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What's Truth Got to Do With It? The Burden of Proof Instruction Violates the Presumption of Innocence

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In Wisconsin state courts, jurors are instructed that their role is to find the truth. Wis JI - Criminal 140 instructs jurors that: "While it is your duty to give the defendant the benefit of every reasonable doubt, you are not to search for doubt. You are to search for the truth."

This statement is read to jurors in every county in Wisconsin without objection. This portion of the instruction ought be objected to by the defense as it violates the right of the accused to the presumption of innocence. The instruction also is contrary to the multiple purposes served by the criminal jury trial.

Whatever our broader hopes for our justice system, carefully speaking, a criminal trial is not a search for the "truth." In actuality, a trial is an evaluation of the evidence presented in order to determine if the State has proved each element of each alleged offense beyond a reasonable doubt.

The criminal trial serves a number of goals that are inconsistent with a lay understanding of truth, by using of a higher burden of proof; by limiting the ability to have new evidence (even of actual innocence) considered; by using the exclusionary rule, the Rules of Evidence and privileges to exclude evidence; and by using a non-expert jury.

In a criminal case, an accused is entitled to a determination at a burden of proof higher than that of civil cases. The use of a burden of proof higher than that in civil cases expresses a preference for erring on the side of liberty, not its loss. *In re Winship*, 379 U.S. 358, 372 (1970) (Harlan, J., concurring).[1] By requiring that a jury return a verdict of guilt only if it finds that the allegation was proven beyond a reasonable doubt, the system reflects a preference for a truth that is probabilistic, not absolute, and thus different from a lay understanding of the term "truth."

In all criminal trials, the system is one of uncertainty, which remains following a jury verdict. Some residual

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doubt typically exists as to whether the alleged acts were committed by the accused following a jury verdict. As such, the system does not seek "the truth;" it opines whether or not the State has met its burden of proof. An acquittal is not a finding of an accused's innocence, but merely a finding that the State has not met its burden. A conviction is not a finding that an accused is actually guilty, but a finding that the State has met its burden of proof beyond a reasonable doubt.[2]

As Professor Alan M. Dershowitz explained in *Reasonable Doubts*:

If the only goal of the adversary system were to find "the truth" in every case, then it would be relatively simple to achieve. Suspects could be tortured, their families threatened, homes randomly searched, and lie detector tests routinely administered. Indeed, in order to facilitate this search for truth, we could all be subjected to a regimen of random blood and urine tests, and every public building and workplace could be outfitted with surveillance cameras. If these methods — common in totalitarian countries — are objected to on the ground that torture and threats sometimes produce false accusations, that objection could be overcome by requiring that all confessions induced by torture or threats must be independently corroborated. We would still never tolerate such a single-minded search for truth, nor would our constitution, because we believe that the ends — even an end as noble as truth — do not justify every possible means. Our system of justice thus reflects a balance among often inconsistent goals, which include truth, privacy, fairness, finality, and equality.[3]

The U.S. Supreme Court has made clear that the justice system also has an interest in finality that may be more important than truth. The Court ruled that there are limits to the ability of inmates to raise new evidence even in claims of actual innocence. *Herrera v. Collins*, 506 U.S. 390 (1993) (finding that some wrongful convictions and even executions of innocent defendants must be tolerated due to the need for finality in capital cases.)

In *Herrera*, the Court declined to expand the right to *habeas* relief to cases of evidence of innocence. The Court stated that, "[it] would be ... disruptive of our federal system ... to provide for federal habeas review of freestanding claims of actual innocence." *Id.* at 401. The majority opinion carved the possibility of an exception, by noting:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. *Id.* at 417.

This decision pointedly illustrates that "truth" is but one aim of the criminal justice system and that "finality" is another important aim of the system. In a different way favoring defendants, the justice system's interest in finality is also expressed in the use of statute of limitations or statutes of repose to bar claims after a certain point in all matters other than murder.[4] A statute of limitations values a concern for the stale recollection of witnesses, the possible lack of other evidence and the need for an individual to move forward in life without fear of criminal charge, over a general notion of truth: after all, truth has no arbitrary cut-off date.

The interest in finality is also illustrated by the prohibition against double jeopardy. The court system

operates differently than the common idea of searching for truth in life or scientific or historical study, where new evidence can lead to a re-examination of what is true at any time.

The exclusionary rule also supports the idea that preventing police misconduct can compete with truth as a value, and in some cases may even transcend it. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court fashioned a remedy for police misconduct which would not allow evidence obtained by police action in violation of the defendant's constitutional rights to be introduced even at a state trial. Therefore, the jury was prevented from hearing evidence (in that case, learning about obscene materials found by the police) which would have helped reach a determination of the truth of the accusation. Even beyond the inability to hear evidence at trial, the Supreme Court went further and explicitly recognized that the deterrence of wrongful government conduct may be so important that it is worth the cost of freedom for a criminal.[5]

The Rules of Evidence also filter the types of evidence that may be presented to a jury. The most basic rules filter evidence that is not relevant to a determination of these charges, or that is unduly prejudicial. The most telling example in Wisconsin may be the exclusion of details of prior criminal charges, which prevents a jury from focusing on the criminal history of the defendant and redirects focus instead upon the pending allegation. In contrast, outside of the courtroom, the nature of a prior conviction would matter in choosing whom to watch your child, whom to associate with as friends, and whom to date or marry. As such, the system expresses a preference against common factors used in making a decision and dictates that in determining whether to convict an individual of a crime, we ought minimize the criminal history presented to a jury to the number of prior convictions and not their nature.

Hearsay is also excluded from trials, with some exceptions. This is based on concerns for fairness (specifically, confrontation) and reliability. As the Wisconsin Court of Appeals has noted, "[h]earsay should be carefully scrutinized since it is often unreliable: the statement is taken out of context and the demeanor of the witness cannot be observed." *State ex rel. Ortega v. McCaughtry*, 221 Wis.2d 376, 388, 585 N.W.2d 640, 646 (Wis. App. 1998). Additionally, out of court statements in criminal cases can offend an accused's rights under the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36 (2004). Again, though, outside the courtroom we consider all sorts of hearsay and regularly sift it for reliability, rather than rejecting it outright.

Other evidence, although it may help lead a jury to the truth isinadmissible based on the grounds of privilege. Conversations by an accused with his current or former counsel, his spouse, his physician, his priest, his therapist (and to a limited extent his Dean) are all deemed privileged. The context of these conversations generally cannot be introduced at trial. These privileges are based on principles that in some circumstances the ability of individuals to speak freely without fear of reprisal has an importance greater than truth. Similarly, the accused's decision to remain silent cannot be introduced at trial under the Fifth Amendment, which recognizes the importance of freedom from self-incrimination by keeping the choice to exercise this constitutional protection from the jury.

Some evidentiary privileges also operate to the detriment of the accused. For example, the sexual history of an accuser is protected, with some exceptions, by the rape shield privilege, which keeps relevant information from a jury in order to encourage complainants to speak to police. Limitations are also placed on the accused's access to relevant medical records of her accuser. In carving these exceptions, a value is placed on privacy and the benefits of confidential communications which is deemed greater than allowing the jurors to hear the contents of these conversations or reviewing documents which may help them reach a commonsense determination of the truth.

The search for truth is also limited by the use of a jury from the community. A different type of decision might be reached if stock traders sat as jurors in a white collar criminal case, or ex-convicts or law enforcement officers sat exclusively in criminal cases generally. In searching the truth in other situations, typically experts in the field conduct the investigation. However, in our trial system we explicitly require a jury of people without regard to their expertise, and one that cannot be segregated by use of peremptory strikes in a discriminatory manner.

Referring to a jury's role as the "search for truth" thus misstates the jury's unique role in the criminal justice system. The jury's determination is something different than seeking the common understanding of "truth." A lay jury makes a collective determination whether the evidence (limited by Rules of Evidence, constitutional rights of the accused, and specific privileges) is sufficient to demonstrate that the prosecuting party proved its case to a certain standard unique to the criminal court system ("beyond a reasonable doubt"). This evidence may only be presented once by the prosecution and in most circumstances there are time limitations within which an individual must be charged. Further, the jury is told to find the "truth," but the accused is limited in providing relevant evidence based on the rape shield law, the *Schiffra-Green* decisions and other handicaps in getting relevant information regarding his accuser. Even following a trial, the jury does not and cannot know for certain whether the accused committed the offense despite its collective wisdom. Therefore the courts ought not include the broad language in the final paragraph of Wis JI - Criminal 140 as it misstates the role of the jury. This paragraph detracts from the State's burden of proof to the detriment of an accused.

Defense counsel should request that Wis JI - Criminal 140 be read without inclusion of the final paragraph describing the jury's job as a "search for the truth." The removal of this paragraph would charge the jury to do its duty in a manner more consistent with the presumption of innocence afforded to everyone who is criminally charged.

Endnotes

1. Justice Harlan wrote that, "I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value that it is far worse to convict an innocent man than to let a guilty man go free." *See also* Starkie, *Evidence* 751 (1824), ("The maxim of the law ? is that it is better that ninety-nine ? offenders shall escape than that one innocent man be condemned."), quoted by Justice Stevens in his opinion in *Schlup v. Delo* 513 U.S. 298, 325 (1995).

2. Indeed there is little dispute that wrongful convictions occur. Numerous criminal justice studies have attempted to quantify the frequency of wrongful convictions. For an up-to date list of DNA exonerations, *see* The Innocence Project, *Innocence Project Homepage*, **http://www.innocenceproject.org** (last visited December 21, 2005). While this website collects information regarding convictions of innocent people where DNA evidence is available, it is far more difficult to determine how many innocent individuals have been convicted in other circumstances. Studies suggest that this number may be far higher than expected. *See* Samuel R. Gross et. al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 527 (2005). *See also* George C. Thomas III et. al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 271-73 (2003) (reviewing studies to support the conclusion that when it comes to protecting the innocent, "the system fails far more often than most people thought, and far more often than is acceptable").

3. ALAN M. DERSHOWITZ, REASONABLE DOUBTS 42 (1996).

4. The irony is that the system allows for prosecution of murder without any statute of limitation, showing a preference for prosecuting this serious offense over a concern for finality. But, it has also recognized finality as superior to preventing the system from executing the actually innocent. A reduced concern for finality at the outset may enhance the likelihood of convicting an innocent person; then an increased concern for finality after the conviction may make it more difficult to stop the innocent man's execution, if only belatedly he gathers evidence of his innocence.

5. *Mapp v. Ohio,* 367 U.S. 643, 659 (1961) ("The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence"). ■