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a fine of fifty dollars by the superior court was not shocking enough by itself to compel the conclusion that the increased sentence had been motivated by judicial vindictiveness. The *Colten* Court therefore required some evidence indicating why the superior court had treated the defendant any differently or more severely than defendants originally before the court.[51] In *Pearce* the increased sentence itself was sufficient. In *Colten* the Court found the increased sentence insufficient without more evidence. Whether the Court was motivated by the factual distinctions between the two types of appeals or by the belief that such a decision was required to preserve the effectiveness of the inferior court system, the rationale for the decision is debatable.

The effects of *Colten* on the practical operation of the inferior court system remain to be seen. Whether a criminal defendant convicted in an inferior court will now more readily accept the sentence of the lower court or whether inferior court judges will become more disposed to offer lenient sentences as an incentive to defendants to accept their judgment as final cannot be predicted. Yet two effects of this decision are certain: the benefits of the inferior court system in terms of facilitating the efficient administration of criminal justice have been protected from one possible threat of erosion, and the potential threat of isolated instances of vindictive sentencing in less serious criminal cases has not been eradicated.

ROBERT LOUIS QUICK

Criminal Procedure—Use of the Reasonable Doubt Standard in Ruling on a Motion for Judgment of Acquittal

Rule 29(a) of the Federal Rules of Criminal Procedure instructs the trial judge to "order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses."[1] For many years the various federal courts of appeals set different standards for a trial judge in ruling on motions for judgment of aquittal. However, the recent decision in *United States*

[51] 92 S. Ct. at 1960.

[1] FED. R. CRIM. P. 29(a).

v. Taylor[2] has brought uniformity[3] among all of the circuits with regard to the judicial standard of evidence necessary to allow jury consideration of a criminal charge.[4] In that case Judge Friendly writing for the Second Circuit overruled the so-called "Second Circuit doctrine,"[5] promulgated by Judge Learned Hand, which provided that the standard of evidence necessary for a trial judge to deny a motion for a directed verdict in a civil suit and to disallow a motion for judgment of acquittal in a criminal case were identical.

A motion for judgment of acquittal can be made after the prosecution closes, after both sides rest, or after the jury returns an adverse verdict.[6] The trial judge is then compelled to rule as a matter of law[7] on the sufficiency of the prosecution's evidence.[8] The issue in controversy among the various Courts of Appeals[9] had been the proper standard to apply in assessing whether the prosecution had produced a sufficient quantum of evidence to justify presentation of the case to the jury. The standard now uniformly adopted was announced by Judge Prettyman in *Curley v. United States*:[10]

> The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; . . . .

By 1967, all the courts of appeals except the Second Circuit had adopted this standard.[11]

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[2]464 F.2d 240 (2d Cir. 1972).

[3]*See* text accompanying note 11 *infra*.

[4]Actually, the overruling of the "Second Circuit doctrine," *see* text accompanying note 5 *infra*, was dictum as the defendant's conviction was affirmed on the ground that the evidence against him was sufficient to pass the newly adopted and more stringent test. 464 F.2d at 245.

[5]*See* text accompanying note 12 *infra*.

[6]FED. R. CRIM. P. 29(a), (c).

[7]*See, e.g.*, FED. R. CRIM. P. 29(a); 5 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE §§ 2073, 2076 (1957).

[8]FED. R. CRIM. P. 29(a).

[9]*See, e.g.*, Hays v. United States, 231 F. 106, 108 (8th Cir. 1916), *aff'd*, 242 U.S. 470 (1917).

[10]160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947).

[11]*See, e.g.*, Parker v. United States, 378 F.2d 641 (1st Cir.), *cert. denied*, 389 U.S. 842 (1967); United States v. Allard, 240 F.2d 840 (3d Cir.), *cert. denied*, 353 U.S. 939 (1957); United States v. Sherman, 421 F.2d 539 (4th Cir.) (per curiam), *cert. denied*, 398 U.S. 914 (1970); United States v. Crane, 445 F.2d 509 (5th Cir. 1971); United States v. Collon, 426 F.2d 939 (6th Cir. 1970);

The "Second Circuit doctrine" was most notably expressed in *United States v. Feinberg*:[12]

> [T]he standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases; and . . . , given evidence from which a reasonable person might conclude that the charge in an indictment was proved, the court will look no further, the jury must decide, and the accused must be content with the instruction that before finding him guilty they must exclude all reasonable doubt.

The doctrine became fixed as the only applicable standard in the Second Circuit in *United States v. Valenti*[13] and *United States v. Feinberg*,[14] decided in 1943 and 1944 respectively.[15] The latter opinion, written by Judge Learned Hand, became the leading authority for the doctrine, perhaps because of its distinguished author and its original expression of justification for the standard.[16] Judge Hand reaffirmed this standard in *United States v. Andolschek*:[17] "The accused at bar do not argue that the evidence was not strong enough to support a verdict in a civil case, and it certainly was; that being true, our review ends." The tenor of this statement confirms the conclusiveness of the acceptance of the "Second Circuit doctrine" by its namesake court. Nevertheless, the issue was continually reviewed[18] and attacked.[19] Finally, in *United States v. Taylor*[20] the Second Circuit overruled *Feinberg* and

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United States v. Williams, 311 F.2d 721 (7th Cir.), *cert. denied*, 374 U.S. 812 (1963); Conaway v. United States, 349 F.2d 907 (8th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966); United States v. Brown, 436 F.2d 702 (9th Cir. 1970); United States v. Parrott, 434 F.2d 294 (10th Cir. 1970), *cert. denied*, 401 U.S. 979 (1971); United States v. Harris, 435 F.2d 74 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 986 (1971).

[12]140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944).

[13]134 F.2d 362 (2d Cir.), *cert. denied*, 319 U.S. 761 (1943).

[14]140 F.2d 592 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944).

[15]This doctrine had its origins in Looker v. United States, 240 F. 932 (2d Cir. 1917); Felder v. United States, 9 F.2d 872 (2d Cir. 1925), *cert. denied*, 270 U.S. 648 (1926); and United States v. Rowe, 56 F.2d 747 (2d Cir.), *cert. denied*, 286 U.S. 554 (1932). However, a standard more like the *Curley* rule had apparently been adopted in Fraina v. United States, 255 F. 28 (2d Cir. 1918). Even after the "Second Circuit doctrine" had been in effect, the Second Circuit sometimes appeared to revert back to the *Fraina* criterion. *See, e.g.*, United States v. Silva, 109 F.2d 531 (2d Cir. 1940); United States v. Wishnatzki, 77 F.2d 357 (2d Cir. 1935).

[16]United States v. Masiello, 325 F.2d 279, 288 (2d Cir. 1956) (Frank, J., concurring).

[17]142 F.2d 503, 505 (2d Cir. 1944).

[18]*E.g.*, United States v. Costello, 221 F.2d 668, 671 (2d Cir. 1955), *aff'd*, 350 U.S. 359 (1956).

[19]United States v. Masiello, 235 F.2d 279, 284-85 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring).

[20]464 F.2d 240 (2d Cir. 1972).

insured uniformity[21] among the circuits by adopting the *Curley* test.

An examination of the rationale behind the "Second Circuit doctrine" clearly supports the decision of the court in *Taylor* to abandon the doctrine. Judge Learned Hand had offered two reasons for refusing to differentiate "between evidence which should satisfy reasonable men, and the evidence which should satisfy reasonable men beyond a reasonable doubt."[22] The first was that "courts—at least federal courts—have generally declared that the standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases . . . ."[23] The

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[21]A caveat must be entered about the uniformity of standard that now prevails. Some circuits hold that a special rule must be applied to cases involving circumstantial evidence. This standard, enunciated most clearly in Isbell v. United States, 227 F. 788, 792 (8th Cir. 1915), *quoting* Union Pacific Coal Co. v. United States, 173 F. 737, 740 (8th Cir. 1909), is as follows: "Unless there is substantial evidence of facts which excludes every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

There are interpretations of this statement which indicate that a more stringent standard than the *Curley* rule has been established. For example, the *Isbell* test could mean that the trial judge must grant a motion for acquittal unless the evidence excludes the hypothesis of innocence. The standard could be defined as requiring a reversal of all convictions rendered in cases in which a reasonable mind could reach either a guilty or innocent verdict. However, neither of these interpretations are plausible because of their impracticality. *See* Curley v. United States, 160 F.2d 229, 232 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). They must be dismissed on the further ground that such interpretations would force the trial judge to preempt the functions of the jury by becoming a trier of fact before submission of the case to the jury, which would then become merely a device for checking the judge. The Supreme Court has held that it was "confusing and incorrect" to use the *Isbell* rule in a jury instruction in a circumstantial evidence case. Holland v. United States, 348 U.S. 121, 139-40 (1954).

In spite of the Court's adverse ruling on the use of this formula as a jury instruction, several circuits have continued to use the *Isbell* test as the proper judicial standard by which to assess the sufficiency of circumstantial evidence when deciding upon a motion for judgment of acquittal. *See, e.g.*, Cohen v. United States, 363 F.2d 321, 327 (5th Cir. 1966), *cert. denied*, 385 U.S. 957 (1966); LaConte v. United States, 330 F.2d 700, 701 (10th Cir. 1964). *But see* Early v. United States, 394 F.2d 117, 118 (10th Cir. 1968). The explanation has two facets: first, the holding in *Holland* dealt with the formula's use as a jury instruction; and secondly, the *Isbell* test has been interpreted to mean not that the evidence must be inconsistent with every hypothesis of innocence, but rather that reasonable minds must be able to decide that it is. The Fifth Circuit, the most tenacious adherent of the *Isbell* rule (*see* Panci v. United States, 256 F.2d 308, 312 (5th Cir. 1958)) has interpreted the test in this manner: "[T]he test to be applied on motion for judgment of acquittal and on review of denial of such motion is not simply whether in the opinion of the trial judge or of the appellate court the evidence fails to exclude every reasonable hypothesis, but that of guilt, but rather whether the jury might reasonably so conclude." Vick v. United States, 216 F.2d 228, 232 (5th Cir. 1954). So interpreted, the *Isbell* test becomes almost indistinguishable from that enunciated in *Curley*. *See* McCORMICK ON EVIDENCE § 338, at 791 (2d ed. E. Cleary 1972).

[22]United States v. Feinberg, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944).

[23]*Id.*

second justification was that "[w]hile at times it may be practicable to deal with these as separate without unreal refinements, in the long run the line between them is too thin for day to day use."[24] A later decision opined that mandatory consideration of the reasonable doubt standard by the judge would add nothing to the judicial process but confusion.[25]

This "too thin for day to day use"[26] argument has been attacked as illogical and patently untrue.[27] It is illogical because it implies that judges are incapable of distinguishing between evidence which merely preponderates and that which is capable of persuading reasonable minds beyond a reasonable doubt, while untrained laymen who comprise the jury are saddled with that very responsibility.[28] This justification for the "Second Circuit doctrine" is irrational because judges are required to make this same distinction when they sit in a criminal case without a jury.[29] Judges must also make a similar distinction in civil cases in which the clear, cogent, and convincing standard of proof is employed.[30]

Some proponents of the "Second Circuit doctrine" contend that the *Curley* standard requires that a trial judge preempt the function of the jury by forcing him to decide that the defendant is guilty beyond a reasonable doubt before he can send the case to the jury.[31] This argument not only fails to consider a basic procedural rule of law but is based on a fundamental misconception of the *Curley* test. First, the trial judge in a jury trial is not the trier-of-fact; therefore he may not properly consider the credibility of the witnesses.[32] In applying the *Curley* stan-

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[24]*Id.*

[25]United States v. Wapnick, 202 F. Supp. 712, 715 (E.D.N.Y. 1962), *aff'd per curiam*, 315 F.2d 96 (2d Cir.), *cert. denied*, 374 U.S. 829 (1963). *See also* 9 WIGMORE, EVIDENCE §§ 2497-98 (3d ed. 1940).

[26]United States v. Feinberg, 140 F.2d 592, 594 (2d Cir.), *cert. denied*, 322 U.S. 726 (1944).

[27]*See, e.g.*, United States v. Masiello, 235 F.2d 279, 285 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring).

[28]United States v. Masiello, 235 F.2d 279, 291 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 809 (2d Cir. 1956) (Frank, J., concurring).

[29]United States v. Masiello, 235 F.2d 279, 291 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 809 (2d Cir. 1956) (Frank, J., concurring).

[30]United States v. Masiello, 235 F.2d 279, 291 (2d Cir. 1956) (Frank, J., concurring); United States v. Gonzales Castro, 228 F.2d 807, 809 (2d Cir. 1956) (Frank, J., concurring); *see, e.g.*, Baumgartner v. United States, 322 U.S. 665 (1944) (government's case must fail in a denaturalization proceeding if proof is sufficient only to meet the preponderance standard); Schneiderman v. United States, 320 U.S. 118 (1943) (same); Deering v. Winona Harvester Works, 155 U.S. 286, 301 (1894) (judge's decision as to prior use of a patented device must be based on proof which leaves no reasonable doubt).

[31]*E.g.*, United States v. Masiello, 235 F.2d 279, 284-85 (2d Cir. 1956).

[32]*E.g.*, United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969). *See also* United States v. Scarpellino, 431 F.2d 475 (8th Cir. 1970) (noting that the same rule applies to appellate courts).

dard, he must evaluate the sufficiency of the prosecution's evidence in the light most favorable to the state,[33] unless a particular piece of testimony is manifestly incredible,[34] and must leave the establishment of testimonial inferences to the jury.[35] The trial judge is thereby prohibited from preempting the fact-finding function of the jury. Secondly, the *Curley* test does not require the judge to find that the defendant is guilty beyond a reasonable doubt before he can submit the case to the jury; he must only be able to conclude that reasonable minds could find the defendant guilty beyond a reasonable doubt.[36]

Perhaps the most serious shortcoming[37] of the "Second Circuit doctrine" is its emasculation of the presumption of innocence and the reasonable doubt standard. The presumption of innocence is the cornerstone of our accusatorial system of criminal justice,[38] which requires that the state prove the guilt of the defendant by independent evidence obtained through police investigation rather than by compelled confession, as under an inquisitorial system.[39] Although it has been generally accepted that the presumption of innocence no longer has any direct evidentiary significance,[40] the presumption has spawned development of the reasonable-doubt standard of evidence necessary to sustain a criminal conviction.[41]

There are several viable reasons for requiring that guilt be proved

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[33]*E.g.*, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969).

[34]*See* Rodgers v. United States, 402 F.2d 830 (9th Cir. 1968).

[35]*E.g.*, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Nelson, 419 F.2d 1237, 1241 (9th Cir. 1969).

[36]*See* United States v. Masiello, 235 F.2d 279, 286 (2d Cir. 1956).

[37]There are two other possible constitutional consequences of the "Second Circuit doctrine," full consideration of which is prohibited by the strictures of time and space. First, the fifth amendment's proscription against coerced self-incrimination could arguably be breached by the use of this rule in conjunction with the "waiver doctrine" on appeal. *See* Comment, *The Motion For Acquittal: A Neglected Safeguard*, 70 YALE L.J. 1151, 1152-56 (1961). Secondly, the defendant might be coerced into abandoning his right to a jury trial by the desire to compel the trial judge to apply the reasonable doubt standard himself in a bench trial. *See* text accompanying note 29 *supra*.

[38]The accusatorial nature of our system of criminal justice is documented by various provisions of the Bill of Rights. *See, e.g.*, U.S. CONST. amend. V (privilege against self-incrimination), amend. VI (right to confrontation and compulsory process), amend. VIII (right to bail).

[39]Watts v. Indiana, 338 U.S. 49, 54-55 (1949).

[40]J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 566-76 (1898); 9 WIGMORE, EVIDENCE § 2511(2) (3d ed. 1940).

[41]*In re* Winship, 397 U.S. 358, 363 (1970); MCCORMICK ON EVIDENCE, *supra* note 23, § 341(c). For a definition of the reasonable doubt standard which distinguishes it from the preponderance standard, *see* United States v. Masiello, 235 F.2d 279, 286 (2d Cir. 1956) (Frank, J., concurring).

beyond a reasonable doubt in criminal trials. The very nature of the criminal process mandates adoption of a more stringent standard of guilt than in a civil action. While an erroneous judgment for one party in a civil case is no worse than an incorrect decision for his adversary, the conviction of an innocent man is a loss for all society. Not only does the convicted innocent defendant suffer an unjust loss of liberty, but the state's interest in a precise judicial system is defeated,[42] and the legitimacy and popular support of that system is undermined.[43] In addition, the criminal sanction of imprisonment and concomitant stigmatization is much more serious than the pecuniary consequence of a civil action.[44] Finally, there is a basic imbalance in resources, prestige, and power—all in favor of the state.[45] For these reasons, the Supreme Court explicitly held in *In re Winship*[46] that the fourteenth amendment's due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

The "Second Circuit doctrine" did not directly remove the reasonable doubt standard from the criminal trial, as the jury was always instructed that they must find the defendant guilty beyond a reasonable doubt.[47] However, the rule did have the effect of preventing judicial consideration of the reasonable doubt standard.[48] Judge Frank characterized this result as a reduction of the criminal standard "to little more than a verbal ritual, a ceremonial set of words included in the judge's charge."[49] As a later Second Circuit opinion noted, "the requirement of proof beyond a reasonable doubt is a direction to the jury" which "can-

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[42]*Cf.* Comment, 70 YALE L.J., *supra* note 40, at 1158.

[43]*In re* Winship, 397 U.S. 358, 364 (1970).

[44]*Id.* at 363. MCCORMICK ON EVIDENCE, *supra* note 23, § 341(c), at 798: "The consequences to the life, liberty and good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case."

[45]*See* Dession, *The Technique of Public Order: Evolving Concepts of Criminal Law*, 5 BUFFALO L. REV. 22, 40 (1955): "To prosecute is far easier than to defend. The prosecutor is normally assumed to represent right and justice, and on top of that he almost invariably enjoys far more investigative assistance and resources generally." For a contrary opinion by a principal in the "Second Circuit doctrine" debate, *see* United States v. Garsson, 291 F. 646. 649 (S.D.N.Y. 1923) (L. Hand, J.).

[46]397 U.S. 358, 364 (1970).

[47]*See* United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (per curiam); United States v. Feinberg, 140 F.2d 592, 594 (2d Cir. 1944); United States v. Valenti, 134 F.2d 362, 364 (2d Cir. 1943).

[48]United States v. Masiello, 235 F.2d 279, 287 (2d Cir. 1956) (Frank, J., concurring).

[49]*Id.* at 288.

not be accorded a quantitative value other than as a general cautionary admonition."[50] Consequently, under the "Second Circuit doctrine" there was no viable means of judicial evaluation of the application of the reasonable doubt standard by the jury. The judge was denied the opportunity to prevent the jury from operating beyond its province, for he no longer had any efficient means to prevent the jury from reaching a verdict based on conjecture, speculation, passion, or prejudice.[51]

Application of the "Second Circuit doctrine" presented the trial judge with two anomalous situations.[52] First, when the prosecution's case was sufficient to pass the civil preponderance test, he had to submit it to the jury to apply the reasonable doubt standard even though he was thoroughly convinced that no reasonable mind could possibly determine that the defendant was guilty beyond a reasonable doubt.[53] Secondly, he had to refuse to grant a judgment n.o.v. if the jury returned a guilty verdict in spite of his conviction that the jury's verdict was unreasonable.[54] These situations were forced upon the trial judge because the "Second Circuit doctrine" effectively precluded him from using the reasonable doubt standard as "either a pre-verdict or post-verdict check on the jury."[55] As Judge Frank said: "This means . . . that a man may be jailed or put to death, although the trial judge and the upper court are clearly convinced that the man's guilt has not been proved beyond a reasonable doubt (*i.e.*, they are sure that no reasonable men would believe that his guilt has been thus proven)."[56]

The rejection of the "Second Circuit doctrine" was not only wise, it was inevitable in light of recent developments. As previously noted, the Second Circuit, at the time of the *Taylor* decision, was the only federal Court of Appeals not employing the *Curley* test.[57] The natural evolution toward uniformity among the circuits dictated the result in *Taylor*.[58]

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[50]United States v. Valenti, 134 F.2d 362, 364 (2d Cir. 1943).

[51]*See* United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring); Curley v. United States, 160 F.2d 229, 232 (D.C. Cir. 1947).

[52]*See* United States v. Masiello, 235 F.2d 279, 287 (2d Cir. 1956) (Frank, J., concurring); United States v. Wapnick, 202 F. Supp. 712, 714-15 (E.D.N.Y. 1962).

[53]*See* United States v. Masiello, 235 F.2d 279, 287 (2d Cir. 1956) (Frank, J., concurring); United States v. Wapnick, 202 F. Supp. 712, 714-15 (E.D.N.Y. 1962).

[54]*See* United States v. Masiello, 235 F.2d 279, 288 (2d Cir. 1956) (Frank, J., concurring); United States v. Wapnick, 202 F. Supp. 712, 714-15 (E.D.N.Y. 1962).

[55]United States v. Masiello, 235 F.2d 279, 288 (2d Cir. 1956) (Frank, J., concurring).

[56]United States v. Gonzales Castro, 228 F.2d 807, 808 (2d Cir. 1956) (Frank, J., concurring).

[57]*See* note 11 *supra*.

[58]The injustice of having two different standards within the same judicial system is obvious.

Furthermore, the Supreme Court had indicated its disapproval of the "Second Circuit doctrine" in a number of cases.[59] In a slightly different context[60] in *In re Winship*,[61] the Court expressed disagreement with the "too thin for day to day use" argument:

> "[W]e reject the Court of Appeals' suggestion that there is, in any event, only a 'tenuous difference' between the reasonable-doubt and preponderance standards. The suggestion is singularly unpersuasive. In this very case, the trial judge's ability to distinguish between the two standards enabled him to make a finding of guilt that he conceded he might not have made under the standard of proof beyond a reasonable doubt."

In *United States v. Vuitch*,[62] the Court had stated that "a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt." The significance of this dictum is enhanced in light of the holding in *In re Winship*[63] that the due process clause requires proof beyond a reasonable doubt for conviction in a criminal case and the Court's rejection of the justification for the "Second Circuit doctrine" as "singularly unpersuasive."

The next logical step for the Supreme Court would have been to declare that the Constitution mandates the application of the reasonable doubt standard by the trial judge in assessing the sufficiency of the prosecution's evidence in a criminal case so that due process is not denied to a criminal defendant by a jury verdict based on mere conjecture, speculation, passion or prejudice. The decision in *Taylor* makes Supreme Court consideration of this issue unnecessary.

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A defendant should not be sent to prison in the Second Circuit when the identical case against him in the Fifth Circuit would result in a directed verdict of acquittal.

[59]*See, e.g.*, Mortensen v. United States, 322 U.S. 369, 374 (1944):

> But we have never hestiated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. *Cf.* Abrams v. United States, 250 U.S. 616, 619. Our examination of the record in this case convinces us that there was a complete lack of relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that petitioners [were guilty].

In American Tobacco Co. v. United States, 328 U.S. 781, 787 (1946), the Court stated: "The verdict in a criminal case is sustained only when there is 'relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt,' that the accused is guilty."

[60]Here, there was a bench trial in a New York State juvenile court.

[61]397 U.S. 358, 367 (1970).

[62]402 U.S. 62, 72 n.7 (1971).

[63]397 U.S. 358, 367 (1970).