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Could the Presumption of Innocence Protect the Guilty?

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Abstract

At criminal trial, we demand that those accused of criminal wrongdoing be presumed innocent until proven guilty beyond any reasonable doubt. What are the moral and/or political grounds of this demand? One popular and natural answer to this question focuses on the moral badness or wrongness of convicting and punishing innocent persons, which I call the direct moral grounding. In this essay, I suggest that this direct moral grounding, if accepted, may well have important ramifications for other areas of the criminal justice process, and in particular those parts in which we (through our legislatures and judges) decide how much punishment to distribute to guilty persons. If, as the direct moral grounding suggests, we should prefer under-punishment to over-punishment under conditions of uncertainty, due to the moral seriousness of errors which inappropriately punish persons, then we should also prefer erring on the side of under-punishment when considering how much to punish those who may justly be punished. Some objections to this line of thinking are considered.

Key Words: Presumption of innocence; standard of proof; sentencing; tariff-setting.

Introduction

There are two obvious answers to our title question: obviously yes; and obviously no. The obvious affirmative answer is that the presumption of innocence protects the factually guilty who have yet to be found legally guilty. Imagine Kerry has committed a crime, but has refused to plead guilty. At trial, she is entitled to receive the protection afforded by the presumption of innocence, even though she is in fact guilty of the crime of which she is accused. The obvious negative answer is that once Kerry has been found legally guilty, she is no longer entitled to be presumed innocent (of that particular crime).

I'm not interested in either of those obvious answers here. Rather, I want to see whether, and put forward a case that suggests that, the presumption of innocence (and the attendant high standard of proof required to overturn it) that we acknowledge as proper in a criminal trial can continue to offer some protection to those who have been found *legally* guilty – i.e., those who we have already decided are guilty beyond reasonable doubt and are going to be

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punished for their crime. In particular, I suggest that the trial presumption and standard may protect the guilty when we are deciding *how much* punishment they ought to receive (either *ex ante* through legislation, or *ex post* through sentencing). It may seem that this is a contradiction – after all, I have just said that it is obvious that such persons are not entitled to be presumed innocent. The protection that the presumption of innocence and standard of proof may offer them, however, is indirect. They are not entitled to the *same* protections that they are afforded at trial, but if we accept that these procedural principles are directly morally grounded in a concern to avoid the serious badness or wrongness of punishing people who do not deserve, or are not liable to, punishment, then the principles revealed by that *grounding* (rather than the procedural rules themselves) may offer protection to those who have already been found guilty. In short, the argument is that since this direct moral grounding states that, morally speaking, we should prefer letting the guilty go free to punishing the innocent, it reveals a moral preference for under-punishment over over-punishment under conditions of uncertainty. This, it is argued, suggests that we should prefer under-punishing to over-punishing the *guilty* as well. If the presumption of innocence is grounded in a concern to avoid the intrinsic moral badness or wrongness of inappropriate punishment, then it seems that we should be as concerned with avoiding punishing the guilty too much as we are with avoiding punishing the innocent, since these errors are ultimately of the same type – giving people punishment they should not, in fact, receive.

If the analogy between the errors possible in deciding whether to convict and those possible in deciding how much to punish is taken to be full-blown, then legislatures should only prescribe punishments, and judges should only hand them down, to the extent that they are sure beyond reasonable doubt that such a punishment will not over-punish the offender. However, weaker interpretations of the argument are also available, as I will explain further. I do not defend the direct moral grounding of the presumption here, although, in the section that follows, I will elucidate it and show how it is a common, and indeed the dominant, way to justify the presumption of innocence, and one that is supported by those who offer opposing views on debates concerning the presumption within positive law. Nevertheless, my thesis is a conditional one: it explains how we should treat the guilty *if* the presumption is directly morally grounded. It may be, however, that the direct moral grounding does not offer the correct or best justification of the presumption and related standard of proof, and we should, perhaps, seek alternative ways of justifying the presumption.

The presumption of innocence and its direct moral grounding

Here is a somewhat stylised¹ account of how, in a democratic society, some particular person comes to be punished for some particular crime:

Stage 1: Legislation

Some body or bodies of representatives create a law which deems that:

- i. Some conduct is worthy of punishment and is therefore to be prohibited by criminal law (criminalisation)²
- ii. Those found to have acted in this way are to be subjected to punishment within a certain range³ (tariff-setting)

Stage 2: Trial

Some particular person is accused of having acted in the way criminalised by the legislator. A trial is set up to deem whether they did or did not act in this way.

Stage 3: Sentencing

If a person is found guilty at Stage 2, a judge may distribute some punishment to them, within the range specified by the legislator at Stage 1.ii (tariff-setting).

At Stage 2 we impose various procedural norms which protect the accused. These include the presumption of innocence and a high standard of proof, which together demand that the person or persons charged with deciding whether the accused is guilty or not initially presume the alleged offender to be innocent, and that they have a high degree of confidence in the proposition ‘the defendant committed the crime’ before they allow themselves to declare the defendant guilty. At Stage 1 we usually apply democratic majoritarian rules to aggregate votes, and (so far as I know) there are no political rules or norms that suggest what the individual legislator’s credence in the proposition ‘Conduct A ought to be criminal’ should be before she is prepared to vote for its being criminalised, or the level of punishment that ought to accompany it. Similarly, I do not know of any rules or culture surrounding how sure a judge at

¹ One of the ways in which it is oversimplified is that it does not afford prosecutors the central role that they in fact play in deciding who will be charged, and with what. A fully-developed account of what the direct moral grounding of the presumption of innocence tells us about the entire criminal justice system would have to recognise and incorporate this central role that prosecutors play. I am grateful to Doug Husak for pointing this out to me.

² I assume here, and throughout, that in criminalising the conduct, the legislature judges that that conduct is, at least sometimes, worthy of punishment, and that this is what makes the conduct appropriate for regulation by, and what is distinctive about, the criminal law.

³ This range may extend downward to ‘no punishment’ but must (as per note 2) extend upward to ‘some punishment’.

Stage 3 ought to be that the punishment they dish out (within the range specified by the legislature) is not *too much* punishment.

The presumption of innocence, on its own, is not much to write home about. It offers hardly any protection to any suspected offender. Imagine, for example, a rule that said that we must presume all persons innocent until we think we may have heard a rumour that they might be guilty. Whilst such a rule contains the injunction that we initially presume persons to be innocent, the standard of proof (if it can even be called that) required to overturn that initial presumption is so wishy-washy that it would not offer adequate protection to suspected offenders. Therefore, to have any teeth, and to be worthy of being called, as Viscount Sankey famously called the presumption, the ‘golden thread’ of a legal system (Simester & Sullivan 2003, 64; Ashworth 2006, 83), the presumption of innocence must be coupled with a robust epistemic standard required to overturn that initial presumption. In many jurisdictions, such as the one I am writing in, the standard is one of ‘beyond reasonable doubt’. Since the presumption of innocence only offers the kind of robust protection associated with it when it is coupled with this kind of standard of proof, I will run presumption and standard together in this essay, both in the sense that I will discuss them together, as one, and will assume that they should be justified together, motivated by the same kinds of concerns. This gives us a principle like this one:

Presumption of Innocence Principle (PIP): accused persons are to be *presumed innocent* until proven guilty *beyond any reasonable doubt*.

There are some very interesting legal debates about how best to understand and interpret the presumption of innocence in positive law. In particular, such debate focuses on whether the presumption is a purely procedural principle for use at trial, or whether it can or should have any role in enacting, interpreting or evaluating (and possibly even striking down) criminal laws. For example, does a law which lowers the standard of proof through the content of the offence (‘it is a crime to be reasonably suspected of X’) fail to respect the presumption, or is the presumption of innocence, being a procedural principle for criminal trials, simply not the kind of principle which substantive criminal statutes can or cannot respect?⁴

These debates can be fascinating, but I am not going to venture into them here. That is because regardless of whether or not the positive law presumption or standard of proof can

⁴ Contributions to this debate include: Tadros & Tierney 2004; Tadros 2007; Roberts 2005; Duff 2005.

tell us something about how we should view or treat existing criminal statutes, there are further questions about *why* we support the PIP (what are its moral and/or political grounds?) and whether or not *those* can tell us something about how we *ought* to make laws or treat guilty persons. These normative questions about what our criminal process (broadly conceived, from legislation through to sentencing) should look like, and what the grounds of the PIP might tell us about what they should look like, are the kinds of questions I am concerned with here, and they do not depend on our answers as to how we ought to view the presumption of innocence or standard of proof as a matter of positive law.

To illustrate this, consider the justifications offered for the presumption of innocence by two opposing protagonists in this debate concerning the best interpretation of the presumption in positive law. Victor Tadros, who has a ‘wide’ or ‘substantive’ view of the presumption, argues (with Stephen Tierney) that the presumption is justified because ‘it is generally seen as better for the guilty to go free than for the innocent to be convicted’ (Tadros & Tierney 2004, 402). Meanwhile, Paul Roberts, who advocates a ‘narrow’ or ‘proceduralist’ interpretation of the presumption of innocence, says that the presumption is justified ‘because wrongful conviction, censure and punishment are such grave injustices that strenuous efforts must be made – sometimes involving the sacrifice of other interests and values – in order to minimize the risk of condemning the innocent...The presumption’s normative significance lies in the moral imperative of expressing official censure of criminal wrongdoing, and the correspondingly grave injustice of wrongfully convicting a person who is innocent.’ (Roberts 2005, 188). Thus, although Tadros and Roberts offer contrasting interpretations of how courts should interpret the presumption, they offer strikingly similar normative justifications for the presumption and its central place in our criminal procedure and legal culture. Both focus on the grave error of mistaken conviction. Note that in doing so, they also, as I do, seem to assume that presumption and standard are justified in the same way.⁵

Indeed, the justifications offered by Tadros and Roberts are pretty standard and cohere with many other explicit or suggested defences of the PIP. They invoke William Blackstone’s famous claim that ‘it is better that ten guilty persons escape, than that one innocent suffer.’

⁵ It should be noted that I have used the justifications offered by Tadros and Robinson in print. After conversation with both, at the event for which this paper was originally written, I am not sure that either would currently endorse the direct moral grounding. But that they both reached for it, or something very close to it, in earlier work, is instructive, I think, both of how natural a way it is to understand the PIP, and in showing how both sides of the substantive/procedural divide have found it a natural way to think about the PIP.

(Blackstone 1836, 358). This type of justification, which focuses our attention on the badness or wrongness of punishing the innocent, and holds avoiding such an outcome to be significantly more important than convicting the guilty, is so common that Larry Laudan claims that the legal community has been ‘fixated’ on Blackstone’s ratio for more than two centuries, and that our rules of evidence and procedure are ‘founded...on a faith that Blackstone’s intuitions about the respective costs of error are sound and that they should be foundational’ (Laudan 2011, 197).

Such justifications of the PIP offer what I call a *direct moral grounding*. That is, they offer a story in which the procedural principle of the PIP is intimately and directly connected to our moral beliefs, in particular about the badness or wrongness of punishing the innocent and the moral importance of avoiding such an outcome. In order to hold the PIP as directly morally grounded, you would, I think, have to affirm two principles. One is an objective moral principle (in that it spells out what should be done, or what the best state of affairs is, regardless of our epistemic limitations); the other is a subjective moral principle (in that it spells out what should be done *in light of* our epistemic limitations).⁶ The objective moral principle declares that there is a fundamental and important moral difference between punishing the innocent and punishing the guilty. This is the kind of principle that is typically invoked in arguing against purely deterrence-based justifications of punishment. The second, subjective, principle spells out what we ought to do in a world (like ours) where we do not know with absolute certainty who the guilty are. It urges us to err on the side of under-punishing, since punishing the innocent (as per Blackstone) is far worse than letting the guilty go free. Thus a direct moral grounding of the PIP would read something like this:

DMG₁ (Objective): Punishment is only appropriately directed toward those who have performed punishable acts.⁷

⁶ A good illustration of the distinction between these two types of principle (objective and subjective) can be found in the following two utilitarian principles. Objective Principle: The best state of affairs is one in which happiness is maximised. Subjective Principle: Act so as to maximise *expected* happiness.

⁷ Although many who adhere to DMG₁ will be retributivists, I have avoided the language of desert here. That is because such language suggests that it is not only (objectively) permissible to punish the guilty, but that it is *good* to do so. However, others may support DMG₁ without endorsing this controversial retributivist belief. For example, those who adhere to ‘multi-level’ justifications of punishment, or those who see the guilty as *liable* to punishment, but not deserving of it, can support DMG₁ without being through and through retributivists. Thus, ‘appropriate’ here acts as a placeholder for a variety of justificatory relationships between guilt and punishment, *one of which* is desert. For examples of such positions, see: Hart 1959-60; Rawls 2001; Tadros 2011.

DMG₂ (Subjective): Punishment should only be directed toward those whom we are sure beyond any reasonable doubt may be appropriately punished, as per DMG₁.
Therefore, PIP: Persons should be presumed innocent until proven guilty beyond all reasonable doubt.

Most defences of the PIP appear to employ something like this reasoning.⁸ It is not my intention to defend it here, but rather to see what, if accepted, such reasoning can tell us about how, in all consistency, we ought to treat those who are found guilty of a (just) crime. It is my contention that the following conditional claim may well be true: *if* the PIP is directly morally grounded, we ought only to punish persons to the extent that we are sure beyond any reasonable doubt that we are not punishing them too much.⁹ Therefore, if there is reasonable doubt as to whether a punishment is too harsh, it should not be legislated for at Stage 1.i, or delivered at Stage 3. At the least, I think that the direct moral grounding, if correct, should *inform* our tariff-setting and sentencing decisions, and will offer significant protection to the guilty, even if there are good reasons not to set the bar *as high* as we do at trial.

PIP and tariff-setting and sentencing

In a previous article (Tomlin, forthcoming), I have explored what the direct moral grounding of the PIP may tell us about our criminalising practices and institutions (i.e., Stage 1.i).¹⁰ Here I

⁸ There are two, slightly differing, routes that one may travel from DMG₁ to DMG₂: in one route, the importance of setting the innocent free *outweighs* the importance of convicting the guilty; in the other, the importance of setting the innocent free *overrides* the importance of convicting the guilty. Blackstone appears to offer the outweighing approach, whilst someone like Laurence Tribe (1970) offers the overriding approach. See Tomlin forthcoming, section III for further discussion.

⁹ Or, at least, punishing a person too much *in such a way that will wrong the person*. I add this qualification since some theories of punishment may have a plurality of conditions on permissible punishment, only some of which are relevant here, as only some may involve wronging the person. As an illustration, Victor Tadros (to whom I am grateful for making this point to me) has a theory of punishment in which punishment is only permissible when: (a) the person is *liable* to punishment; (b) the punishment is *necessary* to avert some future harm; and (c) it is *proportionate*. Arguably, on such a view, if a person is liable to punishment and the punishment does not exceed some maximum penalty appropriate to that sort of wrongdoing, we would not, in giving the person a punishment which turned out to be non-necessary (but which we did not know was non-necessary), *wrong the person*, even if doing so means that we act (objectively, and all-things-considered) impermissibly. That is, whilst we would have given too much punishment, we would not have given too much punishment *in the way that animates the direct moral grounding of the PIP*. Whether any given element of a theory of permissible punishment involves the risk of *wronging the accused* or simply acting impermissibly will be a matter for each individual theory of punishment. For Tadros' theory, see: Tadros 2011, esp. Part IV.

¹⁰ The reasoning goes that the direct moral grounding focuses our attention on the intrinsic moral badness or wrongness of inappropriate punishment. And since it is unjust punishment that ultimately worries us, then we ought to be equally worried about the differing routes by which it may come to us, including unjust criminalisation. Therefore the direct moral grounding seems to suggest that we should

want to see whether a similar argument can be made with regard to Stages 1.ii and 3 of the criminal justice process, namely tariff-setting and sentencing – the stages which (in conjunction) decide *how much* punishment a guilty person should receive. Such an argument will be based on an equivalence thesis, namely:

Equivalence Thesis 2 (ET₂): Punishing someone more than they should be punished is ultimately the same kind of error as punishing someone for something that they did not, in fact, do. Neither error is inherently worse than the other.

If we believe that there are procedure-independent limits to how much we may punish persons, either in general or for particular crimes (if, for example, we believe that legislatures ought not to prescribe the death penalty, or custodial sentences for minor traffic offences) then we believe that legislatures and judges can make errors in deciding how much to punish the guilty – they can over-punish. ET₂ claims that this is ultimately the same kind of error as punishing the innocent. ET₂ can be supported, or motivated, via two routes – by thinking about whether, at root, the error of punishing someone too much is the same *kind* of error as punishing the innocent (the bad outcome which is declared so fearsome in the direct moral grounding of the PIP), and by thinking of cases which seem to support ET₂ (by showing both that the error does indeed seem to be of the same type, and that it can be just as serious).

As regards the first route, punishing someone too much is, indeed, at root, the same kind of error as punishing an innocent person. Both, ultimately, are errors of over-punishment. In the case of wrongful conviction (and, indeed, in the case of wrongful criminalisation) someone who should receive no punishment receives *some* punishment¹¹, whilst in the case of punishing someone too much, someone who should receive some punishment receives too much. Either way, a person receives punishment which (objectively) they should not receive. Punishing someone too much is akin to punishing them after they have already been appropriately punished. It is like punishing them for a second time for the same crime – if the person should receive six months in jail, then putting them in jail for a year gives them a double sentence. This is the same kind of error as giving somebody a first sentence of six months through wrongful conviction.

only criminalise when we are sure beyond reasonable doubt that the conduct is justly criminalisable. The argument for this conclusion is based on an equivalence thesis:

Equivalence Thesis 1 (ET₁): It can be as bad or worse to punish someone for something that they should not, in fact, be punished for, as it is to punish someone for something that they did not, in fact, do. Both are ultimately the same kind of error.

¹¹ Or, at least, will ordinarily receive some punishment. I discuss below the fact that conviction does not always lead to punishment.

As regards the second route, here is a case which helps illustrate this. Consider Adam, who is wrongly convicted of littering, and fined £200. Now consider Charlie, who is correctly convicted of littering but is sent to prison for five years. The injustice that Charlie suffers is ultimately of the same type that Adam suffers – punishment she should not receive – and the injustice she suffers is greater: the punishment is so grossly disproportionate that she is wronged far more than Adam is – he only has to pay a small fine and receive mild censure when he should receive none. If we think the potential injustice that someone who is accused of littering and may receive a small fine may suffer is so serious that it warrants the protection of the PIP, why are similar presumptions and protections not in place for the guilty, who may suffer greater injustice still?

Two types of error: factual and normative

Before moving on to examine some reasons why conviction decisions on the one hand and tariff-setting and sentencing decisions on the other may be importantly different, I want to separate out two different kinds of error that the thesis defended could potentially apply to: factual errors and normative errors. Although I argue that both kinds of error are ultimately of the same type and potentially as serious as one another, a more limited thesis would see the protections afforded to defendants through the PIP extended to the guilty in the case of *factual* errors only.

In regard to factual errors, consider the case of Charles Shonubi. Shonubi was arrested and convicted of drug-smuggling after being caught at JFK airport with 427.4 grams of heroin contained in balloons which he had swallowed.¹² However, in sentencing Shonubi, the judge, guided by the Federal Sentencing Guidelines, had to take into account not only the 427.4g that had been found on Shonubi, but the total quantity of drugs that Shonubi had smuggled (Bring & Aitken 1997). Therefore, whilst Shonubi's conviction was for the crimes associated with the 427.4g found in him at JFK, the sentencing also took into account an estimated amount of drugs he was thought to have brought in across seven prior smuggling trips to the USA. The initial sentence was calculated on the basis that Shonubi had smuggled 3419.2g, since he had made eight trips and was caught with 427.4g ($8 \times 427.4 = 3419.2$). The case then bounced back and forth between the District Court and the Second Circuit Court. Several issues are raised by the case. One is what kinds of evidence can be brought to bear in sentencing decisions. The

¹² For a summary of the cases involving Shonubi and discussion of some of the normative issues involved, see Colyvan, Regan & Ferson 2001.

question that confronts us here, however, is: how *sure* should we ask that a judge be that Shonubi had smuggled 3419.2g before basing his sentence on that amount?

Another way that this question may arise is this. Imagine that Jonathan is correctly convicted of a (just) crime. He ought to be punished. The sentencing guidelines (correctly) state that certain aggravating factors should enhance the penalty a judge delivers (for example, if the crime was committed with a racist motivation). How sure need the judge be that the aggravating factors were present before including them as part of the considerations for sentencing?

Surely, if we think, as per the direct moral grounding of the PIP, that the badness or wrongness of inappropriate punishment is sufficiently serious such that information used for conviction must be established beyond reasonable doubt, then we should expect the same standard of information used to calculate sentences. If a judge uses information in passing sentence, he punishes you on the basis of that information. If that is past conduct, he punishes you for that conduct. At trial, we don't accept that you should be convicted for past conduct unless that conduct has been proven beyond reasonable doubt. You are then punished on the basis of that conviction (and thus that conduct). Why let additional conduct slip in the back door later on, at a lower standard, when sentencing?¹³

¹³ In a series of decisions, the US Supreme Court has ruled that, in certain circumstances, allowing conduct to slip in the back door at a lower standard at the sentencing stage is unconstitutional. See: *Apprendi v. New Jersey*, 530 US 466 (2000); *Ring v. Arizona*, 536 US 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 US 220 (2005). The important principle, established in *Apprendi*, is that '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' However, the *Apprendi* principle differs from the position explored here, and the reasoning offered in support of it, in two crucial respects. Firstly, the strict epistemic standard of beyond reasonable doubt must only be met when the judge seeks to impose a sentence *beyond* the standard range, and not when the judge applies aggravating factors *within* the standard range (see *Williams v. New York* 337 US 241 (1949)). As *Williams* shows, within the standard range, or in an indeterminate sentencing regime, judges are permitted to hand down whatever sentence they choose, and the facts on which they base their decisions need not be shown beyond a reasonable doubt. Indeed, as Justice Breyer notes, dissenting in *Blakely*, under such systems, 'the judge could vary the sentence greatly based upon his findings about how the defendant had committed the crime – findings that might not have been made by a "preponderance of the evidence" much less "beyond a reasonable doubt."' As was stated in *McMillan v. Pennsylvania* 477 US 79 (1986), 'Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all.' Secondly, the *Apprendi* principle states *both* that facts increasing sentences beyond the standard range must be established beyond reasonable doubt *and* that it must be a jury who decides whether the facts have been so established. Importantly, the Supreme Court's stance is more focused on the jury being the appropriate decision-maker than on the appropriate decision standard (which is all my argument here focuses on). As the Court's decision in *Blakely* (written by Justice Scalia) states, 'Our commitment to

However, empirical errors, such as the amount previously smuggled (or not) by Charles Shonubi and the presence (or not) of aggravating factors are but one way in which we can deliver too much punishment – we can make normative errors too. Even when we *know* all the (non-moral) facts, we must still decide how much to punish given those facts. Unless we think that the legally defined punishment for a crime is, by definition, the morally correct one, then we think that legislators and judges can make moral errors – they can punish too much – and as such inappropriate (for example, undeserved) punishment can be the result of such errors. Think of Charlie, languishing in jail for five years for littering. Charlie did it. The punishment is in accordance with the laws of the land. But the punishment is disproportionate. My argument is that both kinds of error are (all else equal) as serious, and ultimately of the same type, as one another, and therefore I think that the direct moral grounding of the PIP (if correct) ought to inform the way that that we should err in cases of both empirical and moral uncertainty. However, a weaker thesis would apply such reasoning only to empirical errors. It would say that any empirical information to be used in sentencing must be proven beyond reasonable doubt.

The direct moral grounding seems to suggest that we ought only to punish persons when we're sure beyond reasonable doubt that we're not punishing when we should not be. This will include punishing people too much for crimes that they have, in fact, committed. Beyond reasonable doubt may be an impossible or impractical standard to expect in practice, but moral consistency would appear to demand it, and we could certainly move closer to it. Consider the following example. The legislature is enacting a new crime, making it a criminal offence to ϕ . 49% of the legislature are sure that ϕ -ing ought to attract a maximum penalty of two years imprisonment, whilst the other 51% place 49% credence in the two year maximum penalty and 51% credence in the idea that the appropriate maximum is four years. Almost half the legislature is *sure* that four years is too much. The others (just over half) think it almost as likely as not that four years is too much. Yet if legislators vote on a balance-of-probabilities basis and with a simple majority-wins rule, the legislature would attach a maximum penalty of four years imprisonment to ϕ -ing, despite a widespread belief that this would be to punish too much. Given the great lengths we go to to avoid convicting and punishing the innocent, can we justify being quite so blasé about punishing people too much?

Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial.'

Innocence and guilt vs. more and less punishment

So far the argument suggests that if the fear of giving punishment we should not give is what justifies the presumption of innocence, then we need to be as careful not to punish more than we should as we are not to punish when we should not. In order to argue against this, someone could simply deny that the direct moral grounding is the right way to understand the justification for or value of the PIP, or even deny that the PIP standard is the right standard to have in a criminal trial.¹⁴ These responses may be right – I think we need greater philosophical reflection on the purpose and grounding of the PIP – but I am going to set them to one side here. After all, my thesis is a conditional one, based on the (commonly used) direct moral grounding. (However, even though I am accepting, *arguendo*, the direct moral grounding, the argument here nevertheless contributes to the assessment of the adequacy of the direct moral grounding, for we are in a position to fully evaluate that way of grounding the PIP only once we fully understand its ramifications for all stages of the criminal justice process.)

If an adherent of (something like) the direct moral grounding wanted to block its apparent ramifications for Stages 1.ii and 3 of the criminal justice system, the most obvious strategy would be to point to important differences between the decision made at Stage 2 (conviction) and those that, together, decide how much to punish offenders. The main difference is that what we decide at Stage 2 (and, indeed, Stage 1.i) is whether to declare someone a criminal and render them liable to punishment, whilst at Stages 1.ii and 3 we decide how *much* to punish – whether to punish more or less. Therefore, the decision we protect with the presumption of innocence is a modal one (whether the person be branded guilty or not) whilst those we are considering here are of degree.

Why should this matter? Ultimately the direct moral grounding seems to instruct us to err on the side of caution – to prefer under-punishment to over-punishment. Punishing the innocent and punishing too much are both instances of inappropriate punishment. One reason we might see an important difference is that, as I have observed from the outset, the guilty, of course, (once *found* guilty) have no right to be presumed innocent. The presumption of innocence may be more than an epistemic starting point we instruct juries to adopt – it may be also reveal a condition on which our concerns about and protections against inappropriate punishment are based. Our fears may not be of inappropriate punishment tout court, but rather a specific incidence of inappropriate punishment – punishing *the innocent*. In other

¹⁴ For a provocative utilitarian argument along these lines, see Laudan 2011.

words, the guilty not only have no right to be presumed innocent, we ought to be less troubled by the idea of punishing them inappropriately.

One reason this might be the case is that once we know you to be guilty, you lose the status required for us to be worried about mistreating you through the medium of punishment (or your status in this sense is considered lesser). Yet surely we insist that each charge against a person be proven beyond all reasonable doubt, even after they have been found guilty of one crime. Imagine Nina is charged with two murders. Now imagine that she is found guilty of the first. Should we retain the presumption of innocence and beyond reasonable doubt standard for establishing whether she committed the second crime? Yes. Given this, it can't be that just because we know Nina is a criminal then she has lost status, making us less worried about inappropriately punishing her. The argument that we should be less worried about inappropriately punishing the guilty cannot be based on loss of status, otherwise we would be comfortable with a lower standard at trial for those already found guilty of one crime.

Another way that the binary choice of guilty or not guilty might be importantly different from the scalar decision of how much to punish is to do with censure.¹⁵ Criminal law theorists often point to the concept of censure to explain what is distinctive about the criminal law, and therefore it may be important in justifying the distinctive procedural protections that come with that area of law. In the decisions taken at Stages 1.i and 2, the question concerns whether a type of conduct or a particular person ought to be censured. But in tariff-setting and sentencing decisions we have already decided that the conduct or person ought to be censured. That key decision has been made. Now (an argument might go) we are only deciding how much *hard treatment* those who are shown to have acted in the prohibited way should get. And since censure is what is special about the criminal law, and it is inappropriate censure not hard treatment that we fear (as evidenced by our comfort in distributing hard treatment on the basis of a balance of probabilities standard in the civil law), then we can worry less about errors in these kinds of decisions. The question of censure is no longer a live one.¹⁶

¹⁵ I am grateful to Lucia Zedner and Mike Redmayne for discussion here.

¹⁶ This would avoid the Nina counter-example, since the question asked at trial would be 'should we censure Nina for *this* crime?' and so she should be equally protected against inappropriate censure at each trial.

To back up this thought, we can distinguish between conviction and a decision to punish. Thus far, I have written as if what worries us about the decision to convict is that we might inappropriately punish. However, not every conviction leads to punishment, and yet we think that every conviction decision should be protected by the PIP. This may suggest that it is not punishment that worries us, but conviction. Why should we worry about conviction but not, to the same extent, about punishment? The only plausible answer seems to be that it is conviction that carries the censure of the community.

There are two problems with such an argument. The first is that it *fully* distinguishes the censure and hard treatment elements of punishment, seeing censure purely as something we do or don't do, and as delivered purely through conviction, and hard treatment as an independent imposition, of which we may give more or less. However, in reality censure (a) is delivered *through* hard treatment, and, consequently, (b) is not simply either delivered or not. We censure murderers more than we do litterers, and we do so *precisely* by giving them *more hard treatment* than litterers. Given this, censure goes *along with* hard treatment, and so censure is still a live issue in sentencing and tariff-setting decisions.

Secondly, while the division between 'no censure'/non-criminal to 'some censure'/criminal may be a very important one, it is intuitively implausible to suggest that censuring somebody who should not be censured is always a worse error than censuring somebody too much. Consider innocent people who are fined minor amounts in criminal law courts. They are publicly censured, and are given very little hard treatment. Now think of the person given a long prison sentence after being (rightly) convicted of littering. This second error is far more serious than the first – even though some censure is appropriate. Given this, the no censure/some censure line cannot be all that matters, and even if it needs *more* protection, similar protection ought to be offered against mistakes of degree.

It is also, I think, implausible to think that inappropriate conviction is feared *purely* because it carries inappropriate censure (as defined independently of punishment). Conviction's status as the *gateway* to punishment surely plays a huge role in its normative status and, consequently, the need to protect the innocent from it.

Another thought, along similar lines, is that the error of giving too much punishment, per unit of punishment, decreases as the level of punishment increases. So, giving 501 units of

punishment when 500 should have been given, whilst being the same *kind* of error, is not an error of the same *magnitude* as giving one unit when zero units should have been given, nor giving eleven units when ten units should have been given. Call this the *diminishing marginal significance of over-punishment*. This may well be correct – it seems intuitively plausible – but there are two things to say to such an argument pressed against my thesis here. Firstly, this would suggest that while we can be more comfortable with errors in sentencing than errors in conviction, at the least we need a sliding scale of protection, and at the lower levels of punishments, these would need to be almost the same as the trial standard.

Secondly, while the *diminishing marginal significance of over-punishment* seems plausible, so does the *diminishing marginal significance of punishment*. It may well be the case that you wrong someone less by giving them 501 days in jail rather than 500 than you do by giving them one day in jail when you should give them zero. But it is more important to punish someone who ought to be punished than it is to punish someone to exactly the right amount. In recognising the importance of the moral line between guilt and innocence, my imaginary interlocutor should also recognise that it is not only more important to keep the innocent on that side of the line, but also to get the guilty over it. So, at the higher levels of punishment, not only are the errors less serious, but the countervailing considerations in favour of more punishment (whether retributive or deterrence-based) also seem less important. Thus, we should expect to see the balance of reasons, currently highly in favour of under-punishment and against risking over-punishment, stay in roughly the same place.

Fair warning

I would argue that a more important difference between conviction decisions and quantity of punishment decisions, and one more likely to protect tariff-setting and sentencing decisions from the ramifications that a direct moral grounding of the PIP seems to suggest, concerns fair warning. Those who are wrongly convicted didn't do what they are alleged to have done. Those who are punished too much did do what they are alleged to have done, and, in a country within which rule of law principles are adhered to, were forewarned that their conduct was illegal and would be met with this level of censure and sanction.

Why should 'fair warning' make overly harsh punishment less troubling? It cannot simply be that the people were forewarned: telling people you are going to treat them unjustly before you do it is, in and of itself, of no moral significance. (Consider a James Bond baddy who

explains to his victims what he is going to do and then does it. This is morally no better than just doing it). The important difference appears to be that those who are rightly convicted but unjustly punished were given an *opportunity to avoid* the conduct which has landed them in trouble, whilst those who are wrongly convicted are not.

I certainly think this opportunity to avoid makes an important difference to our judgement of the person who is punished. The person has been foolish or imprudent – they end up getting punished when they could have avoided this punishment. But does it make a difference to our judgement of *the punisher's* actions, or the moral badness or wrongness of the over-punishment? Does the imprudent behaviour of the criminal make the (*ex hypothesi* unjust) punishment less troubling or less unjust? I am not sure that it does. Consider this example. Ian is confronted by a highwayman. The highwayman, as is customary, offers Ian a choice: 'your money or your life'. Ian refuses to give his money. The highwayman kills him. Now, Ian has certainly been foolish, in a way that someone who is the victim of an ordinary murder is not. But does this make Ian's killing less morally troubling? Can Ian's imprudent behaviour make the killing somehow less unjust? The answer would seem to be 'no'. The threat was an unjust threat, and while the person reacted in a foolish way to the unjust threat, this does not change the fact that they were given an unjust option set.

Of course, there are various important differences between Ian's case and the case of someone who acts in a (justly) criminalised way, but is given a prior threat of unjust over-punishment. Ian has a right to act in the way he does, even though it is foolish, whilst the person who fails to respond to just criminalisation coupled with unjust threats of punishment has no such right. But the person *does* have a right not to be threatened *with that* – the threat remains unjust. Another important difference is that the highwayman *intentionally* makes an unjust threat, and intentionally kills Ian, whereas the state does not *intentionally* over-punish – it does so because of moral or empirical errors. Regardless of these important differences, the example shows that foolishness in the face of an opportunity to avoid some conduct does not in and of itself seem to make an unjust threat based on that conduct less unjust, or its being carried out less morally problematic.

Those who advocate fair warning/opportunity to avoid as marking an important moral difference between incorrect conviction decisions and unjust punishments presumably do not think of fair warning/opportunity to avoid as being *all* that matters. It is, after all, in Andrew

Ashworth's words, 'the social and legal consequences of being convicted of a crime' (Ashworth 2006, 83) that explain why the PIP is so important. Therefore, if we wish to accord reasonable avoidability (or the lack thereof) a central place in the justification of the PIP then it must be that the stringent epistemic conditions of the PIP apply at Stage 2 of the criminal justice process because there the person who *didn't* do it is threatened with unjust punishment which they did not have the opportunity to avoid, whilst those who *did* will be punished justly for something they had the opportunity to avoid. So it is the *combination* of unjust punishment *and* the failure to provide opportunity to avoid that makes the errors of conviction particularly serious.

If this is the case, further work would need to establish, firstly, *how* inappropriate punishment and opportunity to avoid relate and, secondly, how we ought to weigh the two kinds of mistake – just *how* important is reasonable avoidability compared with disproportionate punishment?

Before going on to make some observations concerning both of these issues, I would first like to note that if it is accepted that the lack of reasonable avoidability provides *some* of the justification of the PIP, none of this threatens my (weaker) conclusion that the grounds of the PIP can tell us *something* about how we ought to treat the guilty – if the fear of unjust punishment plays *any* role, then it ought to play a similar role in figuring how much punishment to distribute. In addition, I think that the discussion here helps illustrate how thinking about what the direct moral grounding of the PIP can tell us about other areas of the criminal justice process helps us think through whether we wish to endorse the direct moral grounding in the first place, and, if we do, how best to develop it. For example, by thinking about whether and how the direct moral grounding directs us in our treatment of the guilty, the question of what role, and how important, the lack of reasonable avoidability is in justifying the PIP becomes more vivid.

To turn our attention back to the question of how reasonable avoidability and unjust punishment relate, there seem to be three possible relations:

1. Reasonable avoidability is a *necessary condition* of just punishment¹⁷;
2. Reasonable avoidability is an *element of* just punishment – it contributes to the justness of some punishment;

¹⁷ For an argument against this stance, see C.H. Wellman's example of Nazi war criminals in Wellman 2012, 388.

3. Reasonable avoidability is a separate consideration from the justness of punishment.

Both of the first two possible relationships make reasonable avoidability *part of* the justness of punishment. Seeing things in one of these ways seems to put us in a position whereby the error of incorrect conviction is objectionable because of concerns about unjust punishment, and *part of* that injustice is explained by the lack of opportunity to avoid. But this makes failure to provide the opportunity to avoid punishment *the same kind of error* as punishing when we ought not to punish, or punishing too much – unjust (undeserved, for example) punishment is what we fear, and failure to provide opportunity to avoid is but one way in which a person may come to experience the badness or wrongness of unjust punishment.

If this is the case, our argument here remains intact – the direct moral grounding tells us that we morally-speaking ought to prefer not giving unjust punishment over giving just punishment, and since over-punishment is a kind of unjust punishment, we ought to be very careful not to deliver it. Only if lack of fair warning is a *distinctive* kind of wrongness can it play a distinctive role in the justification of the PIP, and one that is not present in the case of tariff-setting and sentencing decisions.

If the relationship is to be understood in this way then this raises the question of *how important* lack of fair warning can be, compared to other kinds of wrongdoing. Consider this example: people who are over-punished by being sentenced to death, or given long prison sentences, for littering. These people suffer a massive injustice, even though they were forewarned of it. I think these punishments represent more serious wrongs than fining someone £20 for littering even if they were not forewarned. Opportunity to avoid may be important, but it doesn't seem to me to be the only thing, or even the most important thing, in judging whether and how much someone has been wronged by some punishment.

Finally, to further consider what work fair warning can do in splitting apart conviction decisions from punishment decisions, consider this from the two perspectives from which punishment decisions are made. Judges are to sentence people within a range of punishments of which they were given fair warning. But note that they were given fair warning of a *range*, and the question the judge must answer is what punishment to distribute *within that range*. This makes the role of fair warning complex. In some sense, the criminal was given fair

warning, but in another, and in the sense in which the judge has to make the decision, they were not: they were not told *where* in the range their punishment would sit. And since it is *this* that the judge must decide, the judge, perhaps, *cannot* think of the person as having been forewarned in the relevant sense.

Now consider the legislature. The legislature does not have an individual person in front of it, whom it can say has been forewarned. Rather, the legislature's role is to decide *what* forewarnings, what *threats*, it ought to issue. Everyone will therefore be forewarned. The legislature must balance the goodness that can come through its warnings and punishments (retributive or deterrent) against the *risk* of unjust threats and punishments. As far as fair warning is concerned, all is equal. But the threat of unjust punishment remains. It must decide what to warn *of* – the legislature is the highwayman here. Therefore, fair warning seems something of a red herring from this *ex ante* perspective.

An argument for abolition?

Is this an argument for abolitionism?¹⁸ I don't think it need be. At its most mild, the thesis simply says that the direct moral grounding of the presumption of innocence, if correct, tells us that similar concerns ought to fuel protections for those who have been found guilty. At its most extreme, the thesis says that legislatures and judges must be sure beyond reasonable doubt that their punishments are not overly harsh. Why should we think that this could lead us to an argument for abolitionism? My argument here relies on there being uncertainty and disagreement as to the appropriate level of punishment for a given offence or offender. Some think this leads directly to abolitionism. Consider the following argument, adapted from one, specifically aimed at retributivists, made by Greg Roebuck and David Wood (2011):

1. It is impermissible to punish someone disproportionately;
2. Due to moral uncertainty and disagreement, we cannot be sure that our punishments are proportionate;

Therefore

3. We should not punish.

1. gets off the ground when we think of intentionally or knowingly punishing someone too much. In ordinary circumstances, this will be impermissible. However, it does not follow from the fact that it is impermissible to intentionally bring about an outcome that it is

¹⁸ I am grateful to Doug Husak for encouraging me to address this question.

impermissible to *risk* bringing it about. For example, it would clearly be impermissible to intentionally run over a child in your car, but it does not follow from this that it is impermissible to drive, even though driving creates a *risk* of running people over.

Consider the factually innocent. Again, in ordinary circumstances, it will be impermissible to intentionally and/or knowingly punish the innocent. At the least, there is something regrettable about doing so that is not present when we intentionally punish the factually guilty (proportionately). However, if we were concerned about *never* punishing the innocent, we would have no punishment, since any punishment system *risks* punishing the innocent. Yet rather than seeing this risk as a reason to abolish punishment, we are prepared to risk *some* non-intentional unjust punishment in order to secure some of the goods of just punishment. I don't think retributivists (or anyone else) are necessarily committed to 1. in the way that Roebuck and Wood claim they are. This is because Roebuck and Wood don't appear to observe the distinction between objective and subjective normative claims, and make the jump from something being objectively objectionable or impermissible to *risking* such an outcome being subjectively impermissible under conditions of uncertainty. Retributivism claims that it is *objectively* wrong or bad to punish the innocent, or to punish people too much, but it does not follow that it is always *subjectively* all-things-considered wrong to do so (or risk doing so) – we need to know how to balance different risks. Only if the badness or wrongness of undeserved punishment *infinitely* outweighs or completely overrides the goods of deserved or appropriate punishments should retributivists accept this abolitionist conclusion. Given that retributivists generally support the PIP but do not support abolitionism, they seem to accept some risk of unjust punishment, and thus deny the *subjective* position that Roebuck and Wood suggest they accept. Thus I don't think people are committed to 1. in the way that Roebuck and Wood need them to be for their argument to go through.¹⁹

Therefore, the question is: how *much* risk should we accept? Let's say that the more extreme conclusion of the argument presented here is true – that we ought not to punish unless we're sure beyond reasonable doubt that we are not punishing too much. Whilst Roebuck and Wood may be wrong that (subjectively speaking) it is always (all-things-considered) wrong to risk over-punishing, the argument here says that as soon as there is reasonable doubt about a

¹⁹ See, further, Alexander 1983.

punishment's proportionality, then we must not punish beyond that level. Could *this* be an argument for abolitionism?

It *could* be, but that would rely on the validity of two further claims. Firstly, the position that giving people *any punishment* would be to over-punish them must be a reasonable one. Since we must only punish up to the point where there is reasonable doubt about the punishment, this position only supports abolitionism if all punishment creates reasonable doubt. Therefore, the argument must rely on abolitionism being a reasonable position. As such, it is not in and of itself an independent argument for abolitionism, but rather one that tells us how a pre-existing reasonable belief in abolitionism ought to figure in our moral deliberation. The abolitionist may have the scales weighted heavily in her favour with this argument, but she must still make her case on independent grounds. If our moral uncertainty is between whether murders ought to be punished more or less (but not at all about whether they ought to be punished at all) then the argument here says we ought to punish them less, not that we ought not to punish them. Uncertainty, pace Roebuck and Wood, doesn't lead us to *no punishment* unless no punishment is (independently) a reasonable option.

But in order for this argument to lead us to abolitionism, it must *also* be true that the direct moral grounding of the PIP exists as a principle and grounding *external to* and not *within* a theory of punishment or criminal law. To explain: imagine someone who affirms the direct moral grounding as explaining the epistemic standards we need to adhere to *if* we're going to have a system of criminal law and punish people. Here the PIP is a principle for use *within* a system of punishment, and not, therefore, a principle that can be used to question whether we ought to have such a system at all. (After all, DMG₁ asserts the justness of punishment). We have already decided to punish people, the question is who and how much. Another way we might hold the PIP is as a fundamental moral position – if we are going to punish people *at all* we must be sure beyond reasonable doubt that such punishment will be appropriate. Here the PIP *could* challenge the notion of a punishment system, but only if, as explained above, abolitionism is an independently reasonable position.

Conclusion

When people, whatever they believe the best interpretation of the presumption of innocence (and its attendant high standard of proof) to be, try to defend the PIP, they will generally

reach for something like Blackstone's argument, or a similar moral argument that focuses our attention on the dreadful consequences of unjust punishment.

Here, and in previous work, I have tried to show that, if correct, such an argument has major ramifications for how we should behave and make decisions in other areas of the criminal justice process. It may be that we reject these ramifications. But in order to do so, I think we either need to abandon our existing justifications of the presumption of innocence, or to provide more nuanced versions of them.

Even if the argument does not go through undiluted, it seems likely to me that there is an unjustifiable cognitive dissonance between the extreme lengths we go to in order to protect the legally innocent and the comparatively cavalier way in which we make and enforce the criminal law (Husak 2008, ch. 1; Ashworth, 2000). Furthermore, the very grounds on which we affirm the procedural protections we endorse at trial can be used to inform a more careful approach to legislation and sentencing.

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