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by
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Professor Schwartz has written a persuasive justification for the role of the presumption of innocence in our criminal justice system. Concentrating on the criminal trial as a societal institution, he emphasizes the presumption of innocence primarily as a means of assuring such "procedural safeguards [exist] as will command judicial and popular respect for verdicts."[1] He suggests that the presumption of innocence must be viewed "pragmatic[ally]," arriving at a constitutional right that would strike down legislation or procedures that are "arbitrary, incompatible with civilized respect for the individual, and shock the conscience of the Court."[2] He would implement the presumption of innocence under a strict scrutiny standard, searching not only for legislation that "shocks the conscience" through its treatment of the reasonable doubt rule, but also for definitions of crime that do not show "civilized respect for the individual."[3]

Although I agree with many of Lou's observations and arguments, I remain convinced that the basic approach of *Mullaney v. Wilbur*,[4] what I call the expansive proceduralist approach, is superior in determining when the reasonable doubt rule should apply. Under this approach, the presumption of innocence as manifested in the reasonable doubt rule attaches whenever a fact functions in the legislative scheme to make a "substantial difference between punishment and stigma."[5] Lou's criti-

* Associate Professor, University of California, Hastings College of the Law. I would like to thank Professors Ron Allen and Gordon Van Kessel for their insightful reactions to my original article, and Professor Lou Schwartz for making the whole study and teaching of law a continuous and fascinating dialogue.

1. L. Schwartz, *"Innocence"-A Dialogue with Professor Sundby*, 41 HASTINGS. L.J. 153, 157 (1989).
2. *Id.*
3. *Id.*
4. 421 U.S. 684 (1975).
5. The "substantial difference" standard is a modification of a test that Justice Powell

cisms allow me the opportunity to expand upon my reasons for supporting this view of the reasonable doubt rule.

I understand Lou's concerns to fall into two major categories, suggesting that my proposed approach is at once too narrow and too broad. On the one hand, he suggests that by focusing too intently on the reasonable doubt rule, the other protections which the presumption of innocence embodies might be lost. On the other hand, he suggests that the reasonable doubt rule as applied under my proposed approach would reach too many factors involved in the criminal process, such as mental impairment defenses and sentencing factors. I will deal with these objections individually.

A. Is a Distinct Constitutional Standard for the Reasonable Doubt Rule Too Narrowly Focused?

Lou correctly contends that the presumption of innocence's role at the criminal trial goes beyond concerns of factual guilt or innocence. As he notes, "criminal trials often turn out to be trials of the government as well as the defendant . . . ."[6] He points out, for example, that factually guilty individuals may be acquitted for a variety of reasons, such as government misconduct and jury sympathy. Similarly, a criminal justice system might have a rigid reasonable doubt requirement but so lack other procedures that the presumption of innocence would be a hollow right. Consequently, Lou proposes a broad presumption of innocence standard that addresses not only concerns for convicting the innocent, but also how the government presents its case and defines its crimes. The question of when the reasonable doubt rule applies would not occupy a distinct constitutional niche, but be subsumed under a universal "shock the conscience" test.

While I agree that the presumption of innocence's role is far broader than that of the reasonable doubt rule, I believe Lou downplays too much the concern of convicting factually innocent individuals. In his response, Lou states 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."[7] This conclusion may be true if the presumption of innocence is viewed as only going to

laid the groundwork for in Mullaney v. Wilbur, 421 U.S. at 698, and then elaborated upon in his dissent in Patterson v. New York, 432 U.S. 197, 226 (1979) (Powell, J., dissenting). For discussion of Justice Powell's proposed test, see Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence,* 40 HASTINGS L.J. 457, 465-69, 506-09 (1988).

6. Schwartz, *supra* note 1, at 155.

7. *Id.* at 156.

the funneling of evidence to the trier of fact to assure that the "conviction . . . *rest[s] solely on evidence produced at the trial.* . . ."[8] From my perspective, however, the presumption of innocence is not only a doctrine going to the obtaining and presenting of evidence, but a right reflecting the "fundamental value determinations of our society that it is far worse to convict an innocent man than to let a guilty man go free."[9] If one agrees with this value choice, then dissonance does occur if the presumption of innocence is equated with a preponderance standard, because a preponderance standard reflects a value determination that an erroneous verdict in favor of the government is generally no more serious than an erroneous verdict in favor of the defendant. The reasonable doubt standard, in contrast, reflects the judgment that although an injustice occurs when a guilty individual is acquitted, the greater injustice occurs when an innocent defendant is convicted.[10]

Nor do I share Lou's concern that a strong procedural reading of the reasonable doubt rule might lead to a downgrading of other presumption of innocence concerns.[11] Lou, for example, would use his strict scrutiny test to focus on the substance of what is being penalized and whether it is consistent with "civilized respect for the individual." In the process, he would not only overturn legislation placing the burden of

8. *Id.* at 155 (emphasis added).

9. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

10. As Justice Harlan explained in *Winship*:

> Because the standard of proof affects the comparative frequency of . . . erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each.
>
> When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. A preponderance of the evidence standard therefore seems particularly appropriate . . . .
>
> In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.

Id. at 371-72 (citations omitted).

11. By emphasizing the interest in avoiding erroneous convictions, I do not mean to downplay Lou's legitimate concern for maintaining public confidence in the criminal justice system. Both interests are tied up in the presumption of innocence: I would not condone a system that convicted only the factually guilty but did so in a brutal fashion (for example, using torture to extract confessions), and I am certain that Lou would not tolerate a system where a large number of factually innocent individuals were convicted of serious crimes (for instance, drug trafficking) but public support for the verdicts was high because of the perceived danger of the crime. The question becomes which interest is given preference when the two interests begin to conflict.

persuasion on the defendant for self-defense, but also strike down strict and vicarious liability crimes that are serious felonies. Basically, Lou wants an all-inclusive test that brings together under the presumption of innocence both procedural and substantive fairness issues.[12]

The major difference in our approaches can be seen in our views of *Martin v. Ohio*.[13] While we both agree that the Court erred in allowing the state to place the burden of persuasion on the defendant for self-defense, I object because the state chose to make self-defense an exonerating factor and yet places the risk of non-persuasion on the defendant. Lou, on the other hand, chooses to condemn the Court's decision because it ignores that self-defense is "admirable behavior which it would be outrageous to penalize." While I do not necessarily disagree with Lou's assessment of the importance of self-defense, the important factor for the reasonable doubt rule is *the legislature's decision* not to penalize this behavior. I would reach Lou's level of inquiry as to the importance of self-defense only if a state tried to abolish the defense or severely restricted its operation; even then, I would treat it as a constitutional issue distinct from the operation of the reasonable doubt rule.

My primary concern with Lou's unitary approach is that it couples the reasonable doubt rule's fate with the Court's willingness to determine a fact's constitutional worth under the presumption of innocence. Even if I was convinced that the Court could determine which facts and procedures were sufficiently important to deserve protection under the presumption of innocence, I am highly skeptical that the Court would undertake such an inquiry. The Court has shown a great reluctance to decide constitutional issues concerning substantive criminal law,[14] and I am doubtful they would accept an invitation to do so in the name of the presumption of innocence. If I were certain that Lou was the jurist who would be applying the test, I would be tempted to defer to his judgment and standard. All indications are, however, that the individuals who would be applying the standard possess neither his willingness to apply it nor his sense of what constitutes "civilized respect for the individual."[15]

Because the expansive proceduralist approach bases the reasonable doubt rule on how a legislature uses a fact, these problems are largely

12. Lou's proposed test reminds me more of a "naughty substantivist" than a "naughty expansive proceduralist," Schwartz, *supra* note 1, at 157, given the test's necessity to independently determine the fact's importance to the presumption of innocence.

13. 480 U.S. 228 (1987).

14. *See generally* Sundby, *supra* note 5, at 481-87.

15. Evidence that Professor Schwartz's threshold for shocking the conscience differs from the Supreme Court's can be seen in his willingness to strike down serious strict liability crimes that the Court has allowed to stand. *See* Schwartz, *supra* note 1, at 157-58.

avoided. The Court need not face the perplexing task of evaluating a particular fact or procedure's constitutional worth to decide whether the reasonable doubt rule applies. Moreover, a finding that the reasonable doubt rule applies does not carry the potentially far-reaching ramifications of deciding that a fact is fundamental to the criminal justice system because it is "admirable behavior" or constitutes "civilized respect for the individual." Treating burden of proof questions as a distinct presumption of innocence question will make courts more willing to expand the reasonable doubt rule's scope without fear that other constitutional consequences will attach. While the different aspects of the presumption of innocence that Lou raises are without question important, the reasonable doubt rule's purposes should not be obscured by coupling them with the other goals that the presumption serves.

B. Is a Procedural Approach to the Reasonable Doubt Rule Too Broad in its Application?

Initially, let me reiterate my view that the presumption of innocence is not an absolute right barring conviction of any conceivably innocent individual.[16] Such a system not only is impossible to implement, but ignores the countervailing injustice of acquitting the guilty and the resulting threat to public confidence in the criminal justice system. At some point the right not to be punished if one is innocent must give way to society's need to maintain public order and confidence. Acknowledging the necessity to balance when the constitutional values of the presumption of innocence are involved, however, does not denigrate its core purposes. As with other constitutional values, such as freedom of speech or religion, one can identify the constitutional values at stake and implement them vigorously while still accepting some limitations when the need is compelling. Thus, I do not see an inconsistency, as Lou suggests, in advocating a strong constitutional test to prevent conviction of the innocent while also acknowledging that a standard requiring proof beyond all possible doubt is too stringent.[17]

Beyond this general problem of accommodating competing interests, Lou raises specific situations where he believes an expansive proceduralist application of the reasonable doubt rule would be too broad. He identifies three categories of cases where he would tolerate the

16. *See* Sundby, *supra* note 5, at 459-62, 500-05.

17. *See generally* G. WILLIAMS, THE PROOF OF GUILT 158 (1958) ("It is, then, a question of degree: some risk of convicting the innocent must be run. What this means in terms of burden of proof is that a case need not be proven beyond all doubt.").

conviction of "innocent" defendants based on a lowered burden of persuasion:

> (1) minor regulatory offenses not regarded as immoral or infamous, carrying very low penalties, and incurring 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.[18]

Lou also raises the problem of extending the reasonable doubt rule to the context of sentencing with its less formalized procedures.[19]

The areas of impaired volition defenses and sentencing are admittedly troublesome.[20] As I acknowledged in my original article, many mental illness defenses fall outside intuitive notions of innocence.[21] Moreover, and this is the point that Lou emphasizes, reliability concerns over mental illness defenses are particularly cogent when the pervasive role of expert witnesses is combined with the impreciseness of psychiatry. Lou concludes:

> The impaired volition cases seem to require compromise of our aversion to convicting the "innocent" mainly because of agonizing doubts about the ability of experts reliably to distinguish subtle shades of individual impairment, absent identifiable gross mental disease. If expert testimony on this point is unreliable, the result will be haphazard convictions and acquittals, more rather than less injustice.[22]

While I share this serious concern over unreliable jury verdicts, the question remains how best to resolve the problem. As Lou observes, unreliable expert testimony will result in both "haphazard convictions and acquittals," meaning not only will truly guilty individuals be acquitted, but also that individuals who are not legally responsible under the state's laws will be convicted. Perhaps I am a "bold legalist," but it does not strike me as outrageous to suggest that if the state recognizes mental

18. Schwartz, *supra* note 1, at 158.

19. *Id.*

20. As Lou notes, I have no objection to excluding "jurisdictional" issues from the reasonable doubt rule's scope. *Id.* at 158 n.21. Likewise, I have no problem with his first category of "minor regulatory offenses" to the extent he is arguing one may dispense with a *mens rea* requirement and, consequently, some "innocent" individuals (meaning individuals who caused, but did not intend a result) will be convicted. *Id.* I trust that Lou would still require that the *actus reus* be proven beyond a reasonable doubt, which a procedural approach to the reasonable doubt rule undoubtedly would require.

21. Sundby, *supra* note 5, at 492-93.

22. Schwartz, *supra* note 1, at 158-59.

illness as a defense, then the risk of unreliability should be resolved against the state.[23]

My boldness, however, is tempered by two considerations. First, as Lou points out, problems of reliability are going to be greatest when the system is dealing with "subtle shades of individual impairment" rather than "gross mental disease." If the risk of erroneous acquittals in these gray areas of psychiatric evaluation is too great, the legislature has a number of options: it can restrict the availability of such defenses to gross impairment;[24] implement a centralized system for psychiatric evaluation;[25] make certain types of mental illness not exonerating excuses but factors for treatment;[26] control the use of expert testimony;[27] or utilize a

23. My boldness, at least as to the basic insanity defense, is shared by approximately one-third of the states. I. KEILITZ & J. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES 50 (1984). It is also worth noting that the two sources Lou cites, the American Bar Association (ABA) and American Psychiatric Association (APA), are ambivalent on the issue. The ABA in fact recommended shifting the burden of persuasion to the defendant only in cases where the jurisdiction uses the Model Penal Code test with its volitional prong; in all other cases, the ABA recommended that "the prosecution should have the burden of disproving the defendant's claim of insanity beyond a reasonable doubt." *Id.* at 50 (quoting REPORT OF THE STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE AND COMMISSION ON THE MENTALLY DISABLED, 108 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 715 (1983)). The APA was "exceedingly reluctant" to even take a position and, in any case, believed that shifting the burden of proof to the defendant would not have a significant effect on insanity acquittals. *Id.* at 51 (quoting from AMERICAN PSYCHIATRIC ASSOCIATION STATEMENT ON THE INSANITY DEFENSE 12 (1982)).

24. *Cf.* CAL. PENAL CODE § 28(b) (West 1988) ("there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse"); Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1987) (limiting mental disease defenses to insanity). As a general trend, states are returning to the M'Naghten test from more liberal formulations of the insanity test. *See,* J. DRESSLER, UNDERSTANDING CRIMINAL LAW 297 (1986).

25. MICH. COMP. LAWS ANN. § 768.21 (West 1982) (all felony defendants entering plea of insanity must be evaluated by Center for Forensic Psychiatry). *See* Packer, *Insanity Acquittals in Michigan 1969-83: The Effects of Legislative and Judicial Changes,* 13 J. PSYCHIATRY & L. 419, 431 (1985) (noting high correlation between Center's evaluation and ultimate disposition).

26. A number of states, for example, have instituted a verdict of Guilty but Mentally Ill (GBMI). These statutes generally provide that defendants adjudicated GBMI are required to receive psychiatric treatment as part of their sentence, and, in some states, upon discharge from treatment are transferred to prison for the remainder of their term. *See, e.g.,* MICH. COMP. LAWS ANN. § 768.36 (West 1982); GA. CODE ANN. § 17-7-131(g) (Supp. 1984). The effect and desirability of the GBMI verdict has been the subject of considerable debate. *See generally* Fentiman, *"Guilty But Mentally Ill": The Real Verdict is Guilty,* 26 B.C.L. REV. 601 (1985); Smith & Hall, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study,* 16 U. MICH. J.L. REF. 77 (1982).

27. *See, e.g.,* Insanity Defense Reform Act of 1984 (amending FED. R. EVID § 704(b)) ("No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have mental state or condition constituting an element of the crime or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.").

combination of such reforms. Indeed, if reliability is so questionable in this area, such reforms constitute a positive step in formulating a view of legal responsibility that reflects current medical and psychiatric understandings of human behavior.

Second, despite occasional notorious cases that capture the public's attention, the evidence indicates that the insanity defense is neither frequently pleaded by defendants nor found by juries.[28] It is doubtful that the rate of either pleading or acquittal would skyrocket if the reasonable doubt rule were applied.[29] A significant number of jurisdictions already require the state to prove the defendant's sanity beyond a reasonable doubt and the evidence does not show intolerably high acquittal rates.[30] Moreover, powerful disincentives exist to pleading insanity, including the stigma attached to such a finding and the potential for psychiatric confinement.[31] Finally, and especially when the insanity standard is a restrictive one such as the M'Naghten test, factfinders will be reluctant to find even a reasonable doubt as to the defendant's insanity without persuasive evidence beyond the defendant's word.[32]

Thus, although one cannot be sanguine about the potential abuse of mental impairment defenses, no reason exists to fear—especially given possible modifications to the defenses—that applying the reasonable doubt rule will lead to a deluge of erroneous acquittals.[33] Granted, if the

28. *See generally* R. SIMON & D. AARONSON, THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA 7 (1988) (insanity defense invoked in less than 1 percent of all criminal trials); AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE 5 (1982) ("Successful invocation of the defense is rare, probably involving a fraction of one percent of all felony cases. While philosophically important for the criminal law, the insanity defense is empirically unimportant.").

29. The rate of acquittal and pleading appears to be much more directly tied to the insanity standard used and the consequences of a successful plea than to the burden of proof. *Cf.* A. MATTHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW: A FIELD STUDY 52 & Table 3 (1970) (noting decline in successful insanity defenses when insanity standard made more restrictive); *see* I. KEILITZ & J. FULTON, *supra* note 23, at 51.

30. A brief review of criminal cases handled by U.S. Attorney Offices from 1977-79, years in which the government bore the burden of persuasion on sanity, shows a very small rate of insanity acquittals: 5 of 1,543 acquittals in 1977 were not guilty by reason of insanity (NGRI); 13 of 1,401 in 1978; and 7 of 1,263 in 1979. U.S. DEPT. OF JUSTICE, STATISTICAL REPORTS: UNITED STATES ATTORNEY'S OFFICE 1977-79. In some cases, of course, the prosecution may not contest an insanity plea, especially if the government's psychiatrists find that the defendant meets the insanity criteria. R. SIMON & D. AARONSON, *supra* note 28, at 8.

31. *See, e.g.,* Pogrebin, Regoli, & Perry, *Not Guilty by Reason of Insanity,* 8 INT'L J. L. & PSYCHIATRY 237, 238 (1985). Defendants who are acquitted on the basis of insanity frequently serve as much time in confinement at a mental institution as they would have in prison if convicted. *Id.* at 240; *see also* A. MATTHEWS, *supra* note 29, at 37-43.

32. *See* authorities cited in Sundby, *supra* note 5, at 501 nn.164-66 and accompanying text.

33. Despite the evidence that the insanity defense is not being abused, some have argued

reasonable doubt rule applies, more defendants pleading insanity will be found not guilty by reason of insanity, but a flood of acquittals seems unlikely. And most importantly for the presumption of innocence, within that pool of defendants who otherwise would not be found criminally insane, there will be individuals who, in fact, are not legally responsible under the state's definition of criminal responsibility.

For me, the most difficult issue is sentencing and the proper role of the reasonable doubt rule. The criminal justice system traditionally has treated the sentencing phase as a distinct and separate process from the guilt-innocence phase, reflecting an intuitive distinction with which most individuals would agree; a difference exists between deciding whether one can be punished and, once that question is decided, determining the proper punishment. Yet, at the same time, concerns over wrongful deprivation of liberty may be as great if not greater at the punishment phase. *Mullaney v. Wilbur,* for example, was essentially a sentencing issue based on the different penalties attaching to a murder conviction rather than a manslaughter conviction.[34] If the presumption of innocence in the form of the reasonable doubt rule is not extended to the sentencing phase in such a situation, a legislature simply could shift the murder-manslaughter distinction based on heat of passion to the sentencing phase and use a lesser burden of proof.

Balancing the need for sentencing discretion with the desirability of avoiding additional punishment based on erroneous factual findings is not an easy one. Even Justice Powell when faced with the possibility of extending his proceduralist standard into the context of formal sentencing procedures declined to do so. In *McMillan v. Pennsylvania,*[35] the Court by a 5-4 margin upheld a Pennsylvania statute that imposed a

that "[t]he problem is that when the insanity defense is invoked in sensational trials—which it often is— such as the Hinckley case, it influences, far beyond statistics, the public's faith in the court's ability to respond to crime in a fair and just manner." *Insanity Defense in Federal Courts: Hearings on H.R. 6783 and related Bills Before the Subcomm. on Criminal Justice of the House of Representatives Comm. on the Judiciary,* 97th Cong., 2nd Sess. 151 (1982) (statement of Rep. Lagomarsino). Shifting the burden of persuasion to the defendant, of course, will not alter the public's misperception that the insanity defense is frequently pleaded and successfully used. As long as insanity defenses are recognized in murder cases, high-profile insanity cases are inevitable.

34. In *Mullaney,* the state had argued that under Maine law whether the defendant was guilty of manslaughter rather than murder became relevant only after the defendant had been found guilty of the crime of felonious homicide. 421 U.S. at 696-97. Using this characterization, the state maintained that the only issue raised was one of sentencing to which the reasonable doubt rule did not apply. Justice Powell accepted the state's characterization of Maine law but rejected the proposed distinction for applying the reasonable doubt rule as too formalistic. *See generally* Sundby, *supra* note 5, at 466.

35. 477 U.S. 79 (1986). Justice Powell concurred without a written opinion.

mandatory sentence of five years if the judge found by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the offense.

As with the reasonable doubt rule at the guilt-innocence phase, proper resolution of the problem requires looking to the legislative judgment involved and how it operates. If the legislature specifies conduct and mandates that it deserves more or less punishment, then the reasonable doubt rule should attach. As Justice Stevens strenuously argued in his *McMillan* dissent, by mandating a minimum five year sentence based on the visual use of the firearm, the Pennsylvania legislature had "identifie[d] conduct [it] specifically intended to prohibit and to punish by a special sanction."[36] In such a situation, when the legislature is affirmatively identifying conduct and prescribing punitive consequences, there is no logical justification for not treating the specified conduct as a "fact necessary to constitute the crime."[37]

The objection remains that the defendant subject to judicial discretion within a prescribed range has similar due process concerns as the defendant faced with legislative distinctions. A defendant, for instance, may be given a five year rather than a four year sentence based on a judge's erroneous assessment that she has not shown remorse or that she lacked a belief in a moral justification for her acts.[38] Why should a judicial decision be treated differently than the factual distinctions drawn by the legislature?

The difference lies in the nature of the decisionmaking that takes place. When the legislature specifies conduct which mandates specific consequences for the defendant, whether it be a minimum sentence or a range of punishment, the legislature is actively defining facts constituting the criminal conduct justifying the range of punishment. The identified factors act as a predicate for a particular type of punishment rather than merely as evaluative criteria. Consequently, a sentencing fact properly may be subject to the reasonable doubt rule if singled out by the legislature as a factor punished by a "special sanction." [39]

36. *Id.* at 103-04 (Stevens, J., dissenting).

37. *Id.* at 103 (quoting from *In re* Winship). Justice Stevens, however, argued that the reasonable doubt rule applied only to sentencing factors that raised the sentence. He believed that legislative abuse of mitigating facts was unlikely given public resistance if the legislature tried to define a crime broadly to include innocuous behavior and then shift the burden to the defendant to show his or her behavior was in fact acceptable. *Id.* at 101-02. Consequently, Justice Stevens' later concurrence in Martin v. Ohio, allowing the state to place the burden of persuasion on the defendant for self-defense—a mitigating factor—was not surprising.

38. *Cf.* CAL. R. CT. 423(a)(4)(7), (b)(3)(factors in mitigation of sentence include belief in right to act and acknowledgment of wrongdoing).

39. *McMillan,* 477 U.S. at 103-04 (Stevens, J., dissenting). *See generally* Dripps, *The*

Once we are within the legislatively prescribed range of punishment, however, judicial discretion and consideration of a wide variety of facts do not raise the same concerns. The potential consequences for the defendant's conduct already are specified. What remains is an assessment by the sentencer of what punishment within that range would best serve the various purposes involved, such as retribution, rehabilitation, and deterrence. Although the sentencer undoubtedly will be making factual findings in deciding the best punishment, the decision will be made within a range that the legislature has determined is appropriate for the proven conduct.[40]

Moreover, when the judge's use of a sentencing fact is discretionary, the certainty of proof can be taken into account when imposing the sentence, giving a harsher or lighter sentence according to the level of proof. In contrast, when the legislature has mandated specific punitive consequences depending on a fact's existence, the effect is all-or-nothing: the defendant either becomes subject to the prescribed punishment or not depending on whether the fact is found to be true. Given the mandatory punitive consequences following from the finding of a legislative sentencing fact—whether the consequence is a minimum sentence or a different range of possible punishment— a justification exists for applying the reasonable doubt rule that does not when the use of the fact is within the sentencer's discretion. The fact, including how strongly it has been proved, no longer becomes part of an overall assessment of the proper sentence based on a variety of factors, but now serves as an independent basis for justifying a particular punitive result.[41]

Nor would applying the reasonable doubt rule to legislative sentencing factors jeopardize the sentencing process. A similar procedure already is used in California, where legislatively prescribed enhancement factors which increase the available penalty must be proven beyond a reasonable doubt; in contrast, judicially determined "aggravating" and

Constitutional Status of the Reasonable Doubt Rule, 75 CALIF. L. REV. 1665, 1697-1703 (distinguishing between legislative and judicial grading decisions based on need for individual assessments of proper punishment within legislatively prescribed limits).

40. *See* Dripps, *supra* note 39, at 1699 ("The common sense of the system is that the convict has qualified himself as a fit object of punishment within the [legislatively prescribed] discretionary range, and may not complain that he might have fared better before a different judge.").

41. The court in U.S. v. Davis, 715 F. Supp. 1473 (C.D. Cal. 1989) applied similar reasoning in finding that the new Federal Sentencing Guidelines, 18 U.S.C. §§ 3551-3742 (1987), required that the reasonable doubt rule apply to the Guideline's sentencing factors. The court concluded that because the Guidelines take away judicial discretion over how much weight to give factors in imposing sentence, the sentencing factors were no longer "procedural," but "go instead to the substantive right to due process of law." *Id.* at 1477, n.16.

"mitigating" factors which are weighed by the sentencing judge are not subject to the reasonable doubt rule.[42] In overturning a lower court decision relieving the state of proving certain enhancement factors beyond a reasonable doubt, the California Supreme Court explained,

> [the lower court opinion] fails to distinguish a trial court's decision in fashioning appropriate punishment from the need to establish before the trier of fact the wrongful criminal conduct for which punishment is being imposed. "Sentencing facts" such as aggravating and mitigating circumstances assist a judge in selecting from among the options of punishment the trier of fact's verdict has made available. They help the Court select, for example, the higher, middle or lower term and whether terms should be consecutive or concurrent. Such factors are largely the articulation of considerations sentencing judges have always used in making these decisions.[43]

The California Supreme Court's distinction strikes me as a defensible and easily administered approach that would further the purposes of the reasonable doubt rule without frustrating the need for some discretion on the sentencer's part.

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42. *See generally* People v. Hernandez, 46 Cal. 3d. 196, 205, 757 P.2d 1013, 1020, 249 Cal. Rptr. 850, 857 (1988) (unlike judicial sentencing factors, legislatively determined enhancement facts must be proven beyond a reasonable doubt). *Compare, e.g.*, CAL. PENAL CODE § 667.8 (West Supp. 1989) (additional term of 3 years imposed where kidnapping is for purpose of committing sexual offense) *with* CAL. R. CT. 421, 423 (listing aggravating and mitigating factors judges are to weigh in determining proper level of sentencing).

43. *Hernandez*, 46 Cal. 3d. at 205, 757 P.2d at 1019, 249 Cal. Rptr. at 856. The Court's decision was based on legislative intent, although the Court did note the potential constitutional problems if the reasonable doubt rule did not apply. *Id.* at 208, 757 P.2d at 1021, 249 Cal. Rptr. at 858. The Court distinguished the Pennsylvania statute at issue in *McMillan*, because the California enhancement provision, unlike the Pennsylvania statute, increased the range of punishment otherwise available. It is unclear, therefore, whether the California Supreme Court would take a different view if the legislation simply mandated a minimum sentence without increasing the potential maximum punishment.

One potential problem with the California system as currently implemented is that the judicially determined aggravating and mitigating sentencing factors are used to decide which of three legislatively determined punishment ranges are to be used. CAL. PENAL CODE § 1170 (1989). This intersection of legislative and judicial sentencing factors makes the system more constitutionally suspect than if the judicially determined factors were simply used to determine the sentence within a single range of punishment. *See* People v. Nelson, 85 Cal. App. 3d 99, 104, 149 Cal. Rptr. 177, 180 (1978) (Reynoso, J., concurring) ("By a rational constitutional analysis one may conclude that basic due process demands a beyond reasonable doubt standard before a person is incarcerated for an extra year [because the judge chose the highest legislative range of punishment after finding by a preponderance the aggravating facts outweighed the mitigating]. After all, no right is more precious than one's freedom."). Because the selection of the upper, middle, or lower term ultimately rests with the judge's discretion, however, the system can still be characterized as one of judicial grading rather than legislative. *See* People v. Ramos, 106 Cal. App. 3d 591, 606, 165 Cal. Rptr. 179, 187 (5th Dist. 1980) (although enhancement factors are mandatory, choice of level of punishment is discretionary).

In sum, I completely agree with Lou that the presumption of innocence embodies a rich and diverse set of safeguards necessary to maintain public respect and confidence in the criminal justice system. I still believe, however, that the reasonable doubt rule should apply based on how a legislature uses facts rather than by independent judicial assessment of a fact's constitutional importance. The approach may require rethinking and redefining certain legal doctrines, such as mental impairment defenses, and may necessitate a limited extension of the reasonable doubt rule into areas to which it has not previously been applied, like sentencing. These consequences of an expansive proceduralist approach to the reasonable doubt rule, however, are not excessive given the gain in protecting individuals from erroneous punishment. A strong reasonable doubt rule immune from legislative manipulation concededly cannot guarantee that innocent individuals will never be convicted, but a strong reasonable doubt rule can stand as an effort to further the constitutional value of avoiding erroneous convictions and punishment as far as is reasonably possible.