra* note 1, at 488; *cf. id.* at 467 ("all facts relevant to punishment").
4. *Id.* at 466.

establish guilt. This approach would require the Court to produce a constitutional definition of the state of innocence to be protected by the presumption and proof beyond reasonable doubt. Scott prudently draws back at this prospect of federalized standardization of offenses, justifications, excuses, culpability, responsibility, and so on. He ends up advocating the theory he calls "expansive proceduralism."[5]

Scott proposes that the relevant state penal statute should be analyzed to determine what state of innocence the legislature recognized through its choice of elements of the offense and prescription of defenses.[6] This state of innocence then must be protected by requiring proof beyond a reasonable doubt. For example, a state legislature that makes self-defense a justification for homicide could not put the burden of proving self-defense on the defendant. The defendant is innocent until the state proves beyond a reasonable doubt that he did not commit the homicide in self-defense. This result, however, runs counter to *Martin v. Ohio,*[7] when the Supreme Court upheld Ohio's rule that self-defense must be established by the defendant. Scott condemns this as "restrictive proceduralism: an individual is now serving a sentence for murder even though it may be as likely or not that she acted in a justifiable and blameless fashion."[8]

A. The Meaning of Innocence

Agreeing as I do with so much of Scott's article and with his condemnation of the result in *Martin v. Ohio,* I nevertheless want to warn against adopting some of his concepts, notably his idea of innocence. As used in the article, the term is intolerably vague and misleading, especially when associated with jury verdicts. It oversimplifies trial to identify acquittal with innocence, or to posit "accuracy" of the trial verdict as the paramount goal of the proceedings. Defendants are acquitted for many reasons, the least likely being innocence. A defendant may be acquitted even though almost every member of the jury is satisfied of his guilt if even one juror harbors a lingering doubt. A defendant may be acquitted if critical evidence of his guilt is inadmissable because the police violated the Constitution in obtaining that evidence by unlawful search or coercive interrogation. A defendant also may be acquitted if he proves that the police entrapped him into committing the offense. In

5. *Id.* at 487-505.
6. *Id.* at 505-06.
7. 480 U.S. 228 (1987).
8. Sundby, *supra* note 1, at 458.

short, criminal trials often turn out to be trials of the government as well as the defendant—and properly so.

More remarkable is the spectacle of jury acquittal because the jury sympathizes with the defendant even though guilt clearly has been proven by the evidence according to the law set forth in the judge's instructions. This was the case in the recent prosection of Lt. Col. Oliver North. The jury convicted him of three felonies involved in the cover-up of his earlier activities, but acquitted him of nine counts growing out of the activities themselves, unlawfully diverting funds to support the Nicaraguan Contras. One can only guess at explanations, but most likely the jury believed North was merely a tool of higher-ups who were "getting off" and leaving North in the position of "fall guy" as he claimed. Similar instances of jury nullification are found in the notorious "unwritten law" pursuant to which juries acquit a betrayed spouse charged with murdering the paramour, although the law and the evidence very clearly call for a manslaughter conviction.

It is important to preserve the distinction between acquittal and innocence, which is regularly obfuscated in news media headlines. When acquittal is interpreted as a finding of innocence, the public is led to believe that a guiltless person has been prosecuted for political or corrupt reasons. As a result, well justified prosecutions of powerful figures might be deterred.

B. The Independent Role of the Presumption of Innocence Distinct From the Reasonable Doubt Rule

The real import of the presumption of innocence is that conviction must rest solely on evidence produced at the trial, notwithstanding Supreme Court dicta linking the presumption to the constitutional requirement of proof beyond reasonable doubt.[9] The trier of fact, whether court or jury, must not be influenced by the fact that prior to trial a number of officials, including the arresting officer, the committing magistrate, and the bail judge, already have found the evidence persuasive against the defendant. To give meaning to the presumption, the judge should tell the jury (or remind herself if this is a bench trial) that guilt must be proven solely by the evidence produced at trial.[10]

9. *Id.*

10. Compare the refusal of a judge to permit members of the Attorney General's Special Strike Force Against Organized Crime to identify themselves as such while prosecuting organized crime offenses.

A recent article by Professor George F. Fletcher,[11] discussing the struggle to incorporate the presumption of innocence into the penal law of the U.S.S.R., highlights the importance of this concept of the presumption. In the Soviet Union, the "procuracy" (prosecutor's office) makes a documented preliminary judgment of guilt. According to Fletcher, those resisting the adoption of the presumption of innocence view the presumption as "incompatible with the reliance on the procuracy's judgment—the trial might actually give the defendant a reasonable chance in court."[12] The Fletcher account clearly demonstrates that the presumption of innocence is independent of the rule requiring proof beyond a reasonable doubt. The Soviets have long subscribed to a version of the reasonable doubt rule without presuming innocence.[13] Finally, the discontinuity between the presumption of innocence and proof beyond reasonable doubt is demonstrated by the fact that there is no intellectual dissonance in conceiving a system in which the presumption might coexist with a requirement of proof merely by preponderance of the evidence.

C. The Feasibility of a Constitutional Requirement of Proof Beyond Reasonable Doubt

Lastly, I want to consider the feasibility of Scott's proposed rule that would constitutionally require proof beyond a reasonable doubt for "every fact that bears on the individual's guilt and punishment."[14] This rule would necessitate revolutionary changes in existing constitutional and criminal law with little gain in justice or expediency. If adopted, the rule's chief effect would be to change the odds against convicting the innocent from the traditional ten to one ("better that ten guilty go free than that one innocent suffer")[15] to closer to one hundred to one. Scott believes "injustice" is done when the guilty avoid conviction[16] and that a balance of injustices must be struck. He repudiates any suggestion that the burden of proof should be beyond all possible doubt or that society could tolerate a one million to one ratio of unjust acquittals.[17] Yet if every accused has a constitutional right not to be punished when inno-

11. G. Fletcher, *In Gorbachev's Courts,* N. Y. Rev. of Books, May 18, 1989, 13, at 15-16.
12. *Id.* at 14.
13. HAZARD, BUTLER & MAGGS, THE SOVIET LEGAL SYSTEM 57 (1984).
14. Sundby, *supra* note 1, at 488, 495-505.
15. *Id.* at 460.
16. *Id.* I have a different view of "justice." *See* Schwartz, *Justice, Expediency, and Beauty,* 136 U. PA. L. REV. 141 (1987). For me, justice is done when a defendant is acquitted pursuant to society's insistence on restraining lawless actions of police and prosecution.
17. Sundby, *supra* note 1, at 460-61.

cent, it surely makes no sense to add "unless the state's interest in effective law enforcement requires that constitutional right to be abridged." Questions immediately arise, such as: "How far may this right be abridged?" and "How long must a conviction remain vulnerable to collateral attack by the putatively innocent convict?"

D. A Proposed Rule—Strict Scrutiny

I submit there is no constitutional right to have innocence always and certainly vindicated (an impossible aspiration in a society conducted by fallible human beings), but only a right to procedural safeguards that will command judicial and popular respect for verdicts. Perhaps I am being a naughty "expansive proceduralist" or a naughty exponent of "natural law," but I see no escape from a pragmatic approach to questions of punishability, permitting the Supreme Court to invalidate legislation and procedures that are arbitrary, incompatible with civilized respect for the individual, and shock the conscience of the Court.

I propose a "strict scrutiny" test. My test would not mechanically accept state legislatures manipulating the elements of an offense to avoid the requirement of proving culpability beyond reasonable doubt. I would not uphold definitions of felonies or other infamous crimes merely because a rational legislator might have so balanced the conflicting pressures. Under a strict scrutiny standard, I, like Scott, would repudiate *Martin v. Ohio.* It is totally at odds with modern American sensibility that we should tolerate conviction in a self-defense case without proof beyond reasonable doubt that the defendant did not act in reasonable self-defense. This is not because the state has designated self-defense an issue of guilt or innocence, but because justified self-defense is admirable behavior, which it would be outrageous to penalize.[18]

The same cannot be said of "excusable self-defense" when the judgment as to the need to resort to lethal measures was erroneous. For reasons of penal policy rather than federal Constitutional law, I would certainly mitigate to manslaughter in cases of unreasonable resort to needless lethal self-defense. By the same token I would repudiate *United States v. Balint,*[19] which would permit conviction of a druggist for feloni-

18. Yet even in this extreme case, one must avoid dogmatism. Our ancestors were not totally irrational in treating self-defense as mitigating rather than exculpating. They saw that self-defense is invariably invoked by the *survivor,* without the possibility of contradiction by the deceased; that such issues as who was the initial "aggressor?" and "did he break off the engagement?" and "was he responding to excessive force?" hardly lent themselves to beyond-reasonable-doubt resolutions. Remitting the problems to the less formal post-conviction stage must have appeared quite reasonable to Anglo-Norman judges bent on suppressing violence.

19. 258 U.S. 250 (1922).

ous possession of an administratively designated drug whether or not the accused knew or had reasonable opportunity to know that the drug was present in a patent medicine on his shelf. I would repudiate *United States v. Park,*[20] which convicted the president of a vast grocery chain for rodent exposure in a remote warehouse, merely on the basis that he admitted overall responsibility for every aspect of the corporation's operations; I would require a substantial dereliction in his supervisory behavior.

By way of illustration, there are areas in which any "strict scrutiny" rule would tolerate some conviction of the "innocent." Three categories comprise most of the cases: (1) minor regulatory offenses not regarded as immoral or infamous, carrying very low penalties, and occurring in such circumstances or with such frequency that enforcement would be substantially obstructed by requiring proof of culpability beyond reasonable doubt; (2) defenses requiring impracticable assessments of impaired volition, absent generally recognized mental illness; (3) defenses of a jurisdictional character, for example, those challenging the competence of the court rather than the issue whether the defendant engaged in the reprehensible behavior.[21]

It is, of course, horn book law that the legislature may eliminate *mens rea* as an element of regulatory offenses. In this area, we are all restrictive proceduralists. But a strict scrutiny approach to such legislation should lead to refinement of the doctrine and consideration of alternative solutions to enforcement problems.[22] Thus, imprisonment, even for short terms, might be precluded for first and unwitting offenders. Quite short terms might be allowable when the regulatory violation actually entailed a criminally negligent disregard of a substantial risk of the harm against which the regulation was directed. Repeated flouting of regulations could carry misdemeanor sanctions.

The impaired volition cases require us to compromise our aversion to convicting the innocent mainly because of agonizing doubts about the abilities of experts to distinguish reliably among subtle shades of individ-

20. 421 U.S. 658 (1975). *Compare* N.Y. PENAL LAW § 125.25 (McKinney 1987); People v. Casassa, 49 N.Y.2d 668, 404 N.E.2d 1310 (1980) (burden shifted to defendant on issue of "extreme emotional disturbance"); Regina v. Sault Ste. Marie, 85 D.L.R. 3d 161 (Supreme Court of Canada 1978) ("Open to the accused to avoid liability by proving that he took all reasonable care").

21. Scott concedes a necessary "exception" for this third category. Sundby, *supra* note 1, at 506 n.178.

22. Such an alternative solution was embodied in the proposed Reform of the Federal Criminal Code. National Commission on Reform of the Federal Criminal Code, Study Draft § 1006 (1970).

ual impairment absent gross mental disease. If expert testimony on the issue of impaired volition is unreliable, the result will be haphazard convictions and acquittals, more rather than less injustice. Economic inequalities that would deny poor defendants access to expert testimony increases the likelihood of injustice. There has been violent controversy in recent decades over the extent, if at all, that impaired volition should be accepted as an excuse or mitigation in the determination of guilt. After brief judicial flirtations with the more liberal Model Penal Code formulation, California and federal legislators have reverted to *M'Naghten* Rules, excluding volitional defenses even in conjunction with mental illness.[23] Diminished responsibility, a doctrine that gives mitigating effect to mental abnormalities less severe than exculpating insanity, has sustained similar reverses.

This treatment of impaired volition defenses has been backed by the American Psychiatric Association, as well as the American Bar Association.[24] The ABA explicitly recommended that jurisdictions retaining a volitional test should put the burden of proof upon the defendant. In the face of these manifestations of dubiety, it would be a bold legalist who would opine that the Constitution makes volitional impairment equivalent to innocence, requiring disproof beyond a reasonable doubt.

The impaired volition cases highlight a crucial feature of our conviction/punishment system overlooked by Scott. Our system makes a radical distinction between the procedures for proving the commission of the offense and the much less formal procedures for sentencing. Only the former procedure provides such safeguards as the presumption of innocence, proof beyond a reasonable doubt, exclusion of hearsay testimony, and jury trial. That is as it should be, for conviction is the basic determination that the defendant has forfeited his freedom and subjected himself to dispositions society makes for its own protection. Sentencing is an altogether different matter. Unreviewable discretion by the trial judge is only beginning to be constrained by the growing movement towards sentencing guidelines.[25] Examination of these guidelines or presentence reports available to sentencing judges, reveals the remarkably wide range of factual issues that enter into post-conviction determinations, including:

23. § 402 of the Comprehensive Crime Control Act of 1984, 18 U.S.C. § 17(a) (West Supp. 1989) (even "severe" mental illness), overriding decisions like United States v. Brauner, 471 F.2d 969 (D.C. Cir. 1972); CAL. PENAL CODE § 25(b) (West 1988) (voter initiative of 1982, overriding decisions like People v. Drew, 22 Cal. 3d 333 (1978)).

24. ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1(a) (1989).

25. UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (West 1988): constitutionality sustained in Mistretta v. United States, 109 S. Ct. 647 (1989).

motive of pecuniary gain; exceptional depravity; defendant's belief that he had a moral justification; youth; domination of an other person; education and criminal history of the convict; and restitution or remorse.[26]

For present purposes, two conclusions emerge. First, a legislative choice to eliminate a culpability element from the definition of an offense does not mean that culpability is being ignored. It means only that the particular culpability issue is to be weighed at a different stage and in a different manner: by the district attorney, perhaps, in exercising her prosecutorial discretion, by the sentencing judge, by the parole board, or by executive clemency. The second justifiable conclusion is that the multitude of factual issues presented in discretionary sentencing could not possibly be disposed of on the basis of proof beyond a reasonable doubt. Surely, Scott overstates his position when he declares, to the contrary, that whenever the state uses a fact "to justify a particular criminal sanction," the reasonable doubt rule is constitutionally applicable.[27]

Two recent cases show that the question as to the proper stage of criminal proceedings when issues affecting punishability should be considered—and the associated question whether there must be proof beyond reasonable doubt—are headed for the Supreme Court. *United States v. Scroggins*[28] held that in sentencing on a count to which defendant had pleaded guilty, the judge may consider defendant's behavior covered by counts dropped pursuant to a plea bargain, *i.e.*, the decision espouses the "real offense" approach to sentencing.[29] The court treated evidence of eighteen prior thefts as showing that the theft to which he pleaded guilty was part of a pattern manifesting greater culpability than would an isolated occurrence. Accordingly, restitution for all the thefts could be required. In *United States v. Davis*,[30] a district judge held guideline sentencing unconstitutional when it turns on facts not proved beyond a reasonable doubt, *e.g.*, facts related to the amount of drugs involved and the "leadership" role of defendant in the transaction. Is it too early to start counting heads on the Supreme Court?

26. See list of aggravating and mitigating circumstances, MODEL PENAL CODE § 210.6(3), (4); list of special circumstances qualifying for death penalty, CAL. PENAL CODE § 190.2 (West 1988).

27. Sundby, *supra* note 1, at 465.

28. 880 F.2d 1204 (11th Cir. 1989).

29. *See* Schwartz, *Options in Constructing a Sentencing System*, 67 VA. L. REV. 637, 680 *et seq.* (arguing in favor of real offense sentencing). The Model Penal Code unhesitantly shifts the burden of proof affecting penalties, *e.g.*, § 210.2(1)(b) ("presumption" of recklessness in felony murder); § 223.1(2)(b) (burden of proof on defendant to show amount involved in theft is less than $50).

30. 715 F. Supp. 1473 (C.D. Cal. 1989).