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THE RHETORIC OF INNOCENCE

William S. Laufer*

Abstract: This Article promotes the serious consideration of innocence in the criminal process, and gives meaning to the rhetoric surrounding the presumption of innocence. The first part illustrates the near irrelevance of innocence in an accusatorial system of justice where burdens of proof require proof of guilt. The second and third parts of the Article discuss the meaning of the presumption of innocence. It is argued that legislatures and courts have ignored the tension between the conflicting goals of the criminal process by thinking of the presumption of innocence as a legal presumption. As a legal presumption, its effects are indistinguishable from the reasonable doubt rule. Arguments are presented that the presumption should be factually based so that jurors are asked to assume the accused's innocence in fact. This Article concludes with a proposal for a factually based assumption of innocence.

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INTRODUCTION

Before the appearance of the jury trial in Europe, proof of an accused's guilt or innocence was often obtained through torture.[1] Arbitrariness and cruelty were the hallmarks of medieval and post-medieval justice.[2] Ancient methods of justice included trials by battle and the ordeals of hot iron, boiling water, cold water, and cursed morsel.[3] These trials and ordeals involved significant physical challenges that

1. *See, e.g.*, Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (1883); Sir Leon Radzinowicz, *A History of English Criminal Law and its Administration From 1750* (1968).

2. Even early English criminal procedure allowed for bloodthirsty and barbaric practices. An accused had to expressly accept a trial by jury by declaring a plea—guilty or not guilty—and by declaring that "I put myself upon the country." Those unfortunate souls who refused to make such declarations were subjected to *peine forte et dure*. Prisoners were stretched naked on their backs between two wooden boards with heavy iron weights placed over their bodies. Food was withheld until pleas were made—or until death. This practice was abolished in 1772. *See* Theodore F.T. Plucknett, *A Concise History of the Common Law* 126 (1956); Barbara A. Hanawalt, *Crime and Conflict in English Communities* 1300–1348 (1979).

3. *See* Melville Madison Bigelow, *History of Procedure in England From the Norman Conquest* 322 (1880) (noting that the ordeal "was a solemn invocation to Heaven to decide the matter in dispute; and the result of the test was regarded by the credulous masses as effected by the direct interposition of the Almighty"). For a thorough treatment of the supernatural theory and mortal practice of the ordeal, see John H. Wigmore, *A Kaleidoscope of Justice* (1941). Professor Wigmore's survey of ancient adjudicatory practices in Europe, Asia, Africa, America, and Oceania is nothing short of remarkable.

determined the accused's factual guilt or factual innocence.[4] A successful combatant in a trial by battle demonstrated factual innocence. Hands free of scars after carrying hot irons or touching boiled stones in an ordeal belonged to the blameless and virtuous.[5]

The development of the jury trial in England and the Romano-canon inquisition process on the Continent transformed the cruel methods of compurgation and trial practices prescribed by medieval law.[6] Those accused of crimes were no longer physically and psychologically tortured to determine their legal or moral culpability.[7] Convictions were no longer obtained on the basis of irrational proofs.[8] As modern standards emerged and burdens of production and persuasion shifted from the accused to the accuser, evidence of factual innocence became increasingly irrelevant.[9] An accused did not have to demonstrate

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4. This Article will consider the role of three conceptually distinct determinations of innocence and three determinations of guilt. The presumption of innocence will be discussed in parts I and II as an analogue of legal innocence—a conclusion of law in favor of the accused. An accused is legally innocent until or unless guilt (legal guilt) is established beyond a reasonable doubt. All defendants, whether guilty in fact or not, are legally innocent until or unless convicted. If convicted, whether factually guilty or not, one is legally guilty. Actual innocence, applied on appeal, is a standard of proof requiring: (1) a fair probability that a judge or jury would have acquitted had certain evidence been available, (2) the absence of evidence that would lead a rational trier of fact to conclude that the accused was guilty beyond a reasonable doubt, or (3) evidence sufficient to support a colorable claim of innocence. Actual innocence is required by some courts in order to proceed with claims of newly discovered evidence after conviction. Finally, factual innocence is simply the state of being innocent in fact. Proof of factual innocence is required by those claiming compensation for wrongful conviction and incarceration. Legal innocence and legal guilt require a judicial determination of whether an accused committed the criminal act beyond a reasonable doubt.

5. A person could prove factual innocence or face the consequences of definite guilt, which often meant death. *See* Marcello T. Maestro, *Voltaire and Beccaria as Reformers of Criminal Law* 13 (1972).

6. *See* Plucknett, *supra* note 2, at 118–5. *See also* Gerhard O.W. Mueller, *Memoranda on Laymen as Judges in Germany and Austria* (1954) (unpublished manuscript, University of Chicago School of Law, on file with the Washington Law Review).

7. *See* S.F.C. Milsom, *Historical Foundations of the Common Law* 403–13 (1981); T.F.T. Plunknett, *A Concise History of the Common Law* (1956).

8. *See* Barbara J. Shapiro, *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence* 1–41 (1991); J.S. Cockburn and Thomas A. Green, *Twelve Good Men and Ture: The Criminal Trial Jury in England, 1200–1800* (1988); Thomas A. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200–1800* (1985); Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of "Free Proof" in the German Code of Criminal Procedure*, 29 Buff. L. Rev. 122 (1959).

9. *See, e.g.*, M.N. Howard et al., *Phipson on Evidence* 91 (1990) (noting that "[i]n early times the law appears to have presumed guilt, not innocence"); George P. Fletcher, *Rethinking Criminal Law* 517 (1978), has traced a transition in the allocation of burdens of persuasion to private litigation in the middle nineteenth century. *See also* George P. Fletcher, *Two Kinds of Legal Rules: A*

innocence by hands unscarred from hot coals, irons, or stones. An accused did not have to bring together twelve peers in a wager of law to swear that his or her oath of innocence was clean and trustworthy. God could no longer reveal the innocent from the murderer, thief, and robber. Proof of factual innocence was replaced by proof of legal guilt or its absence, legal innocence.[10]

This was much more than a change in jurisprudential semantics. Legal standards and burdens of proof acknowledged what ancient fact finders and jurists could not: Definitive proof of factual innocence was too much of a burden for mortals to bear.[11] Without divine judgments, the law must presume goodness, honesty, and duty.[12] A mere accusation could not amount to a presumption of guilt.[13] As the General Court of Massachusetts noted in 1657, ". . . in the eye of the law every man is honest and innocent, unless it be proved legally to the contrary."[14] The evolution from an inquisitorial system to an adversarial system of justice reflected a consensus that a number of fundamental interests and rights required that the burdens of production and persuasion be shifted to the state.[15] In allocating burdens, courts and commentators repeatedly

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Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880, 889–900 (1968).

10. The distinction between legal innocence (i.e., a finding of "not guilty") and a finding of factual innocence is critical. Common law courts determine guilt or its apparent absence, not factual innocence. If wrongly accused, the best that one can hope for—before an appeal or collateral attack of a conviction—is a determination that the evidence of factual guilt was insufficient.

11. For a discussion of the move away from divine judgments, see Bigelow, supra note 3, at 322–40. *See also* Rupert Cross, *The Golden Thread of the English Common Law: The Burden of Proof* (1976).

12. *See, e.g.,* James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898).

13. *See* Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial,* 1978 Wis. L. Rev. 441, 460; Hermne Herta Meyer, *Constitutionality of Pretrial Detention,* 60 Geo. L.J. 1140, 1147 (1972). According to Andrew Ashworth, the presumption of innocence is tied to the severe consequences of criminal conviction, along with the dramatic imbalance in power and resources of an accused and the state. A presumption of guilt "would impose an oppressive burden on individual citizens, and would place immense power in the hands of the state officials who decide on prosecution." Andrew Ashworth, *Principles of Criminal Law* 74 (1991).

14. Records of Massachusetts, iii, 434–35, *cited in* Thayer, *supra* note 12, at 552. As Fletcher has noted: "*ei incumbit probatio qui dicit; non qui negat.*" [The burden of proving a fact rests on the party who asserts it, not on the party who denies it.] George P. Fletcher, *Rethinking Criminal Law* 520 (1978).

15. Commentators have noted that, after moving away from inquisitorial models of inquiry, the criminal process in England, and then later in the United States, left the accusatorial model for one that is adversarial. As Justice Frankfurter noted in 1961, "[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and

affirmed that an individual's liberty interest was valued over society's interest in obtaining a conviction.[16] It is a fundamental value of Anglo-Saxon justice that "it is far worse to convict an innocent man than to let a guilty man go free."[17] Evidence of this value, as a reflection of the

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freely secured and may not by coercion prove its charge against an accused out of his own mouth." Rogers v. Richmond, 365 U.S. 534, 541 (1961). *See also* Herring v. New York, 422 U.S. 853, 862 (1975) (noting that the "very premise of our adversarial system . . . is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free"). For related commentary, see Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1149–53 (1960); *Crime in England: 1550–1880* (J.S. Cocburn, ed. 1988). Evidence of these fundamental interests developed over time. Notably, a presumption of guilt was maintained, in various forms, for many centuries under the ancient law of England. *See* Bigelow, *supra* note 3, at 322. For two excellent discussions of the development of reasonable doubt rule, see Theodore Waldman, *Origins of the Legal Doctrine of Reasonable Doubt Rule*, 20 J. Hist. Ideas 299 (1959); Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507 (1975).

16. As Professor Underwood has astutely observed, the reasonable doubt rule serves to reduce the likelihood of conviction by placing a thumb "on the defendant's side of the scales of justice." The reasonable doubt rule creates a deliberate imbalance in favor of the accused. Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977). There are some practical reasons for this imbalance. As the Court noted in *In re* Winship, 397 U.S. 358, 363 (1970): "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." Judge Richard A. Posner, in his treatise *The Problems of Jurisprudence*, commented on the dilemma that this imbalance creates: "In general, unless the resources devoted to determining guilt and innocence are increased, the only way to reduce the probability of convicting the innocent is to reduce the probability of convicting the guilty as well." Richard A. Posner, *The Problems of Jurisprudence* 216 (1990). *See also* Glanville Williams, *Letting Off the Guilty and Prosecuting the Innocent*, 1985 Crim. L. Rev. 115.

17. *In re* Winship, 397 U.S. at 372. This maxim may be traced to Hale who noted in the late 1600s that it is better that five guilty men should be acquitted before one innocent man is convicted. Matthew Hale, *Pleas of the Crown*, or, *A Brief but Full Account of Whatsoever Can Be Found Relating to that Subject*, 289 (1678). Similar references may be found in the work of Fortescue, who wrote: "I would rather wish twentie evill doers to escape death through pitie than one man to be unjustly condemned." *De Laudibus legum Angliae* c. 27 (1545). Blackstone observed that "the law holds, that it is better that ten guilty persons escape than that one person suffer." 4 William Blackstone, Commentaries, 358 (1765). This 10:1 ratio is known as the "Blackstone ratio." For earlier examples, see William S. Holdsworth, *History of English Law* 620 (1925). Bentham reveals the limits of the maxim's logic in writing that: "But we must be on our guard against those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence. Public applause has been, so to speak, set up to auction. At first it was said to be better to save several guilty men , than to condemn a single innocent man; others, to make the maxim more striking, fix the number ten; a third made this ten a hundred, and a fourth made it a thousand. All these candidates for the prize of humanity have been outstripped by I know not how many writers, who hold, that, in no case, ought an accused person to be condemned, unless evidence amount to mathematical or absolute certainty. According to this maxim, nobody ought to be punished, lest an innocent man be punished." Bentham, *Principles of Judicial Procedure* 169 (1829). Bentham, however, is mindful of the difference between erring on the side of acquitting the

presumption of innocence, may be seen in the reasonable doubt rule, as well as a series of substantive and procedural safeguards that arguably presuppose legal innocence,[18] e.g., the privilege against self-incrimination and the right to remain silent while in police custody and during trial;[19] the duty of the state to disclose exculpatory evidence;[20] the right to compulsory evidence;[21] the right to confront adverse witnesses;[22] and the right to effective assistance of counsel.[23]

Even though the requirement that an accused demonstrate factual innocence became inapposite following the abolition of ordeal and other ancient modes of trials, rhetoric of the importance of factual innocence remains in law today.[24] In fact, myths of the importance of an accused's

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guilty versus convicting the innocent. Both may be calculated as great evils, according to Bentham, but the latter clearly creates more injustice. *Id.*

18. These constitutional safeguards have the definite effect of making the state's task of overcoming the presumption of innocence more difficult—but not impossible. Herrera v. Collins, 113 S. Ct. 853, 860 (1993). *See* In re *Winship*, 397 U.S. at 364 (noting that "the 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"); *see also* Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Jackson v. Virginia, 443 U.S. 307 (1979). As the court noted in *Patterson*, "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." 432 U.S. at 208. An excellent discussion of the relation between certain safeguards and innocence appears in a treatise by Henry J. Abraham, *The Judicial Process* 95–97 (1993). One of the better discussions of the presumption of innocence in relation to constitutional law is found in Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis. L. Rev. 441.

19. For an interesting analysis of the right to silence, generally, and the privilege against self incrimination, see Note, *Adverse Inferences from Silence*, 22 Mich. J. L. Reform 1019 (1989). *See also* United States v. Hasting, 461 U.S. 499 (1983) and Carter v. Kentucky, 450 U.S. 288 (1981) for discussions of the right to silence in relation to permissible inferences of guilt. In *Carter*, the Court ruled that a "no inference from silence" instruction from the judge was required by the Fifth and Fourteenth Amendments. *Id.* at 305. *See also* Griffin v. California, 380 U.S. 609 (1965) (holding the Fifth Amendment forbids adverse prosecutorial comments on an accused's silence or judicial instructions that silence is evidence of guilt); Lakeside v. Oregon, 435 U.S. 333 (1978) (holding that jury instruction on failure to testify did not amount to lead to adverse inferences); Bruno v. United States, 308 U.S. 287 (1939). The court has noted that jury instructions on the Fifth Amendment's privilege against compulsory self-incrimination are critical because "[t]oo many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are. . .guilty of crime. . . ." Ullmann v. United States, 350 U.S. 422, 426 (1956), *overruled by* D'Elia v. Pennsylvania Crime Comm'n, 555 A.2d 864 (1989).

20. Brady v. Maryland, 373 U.S. 83 (1963).

21. Taylor v. Illinois, 484 U.S. 400 (1988).

22. Coy v. Iowa, 487 U.S. 1012 (1988).

23. Duncan v. Louisiana, 391 U.S. 145 (1968).

24. For a discussion of the role of rhetoric in law, generally, see Haig Bosmajian, *Metaphor and Reason in Judicial Opinions* (1992); Lawrence M. Solan, *The Language of Judges* (1993). *See also* Robert Prentice, *Supreme Court Rhetoric*, 25 Ariz. Law Rev. 86 (1983); Richard Posner, *Law and*

factual innocence in the criminal process abound.[25] Time-honored and revered presumptions are held out as evidence of an accused's innocence from time of arrest through trial.[26] Courts, legal commentators, and the lay public often mischaracterize dispositions of "not guilty" as findings of factual innocence.[27] Appellate courts add credibility to the importance of innocence by requiring a showing of actual innocence in order for a petitioner to proceed with certain post-conviction remedies.[28] And, finally, Congress and a host of state legislatures have enacted erroneous conviction statutes with an apparent interest in providing procedural and financial remedies for convicted innocents.[29] These presumptions, findings, verdicts, requirements, and compensation schemes suggest that evidence of factual innocence is important if not central in substantive criminal law and criminal procedure. However, even a cursory review of

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Literature: A Misunderstood Relation (1988); Thomas Ross, *Metaphor and Paradox*, 56 Ga. L. Rev. 1053 (1989); Burr Henly, *"Penumbra": The Roots of a Legal Metaphor*, 41 Hastings Const. L. Q. 81 (1987); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 74 Stan. L. Rev. 1371 (1988); Steven L. Winter, *Transcendental Nonsense: Metaphoric Reasoning and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105 (1989). Existing studies of innocence and rhetoric consider the "innocent white victim" of affirmative action. *See* Thomas Ross, *Innocence and Affirmative Action*, 43 Vand. L. Rev. 297 (1990).

25. *See infra* notes 280–94 and accompanying text.

26. The presumption of innocence is commonly thought of as a factual presumption when it is at most a presumption of legal innocence and, at least, an ineffective rhetorical device. It is often said that "one is presumed innocent, until proven guilty." This maxim has come to mean that the burden of production and persuasion falls on the prosecution to prove guilt beyond a reasonable doubt. An accused remains legally innocent until or unless such proof is introduced. *See McCormick on Evidence* § 342 (3d ed. 1984). Of course, it may be argued that a presumption of legal innocence must have as its foundation certain factual assumptions. For a sizable number of cases this argument is strong. Evidence of factual innocence, as part of the accused's theory of the case, for example, may provide the basis for an acquittal. This argument is weak, however, for a majority of cases where tactical and strategic considerations having far less to do with an accused's factual culpability reduce the need for raising factual innocence. Evidence of factual innocence has fallen prey to defense strategies, employed at trial, that address the failure of the prosecution to prove guilt beyond a reasonable doubt.

27. *See infra* notes 238–41 and accompanying text.

28. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (noting that "[i]n the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the ends of justice require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"). *See also* Herrera v. Collins, 113 S. Ct. 853 (1993). For an excellent review of the genesis of this requirement, see Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970).

29. *See infra* notes 272–79 and accompanying text. A federal statute relating to unjust conviction is found in 28 U.S.C. § 2513 (1988 & Supp. 1993).

normative models of the criminal process, as well as statutory and decisional law, reveals the contrary.[30]

Part I of this Article argues that an accused's factual innocence plays an insubstantial role following arrest and that the vast majority of presumptions, findings, verdicts, or requirements suggesting otherwise are no more than rhetorical devices.[31] Part II explores some concerns with the effects of these rhetorical devices and mischaracterizations, suggesting that: (1) innocence plays a primary role as a burden allocation and gatekeeping device, and (2) the absence of meaningful inquiry into factual innocence increases the risk of juror partiality, as well as erroneous convictions and incarcerations. Part III calls for a reconstruction of the presumption of innocence, arguing that legislatures should consider, and that courts should adopt, an assumption of factual innocence. The proposed revision revives the construct of factual innocence, and attempts to give meaning to the empty rhetoric that has surrounded this time-honored principle of Anglo-Saxon law.[32]

I. THE IRRELEVANCE OF INNOCENCE

Existing legal procedures and practices, such as the presumption of innocence and the collateral attack of convictions, suggest a strong consideration of an accused's factual innocence, if not a systemic allegiance to the notion. But these procedures and practices do no more than gull the unsuspecting into believing that factual innocence has a prominent legal meaning.[33] As each successive stage of the criminal

30. *See infra* notes 100–47 and accompanying text.

31. This is not to suggest that the notion of factual innocence has been abandoned throughout the criminal process. As will be explored in part I.C, factual innocence plays a role as a gatekeeper of habeas petitions and as a standard of proof in criminal malpractice cases.

32. The primary argument running through parts I to III is that a consideration of an accused's factual innocence is most often lost in the criminal process. In spite of rhetoric to the contrary, functionaries do not presume factual innocence at trial. In fact, a body of empirical evidence reveals that both reasonable doubt and presumption of innocence instructions are most often misunderstood by jurors. Defense strategies reflect the allocation of burdens and therefore stress the disproving of legal guilt. Further, where actual and factual innocence is considered on appeal or with a collateral attack on conviction, it serves a limited gatekeeping function. Courts have erected steep barriers that make claims of actual innocence difficult if not impossible to successfully maintain. Finally, in the rare case where factual innocence is successfully claimed, federal and state law offers limited compensation to the wrongfully convicted and imprisoned. In part III, instructions are designed that address jurors' predispositions of factual and legal guilt.

33. Though obvious, it should be noted that claims of innocence are notoriously difficult to determine in law, as well as in fact. Commentators have documented what practitioners have observed for centuries: "[C]riminal defendants, unlike clients in almost all other settings, have essentially nothing to lose by making false claims." Robert E. Scott and William J. Stuntz, *A Reply:*

process is carefully considered, there is only slight interest in and consideration of an accused's factual innocence.[34] Part I reveals that the law is often far more concerned with demonstrating the appearance of an interest in innocence.

A. *Presuming Innocence*

1. *Interpretations of the Presumption of Innocence*

In reviewing his experiences on the bench in the middle to late 1800s, Justice Darling noted that: "It is greatly to be feared that the so-called presumption of innocence in favor of the prisoner at the bar is a pretence, a delusion, and empty sound. It ought not to be, but—it is."[35] More than a century later, critics of the importance of the presumption of innocence are nearly impossible to find.[36] The presumption of innocence has been

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Imperfect Bargains, Imperfect Trials, and Innocent Defendants, 101 Yale L.J. 2011, 2012 (1992). But there is much more to the notion of innocence. After a number of procedural "screens" that impose increasingly difficult standards of proof, such as arrest, preliminary hearings, possible grand jury action, and bail determinations, an inference of guilt seems natural. Factual innocence, as well as the presumption of innocence, appear counterfactual by the time an accused appears for trial. There is little doubt that this inference contributes to the likelihood of convicting innocents. *See, e.g.*, Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 Law and Hum. Behav. 283, 291 (1988) (finding that the following types of errors and factors contributing to wrongful convictions in his sample of cases: (a) eyewitness errors, (b) perjury by witnesses, (c) negligence by criminal justice officials, (d) "pure error," (e) coerced confessions, (f) perjury by criminal justice officials, (g) "frame up," (h) identification by police due to prior criminal record, and (I) forensic errors). *See also* C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 Crim. & Delinq. 518 (1986); R. Brandon and C. Davies, *Wrongful Imprisonment: Mistaken Convictions and Their Consequences* (1973); Donald E.J. MacNamara, *Convicting the Innocent*, 15 Crim. & Delinq. 57 (1969); E.M. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (1932).

34. *See infra* note 152 and accompanying text.

35. Anonymous, *Ten Years a Police Judge* 207 (1884) (quoted in Wigmore, *Evidence in Trials at Common Law* 531 (1981)).

36. As Professor George P. Fletcher notes, the presumption of innocence may be found in state and federal statutes, standard jury instructions, as well as clauses in international declarations and covenants on human rights, e.g., The European Convention on Human Rights, Nov. 4, 1950, Art. 6(2); Universal Declaration of Human Rights, Dec. 10, 1948, Art. 11(2), U.N. Doc. A/811. George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880 (1968). It is not an overstatement that "Good men everywhere praise the presumption of innocence." *Id.* at 880. The rhetoric supporting the presumption of innocence is vast. *See, e.g.*, Deutch v. United States, 367 U.S. 456, 471(1961) (explaining that "[o]ne of the rightful boasts of Western civilization is that the [prosecution] has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. Among these is the presumption of the defendant's innocence").

called a "general principle of our political morality," [37] "as irresistible as the heavens till overcome,"[38] "a guardian angel,"[39] "a cornerstone of Anglo-Saxon justice,"[40] "a touchstone of American criminal jurisprudence,"[41] and a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"[42] Commentators and courts extol the virtues of the presumption of innocence, some going so far as to consider it, in itself, probative evidence of factual innocence.[43]

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37. William Twining, *Rethinking Evidence: Exploratory Essays* 208 (1990).

38. Thayer, *supra* note 12, at 553 (quoting Bradner, *Evidence* 460).

39. *Id.*

40. Henry J. Abraham, *The Judicial Process* 96 (1993). *See also* United States v. Millan-Colon, 834 F. Supp. 78, 82 (S.D.N.Y. 1993) (noting that the presumption of innocence is "a cornerstone of our criminal justice system").

41. People v. Layhew, 548 N.E.2d 25, 27 (Ill. App. 1989) (citing Ill. Pattern Jury Instructions, Criminal, No. 2.03 (2d Ed. 1981)), *rev'd*, 564 N.E.2d 1232 (Ill. 1990).

42. Coffin v. United States, 156 U.S. 432, 453 (1895).

43. *See, e.g.*, Simon Greenleaf, *A Treatise on the Law of Evidence* 42–43 (1876). Professor Greenleaf is credited in a series of Supreme Court cases at the turn of the century that upheld and then questioned the notion that the presumption of innocence was probative evidence. *See Coffin*, 156 U.S. at 453 (holding that the presumption of innocence, which is "axiomatic," "elementary," and a "foundation" of the administration of criminal law, is also evidence in favor of the accused); Allen v. United States, 164 U.S. 492 (1896); Agnew v. United States, 165 U.S. 36 (1897); Holt v. United States, 218 U.S. 245, 253 (1910). In perhaps the most eloquent of all tributes to the presumption of innocence, Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 Va. L. Rev. 371, 404 (1970), suggests that it "represents far more than a rule of evidence. It represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community."

Judges in federal and state courts also refer to the presumption of innocence with a rhetorical respect, reverence, and adoration. *See, e.g.*, United States v. Simms, 18 F.3d 588, 593 (8th Cir. 1994) (noting that "[a]ll of the presumptions of the law are in favor of innocence and the defendant is presumed to be innocent until proven guilty"); Heiser v. Ryan, 15 F.3d 299, 305 (3d Cir. 1994) (stating that "the presumption of innocence, which underlies the societal concerns expressed in the Speedy Trial Clause, can no longer apply once the defendant has been found, or pleads, guilty"); United States v. Nickens, 955 F.2d 112, 118 (1st Cir. 1992) (stating that the presumption of innocence "is a basic premise of our criminal legal system"); Spain v. Rushen, 883 F.2d 712, 721 (9th Cir. 1989) (opining that "[i]t is axiomatic that our criminal justice system affords every accused individual a presumption of innocence"); United States v. Fleishman, 684 F.2d 1329, 1342 (9th Cir. 1982) (noting that standing alone, the presumption of innocence "is sufficient to acquit a defendant"), *overruled by* U.S. v. Ibara-Alcarez, 830 F.2d 968 (9th Cir. 1987); United States v. Decoster, 624 F.2d 196, 291 (D.C. Cir. 1976) (noting that the presumption of innocence "that cloaks the accused cannot be stripped by a conviction obtained in something less than a constitutionally adequate trial"); United States v. Cassiere, 4 F.3d 1006, 1025 (1st Cir. 1993) (stating that a failure to instruct on the reasonable doubt rule strikes at the very heart of the presumption of innocence); Hunt v. Roth, 648 F.2d 1148, 1162 (8th Cir. 1981) (noting that "[r]elease upon reasonable conditions of bail thus serves to preserve the presumption of innocence by preventing infliction of punishment before trial"); Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (stating that the presumption of innocence would lose meaning if the right to bail before trial is not preserved); *In re* Extradition

In recent years courts have ruled that even though the presumption of innocence is not found explicitly in the Constitution, its articulation is an essential component of a fair trial.[44] An accused may not be tried and convicted on suspicion and implication. There is a constitutional right that an accused may be convicted only upon proof adduced at trial.[45] As Chief Justice Burger noted in *Estelle v. Williams*,[46] courts must be on guard not to frustrate the reasonable doubt rule or presumption of innocence. Any effort or practice at trial that undermines this rule or presumption, such as the appearance of the defendant in court dressed in jail or prison clothes, compromises the fairness of the factfinding process.[47] Armed with this strong admonition, courts have ruled with

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of Nacif-Borge, 829 F. Supp. 1210 (D. Nev. 1993) (noting that the presumption of innocence "guarantees that defendants pending trial are entitled to a concomitant presumption in favor of bail in this country"); Augustus v. Roemer, 771 F. Supp. 1458, 1464 (E.D. La. 1991) (noting that the presumption of innocence represents "a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community"); People v. Pena, 609 N.Y.S.2d 827 (1994) (stating that the presumption of innocence as a fundamental safeguard); Stern v. State, 827 P.2d 442, 448 (Alaska Ct. App. 1992) (stating that the presumption of innocence should not be relaxed by having the accused appear before the jury with the "badges" of custody); People v. Hardy, 825 P.2d 781 (Cal. 1992) (noting that reliance on the presumption of innocence means never having to take the witness stand), *modified*, 2 Cal. 4th 758 (1992), *cert. denied*, 113 S. Ct. 987 (1993); Commonwealth v. Angiulo, 615 N.E.2d 155 (Mass. 1993) (stating that empaneling an anonymous jury likely taints a juror's perception of the defendant, burdening the presumption of innocence); Summerville v. Warden State Prison, 641 A.2d 1356 (Conn. 1994) (stating that "[i]f the presumption of innocence means anything, it means that one who is clothed with it does not bear the burden of establishing his innocence"); Roundtree v. United States, 581 A.2d 315, 342 (App. D.C. 1990) (noting that the presumption of innocence is supported by the absence of motive); People v. Layhew, 548 N.E.2d 25, 27 (Ill. App. Ct. 1989) (noting that the presumption of innocence and the reasonable doubt rule are cherished by Americans), *rev'd*, 566 N.E.2d 1232 (Ill. 1990); People v. Goss, 503 N.W.2d 682 (Mich. Ct. App.1993) (noting that the presumption of innocence is not merely a due process right, but is intertwined with the right to trial by jury), *aff'd*, 521 N.W.2d 312 (Mich. 1994) People v. Carpenter, 428 N.E.2d 983, 985 (Ill. App. Ct. 1981) (stating that when the presumption of innocence is not on the minds of the jurors "the trial could become a mere formality in which the jury presumes guilt and its function would thus deteriorate into one simply ratifying the criminal investigation"); Lanes v. State, 767 S.W.2d 789, 796 (Tex. Crim. App. 1989) (stating that "implicit in the probable cause requirement is the presumption of innocence"); United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) (noting that the presumption of innocence is a central precept of criminal justice).

44. Estelle v. Williams, 425 U.S. 501, 503 (1976).

45. Taylor v. Kentucky, 436 U.S. 478, 485 (1978) (stating that "[t]his Court has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial").

46. 425 U.S. 501.

47. As the court observed, "Courts have, with few exceptions, determined that an accused should not be compelled to go to trial in prison or jail clothing because of the possible impairment of the presumption so basic to the adversary system." *Estelle*, 425 U.S. at 505. Defendants are generally entitled to the "physical indicia of innocence." United States v. Samuel, 431 F.2d 610, 614 (4th Cir.

some consistency that jury instructions on the presumption of innocence are required to ensure that extra-legal considerations are not determinative.[48] The presumption of innocence has a definite "purging effect" that is essential to a fair trial.[49]

a. *Proxy for Reasonable Doubt*

Even with near universal support and endorsement of the presumption of innocence, there has been a longstanding scholarly controversy over its exact meaning. At least two sides may be distinguished. First, there are scholars, like Thayer and Cross, who see the presumption of innocence and reasonable doubt rule as proxies for the same rule that there must be proof beyond a reasonable doubt, and that the burden of proof remains with the state throughout the trial.[50] The presumption of

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1970). *See also* Kennedy v. Cardwell, 487 F.2d 101, 105 (6th Cir. 1973) (stating that "[w]hen the court allows a prisoner to be brought before a jury with his hands chained in irons, and refuses, on his application, or that of his counsel, to order their removal, the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers") (citing State v. Kring, 64 Mo. 591, 593 (1877)), *cert. denied*, 416 U.S. 959 (1974). *See* United States v. Decoster, 624 F.2d 196, 273 n.56 (D.C. Cir. 1976) (stating that "[f]orcing the accused to appear in jail clothes not only violates his due process right to the presumption of innocence, but also implicates the equal protection guarantee because it generally operates only against those who cannot post bail prior to trial") (citations omitted). *See also* United States v. Harris, 703 F.2d 508 (11th Cir. 1983); Mitchell v. Engle, 634 F.2d 353 (6th Cir. 1980); Boswell v. Alabama, 537 F.2d 100 (5th Cir. 1976); Fernandez v. United States, 375 A.2d 484 (D.C. 1977).

48. *See Estelle*, 425 U.S. at 501; United States v. Thaxton, 483 F.2d 1071 (5th Cir. 1973); United States v. Dilg, 700 F.2d 620 (11th Cir. 1983). *Cf.* United States v. Payne, 944 F.2d 1458 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1598 (1992); United States v. Walker, 861 F.2d 810 (5th Cir. 1988); *Taylor*, 436 U.S. at 486. Notably, there are clear limits to the requirement that a trial court instruct jurors on the presumption of innocence. In Kentucky v. Whorton, 441 U.S. 786, 789 (1979), the Court retreated to the position that a failure to instruct on the presumption of innocence must be evaluated in light of the totality of the circumstances. All instructions given to jurors, the weight of the evidence, and the arguments of counsel must be considered in the context of such an omission. Ultimately, courts must ask whether, given the totality of the circumstances, there was a genuine danger that the jury made a determination of guilt on something other than lawful evidence. The totality of circumstances test was upheld recently in Delo v. Lashley, 113 S. Ct. 1222 (1993).

49. For a discussion of the reasonable doubt rule and presumption of innocence in relation to constitutional law, see Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L.J. 457 (1989).

50. Thayer, *supra* note 12, at 565. *See also* Sir Rupert Cross, *Evidence* 122 (1979) (stating that "[w]hen it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt"). For example, the California Penal Code states:

> Presumption of innocence; Acquittal in case of reasonable doubt; Effect of presumption; Definition. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled

innocence, accordingly, is a rule that allows the accused to stand silent during trial.[51] With this interpretation, the presumption of innocence is not considered a proxy for assuming the factual innocence of the accused. On the contrary, as one treatise noted: "When we speak of the presumption of innocence, we are not talking about a process of inference following the establishing of a basic fact. Rather, we are talking about a fundamental principle of our criminal procedure which imposes a burden on the prosecution of establishing the accused's guilt beyond a reasonable doubt."[52]

Evidence supporting this view of the presumption of innocence may be found in explicit references by courts and commentators arguing that the presumption of innocence and reasonable doubt rule are indistinguishable.[53] Further evidence appears in a number of cases where courts could have distinguished the presumption of innocence as an independent construct but chose not to do so. For example, in *Cupp v. Naughten*,[54] the Supreme Court considered the effects of jury instructions in an armed robbery case that called for a presumption of truthfulness regarding the testimony of witnesses.[55] The prosecution's case consisted of the testimony of two eyewitnesses and two police officers. The

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to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

Cal. Pen. Code § 1096 (1994).

51. *See* John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 Va. L. Rev. 1223 (1969); Note, *Adverse Inferences From Silence, supra* note 19, at 1062–78. *Cf.* Cal. Evid. Code § 600 (1994):

(a) A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence. (b) An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

52. John A. Andrews & Michael Hirst, *Criminal Evidence* 89 (1986).

53. *See, e.g.*, Taylor v. Kentucky, 436 U.S. 478, 491 (1978) (Stevens, J., dissenting) (stating that "[t]he function of the instruction is to make it clear that the burden of persuasion rests entirely on the prosecutor. The same function is performed by the instruction requiring proof beyond a reasonable doubt"). For earlier support, see Bell v. Wolfish, 441 U.S. 520, 531 (1979).

54. 414 U.S. 141 (1973).

55. An Oregon state court had instructed the jury that "every witness is presumed to speak the truth. This presumption may be overcome by the manner in which the witness testifies, by the nature of his or her testimony, by evidence affecting his or her character, interest, or motives, by contradictory evidence or by a presumption." *Id.* at 142.

defense did not call any witnesses and the accused did not testify. If jurors are instructed to presume the truth of witnesses for the prosecution, how can they also presume the innocence of the accused? Putting aside abstruse analyses of due process and what constitutes a fair trial, the most reasonable answer is that a true presumption of truthfulness would conflict with a true presumption of innocence.[56] This conflict would lead most rational jurors to choose between presumptions.[57] As the Ninth Circuit Court of Appeals had noted, the instruction may have had the effect of shifting the burden to the accused to prove innocence.[58] The Supreme Court, in reviewing the entire proceeding, ruled that the truthfulness instruction neither shifted the burden of proof nor violated the presumption of innocence. That the jury had been properly instructed on both the reasonable doubt rule and presumption of innocence ensured the due process rights of the accused. In considering the role that the reasonable doubt rule and presumption of innocence played at trial, Justice Rehnquist concluded that "[w]hatever tangential undercutting of these clearly stated propositions may, as a theoretical matter, have resulted from the giving of the instruction on the presumption of truthfulness is not of constitutional dimension."[59]

Justice Rehnquist, I would argue, neglected to tackle the apparent conflict between the presumptions of truthfulness and innocence because the presumption of innocence is not implemented as a presumption of factual innocence. Rather, as Thayer and Cross have argued, the presumption of innocence has become a preliminary proxy for the reasonable doubt rule. If the presumption of innocence is considered as a preliminary belief in the accused's legal innocence, there is no conflict and certainly no violation of a "constitutional dimension."[60]

56. It is noteworthy that federal courts had in prior cases disapproved of presumption of truthfulness instructions. *See* United States v. Birmingham, 447 F.2d 1313 (10th Cir. 1971); United States v. Stroble, 431 F.2d 1273 (6th Cir. 1970); McMillen v. United States, 386 F.2d 29 (1st Cir. 1967), *cert. denied*, 390 U.S. 1031 (1968); United States v. Dichiarinte, 385 F.2d 333 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); United States v. Johnson, 371 F.2d 800 (3d Cir. 1967); United States v. Persico, 349 F.2d 6 (2d Cir. 1965); United States v. Safley, 408 F.2d 603 (4th Cir. 1969), *cert. denied*, 395 U.S. 983 (1969).

57. This is not merely a case of evidence from witnesses rebutting an existing presumption. The presumption of truthfulness and innocence conflict without *any* testimonial evidence.

58. Naughten v. Cupp, 476 F.2d 845, 847 (9th Cir. 1972) (stating that "the clear effect of the challenged instruction was to place the burden on [the accused] to prove his innocence. This is so repugnant to the American concept that it is offensive to any fair notion of due process of law"), *rev'd*, 414 U.S. 141 (1973).

59. 414 U.S. at 149.

60. The decision in *Naughten* is but one case where the real meaning of innocence, I would argue, differs from a literal reading of the opinion. One of the best examples of this difference is found in

b. Distinct Rules

Courts and scholars on a second side of the controversy argue that the presumption of innocence and reasonable doubt rule are in some ways logically separate and distinct.[61] Following Coffin, the Supreme Court continued to require lower courts to find a conceptually meaningful distinction. Through this interpretation the presumption of innocence ensures allegiance and adherence to the reasonable doubt rule by requiring a certain fairness in the factfinding process.[62] This interpretation also assumes that the presumption of innocence acts as a conceptual guard against dilution of the reasonable doubt rule.[63] But

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Justice Stevens dissent in *Lakeside v. Oregon*. The italicized text contains presumption of innocence rhetoric with a meaning that appears to differ from the literal text:

> Experience teaches us that most people formally charged with crime are guilty; yet *we presume innocence until the trial is over.* Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty; yet we *forbid trial judges or juries to draw that inference.* The presumption of innocence and the protections afforded by the Due Process Clause impose a significant cost on the prosecutor who must prove the defendant's guilt beyond a reasonable doubt without the aid of his testimony. That cost is justified by the paramount importance of protecting a small minority of accused persons those who are actually innocent from wrongful conviction.

Lakeside v. Oregon, 435 U.S. 333, 342–43 (1978) (emphasis added). Who presumes factual innocence armed with experience that most charged are guilty? Who fails to draw inferences of guilt from the silence of a defendant charged with a serious crime, when experience suggests guilt?

61. This view has been restated by Charles E. Torcia, who maintains that the presumption of innocence and reasonable doubt rule "must always be kept separate and distinct." Charles E. Torcia, *Wharton's Criminal Evidence* 167 (13th ed. 1972). Accordingly, "the defendant is entitled to instructions upon two separate points: (1) the presumption of innocence, and (2) what constitutes a reasonable doubt." *Id*. A similar view was espoused by Spencer A. Gard, *Jones on Evidence: Civil and Criminal* 152 (6th ed. 1972) (stating that "[t]he presumption of innocence must not be confused with the rule which requires proof beyond a reasonable doubt to justify a finding of guilt, although courts continue to treat them as though they carried the same implication"). The distinction between the presumption of innocence and reasonable doubt rule was discussed by Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L.J. 457 (1989), where it is concluded that the reasonable doubt rule gives the presumption of innocence constitutional meaning.

62. *See* Coffin v. United States, 156 U.S. 432, 459 (1895).

63. *See* Estelle v. Williams, 425 U.S. 501, 505 (1976). Evidence of the presumption of innocence as a distinct and less significant variant of the reasonable doubt rule is found in the Supreme Court's treatment of presumption of innocence and reasonable doubt rule instructions. The Court has ruled that failure to instruct the jury on the presumption of innocence may be harmless error. *See* Kentucky v. Whorton, 441 U.S. 786 (1979). A harmless error analysis was rejected for a failure to instruct on the reasonable doubt rule. Jackson v. Virginia, 443 U.S. 307, 320 (1979); Estelle v. McGuire, 502 U.S. 62 (1991); Sullivan v. Louisiana, 113 S. Ct. 2078 (1993). For a recent discussion of the application of harmless error analysis to the presumption of innocence, see Arizona v. Fulminante, 499 U.S. 279 (1991), *reh'g denied*, 500 U.S. 938.

One commentator has written that there are two conceptually distinct forms of the presumption of innocence. The first is a rule of evidence that serves to reinforce the reasonable doubt rule at trial. A second form of the presumption of innocence, in effect before trial, is not a factual presumption, but

commentators on the second side of the debate have observed that the presumption of innocence, while a corollary of the reasonable doubt rule, also conveys powerful symbolic messages to all criminal justice functionaries and to the community at large. Instructions on the presumption of innocence do more than just minimize confusion regarding burdens and standards of proof by reminding jurors not to disregard that the state bears the burden of establishing every element of the offense beyond a reasonable doubt.[64] For attorneys and judges, the presumption of innocence serves a special expressive and educative function. According to Professor Tribe, the presumption of innocence operates as a refusal to acknowledge prosecutorial omniscience in the face of the defendant's protest of innocence, and as an affirmation of respect for the accused—a respect expressed by the trier's willingness to

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a normative expression "that there should be no deprivation of liberty without due process of law." Note, *Preventive Detention Before Trial*, 79 Harv. L. Rev. 1489, 1501 (1966).

64. *See* Wigmore, *supra* note 35, at 530; Delo v. Lashley, 113 S. Ct. 1222, 1225 (1993). *See also* Federal Judicial Center, *Pattern Criminal Jury Instructions* 6 (1988) (stating that "the committee believes that it is important to plant the presumption in the jurors' minds so that there will be no confusion during the course of the trial"). The Committee Comment to Seventh Circuit Pattern Instruction No. 2.06 states: "Regardless of what may be constitutionally required . . . , it is well-established that juries in federal criminal trials should be instructed on both the presumption of innocence and the government's burden to prove guilt beyond a reasonable doubt." The language used in the Model Federal Jury Instruction on the presumption of innocence and burden of proof supports this view. In fact, all five paragraphs focus on legal guilt, legal innocence, and relevant burdens of proof. Unfortunately, presumption of innocence and reasonable doubt rule instructions are most often joined so that they become difficult for jurors to distinguish. *See infra* note 181 and accompanying text.

> Although the defendant has been indicted, you must remember that an indictment is only an accusation. It is not evidence. The defendant has not plead not guilty to that indictment.
>
> As a result of the defendant's plea of not guilty the burden is on the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the simple reason that the law never imposes upon a defendant in a criminal case the burden of calling any witness or producing any evidence.
>
> The law presumes the defendant to be innocent of all the charges against him. I therefore instruct you that the defendant is to be presumed by you to be innocent throughout your deliberations until such time, if ever, you as a jury are satisfied that the government has proven him guilty beyond a reasonable doubt.
>
> The defendant begins the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit a defendant unless you as jurors are unanimously convinced beyond a reasonable doubt of his guilt, after a careful and impartial consideration of all of the evidence in this case. If the government fails to sustain its burden, you must find the defendant not guilty.
>
> This presumption was with the defendant when the trial began and remains with him even now as I speak to you and will continue with the defendant into your deliberations unless and until you convinced that the government has proven his guilt beyond a reasonable doubt.

Federal Judicial Center, *Pattern Jury Instructions* 6 (1988).

listen to all the accused has to say before reaching any judgment, even a tentative one, as to his probable guilt.[65] The presumption of innocence, accordingly, stalls any predetermination of guilt by protecting the credibility of the accused's representations of innocence, in addition to guarding against an unjust imbalance in the burden of proof.[66]

Additional support for the notion that the presumption of innocence and reasonable doubt rule are conceptually distinct comes from empirical researchers who have proposed theoretical models of juror decisionmaking grounded in cognitive algebra, Bayesian probability theory, and stochastic processes.[67] In an algebraic sequential averaging model, which is a weighted average equation, the reasoning of jurors is continually recalculated in the form of subjective probabilities of guilt as new evidence is presented.[68] The presumption of innocence is tied to

65. *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1370 (1971).

66. Researchers such as Hastie and Saks conceive of the presumption of innocence as an initial belief state and the reasonable doubt rule as a decision criterion. *See Inside the Juror: The Psychology of Juror Decision Making* (Reid Hastie ed., 1993).

67. For an outstanding review of these models see *Inside the Juror: The Psychology of Juror Decision Making* (Reid Hastie ed., 1993); Valerie P. Hans, *Jury Decision Making* in *Handbook of Psychol. & Law* 56–76 (Dorothy Kagehiro & William S. Laufer eds., 1992).

68. Hastie, *supra* note 66, at 96. At the core of an algebraic weighted sequencing or average model is an equation that calculates a juror's final decision on the basis of the weighted average of her initial opinion and the evidence presented at trial. An averaging model of juror information integration is represented by the equation:

$$J = \frac{wo\ so \sum si\ wi}{wo \sum wi}$$

where J equals a final evaluation of the probability or likelihood of guilt; so is the juror's initial disposition; wo is the initial weight given to the disposition; $si\ wi$ equals the perceived probative value of evidence presented at trial, i.e., the importance, credibility or relevance of any given piece of evidence. According to this model, as evidence is presented the importance of a juror's initial opinion decreases.. Thus, any increase in $\sum wi\ si$ decreases the value of the $wo\ so$ term. *See* Thomas M. Ostrum et al., *An Integration Theory Analysis of Jurors' Presumptions of Guilt or Innocence*, 36 J. Personality & Soc. Psych. 436 (1978). For a discussion of the genesis of this decision making model, see Ewart A.C. Thomas and Anthony Hogue, *Apparent Weight of Evidence, Decision Criteria, and Confidence Ratings in Juror Decision Making*, 83 Psychol. Rev. 442 (1976). A simplified depiction of this model, borrowed from Hastie, *Inside the Jury, supra* note 66, at 12, appears below:

jurors' initial belief states or "anchors" at the beginning of the model where preliminary instructions are given.[69] This differs from the reasonable doubt rule, which is a decision criterion to convict or acquit.[70] The reasonable doubt rule and presumption of innocence are on opposite ends of the Bayesian probability updating model[71] and the Stochastic Poisson process model.[72] The presumption of innocence, once translated,

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Algebraic Sequential Averaging Model

0 50 100

Innocent Guilty

meter

0 100

meter RDR

Initial Opinion ("Anchor")

New Evidence Item

Opinion Adjustment Process

Decision Criterion to Convict

Compare Opinion versus Criterion

Decision

POI Instructions (Belief State)

RDR Instructions (Decision Rule)

All jurors are instructed on the presumption of innocence and begin with an initial belief or opinion regarding the accused. The opinion meter that appears in the top left hand corner of the model changes as evidence is presented. This change reflects a weight attached to the importance, reliability and relevance of the evidence. After the process of weighting is complete, charging instructions are used as decision rules to guide jurors in rendering a verdict. *See, e.g.*, Martin F. Kaplan, *Discussion Polarization Effects in a Modified Jury Decision Paradigm: Informational Influences*, 40 Sociometry 262 (1977); Martin F. Kaplan and G.D. Kemmerick, *Juror Judgment as Information Integration: Combining Evidential and Nonevidential Information* 30 J. Personality & Soc. Psychol. 493 (1974).

69. Hastie, *supra* note 66.

70. It should be noted that juries are most often given a charging instruction on the reasonable doubt rule after the close of evidence or summation. However, given the interdependence of presumption of innocence and reasonable doubt rule, it is quite common for juries to be instructed on the presumption and reasonable doubt rule in preliminary instructions.

71. The presumption of innocence is at issue with prior probability judgments made at the start of a Bayesian probability updating model. Jury instructions on standards of proof are considered much later, once again in relation to a decision criterion to convict. *Cf.* Terry Connolly, *Decision Theory, Reasonable Doubt, and the Utility of Erroneous Acquittals*, 11 Law & Hum. Behav. 101 (1987)

72. Just like the algebraic model, the presumption of innocence is considered with an initial opinion in a Stochastic process model, with reasonable doubt rule instructions evaluated as a criterion of conviction. It should be noted that the presumption of innocence and reasonable doubt rule are not distinguished in the recently developed explanations-based Cognitive Story model. In fact, it is difficult to determine what role, if any, the presumption of innocence plays during the story and match process. *See* Nancy Pennington and Reid Hastie, *The Story Model for Juror Decision Making*, in *Inside the Jury*, *supra* note 66; Nancy Pennington and Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519 (1991). The Story Model suggests that jurors impose a narrative story organization on all evidence presented at trial, transforming the evidence into a plausible account of "what happened." *Id.* The imposition of such

is an initial opinion or belief in the accused's innocence that, upon presentation of the state's evidence, is verified or disaffirmed. The reasonable doubt rule is a decision rule that takes revised opinions and beliefs regarding the accused's innocence and calculates a verdict.[73]

There is a wealth of support for both sides of the controversy over the presumption of innocence's meaning. In theory and in mathematical models the presumption of innocence and reasonable doubt rule may be distinct, but in the practice of law the two are often indistinguishable.[74] In case after case, the legal term "innocence" stands in for the idea that the state has not met its burden of proof beyond a reasonable doubt and that the accused, therefore, lacks criminal culpability or responsibility.[75] Both preliminary and charging instructions further obscure the distinction by intermingling presumption of innocence and reasonable doubt rule provisions.[76] Moreover, judges do little to explain any conceptual differences between the two.[77]

It would be naive to say that the presumption of innocence has achieved such prominence as a mere reminder of an accused's legal

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an organization facilitates juror comprehension and allows for predeliberation determinations of guilt. *See* Nancy Pennington and Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. Personality & Soc. Psychol. 189 (1992). According to some researchers, algebraic models and the story model are not necessarily incompatible. The story model is a pattern matching model that may take place in conjunction with the movement of opinion meters. *See* Lola Lopes, *Two Conceptions of the Juror*, in *Inside the Jury, supra* note 66. Due to the ill-defined nature of preliminary presumption of innocence instructions and juror predispositions in the story model, references are limited to information integration models throughout the balance of this article. It is likely, however, that the arguments and points made are equally applicable to a story model.

73. The temporal placement of the presumption of innocence and reasonable doubt rule in these models is not an artifact of the timing of the instructions. Instead, it reflects a distinction between the presumption of innocence as a guardian of initial beliefs, and the reasonable doubt rule as a decision rule.

Notably, there are several assumptions of decision making models that place definite limits on their external validity. For instance, with regard to algebraic weighted models, researchers have noted the limitation of estimating the probability of guilt on an interval scale. Many attributes and dimensions in an actual trial do not lend themselves to such quantification. In addition, the way in which algebraic models require information items to be specified is equally unrealistic given the complexity of evidence presented at trial. *See* Hastie, *supra* note 66, at 90–91.

74. *See infra* notes 280–92 and accompanying text.

75. *See* Sundby, *supra* note 49, at 493 (explaining that "[i]t may be helpful to think of innocence in this context as more of a question of criminal responsibility than an issue of culpability. The term responsibility perhaps better reflects the idea that once the focus is on the criminal trial, the issue is no longer one of abstract moral right and wrong, but specifically whether society views the individual as responsible for violating the criminal law.")

76. *See infra* notes 399–401 and accompanying text.

77. *Id.*

innocence, or as a symbolic message to criminal justice functionaries. Reminders and symbolic messages do not rise to the level of fundamental due process rights. Reminders and symbolic messages are not axiomatic, elementary, and basic premises of a legal system. The rhetoric that supports the presumption of innocence has given a simple maxim the appearance and sound of a fundamental legal doctrine.[78] Presuming anything but the factual innocence of an accused would, if the rhetoric is taken seriously, compromise the impartiality and accusatorial nature of guilt determination.[79] Neglect factual innocence, and the fundamental fairness of a trial is called into question. The vast difference between the actual operation and the rhetorical commitment of the presumption is nothing short of remarkable. This difference is explored below in a discussion of the history and evolution of the presumption of innocence, the normative environment within which it is maintained, and mounting empirical evidence of juror miscomprehension of basic legal doctrines.

2. *Historical Basis*

Thayer's careful tracing of legal history finds only fleeting references to the presumption of innocence from the thirteenth century through the seventeenth century.[80] From Bracton to Menochius, the presumption of innocence was found to be no more than a symbolic reference or "synonym" for the evidentiary burdens of a criminal case.[81] Issues

78. A discussion of the tension between legal innocence and factual guilt will appear in part II.A. A proposal that is designed to return meaning to be the presumption of innocence is discussed in part III.

79. *See infra* notes 357–61 and accompanying text.

80. The Court in *Coffin* finds early references to the presumption of innocence in Deuteronomy, as well as in Roman law and the laws of ancient Greece. Coffin v. United States, 156 U.S. 432, 454 (1895). Thayer, *supra* note 12.

81. As Thayer noted:

> And I think it will be found that, in English practice, down to our time, the presumption of innocence—except as a synonym for the general principle incorporated in that total phrase which expresses the rule about a reasonable doubt, namely, that the accused must be *proved* guilty, and that beyond a reasonable doubt—plays a very small part indeed.

Supra note 12, at 554. *See also* Fletcher, *supra* note 9, at 533–34 (explaining that "[r]elating the presumption of innocence to the process of proof and conviction was a relatively new development. The doctrine appears in some early nineteenth-century civil disputes, but it was apparently not until mid-century that judges and commentators began to use the presumption of innocence as a rationale for the prosecutor's burden of persuasion."). Fletcher provides a different historical account of the presumption of innocence, tracing it to private disputes in the early 1800s, "as a rationale for requiring the plaintiff to prove a negative proposition." George P. Fletcher, *Two Kinds of Legal*

relating to weight of evidence, questions about shifting burdens of persuasion, and debates over standards of proof were common. The history of the presumption of innocence, by contrast, is a sparse account of trial strategy and tactics. Throughout the late eighteenth and early nineteenth centuries, practitioners used the presumption of innocence as advocates now use rhetorical devices.[82] Jurists employed the presumption of innocence as an educational tool to inform naive, doubtful, and questioning jurors.[83] The presumption of innocence became a seemingly important reminder from the bench that all jurors are admonished to assume no guilt until and unless there is proof of guilt beyond a reasonable doubt. There is scant historical evidence that the presumption of innocence, at any time, stood alone as a presumption of factual innocence.[84]

The historical record of the presumption of innocence stands in sharp contrast to the evolution of the reasonable doubt rule in seventeenth century English courts. By the middle 1600s jurors were factfinders and evaluators, judging the credibility of testimony and evidence against standards of proof that had emerged from religious and philosophical sources.[85] From this time through the middle 1700s, English juries were asked to base verdicts on their "belief" in the evidence, being "satisfied" with the evidence, or having a "satisfied conscience."[86] Concerned with the effect of residual doubts on the minds of trial jurors, courts over the next century moved away from "satisfaction" standards and instructed juries to acquit if there was a reasonable doubt of the defendant's guilt.[87] In some courts this meant that guilt must be established to a moral certainty.[88]

Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880 (1968).

82. Thayer, *supra* note 12, at 554–59.

83. According to Thayer, the presumption of innocence "has, in our inherited system, a peculiarly important function, that of warning our untrained tribunal, the jury, against being misled by suspicion, conjecture, and mere appearances." *Id.* at 559.

84. Professor Tribe concludes that the presumption of innocence "retains force not as a *factual* judgment, but as a *normative* one—as a judgment that society *ought* to *speak* of accused men as innocent, and *treat* them as innocent, until they have been properly convicted after all they have to offer in their defense has been carefully weighed." Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1371 (1971).

85. *See* Shapiro, *supra* note 8, at 13.

86. *Id.*

87. *Id.*

88. Today, the standard of moral certainty is generally not considered to be an acceptable proxy, standing alone, for the reasonable doubt rule. *See* Victor v. Nebraska, 114 S. Ct. 1239 (1994); Cage v. Louisiana, 498 U.S. 39 (1990), *overruled in part by* Estelle v. McGuire, 502 U.S. 62 (1991).

By the end of the well documented genesis of the reasonable doubt rule, the presumption of innocence was still no more than an often used maxim having little, if anything, to do with presuming factual innocence. By presuming innocence, courts were merely reminding jurors to observe the reasonable doubt rule. While judges increasingly referred to the presumption of innocence, legal theorists were noticeably frustrated by the divergence between presumption of innocence in rhetoric and its appearance in the criminal process. Bentham, for example, highlighted the apparent contradiction of the presumption of innocence that one is presumed innocent while assumed to be guilty.[89] This simple yet powerful observation has been echoed throughout the legal and academic community for years. Jurists and lay observers alike have noted that the criminal process, from beginning to end, defeats presumptions of innocence and invites presumptions of guilt.[90]

To some it is of little consequence that an accused is presumed guilty in fact. The presumption of innocence is a normative conclusion and a

Currently, only California, Idaho, Massachusetts, North Dakota, and Tennessee use moral certainty language in pattern instructions. The Court in *Victor* noted that the meaning of moral certainty has evolved. 114 S. Ct. at 1245–48. For example, reference is made to Commonwealth v. Costley, 118 Mass. 1, 24 (1875) where it was held that: "Proof 'beyond a reasonable doubt'. . . is proof 'to a moral certainty,' as distinguished from absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent. . . ." 114 S. Ct. at 1246. For a historical account of the moral certainty standard, see Barbara J. Shapiro, *"To A Moral Certainty:" Theories of Knowledge and Anglo-American Juries: 1600–1850*, 38 Hastings L.J. 153 (1986).

89. Bentham considered the presumption of innocence in his treatise:

> In all cases of penal procedure, the declared supposition is, that the party accused is innocent; and for this supposition, mighty is the laud bestowed upon one another by judges and law-writers. This supposition is at once contrary to fact, and belied by their own practice . . . .The defendant is not in fact treated as if he were innocent, and it would be absurd to deal by him as if he were. The state he is in is a dubious one, betwixt non-delinquency and delinquency: supposing him non-delinquent, the immediately should that procedure against him drop; everything that follows is oppression and injustice.

Bentham, *supra* note 17, at 169.

90. Wigmore, *supra* note 35 (quoting Darling). Darling casts a wide net, making reference to each and every step of the criminal process:

> The secrecy of complaint-making at the magistrate's office, the mysterious inquisition of the grand-jury room, the publicity of the arrest, the commitment to the lock-up, the demand of bail, the delay of trial, the enforced silence of defence till prosecution has done its worst, are all so many steps and strokes to blacken the accused before he is to open his mouth with a syllable of evidence to break the force of the damaging array of circumstances. To suppose that the presumption of innocence, with unbiased nature prompts, is not before this time choked and strangled to death is an absurdity too gross to dispute.

Id. at 531.

symbolic expression, not a statement of fact.[91] On the contrary, juror predisposition toward factual guilt raises an issue of presumptive partiality. It invites cognitive biases that frame jurors' subsequent evaluations of evidence. And, the use of rhetoric supporting the presumption of innocence in the face of such predispositions only adds legitimacy to a normative environment that tolerates or willingly accepts guilt presumptions.[92] To appreciate the real meaning of this presumption in the context of the criminal process, it is necessary to consider both normative models of the criminal process and empirical models of juror decisionmaking.

3. *Normative Process and Decisionmaking Models*

Normative process and decisionmaking models, such as those constructed by Herbert Packer, Hyman Gross, and Malcolm Feeley, reveal the value antinomy of criminal justice.[93] From the due process and crime control models to the pretrial and plea bargain models, legal theorists have noted the complex relation between presuming innocence and the structural, procedural, and substantive characteristics of the criminal process. The crime control model, for example, emphasizes efficiency, speed, and finality to maximize apprehension and conviction rates. All stages of the criminal process belong to an administrative, routinized machine that has as its sole task the screening and processing

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91. *See* Tribe, *supra* note 84, at 1371 (noting that "[t]he suspicion that many are *in fact* guilty need not undermine either this normative conclusion or its symbolic expression through trial procedure, so long as jurors are not compelled to articulate their prior suspicions of guilt in an explicit and precise way"). Thayer concurs in arguing that the presumption of innocence as a legal presumption is wholly independent of facts that may or may not support it. Thayer, *supra* note 12, at 560.

92. In parts II and III, I conclude that the presumption of innocence is needed as a factual presumption—one that is conceptually distinct from the reasonable doubt rule. *See infra* notes 282–356 and accompanying text.

93. *See, e.g.*, Herbert L. Packer, *The Limits of the Criminal Sanction* (1968); Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (1992); Hyman Gross, *A Theory of Criminal Justice* (1979). Normative theories that explain the criminal process may be distinguished from the more narrowly focused theories of criminal trials. Theories of adversary criminal trials, such as the fight theory, truth-finding theory; fair decision theory, rights theory, and bargaining incentive theory, seek to explain the complex adversarial dynamic created by such proceedings. The focus is squarely on the criminal trial as a separate and distinct stage of the criminal process. *See* Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. Crim. L. & Criminology 118 (1987); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403 (1992); Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (1973).

of suspects and defendants.[94] Crime control theorists rely on the proof determinations that take place at the time of arrest, arraignment, bail, and trial as indicators of probable guilt. As standards of proof move from reasonable suspicion to proof beyond a reasonable doubt, an assumption of factual guilt replaces any earlier presumption of innocence.[95] According to Packer, defendants who are most likely innocent are screened out of the system.[96] Relying heavily on the early stages of the administrative and adjudicatory factfinding, crime control theorists implicitly use a presumption of factual guilt to create efficiency, e.g., plea negotiation and bargaining.[97]

The due process model, in contrast, honors the presumption of legal innocence by erecting an obstacle course of legal protections and safeguards. In doing so, all the qualifying and disabling doctrines that serve to restrict the reach of the criminal law are raised and considered.[98] An accused is legally innocent, and therefore not criminally culpable, where procedural rules are not strictly observed or where viable defenses and excuses are relevant. Once more, factual innocence is unimportant. The presumption of innocence has only functional relevance, ensuring

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94. Packer captures the essence of this machine:

> The image that comes to mind is an assembly-line conveyor belt down which moves an endless stream of cases, never stopping, carrying the cases to workers who stand at fixed stations and who perform on each case as it comes by the same small but essential operation that brings it one step closer to being a finished product, or, to exchange the metaphor for the reality, a closed file.

Packer, *supra* note 93, at 159. There is, however, much more to the crime control position. Theorists, legal scholars, and jurists who are committed to strong, swift, and efficient criminal justice claim that criminal procedure is overly concerned with rights and safeguards. As Judge Learned Hand noted in *United States v. Garsson*,

> Our dangers do not lie in too little tenderness to the accused. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiments that obstructs, delays, and defeats the prosecution of crime.

291 F. 646, 649 (S.D.N.Y. 1923).

95. This is a central theme of all due process theorists. Simply stated, the standards of proof required before trial are far more lax than the reasonable doubt rule. For an excellent discussion of these standards in relation to a series of pretrial screens, see Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960).

96. Packer, *supra* note 93, at 159–60.

97. Goldstein argues that crime control ideology, as reflected in existing laws of criminal procedure, constitute "an inarticulate, albeit clearly operative, rejection of the presumption of innocence in favor of a presumption of guilt." Goldstein, *supra* note 95, at 1152.

98. Accordingly, Packer acknowledges that "The possibility of legal innocence is expanded enormously when the criminal process is viewed as the appropriate forum for correcting its own abuses." Packer, *supra* note 93, at 167.

that the state fulfills its burden to prove legal guilt. The focus here is squarely on the primacy of individual liberty, judicial reliability, formal adversarial fact-finding, and minimization of stigma. The due process model reveres equality and fairness, rather than rountinization and efficiency.

Packer, Feeley, and other legal theorists acknowledge that the crime control and due process models are polarities and illustrate normative extremes.[99] These extremes reflect, more broadly, what Jerome Hall has called "the basic dilemma of criminal procedure."[100] Criminal procedure, Hall maintains, is "designed from inception to end, to acquit the innocent as readily, at least, as to convict the guilty."[101] The easier it is to establish guilt, the more difficult it becomes to prove innocence.[102] Thus, it is not surprising that normative models, viewed in isolation, often appear as zero sum games.[103] In the early to middle 1970s variants of

99. *Id.*

100. Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51 Yale L.J. 723 (1942). Professor Hall's discussion of the inherent conflict of competing normative goals is a landmark study in procedural theory.

101. *Id.* at 728. The object, Hall might argue, is to find some middle ground. Mr. Justice Day made this argument over eighty years ago:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the law.

Weeks v. United States, 232 U.S. 383, 393 (1914).

102. Hall argues that legal commentators fail to appreciate the dual character (crime control/due process) of the criminal process. There is no such thing as an assumption of guilt—it is a notion maintained by well-intentioned but naive reformers who mischaracterize the realities of the criminal process. And polemic arguments that those accused of crimes are afforded too many procedural safeguards also miss the point. Our system of criminal procedure, Hall writes, seeks to determine guilt with the basic hypothesis of innocence. The criminal process is designed with this tension as its central feature—a feature that safeguards constitutional rights and resists oppression. Hall concludes that "the most important single generalization that can be made about American criminal procedure or for that matter about any civilized criminal procedure is that its ultimate ends are dual and conflicting." Hall, *supra* note 100, at 728.

Professor Hall is successful in portraying the illogic of adopting either a strict crime control or strict due process position. *See* Freda Adler et al., *Criminal Justice* 233 (1994). The immanent conflicting nature of the criminal process is acknowledged. Unfortunately, Hall does little to suggest that this dual and conflicting character evolves over time. Conflict in the criminal process is not immune to increasing ideological consensus, or escalating sociopolitical and socioeconomic division. It will be argued below that over the last decade there has been a diminution in goal conflict.

Further, Hall's characterization of the criminal process makes a critical assumption that the tradeoff in conflict is proof of guilt for innocence, or the inverse. This, it will be argued, overstates the importance of proof of innocence in our current criminal justice system.

both crime control and due process models, operating simultaneously, were seen in state and federal trial courts around the United States.[104] Legal and political culture, judicial ideology, caseload constraints, court delay, and available financial resources often determined the quality and character of the interaction between these two models.[105] At that time, the criminal process was defined by the simultaneous expressions of crime control and due process goals and values.[106] Such conflict, reflecting deeply held beliefs about the value of efficient prosecution and the importance of public safety on one side, versus the value of due process and the primacy of liberty interests on the other, created alternating states of equilibrium and disequilibrium.[107]

Over the last decade, value and goal conflict has significantly diminished, resulting in a criminal process with an overriding ideology

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103. There have been surprisingly few game theoretical analyses of the criminal process. *See, e.g.*, Robert L. Birmingham, *A Model Of Criminal Process: Game Theory and Law*, 56 Cornell L. Rev. 57 (1970). Feeley suggests that the plea bargaining model is a mixed strategy game where both the defense and prosecution share gains and losses. *See* Feeley, *supra* note 93. Unfortunately, this model says little, if anything, about the complex normative environment in which compromises and deals are made. And, finally, Feeley's Pretrial Process model justifiably shifts the focus on functionaries who make preliminary decisions concerning arraignment, release, and charging. However, it too fails to capture the complex equilibrium that results from adversarial functionaries who share divergent values.

104. *See, e.g.*, Peter Arnella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 Geo. L.J. 185, 230–31 (1983); Rudolph Alexender, Jr. *The Mapp, Escobedo, and Miranda Decisions: Do They Serve a Liberal or a Conservative Agenda?*, 4 Crim. Just. Pol'y Rev. 39 (1990); C. K. Rowland et al., *Judges' Policy Choices and the Value Basis of Judicial Appointments: A Comparison of Support for Criminal Defendants Among Nixon, Johnson, and Kennedy Appointees to the Federal District Courts*, 46 J. Pol. 886 (1984). *Cf.* Craig M. Bradley, *The Failure of the Criminal Justice Revolution* (1993).

105. For a fascinating thesis on the cyclical nature of this equilibrium, see Thomas J. Bernard, *The Cycle of Juvenile Justice* (1992).

106. *See, e.g.*, Kevin N. Wright, *The Desirability of Goal Conflict within the Criminal Justice System*, 9 J. Crim. Just. 209 (1981). Wright argues that such goal conflict is advantageous. Disequilibrium encourages the representation and protection of minority interests; ensures appropriate procedural checks and balances; and promotes an efficiency in criminal processing. Diversity allows for conflict resolution. Acknowledging the work of Hall, Wright decries the effort of some reformers to create a monolithic and unified system for the administration of criminal justice.

Another perspective, perhaps more consistent with recent experience, would find that where value and goal divergence are primary forces in each stage of law enforcement and adjudication, the result is a dynamic that ensures only minimal observance of procedural and substantive rights, mediocre to inferior representation, and dispassionate prosecution. And with significant goal divergence, no assumptions may be made concerning an accused's guilt or innocence because of strong ideological partisanship. It will be argued that current ideological consensus approaches a crime control model.

107. *See* David J. Bodenhamer, *Fair Trial: The Rights of the Accused in American History* (1992).

often approaching that found in crime control models.[108] This ideology reflects an emphasis on judicial restraint, strict statutory construction, a strong commitment to the rule of law, and a wholesale acceptance of retributive justice.[109] A retributive formalism, reflecting ever-increasing public conservatism toward issues of crime and justice, has replaced much of the due process/crime control conflict found in the 1970s.[110] Examples of a diminution in normative conflict, with a move toward efficiency in prosecution, retributive sentencing philosophies, and incapacitative strategies, are more than revealing. Consider, for instance, the role of the presumption of innocence before trial. Eight years ago, in *United States v. Salerno*,[111] the Court upheld the constitutionality of pretrial detention of arrestees under the Bail Reform Act of 1984.[112] In doing so, Justice Rehnquist weighed the public safety interests of the Government against the liberty interests of the detainee.[113] The Court clearly followed a crime control vision of the criminal process in deciding that there was no violation of substantive due process and no imposition of impermissible punishment. As the Court had concluded some years prior in *Bell v. Wolfish*,[114] pretrial detention is regulatory, not

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108. *See, e.g.*, Alida V. Merlo & Peter J. Benekos, *Adapting Conservative Correctional Policies to the Economic Realities of the 1990s*, 6 Crim. Just. Pol'y Rev. 1 (1992); *Criminal Justice Policy and Politics in the 1990s* (Robert Reiner and Malcolm Cross eds., 1991); C. K. Rowland et al., *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 Law & Soc'y Rev. 191 (1988); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 Judicature 48 (1986); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403, 441 (1992) (stating that "[i]n today's world of criminal practice, prosecutors are not in the business of trying to convince a jury to convict someone whom they believe to be innocent. Our courts are crammed with enough guilty defendants and our prosecutors armed with enough weapons to pressure plea bargains from the 'marginally guilty.'") For two interesting critical reviews, see Tony Platt, *U.S. Criminal Justice in the Reagan Era: An Assessment*, 29 Crim. & Soc. Just. 58 (1987); Susan Caringella Macdonald, *State Crisis and the Crackdown on Crime under Reagan*, 14 Cont. Crises 91 (1990).

109. Charles Fried, *Order and Law: Arguing the Reagan Revolution—A Firsthand Account* (1991); David Karys, *Conservative Legal Thought Revisited*, 91 Colum. L. Rev. 1847 (1991) (book review). David Savage, *Turning Right, the Making of the Rehnquist Supreme Court* (1992).

110. David Kairys, *With Liberty and Justice for Some: A Critique of the Conservative Supreme Court* (1993).

111. 481 U.S. 739 (1987).

112. 18 U.S.C. § 3141 (1988 & Supp. 1993). Before Bell v. Wolfish, 441 U.S. 520 (1979), the presumption of innocence protected the rights of pretrial detainees. Infringements on such rights were measured against a compelling necessity test. *See* Stack v. Boyle, 342 U.S. 1, 4 (1951) (stating that the "traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction") *See also* Block v. Rutherford, 468 U.S. 576 (1984); Schall v. Martin, 467 U.S. 253 (1984).

113. *Salerno*, 481 U.S. at 745 (1987).

punitive, and is one solution among many to the pressing social problem of ever-increasing crime rates in America's inner cities.[115] Further, pretrial detention is carefully limited, and is imposed in the context of a host of constitutional safeguards.[116]

Any consideration by the *Salerno* majority of legal or factual innocence was lost in the rhetoric of public safety and community protection.[117] Justice Marshall, in dissent, zealously upheld the due process vision.[118] The majority, argued Marshall, disregarded principles of justice that are enshrined in the Bill of Rights, far beyond the reach of governmental interference.[119] The Court, accordingly, had renounced the role of the Bail Clause and the Due Process Clause in protecting the presumption of innocence.[120] The Court had turned an untried indictment into evidence.[121] The Court had overlooked the Bail Reform Act's admonition that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence."[122] Finally, the Court had somehow forgotten that an accused is as innocent before trial as he is during trial and after acquittal. Marshall pressed on, borrowing

114. 441 U.S. 520, 533 (1979) (finding that the presumption of innocence has to have "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun").

115. *Salerno*, 481 U.S. at 747. *See* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 Minn. L. Rev. 335 (1990).

116. *Salerno*, 481 U.S. at 742.

117. *See* Cathy Bosworth, Note, *United States v. Salerno: Destruction of the Presumption of Innocence?*, 32 St. Louis U. L.J. 573 (1987); Craig Ethan Allen, Note, *Pretrial Detention and the Loss of Innocence: United States v. Salerno*, 11 Hamline L. Rev. 331 (1988); John A. Washington, Note, *Preventive Detention: Dangerous Until Proven Innocent*, 38 Cath. U. L. Rev. 271 (1988); David Jeff, Note, *The Loss of Innocence: Preventive Detention Under the Bail Reform Act of 1984*, 22 Am. Crim. L. Rev. 707 (1985).

118. *Salerno*, 481 U.S.739, 755 (1987).

119. *Id.* at 755–56.

120. *Id.*

121. It is interesting that the Controlled Substances Act, 21 U.S.C. § 801, triggers a rebuttable presumption under the Bail Reform Act of 1984, 18 U.S.C. § 3141, that there are no conditions that will assure the court that the accused will appear for trial, or that the community would be safe if the accused is placed on his or her recognizance. In short, those accused of drug offenses must rebut the presumption that they pose an increased risk of dangerousness and flight by coming forward with some evidence that they will not flee or pose a danger to the public if released. *See, e.g.*, United States v. Rueben, 974 F.2d 580, 586 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1336 (1993); United States v. Hinote, 789 F.2d 1490 (11th Cir. 1986); United States v. Perry, 788 F.2d 100 (3d Cir. 1986), *cert. denied*, 479 U.S. 864 (1986).

122. 18 U.S.C. § 3142 (J) (1988 & Supp. 1993).

dramatic language from the court in Coffin: "If it suffices to accuse, what will become of the innocent?"[123]

Due process theorists recognize that the perception of an accused's innocence, whether factual or legal, is overcome by standards of proof associated with search and seizure of evidence, arrest, indictment, detention, and plea bargaining.[124] The result of the criminal process is a presumption of guilt and a status degradation.[125] Certain warrantless searches that involve minimal intrusion require a reasonable suspicion

123. Coffin v. United States, 156 U.S. 432, 455 (1895). The court in *Coffin* had borrowed an anecdote from the Emperor Julian, the full text of which is: "[O]h, illustrious Caesar! If it is sufficient to deny, what hereafter will become of the guilty?" To which Julian replied, "[I]f it suffices to accuse, what will become of the innocent?" *Id.*

124. *See* Thaler, *supra* note 13, at 442–50. Thaler argues that a presumption of guilt attaches immediately following arrest. The presumption is underscored by the confidence that is bestowed in the "low-visibility" decisions and determinations made by police, prosecutors, witnesses, and victims. Formal proceedings where probable cause and bail determinations are made, including initial appearances and preliminary hearings, use standards of proof that denigrate the reasonable doubt rule. Add to this the practice of plea bargaining and, according to Thaler, the result is that a significant percentage of convictions are "obtained by a standard of proof below the trial's proof beyond a reasonable doubt." *Id.* at 458–59. *See also* Patricia M. Wald, *Guilt Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers*, 1993 U. Chi. Legal J. 101. Judge Wald makes a similar argument by noting that the importance of the reasonable doubt rule in the criminal process has been overstated. The reasonable doubt rule, according to Wald,

> may be a household phrase thanks to Perry Mason and Scott Turow, but it does not define how most important decisions are made in the criminal justice system. This growing irrelevance of the reasonable doubt standard is demonstrated at every phase of a criminal prosecution, from the initial encounter with a law enforcement officer, to plea bargaining, through the jury trial, and even into sentencing.

Id. at 102. In place of the reasonable doubt rule, Wald makes reference to a series of different measures of suspicion (e.g., articulable or reasonable suspicion by police) and evidence (e.g., probable cause) that play a role in casting a shadow of guilt on the accused. For a contrasting views on an accused's innocence in relation to plea bargaining, see Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992). *See also* Alissa P. Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 Judicature 335 (1990); David Brereton & Jonathan D. Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 Law & Soc'y Rev. 45 (1981). For an excellent overview of all decision making events in relation to standards of proof, see Michael R. Gottfredson & Don M. Gottfredson, *Decisionmaking in Criminal Justice: Toward the Rational Exercise of Discretion* (1980).

125. *See* Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 545 (1960) (stating that "[b]efore verdict, and despite the presumption of innocence which halos every person, the state deprives the suspect of life, liberty, dignity, or property through the imposition of deadly force, search and seizure of persons and possessions, accusation, imprisonment, and bail, and thus seeks to facilitate the enforcement of the criminal law") *See also* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 (1960).

that a crime has been committed or is being committed.[126] Seizure of contraband implicitly confirms police suspicion of guilt.[127] Arrest decisions by law enforcement officers, requiring probable cause to believe that a crime has been or is being committed, lead to an assumption of guilt.[128] Further evidence of guilt is elicited, and then presumed, during an arraignment, preliminary examination, or preliminary hearing where it is determined whether probable cause exists that an offense has been committed by the accused.[129] Grand jury and

126. Reasonable suspicion suffices for warrantless searches. In order to obtain a search warrant, however, state and federal rules of criminal procedure require probable cause. Specifically, probable cause had been demonstrated where facts and circumstances within the agents' "knowledge, and of which they had reasonably trustworthy information . . . [are] sufficient in themselves to warrant a man of reasonable caution in the belief that . . ." a crime has been committed or is being committed. Carroll v. United States, 267 U.S. 132, 162 (1925). Proof of criminal activity is not required. United States v. Tasto, 586 F.2d 1068 (5th Cir.), *cert. denied*, 440 U.S. 928 (1978). However, there must be more than "mere good faith and suspicion." Brinegar v. United States, 338 U.S. 160, 176–77 (1949) (holding that probable cause exists if the facts and circumstances known to the officer warrant a prudent person to believe that the offense has been committed).

127. For a discussion of this effect, see the following two classic studies: Jerome Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* 197 (1964); Paul G. Chevigny, *Police Power: Police Abuses in New York City* (1969).

128. *See* Goldstein, *supra* note 15. Professor Goldstein discusses the fact that police are in a unique position to determine whether or not to enforce a criminal law. Decisions not to enforce, or to enforce, involve strong perceptions and presumptions concerning a suspect's culpability. *See also* Thaler, *supra* note 13, at 443. As noted earlier, Thaler concludes that the presumption of innocence disappears immediately after arrest. This point is discussed in detail by Jonathan D. Casper, *American Criminal Justice: The Defendant's Perspective* 36–37 (1972).

129. The quantum of proof required for probable cause to arrest may or may not differ from probable cause to bind over for trial. *Cf.* Gerstein v. Pugh, 420 U.S. 103 (1975); Brinegar v. United States, 338 U.S. 160 (1949). For arrest, the standard is whether or not there are facts and circumstances "sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964). The minimum quantum of legally competent evidence has often been raised at a preliminary hearing. According to Justice Powell, "[t]he standard of proof required of the prosecution is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt." *Gerstein*, 420 U.S. at 119. *See also* Myers v. Commonwealth, 298 N.E.2d 819 (Mass. 1973). A clear view of the difference in procedural safeguards during a preliminary examination as compared with a trial may be seen in Fed. R. of Crim. P. 5.1:

> (a) Probable Cause Finding. If from the evidence it appears that there is probable cause to believe that an offense had been committed and that the defendant committed it, the federal magistrate shall forthwith hold the defendant to answer in district court. The finding of probable cause may be based on hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12.

See Coleman v. Alabama, 399 U.S. 1 (1970); Feeley, *supra* note 93. According to Feeley, those accused of crime bear significant costs from time of arrest until such hearings. The costs associated with exercising due process guarantees from this point on well exceed the benefits. *Id.* at 30–31.

charging decisions by prosecutors require presumptive judgments concerning a defendant's legal culpability, without the benefits of some pivotal constitutional safeguards, further undermining the presumption of innocence.[130] Bail proceedings also weaken the presumption of innocence by making release decisions contingent on the severity of unproved allegations of wrongdoing and subjective judicial predictions of behavior pending trial.[131] Pretrial detention in jail is decisive evidence of guilt.[132] Plea bargaining practices lure legally innocent and risk-adverse defendants into pleading guilty to lesser charges to avoid the significant costs of further detention and criminal processing.[133] Plea bargain contracts increase the likelihood of convicting innocents as compared with fully adjudicated cases that are decided after testimony of witnesses to the particular event has been heard and all of the truth-checking devices of a vigorous adversary procedure have been used.[134] The sum of all the evidence, suspicions, beliefs, presumptions, and

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130. *See* United States v. Williams, 112 S. Ct. 1735 (1992) (holding that government's failure to disclose to the grand jury "substantial exculpatory evidence" is not error). *See also* United States v. Miller, 471 U.S. 130 (1985); United States v. Calandra, 414 U.S. 338, 349 (1974) (stating that "[i]n deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context. It is evident that this extension of the exclusionary rule would seriously impede the grand jury.") For a critical and somewhat dated review of the grand jury function as a pretrial screen, see Melvin P. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153 (1965). Case law and scholarly literature on prosecutorial discretion and decision making have grown significantly. *See* Freda Adler et al., *Criminal Justice* 288–89, 292-93 (1994). Discretion still remains, with few limitations, in the hands of prosecutors. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (stating that "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion"). *See also* Wayte v. United States, 470 U.S. 598 (1985); United States v. Goodwin, 457 U.S. 368 (1982).

131. *See supra* notes 118–30 and accompanying text.

132. *Id.*

133. For an outstanding discussion of the future of plea bargaining, while considering innocence in relation to bargaining theory and classical contract theory, see Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1948 (1992) (noting that plea bargaining "contract is inefficient because it fails to exploit the risk reduction potential of defendants' private knowledge [of his innocence]") For a powerful rejoinder to Scott & Stuntz, see Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979 (1992) (stating that "[c]onstitutional and doctrinal objections aside, plea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent") *See also* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969 (1992). For a discussion of the effects of vertical and horizontal overcharging in order to "encourage" a defendant to bargain, see Michael P. Cox, *Discretion: A Twentieth Century Mutation*, 28 Okla. L. Rev. 331 (1975).

134. Schulhofer, *supra* note 133, at 2008. Schulhofer concludes that "[p]lea bargaining is a disaster. It can be, and should be, abolished." *Id.* at 2009.

judgments of guilt before trial can do nothing other than weaken, if not disable, the presumption of innocence.[135]

There is also a reduction in normative conflict over the scope and application of the presumption of innocence after trial. Even though courts have not extended the presumption of innocence beyond the stage of conviction, a defendant's presumed innocence may still be at issue at sentencing.[136] Over forty-five years ago the Supreme Court, in *Williams v. New York*,[137] upheld the use of unadjudicated offenses in capital jury determinations. The Due Process clause does not prohibit the consideration of prior unadjudicated crimes. This is so even if such evidence comes from a pre-sentence investigation report, relying on sources who were neither confronted nor cross-examined by the defendant. This type of evidence, in large part, would have been inadmissible in court.[138] Since Williams, many federal and state courts have admitted extraneous unadjudicated offenses as aggravating evidence in the penalty phases of capital trials.[139] While federal circuits are at odds and there is little consensus in state courts,[140] such evidence is

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135. One fine example of the emasculation of the presumption of innocence is the enforcement of asset forfeiture laws, allowing for governmental seizure and taking of private property from those accused of federal narcotics law violations under the Comprehensive Crime Control Act of 1984. *See* 21 U.S.C. § 881 (1988 & Supp. 1993); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 Hastings L.J. 1325 (1991). Crime control theorists, and others, would maintain that presuming innocence after all of the procedural screens is ingenuine and counterfactual. Most of those defendants who opt for trial for a determination of guilt are convicted. *See* H.F.M. Crombag, *Law as a Branch of Applied Psychology*, 1 Psychol., Crime & Law 1 (1994).

136. The Supreme Court has often stated that the presumption of innocence disappears once a defendant has been tried and convicted. As the Court noted in Ross v. Moffitt, 417 U.S. 600, 610 (1974), "[t]he purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt." Following conviction, a petitioner comes to the Court legally guilty, without the presumption of innocence. Herrera v. Collins, 113 S. Ct. 853, 860 (1993); Murray v. Giarratano, 492 U.S. 1, 11–12 (1989). While this is true, one narrow exception may exist with the use of unadjudicated extraneous offenses in sentencing deliberations. In *Delo*, the court left the door open to the application of the presumption of innocence at sentencing if "the circumstances created a genuine risk that the jury would conclude, from factors other than the State's evidence, that the defendant had committed other crimes." Delo v. Lashley, 113 S. Ct. 1222, 1226 (1993).

137. 337 U.S. 241 (1949).

138. The court noted: "We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." *Id.* at 252.

139. For a thorough review of this practice, see Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. Rev. 1249 (1993).

140. *See, e.g.*, Williams v. Lynaugh, 814 F.2d 205 (5th Cir), *cert. denied*, 484 U.S. 935 (1987); Coleman v. McCormick, 874 F.2d 1280 (9th Cir), *cert. denied*, 493 U.S. 944 (1989).

used without any significant restriction in six states,[141] and another ten states allow extraneous offenses to be admitted with limitations.[142] Only eight jurisdictions of the thirty seven that have death penalty statutes disallow evidence of unproved crimes.[143] Courts in the jurisdictions where evidence of unadjudicated crimes is used in penalty determinations have denied, ignored, or minimized the fact that all unadjudicated crimes carry a presumption of innocence.[144]

In spite of all the legal rhetoric supporting the presumption of innocence before, during, and after trial, the prevailing normative environment, underwritten by a reactive formalism, does little to support a presumption of innocence.[145] Early critics of the presumption of innocence would not be surprised that innocence plays an insignificant role in the normative environment of the criminal process—no matter which ideology prevails and no matter how much value or goal conflict exists. The sweeping rhetoric that serves as the justification for the presumption of innocence simply continues in the face of practices that are inconsistent with its premises and promises. Critics would be dismayed, however, by a growing body of empirical evidence suggesting that jurors might not even understand the presumption of innocence as a caution or admonition to follow the reasonable doubt rule. No doubt some would feel frustrated that the presumption of innocence may fail to encourage compliance with existing burdens of proof.

4. *Empirical Evidence of Juror Comprehension*

Playing on the apparent innocence of their client and the naive predispositions of prospective jurors, seasoned trial lawyers find it all too

141. *See, e.g.*, Va. Code Ann. §19.2-264.4 (B) (1990); Stockton v. Commonwealth, 402 S.E. 2d 196 (Va. 1991), *cert. denied*, 502 U.S. 902 (1991).

142. *See, e.g.*, Ga. Code Ann. §17-10-30 (1990); Fair v. State, 268 S.E. 2d 316 (Ga. 1980), *cert. denied*, 449 U.S. 986 (1980). Georgia law differs from California law which requires that all crimes that are referred to in sentencing deliberations be proven beyond a reasonable doubt. People v. Balderas, 711 P.2d 480 (Cal. 1985). California is certainly the exception—Louisiana and Delaware, for example, require only clear and convincing evidence. State v. Wright, 541 So. 2d 891 (La. 1989).

143. For an excellent discussion of extraneous offenses from a state currently prohibiting its use, see State v. Bartholomew, 101 Wash.2d 631, 683 P.2d 1079 (1984).

144. *See* Harris v. State, 827 S.W.2d 949 (Tex. Crim. App. 1992), *cert. denied*, 113 S. Ct. 381 (1992); Motley v. Collins, 18 F.3d 1223 (5th Cir), *cert. denied*, 115 S. Ct. 418 (1994). *See also* Smith, *supra* note 139.

145. Depending on the extent and quality of goal and value conflict, no assumptions or presumptions are made when the normative balance approaches a state of equilibrium.

easy to have at least one juror excused for cause by asking deceptively simple questions: "If you ask the accused, a police officer, and a stranger what the weather forecast is for tomorrow—which one would you believe most?" "If you had to vote right now, before the trial had started, would you vote to acquit or to convict my client?"[146] During voir dire such tricks of the defense trade reinforce the notion that the presumption of innocence has significant meaning and value.[147] Unfortunately, they also tend to reveal the conspicuous lack of juror comprehension of the presumption of innocence and reasonable doubt rule.[148]

Last term, in *Victor v. Nebraska*,[149] the Supreme Court confronted the constitutionality of pattern jury instructions that defined the reasonable doubt rule as involving "not a mere possible doubt," but rather as "depending on moral evidence" that prompts jurors to develop an abiding conviction "to a moral certainty" of the truth of the charge.[150] In considering whether such a standard of proof was a suitable proxy for the reasonable doubt rule, the Court struggled with the question of juror misinterpretation of instructions.[151] The petitioner argued that it was reasonably likely that jurors interpreted the words "moral certainty" to mean a lesser standard of proof. The Court disagreed, and held that the Constitution does not prescribe any particular words or combination of words so long as the instructions, taken as a whole, convey the concept of reasonable doubt.[152] In the process of disagreeing, however, members of the Court revealed their profound ambivalence over certain legal

146. Ann Fagan Ginger, *Jury Selection in Civil and Criminal Trials* 702 (1984).

147. James J. Gobert & Walter E. Jordan, *Jury Selection: The Law, Art, and Science of Selecting a Jury* 410 (1990). *See also* Mullis v. Commonwealth, 351 S.E. 2d 919 (Vt. Ct. App. 1987).

148. Voir dire elicits juror miscomprehension and, less frequently, an unwillingness to abide by the presumption of innocence. *See, e.g.*, United States v. Blount, 479 F.2d 650 (6th Cir. 1973); United States v. Hill, 738 F.2d 152 (6th Cir. 1984); Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio 1971), *aff'd*, 450 F.2d 480 (6th Cir. 1971).

149. 114 S. Ct. 1239 (1994).

150. The following instructions on the state's burden of proof were given to the jury:

> Reasonable doubt is defined as follows: It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they feel an abiding conviction, to a moral certainty, of the truth of the charge.

App. In No. 92-9049, p. 49.

151. *Victor*, 114 S. Ct. at 1243.

152. Justice O'Connor advised that "so long as the court instructs the jury on the necessity that the defendant's guilt be proven beyond a reasonable doubt, the Constitution does not require any particular form of words be used in advising the jury of the government's burden of proof." *Id.* (citations omitted).

terms. The majority opinion did not condone the use of the "moral evidence" and "moral certainty" language as a standard of proof. Justice Kennedy, in a concurring opinion, called the reference to moral evidence "indefensible," and the term moral certainty "a puzzle."[153] He concluded that jurors would be baffled by by the meaning of such legal jargon.[154] Justices Ginsburg, Blackmun, and Souter, in concurring and dissenting opinions, went even further in condemning such evidence and standards.[155]

The Court in Victor also confronted a more difficult question: Do jurors generally understand instructions on the reasonable doubt rule?[156] The answer to this question is significant, as Justice Blackmun acknowledged, because for the reasonable doubt rule to be a meaningful safeguard, it must be understood by those who apply it. Given the extraordinarily high stakes in criminal trials, Blackmun concluded, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."[157] The reasonable doubt rule, like other standards of proof, is a reflection of the value society places on individual liberty.[158] Jurors' misunderstanding of standards of proof can have devastating effects on the outcomes of criminal cases and, if miscomprehension is prevalent, may undermine the confidence that has been placed in the jury system.[159] Juror comprehension of the reasonable doubt rule has

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153. *Id.* at 1251.

154. *Id.*

155. Justice Ginsburg found certain parts of the instructions to be "unhelpful," "less enlightening," "confused," and "no real aid" Justices Blackmun and Souter continued, finding some of the provisions of the instructions to be "misleading," "no help," "offensive to due process," "potentially misleading," "overstating the degree of doubt required to acquit," and "understanding the degree of certainty required to convict." *See id.* at 1252–59.

156. In a concurring opinion, Justice Ginsburg noted that reasonable doubt rule is not "self-defining" for jurors. She also wrote that courts have questioned the effectiveness of reasonable doubt rule instructions. Justice Ginsburg observed that: "At least two of the Federal Courts of Appeals have admonished their District Judges not to attempt a definition. This Court, too, has suggested on occasion that prevailing definitions of "reasonable doubt" afford no real aid." *Id.* at 1252–53. *See, e.g.*, Holland v. United States, 348 U.S. 121 (1954); United States v. Adkins, 937 F.2d 947 (4th Cir. 1991); United States v. Hall, 854 F.2d 1036 (7th Cir. 1988). This point is not new. Justice Woods noted over one hundred years ago that: "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." Miles v. United States, 103 U.S. 304, 312 (1880).

157. *Victor*, 114 S. Ct. at 1254 (*quoting In re* Winship, 397 U.S. 358, 364 (1970).

158. *See* Addington v. Texas, 441 U.S. 418, 424–25 (1979)

159. As one court observed:

Nothing is more basic to the criminal process than the right of an accused to a trial by an impartial jury. The presumption of innocence, the prosecutor's heavy burden of proving guilt

significant consequences for the presumption of innocence as well. If the presumption of innocence is really no more than an admonition for jurors to abide by the reasonable doubt rule, then for this presumption to have any value, jurors must understand the notion of reasonable doubt.[160]

a. Instructions on Proof Beyond a Reasonable Doubt

A growing body of empirical evidence from both laboratory and field research suggests that jurors often misunderstand basic legal standards in both preliminary and charging instructions.[161] Instructed jurors often

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> beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias.

People v. Thomas, 601 N.Y.S.2d 608, 614 (N.Y. App. Div. 1993). This is not to say, of course, that all criminal cases must have a totally impartial jury with complete neutrality, detachment, open-mindedness, evenhandedness, objectivity, and comprehension of instructions. *See* James J. Gobert, *In Search of the Impartial Jury*, 79 J. Crim. L. & Criminology 269 (1988).

160. This presupposition was given legal force in *Taylor v. Kentucky* where the Court observed: "While the legal scholar may understand that the presumption of innocence and the prosecution's burden of proof are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence." 436 U.S. 478, 485 (1978). The goal is to make instructions, at the very least, more than "a string of meaningless legal abstractions." Luther C. Hames, Jr., *Pattern Jury Instructions*, 27 Mercer L. Rev. 291 (1975).

161. The problem of jury instruction misunderstanding was identified over sixty years ago by R. M. Hunter, *Law in the Jury Room*, 2 Ohio St. L.J. 1 (1935); Walter. B. Wanamaker, *Trial By Jury*, 11 U. Cin. L. Rev. 191 (1937); John G. Hervey, *The Jurors Look at our Judges*, 18 Okla. Bar J. 1508 (1947); H. M. Hoffman & Joseph Brodley, *Jurors on Trial*, 17 Mo. L. Rev. 235 (1952). *See* Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (1966). Empirical research on juror comprehension of instructions, however, was initiated in the early 1970s. *See, e.g.*, Rita J. Simon, *"Beyond a Reasonable Doubt"—An Experimental Attempt at Quantification*, 6 J. Appl. Behav. Sci. 203 (1970); David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature 478 (1976); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 Law & Hum. Behav. 163 (1977); Robert. P. Charow & Veda. R. Charow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1359 (1979) (stating that "[t]he inability of jurors to comprehend the charge adequately has obvious implications concerning the soundness of the jury system: if many jurors do not properly understand the laws that they are required to use in reaching their verdicts, it is possible that many verdicts are reached either without regard to the law or by using improper law") In one study of the Pennsylvania Proposed Standard Jury Instructions conducted in 1977, researchers found that jurors were overwhelmingly confident of their comprehension of eight different judicial charges. Objective evaluation showed significant misunderstanding, leading researchers to the conclusion that "there was more actual misunderstanding of the meaning of the instructions as rated by the investigators than the jurors believed to be the case." Joseph J. O'Mara & Rolf von Eckartsberg, *Proposed Standard Jury Instructions—Evaluation of Usage and Understanding*, 48 Penn. Bar Ass'n Q. 542, 550 (1977). *Cf.* Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. Personality & Soc. Psychol. 282, 291 (1976) (stating that "the reasonable-doubt instructions have the intended effect of setting the juror's criterion for conviction"); and Robin Reed, *Jury Simulation: The Impact of*

perform no better than uninstructed jurors on comprehension surveys.[162] Studies dating back to the early 1970s have consistently revealed comprehension levels at or below fifty percent for samples of actual and mock jurors for a wide range of instructions including instructions on the reasonable doubt rule.[163] For example, researchers found a fifty percent comprehension rate of reasonable doubt instructions in a study of the Florida Standard Jury Instructions.[164] Less than a third of a sample of Michigan jurors understood that the prosecution had the burden of proof.[165] Other studies considering reasonable doubt rule instructions in a host of jurisdictions find comprehension error rates ranging between twenty percent and fifty percent.[166] Efforts on the part of researchers to

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Judge's Instructions and Attorney Tactics on Decisionmaking, 71 J. Crim. L. & Criminology 68 (1980).

162. *See* Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 Law & Hum. Behav. 507 (1993). *Cf.* Reed, *supra* note 161.

163. For a superior review of these studies, *see* Dorothy K. Kagehiro, *Defining the Standards of Proof in Jury Instructions*, 1 Psych. Sci. 194 (1990) (stating that "[c]omprehension levels of 50% or less have been found for mock jurors and representative samples of jurors from jurisdictions such as Arizona, California, Florida, Michigan, Nevada, and Washington") (Citations omitted). *See also* Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases*, 16 Law & Hum. Behav. 539 (1992) who found a sample of Michigan jurors understood fewer than half of all jury instructions. A similar finding was obtained by Jane Goodman & Edith Greene, *The Use of Paraphrase Analysis in the Simplification of Jury Instructions*, 4 J. Soc. Behav. & Personality 237 (1989). *See also* Laurence J. Severance & Elizabeth F. Loftus, *Improving Criminal Justice: Making Jury Instructions Understandable for American Jurors*, 33 Int'l Rev. Appl. Psychol. 97 (1984); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 Law & Soc'y Rev. 153 (1982). For an excellent summary of this intractable problem, see J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 Neb. L. Rev. 71 (1990).

164. *See* Strawn & Buchanan, *supra* note 161, at 481. According to these researchers: "After seeing and hearing the video instructions, only 50 percent of the instructed jurors understood that the defendant did not have to present any evidence of his innocence, and that the state had to establish his guilt, with evidence beyond a reasonable doubt." *Id.* at 481.

165. *See* Reifman, *supra* note 163, at 553 (concluding that "the fact that jurors are unable to understand half the instructions they are supposed to apply is a serious cause for concern regardless of what a realistic base line might be") *See also* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J.L. Ref. 401 (1990).

166. For a discussion of these studies, see Amiram Elwork & Bruce D. Sales, *Jury Instructions* in *The Psychology of Evidence and Trial Procedure* 280 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985), and Valerie P. Hans & Neil Vidmar, *Judging the Jury* 113–29 (1989). An excellent review of both the criminal and civil jury comprehension literature is also found in *Verdict: Assessing the Civil Jury System* (Robert E. Litan ed.1993). *See also* Severance & Loftus, *Improving Criminal Justice*, *supra* note 163, at 106, who found a 34% error rate with general instructions. An identical rate was obtained in Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 74 J. Crim. L. & Criminology, 198, 206 (1984). Comparable rates were found with Raymond W. Buchanan et al., *Legal Communication: An Investigation of Juror Comprehension of Pattern Jury Instructions*, 26 Comm. Q. 31 (1978); Amiram Elwork et al.,

reduce comprehension error in mock jurors include modifying the linguistic features and construction in jury instructions,[167] quantifying reasonable doubt rule instructions,[168] presenting jurors with a preliminary instruction at the beginning of the trial and with a final set of instructions (in the form of a charge) at the conclusion of evidence,[169] rewriting pattern instructions,[170] allowing jurors to take notes,[171] and giving jurors

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Making Jury Instructions Understandable (1982); Edward J. Imwinkelried & Lloyd R. Schwed, *Guidelines for Drafting Understandable Jury Instructions: An Introduction to the Use of Psycholinguistics*, 23 Crim. L. Bull. 135 (1987). Robert F. Forston, *Justice, Jurors and Judge's Instructions*, 12 Judges J. 68 (1973) notes that approximately 80% of subjects who were given two chances at answering an instruction comprehension test failed to understand the allocation of burdens and reasonable doubt.

167. *See, e.g.*, Charow & Charow, *supra* note 161. Psycholinguists have addressed the choice of legalistic jargon, use of complex phrases and structure, and organization of jury instructions. *See* Elwork et al., *supra* note 161.

168. Beginning with the work of Rita J. Simon, *supra* note 161, subsequently reinforced by the research of Francis C. Dane, *In Search of Reasonable Doubt: A Systematic Examination of Selected Quantification Approaches*, 9 Law and Hum. Behav. 141 (1985); and Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 Law & Hum. Behav. 159 (1985), there has been a call for the consideration of quantified definitions of standards of proof, i.e., standards of proof that are expressed in probability terms. *See* Kagehiro, *supra* note 163. While quantified definitions of the reasonable doubt rule, for example, appear far more effective in communicating precise levels of proof, a number of legal commentators argue that they would increase the likelihood of juries convicting innocents, and would unwisely and unfairly reduce the level of subjectivity necessary for jurors to effectively decide cases. *See* Lawrence H. Tribe, *supra* note 84. *See also* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 Vand. L. Rev. 1293 (1982).

169. *See* Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. Personality & Soc. Psychol. 1877 (1979); Elwork et al., *supra* note 161; Vicki L. Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law: A Survey of Judges*, 14 Law & Hum. Behav. 235 (1990); Vicki L. Smith, *Impact of Pretrial Instructions on Jurors' Information Processing and Decision Making*, 76 J. Appl. Psychol. 220 (1991); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. Personality & Soc. Psychol. 857 (1991). For a recent extension of this research to civil cases, see Lynne Forster Lee et al., *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. Appl. Psychol. 14 (1993); Donna Cruse & Beverly A. Browne, *Reasoning in a Jury Trial: The Influence of Instructions*, 114 J. Gen. Psychol. 129 (1987); Charles L. Weltner, *Why The Jury Doesn't Understand the Judge's Instructions*, 18 Judges' J. 18 (1979); Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. (1988).

170. An overview of the revision of pattern instructions may be found in Tanford, *supra* note 163. Rewritten pattern instructions reduced comprehension error rates in Severance & Loftus, *Improving the Ability*, *supra* note 163, at 190–91.

171. *See* David L Rosenhan et al., *Notetaking Can Aid Juror Recall*, 18 Law & Hum. Behav. 53 (1994); Leonard B. Sand & Steven Alan Reiss, *A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit*, 60 N.Y.U. L. Rev. 423 (1985). For cases that consider the practice of jury note taking, see United States v. MacLean, 578 F.2d 64 (3d Cir. 1978); United States v. Rhodes, 631 F.2d 43, 45 (5th Cir. 1980); United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).

written or tape-recorded instructions.[172] Most of these recommendations have been well received by law commissions, largely disregarded by legislatures, and rejected by courts.[173]

b. Presumption of Innocence Instructions

Unfortunately, empirical research on jury instructions most often combines reasonable doubt rule and presumption of innocence provisions.[174] Even though mock jurors have been given both presumption of innocence and reasonable doubt rule instructions, researchers rarely distinguished rates of comprehension error in separate analyses. Early work by Thomas M. Ostrom, Carol Werner, and Michael J. Saks suggests that mock jurors initially assume innocence, and then revise this initial assumption in the direction of the evidence presented.[175] This is especially true with jurors who begin the trial with an "anti-defendant" predisposition.[176] Anti-defendant jurors quickly abandon a presumption of innocence when presented with any incriminating evidence.[177] More recent investigations suggests that the presumption of innocence is not well understood by jurors, with comprehension error rates that mirror those for the reasonable doubt rule. Juror presumption of innocence also appears to be subject to a host of nonevidentiary and extra-legal biases.[178]

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172. Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 Law & Hum. Behav. 409 (1989); Larry Heuer & Steven D. Penrod, *Increasing Jurors' Participation in Trial: A Field Experiment with Jury Notetaking and Question Asking*, 12 Law & Hum. Behav. 231 (1988); Sand & Reis, *supra* note 171.

173. *See* J. Alexander Tanford, *Law Reform by Courts, Legislatures, and Commissions Following Empirical Research on Jury Instructions*, 25 Law & Soc'y Rev. 155 (1991). *See also* Carter v. Kentucky, 450 U.S. 288 (1981).

174. *See, e.g.*, Strawn & Buchanan, *supra* note 161, at 481; Severance & Loftus, *supra* note 163.

175. *See* Thomas M. Ostrom et al., *An Integration Theory Analysis of Jurors' Presumptions of Guilt or Innocence*, 36 J. Personality & Soc. Psychol. 436 (1978).

176. *Id.*

177. *Id.* at 446.

178. *See* Vicki S. Helgeson & Kelly G. Shaver, *Presumption of Innocence: Congruence Bias Induced and Overcome*, 20 J. Appl. Soc. Psychol. 276 (1990). Reifman found that slightly less than 50% of the Michigan jurors surveyed misunderstood the prohibition against inferring guilt in cases where the accused did not testify. *See* Reifman et al., *supra* note 163, at 547. For a research on biases and jury instructions, more generally, see Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611 (1985); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 Tul. L. Rev. 1739 (1993). For empirical evidence of bias and discrimination, see Dolores A. Perez et al., *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. Appl. Soc. Psychol. 1249 (1993); Jeffrey E. Pfeifer & James R.P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. Appl. Soc. Psychol. 1713 (1991); Ronald L. Poulson, *Mock Juror*

In general, research over the last decade that simultaneously examines reasonable doubt rule and presumption of innocence instructions paints a bleak portrait of juror comprehension of these bedrock legal principles. Nothing, however, is more damning than the responses of state courts to prospective jurors who demonstrate a misunderstanding of the presumption of innocence, hesitate to abide by its strictures, or are clearly predisposed toward guilt due to pretrial publicity.[179] In one recent case, for example, the Supreme Court of Arizona ruled that there was no fundamental error in allowing a juror to sit for trial who indicated that he: (1) would treat the testimony of police officers differently from that of other witnesses, (2) did not understand which side had the burden of proof, and (3) did not agree with the presumption of innocence.[180] Jurors have remained on panels after demonstrating miscomprehension of the presumption of innocence,[181] preconceived notions or "fixed opinions" of the accused's guilt,[182] and a hesitancy to apply the presumption of innocence.[183]

Attribution of Criminal Responsibility: Effects of Race and Guilty But Mentally Ill (GBMI) Verdict Option, 20 J. Appl. Soc. Psychol. 1596 (1990); Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 Law & Hum. Behav. 1 (1987); Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decision*, 20 Law & Soc'y 423 (1986); Robert J. MacCoun, *The Emergence of Extralegal Bias During Jury Deliberation*, 17 Crim. Just. & Behav. 303 (1990); Saul M. Kassin & Lawrence S. Wrightsman, *The Construction and Validation of a Juror Bias Scale*, 17 J. Res. Personality 423 (1983).

179. *See* Boyde v. California, 494 U.S. 370 (1990); State v. Cunningham, 429 S.E. 2d 718 (N.C. 1993); State v. Martin, 558 So. 2d 654 (La. Ct. App), *cert. denied*, 564 So. 2d 318 (La. 1990); State v. Kelly, 367 So. 2d 832 (La. 1979); State v. Monroe, 329 So. 2d 193 (La. 1976); State v. Liddell, 318 So. 2d 1 (La. 1975); State v. Leichman, 286 So. 2d 649 (La. 1973), *cert. denied*, 420 U.S. 907 (1975).

180. State v. Bible, 858 P.2d 1152 (Ariz. 1993), *cert. denied*, 114 S. Ct. 1578 (1994).

181. *See* People v. Adams, 867 P.2d 54 (Colo. Ct. App. 1993), *cert. denied*, 1994 LEXIS 76 (Colo. Jan. 24, 1994).

182. *See* People v. Jefferson, 628 N.E.2d 925 (Ill. Ct. App. 1993), *appeal denied*, 633 N.E. 2d 10 (Ill. 1994); High v. Zant, 300 S.E. 2d 654 (Ga. 1983), *rehearing denied*, 468 U.S. 1224, *cert. denied*, 467 U.S. 1220.

183. *See Jefferson*, 628 N.E.2d at 273. In this case, the First District Appellate Court of Illinois upheld a lower court's decision to empanel a prospective juror who said that even though it was her guess that their was a presumption of innocence, she would "like to hear something to prove innocence too." This prompted the following dialogue between the court and the prospective juror:

> [THE COURT]: Q: The State has the burden of proving all defendants guilty beyond a reasonable doubt. Do you have any problem with that?
>
> A: No. I know that's the procedure, yes.
>
> Q: Can you abide by that principle?
>
> A: I would certainly try.
>
> Q: You don't have any opinion?

Add to this the fact that prosecutors often make statements to prospective and sitting jurors that significantly confuse the notion of a presumption of innocence, and it is hardly surprising that miscomprehension rates are high.[184] The Fifth Circuit Court of Appeal of Louisiana recently upheld the denial of a motion for a mistrial in a manslaughter case where a district attorney informed a panel of prospective jurors that the presumption of innocence is a "judicial fiction" created to level the playing field. [185] Neither victims nor police,

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A: No.

Q: Well if you were to go back and vote on this case right now, having heard no evidence what would your verdict be?

A: I don't think that I could do it one way or the other.

Q: Well that's what I'm trying to tell you. The presumption of innocence means that if you heard no evidence against him you must acquit him because you would have heard nothing that says he committed any crime? That's what would have to be done. I mean does that make sense to you.

A: Yes

Q: Do you think you could follow that?

A: I'd have to.

Id. A very similar exchange was alleged to have taken place during the voir dire of a Washington case twenty years prior. *See* State v. Johnson, 79 Wash.2d 173, 483 P.2d 1261, 1267 (1971).

184. *See* People v. Hartness, 358 N.E.2d 954 (Ill. App. Ct. 1977) (noting that the prosecutor likened the trial process to a set of scales, so that when one side goes down the presumption of innocence disappears); People v. Patino, 156 Cal. Rptr. 815, 825 (1979) (upholding convictions but nevertheless condemns actions of a prosecutor who tells the jury in summation that the following quote from a famous judge sums up their side of the case: "Under our procedure, the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose even the barest outline of his defense. [¶] He may not be convicted when there is the least fair doubt in the mind of even one juror. Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream. [¶] What we really need to fear is the archaic formalism and watery sentiment that obstruct, delay, and defeat the prosecution of crime."). The Supreme Court of Pennsylvania recently upheld an "inartful" closing statement by the prosecutor in a murder case: "Good morning, Ladies and Gentlemen of the jury: Before I start my remarks to you I think it would be noteworthy to note that alongside our system of justice it is the type of system that we have—a person is presumed innocent until he is proven guilty." Commonwealth v. Brown, 414 A.2d 70, 77 (Pa. 1980). *See, e.g.*, Scott v. Ohio, 480 U.S. 923 (1987) (convicting and sentencing petitioner to death by a jury that heard the trial judge say that, based on the newspaper accounts he had read, he believed petitioner was involved in the crime). *See also* Hutcherson v. State, 558 S.W.2d 156 (Ark. 1977). Judges have also made comments concerning the presumption of innocence that obscure the basis of the presumption.

185. The entire reference to the presumption of innocence was as follows:

As I explained yesterday, there are many principles in law that apply to the jury, and one of the things I want to do is go over those with you so I know that we all understand them and that we're all working from the same page, as they say, but that we also all understand what those principles are. Now, one of those principles is that you need to understand, is that a defendant is presumed to be innocent at the start of trial, and that each of you in your own mind must be able

according to this prosecutor, are required to accept the presumption of innocence, but jurors are obligated to do so.[186]

Finally, courts have allowed jurors to sit in capital and non-capital cases after exposure to pervasive pretrial publicity that clearly affects the presumption of innocence.[187] Courts have increasingly relaxed standards of what constitutes an "impartial jury" in sensational criminal cases, while raising the standards required for proving an adverse publicity that results in a "presumption of prejudice in a community" or a presumption of a juror's partiality.[188] In *Patton v. Yount*,[189] for example, 161 of the

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> to accept that presumption. Now, many times we hear that referred to as a Constitutional right, to be presumed innocent; and, in a way it is, but you don't find that in the Constitution. It's not written in there in any place, you just don't find it in there; but Courts have invented that as a fiction in order to create a level playing field, so to speak. So it is a judicial fiction that is created that you must accept before we begin a trial. The people that are victims of the crime don't have to accept it. The police that investigated it don't have to accept it; but we ask that you do, as jurors, because. . . ."

State v. Watkins, 625 So. 2d 507, 512 (La. Ct. App. 1993).

186. The trial court judge, it should be noted, tried to cure the effects of these remarks by providing a brief instruction on the presumption of innocence that, it turns out, was equally incomprehensible. *See id.* at 513. Equally confusing remarks have been made by prosecutors at the close of evidence. For example, the Supreme Court of California decided there was no error in the following statement of a prosecutor: "You have two different stories. A jury might think this story showing guilt is reasonable, and the other showing the alibi is reasonable. Then I guess we have to take the one that shows the innocence. We have to vote innocent. That is not true at all, because you can see you have to decide what the true facts are at first." People v. Haskett, 801 P.2d 323, 345 (Cal. 1990), *cert. denied*, 502 U.S. 822 (1991). *See also* Commonwealth v. Thomas, 514 N.E.2d 1309, 1312 (Mass. 1987) where a prosecutor, in a closing argument, stated:

> Ladies and gentlemen, the Commonwealth has produced an overwhelming amount of evidence here for you. Because, in order to find the defendant not guilty, you have to disbelieve Christine; and you have to disbelieve Camille; and you have to disbelieve Debra Blum—Debra Talley and Mrs. Blum. You have to disbelieve all of those people. And, if you disbelieve those people, then I am, indeed, a bad person; because I have aided in a conspiracy to convict an innocent person. And that is not what happened over the last two days.

187. *See* Scott v. Ohio, 480 U.S. 923, 925 (1987) (Marshall, J., dissenting) (stating that "the trial judge plunged ahead and petitioner was tried by a jury exposed to comments that overwhelmed the presumption of innocence"). *Cf.* Irvin v. Dowd, 366 U.S. 717 (1961); Murphy v. Florida, 421 U.S. 794 (1975).

188. *See, e.g.*, U.S. v. Ford, 19 F.3d 1271 (8th Cir. 1994); U.S. v. Greer, 968 F.2d 433 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1390 (1993); U.S. v. Lehder-Rivas, 955 F.2d 1510 (11th Cir.), *cert. denied*, 113 S. Ct. 347 (1992); U.S. v. De La Vega, 913 F.2d 861 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2022 (1991); Swindler v. Lockhart, 885 F.2d 1342 (8th Cir. 1989), *cert. denied*, 495 U.S. 911 (1990); Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988), *cert. denied*, 488 U.S.1034 (1989); Wells v. Murray, 831 F.2d 468 (4th Cir. 1987); Bell v. Lynaugh, 828 F.2d 1085 (5th Cir. 1987); King v. Lynaugh, 828 F.2d 257 (5th Cir. 1987), *vacate, en banc*, 850 F.2d 1055 (5th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989); U.S. v. Moreno Morales, 815 F.2d 725 (1st Cir.), *cert. denied*, 484 U.S. 966 (1987). For a discussion of pretrial publicity and juror decision making, see Daniel Linz & Steven Penrod, *Exploring the First and Sixth Amendments: Pretrial Publicity and Jury Decision Making*, in *Handbook of Psychology and Law* 3 (Dorothy Kagehiro & William S. Laufer eds., 1992).

163 jurors admitted that they had previously heard publicity regarding the case. 126 (77%) acknowledged that they were predisposed to a certain opinion about the accused's guilt.[190] Even with this evidence, the Supreme Court ruled that a trial court's findings of impartiality would not be overturned unless there was "manifest error." Jurors must have such fixed opinions that they are unable to impartially determine the accused's guilt.[191]

c. *Models of Juror Decision Making*

Efforts to empirically validate theoretical models of juror decisionmaking hold out the greatest promise of quantifying juror comprehension of and adherence to the presumption of innocence. After considering a host of empirical studies, researchers have identified five initial predispositions of jurors toward the accused.[192] First, investigators report that, most commonly, jurors do not assume that the accused is guilty or innocent. Rather, they assume that guilt and innocence are

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189. 467 U.S. 1025, 1029 (1984).

190. *See also* Irvin v. Dowd, 359 U.S. 394, 398 (1959) (where of the 355 jurors that were called, 233 had formed an opinion of the accused's guilt).

191. Legal standards relating partiality to juror predisposed opinions were first discussed in Reynolds v. United States, 98 U.S. 145, 155 (1878). According to the court, a juror who has formed strong and unchangeable impressions cannot be impartial. Yet, the court was quick to note that there is no agreement as to

> the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive . . . others, that it must be decided and substantial . . . others, fixed . . . and still others, deliberate and settled . . . . All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside.

Id. Subsequent cases have focused on the likelihood that partiality can be laid aside. *See, e.g.* Murphy v. Florida, 421 U.S. 794 (1975). Empirical research suggests that juror opinions about guilt and innocence are affected by pretrial publicity. *See* Linz and Penrod, *supra* 188; Edith Greene and Elizabeth F. Loftus, *What's New in the News? The Influence of Well-Publicized News Events on Psychological Research and Courtroom Trials*, 5 Basic and Applied Soc. Psych. 211 (1984); Stanley Sue et al., *Biasing Effect of Pretrial Publicity on Judicial Decisions*, 2 J. Crim. Just. 163 (1974).

192. Ostrom et al., *supra* note 175, at 437 consider four of these "predispositions" as "fair-mindedness." The authors address the problem of juror objectivity in light of prior opinions concerning the innocence or guilt of the accused. For a superb discussion of the role of prior knowledge or beliefs, see Vicki L. Smith, *supra* note 162. For two interesting twists on the notion of prior knowledge, consider the role of prior jury experience and the use of prior conviction evidence on jury decision making. *See* Ronald C. Dillehay & Michael T. Nietzel, *Juror Experience and Jury Verdicts*, 9 Law and Hum. Behav. 179 (1985); Roselle L. Wissler and Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law and Hum. Behav. 37 (1985).

equally likely.[193] A series of studies report evidence that jurors distribute their uncertainty equally.[194] Jurors simply await the presentation of inculpatory or exculpatory evidence that alters their perception of an equal probability of innocence or guilt.[195] A second initial disposition model suggests that jurors bring along preconceived notions or fixed opinions of the likelihood of guilt. They immediately refer to outcomes of prior trials with comparable facts that have resulted in guilty verdicts. Given the popular perception that most trials result in guilty verdicts, a general presumption of guilt is often found with base rate probability models. A third initial belief is the complete disregard of any opinions concerning the accused's culpability until relevant inculpatory or exculpatory evidence is introduced.[196] A fourth initial opinion conforms to jurors' base-rate estimate of guilt.[197] All jurors who have had some prior experience with the criminal justice system have developed intuitive estimates of the likelihood of guilt.[198] A final predisposition, infrequently observed in empirical research, places the subjective probability of guilt at zero or near zero. Here jurors actually presume legal innocence, and abide by the meaning of presumption of innocence instructions.[199]

As discussed later in parts II and III, initial beliefs support assumptions of innocence or guilt at the initiation of a case. Most often

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193. Hastie, *supra* note 66, at 98. A perfect illustration of this initial belief state is found in High v. Zant, 300 S.E. 2d 654, 658 (Ga. 1983), *cert. denied*, 467 U.S. 1220 (1984), where the petitioner contended that the trial court should have excused a number of jurors for cause due to their perceptions of the presumption of innocence. Consider the voir dire of one prospective juror:

> [Defense Counsel]Q: You would require the defendant to put up some evidence to prove he's innocent?
>
> A: I'd want to hear both sides.
>
> Q: And you'd have to hear both sides before you could return a verdict of not guilty?
>
> A: Yes.

Id.

194. Anne. W. Martin and David A. Schum, *Quantifying Burdens of Proof: A Likelihood Ratio Approach*, 27 Jurimetrics J. 383 (1987); M. F. Kaplan, *Discussion Polarization Effects in a Modified Jury Decision Paradigm: Informational Influences*, 40 Sociometry 262 (1977).

195. Hastie, *supra* note 66, at 98–99.

196. *See* Ostrum et al., *supra* note 175, at 437. These models have been embellished in Hastie, *supra* note 66, at 98–100.

197. *See* Hastie, *supra* note 66, at 98–99.

198. *Id.*

199. *Id*; *Cf.* Note, *Juror Bias—A Procedural Screening Device and the Case For Permitting Its Use*, 64 Minn. L. Rev. 987 (1980); David A. Kravitzet et al., *Reliability and Validity of the Original and Revised Legal Attitudes Questionnaire*, 17 Law and Hum. Behav. 661 (1993).

these assumptions are supported by uninformed, hypothetical impressions or beliefs. Thus, they are not "fixed opinions" or prejudgments that necessarily close the factfinder's mind to new evidence.[200] As evidence is presented, a juror's belief in guilt or innocence, as reflected in an opinion meter, should be updated. In algebraic models, for example, the opinion adjustment process provides new weighted data to the meter. In Bayesian models, evidence feeds the probability updating process and is reflected in the opinion meter. In stochastic poisson process models, a phase of evidence weighting reports to the meter. At least in theory, the presumption of innocence should be in operation throughout these processes. It is only at the close of the evidence and after summation that jurors should have fixed opinions, passing conclusive judgments as to guilt or "no guilt."[201] Unfortunately, this view may be far more naive than accurate. A vast body of empirical research suggests that the weighing of evidence and updating of opinion meters are often constrained by initial predispositions toward guilt. Primacy and framing effects appear to limit juror consideration of disconfirming evidence.[202]

After considering the sparse history of the presumption of innocence, the progress toward conservative retributive ideologies, and the significant comprehension error of jurors, it is difficult, if not impossible, to embrace the rhetoric that surrounds this time-honored presumption. As the consensus for a retributive formalism grows, presumption of innocence rhetoric seems increasingly foreign. The presumption of innocence is a "foundation" of the criminal process, but a court's failure

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200. *See infra* notes 364–84 and accompanying text. Fixed opinions are often defined by state statutes, as well as case law. *See, e.g., Challenges of Jurors*, Ala. Code § 12-16-150(7) (1993); Nobis v. State, 401 So. 2d 191 (Ala. App.), *cert. denied*, 401 So. 2d 204 (Ala. 1981); Black v. State, 596 So. 2d 40 (Ala. Crim. App. 1991). Courts have made it clear that the mere formation of an opinion founded on intuition, light impressions, rumor, bias or hearsay does not amount to a fixed opinion. Thus, even in cases where a prospective juror, during a voir dire examination, admits that she thinks that the accused is guilty and that the defense would have to prove the accused not guilty, it is not a fixed opinion if the prospective juror expresses a willingness to set aside these impressions, beliefs, and opinions. Thomas v. State, 539 So. 2d 375 (Ala. App. 1988), *aff'd*, 539 So. 2d 399 (Ala. 1988); Pierce v. State, 576 So. 2d 236 (Ala. App. 1990), *cert. denied*, 576 So. 2d 258 (Ala. 1991).

201. Most courts and commentators acknowledge that "[o]ne is cloaked with the presumption of innocence until that person is proved guilty beyond a reasonable doubt." Department of Transp. Bureau of Driver Licensing v. Perruso, 634 A.2d 692, 696 n. 9 (Pa. Comm. Ct. 1993), *appeal denied*, 647 A.2d 904 (Pa. 1994). Some, however, lose sight of the fact that the presumption of innocence applies until and unless there is there is evidence from which a juror can conclude, "there is no reasonable doubt of guilt." In the ideal, opinion meters should be constrained by the presumption of innocence until and unless this point is reached.

202. For a discussion of these cognitive effects, *see infra* notes 377–87 and accompanying text.

to properly instruct the jury on the presumption of innocence is harmless error.[203] The presumption of innocence is "axiomatic" and "elementary," but there is no need to ensure that jurors have even a basic understanding of the presumption of innocence.[204] Western civilization can boast about the presumption of innocence, even though jurors often consider it more likely than not that the accused is guilty, have initial predispositions that distribute their uncertainty equally between guilt and innocence, or have fixed opinions that result in a presumptive judgment of guilt.[205] Without substance, this axiomatic and elementary due process right is a hollow symbol of our collective commitment to an impartial accusatory system of criminal justice.[206]

There is value in maintaining the appearance and legitimacy of an accusatorial system of justice. There are tangible costs as well. Reducing the presumption of innocence to burden allocation means one less consideration of innocence. This loss will seem far more significant after an examination of the slight role that factual innocence plays in the defendant's case, as well as in collateral attacks and appeals. The failure to consider innocence will be seen as critical after the connection is made between the consideration of innocence and the risk of juror partiality, as well as erroneous conviction.[207]

B. *Theories, Evidence, and Verdicts of Factual Innocence*

Two observations provide a context within which the role of factual innocence in criminal law may be understood. First, only a very small percentage of all felony arrests result in conviction at trial.[208] On average, for every one hundred adult felony arrests, there are fifty-four convictions.[209] Fifty-two of these convictions result from guilty pleas. Only two convictions follow trial. Across the United States, the percentage of felony arrests that are adjudicated at trial ranges from one percent (Riverside County, California) to ten percent (Multnomah

203. *See infra* notes 314–44 and accompanying text.

204. *See supra* note 186.

205. *See supra* note 202.

206. *See* Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009 (1974).

207. *See infra* notes 288–310 and accompanying text.

208. Barbara Boland et al., *The Prosecution of Felony Arrests, 1988* 3–4 (1992). For an earlier study, see Vera Institute of Justice, *Felony Arrests: Their Prosecution and Disposition in New York City's Courts* (1981).

209. *Id.*

County, Oregon).[210] The national average is three percent.[211] State and county-wide court statistics confirm the conventional wisdom that criminal trials are rare events.[212] The prevalence of pre-indictment or bind-over dispositions, as well as a system-wide reliance on guilty pleas for purposes of caseload management, make the consideration of factual innocence in the criminal process that much more of a rare event.[213]

Second, our accusatorial system of justice places the entire burden of proving the ultimate issue of guilt on the state.[214] Evidence must be produced by the prosecution without compelling the accused to assume any portion of this burden.[215] Even so, it is a common mistake, made by those with and without training in law, to suggest that the adjudicatory

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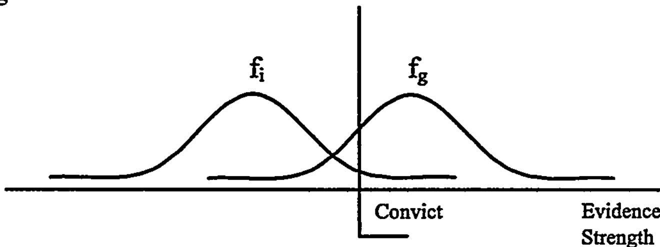
210. *Id.* at 6.

211. *Id.* Game theoretical analyses of the criminal process often assume, for example, that conviction depends on the distribution of evidence of innocence f_i and the distribution of evidence of guilt f_g.



The threshold to convict represents a hypothetical cutoff criterion determined in relation to the strength of evidence for innocence and guilt. *See, e.g.*, Ehud Kalai, *A Rational Game Theory Framework for the Analysis of Legal and Criminal Decision Making*, in *Inside the Juror* 236 (Reid Hastie ed., 1993). Few would argue that there is often a strong association between f_i and f_g. For example, evidence of guilt that is unopposed by contrary evidence increases in weight. *See* Glanville Williams, *Criminal Law* 878–79 (1961). The point is, however, that an association between evidence of innocence and guilt need not be present. Conviction is not contingent on the strength or weakness of f_i, unless it rises to the point where f_g is affected. The same may be said of a motion for acquittal or motion for directed verdict at the close of the prosecution's case or at the close of all the evidence. The success of this motion is determined entirely by the strength of f_g.

212. Freda Adler et al., *Criminal Justice* 324 (1993).

213. *Id.*

214. *See In re* Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1977); Holland v. U.S., 348 U.S. 121, 138–39 (1954).

215. *See* Williams, *supra* note 211, at 871. Affirmative defenses pose one of the most controversial exceptions to this general statement of law. For discussion of burden shifting with affirmative defenses, see John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1380–87 (1979). For a consideration of burden shifting generally, see Sandstrom v. Montana, 442 U.S. 510 (1979).

process carefully weighs evidence of both innocence and guilt.[216] With existing burdens of production and persuasion, this conception of the criminal trial is often inaccurate. Depending on the strategy and tactics of defense counsel, an accused's factual innocence may never be at issue during trial. Both judges and jurors focus squarely on a determination of guilt. The central issue is the reasonableness of any doubt concerning the accused's guilt. In the balance of this section, the slight role of factual innocence at trial will be considered.

Many observers of adversarial trials have abandoned truth-finding and fair decision theories.[217] Such theories paint idealized portraits of adversarial contests that bear little resemblance to trials in the large, congested courts of Los Angeles, New York, Chicago, Boston, and Philadelphia.[218] An alternate conception views the criminal trial as a proceeding in which proof of an accused's factual innocence is incidental to conflicting adversarial strategies: the state's strategy to prove guilt beyond a reasonable doubt, and a series of defense strategies designed to raise a reasonable doubt.[219] Accordingly, advocates shape and reshape evidence to fit their strategies and theories of the case.[220] Courts and juries focus on evidence of guilt admitted in court, and decide whether this evidence, in the aggregate, sustains the accusation.[221]

This is not to say that evidence of innocence is irrelevant or inconsequential before trial, or after the prosecution's case-in-chief.[222]

216. For example, it is not unusual to see the most revered treatises in criminal law and procedure refer to the adversary system as a determination of guilt *and* innocence. *See* Wayne R. Lafave & Jerold H. Israel, *Criminal Procedure* 35–37 (1992).

217. *See, e.g.*, Goodpaster, *supra* note 93, at 118.; Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403 (1992).

218. *See* Jonathan D. Casper, *American Criminal Justice: The Defendant's Perspective* (1972).

219. This strategy may include raising excuses or defenses. *See* Stephen J. Morse, *Culpability and Control*, 142 U. Pa. L. Rev. 1587 (1994).

220. Goodpaster, *supra* note 93, at 132. *See also* Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (1973).

221. After all, with infrequent exceptions, state and federal courts allow for only two dispositions: guilty or not guilty. *See, e.g.*, Cal. Penal Code § 1016 (1994) (allowing for six kinds of pleas: guilty; not guilty; nolo contendere; a former judgment of conviction or acquittal of the offense charged; once in jeopardy; and not guilty by reason of insanity). It is not uncommon, however, for both legal scholars and courts to blur the distinction between those found "not guilty" after trial, and those who are factually innocent. The disposition of "not guilty" confounds two qualitatively different classes of defendants: (1) those factually innocent and thus wrongly charged or prosecuted, and (2) those factually guilty of a crime for whom evidence sufficient for conviction is missing. For many, this distinction is lost.

222. It is fair to say that innocence plays a role in both legal and factual theories of the case. This role, however, is limited by the burdens of production and persuasion. *See* Marilyn J. Berger et al., *Trial Advocacy: Planning, Analysis, and Strategy* 24 (1989) (stating that "[r]ather than telling 'what

The state has a duty to disclose exculpatory evidence to the defense.[223] While not a constitutional right, most states allow the accused to engage in limited pretrial discovery.[224] After the close of the state's case, defense witnesses are called. On occasion, defendants do testify. Alibis are explored. In most circuits, courts must instruct the jury on the defense theory if it is legally sufficient and if there is evidence to support it.[225] But with all the opportunities to explore the accused's innocence, the defense need only disprove guilt.[226] To do so, it employs strategies that challenge or redefine a key element of the prosecution's case.[227]

Where the prosecution has not constructed a complete or internally consistent case, the defense often uses a "challenge strategy" to show how key evidence or testimony does not support a finding of guilt. The defense may identify elements or inconsistencies in the state's case.[228] A

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happened,' therefore, the defense will generally attack portions of the prosecution's story as unreliable or as not making sense 'reasonable doubt'"); Jeffrey L. Kestler, *Questioning Techniques and Tactics* 4–5 (1992). There are a number of practitioners who consider such attacks to be a sign of inadequate lawyering. Consider, for example, the strong sentiments of Herbert J. Stern, *Trying Cases to Win* 151 (1991) (stating that "[m]ost defense attorneys believe that the proper way to open is to harp on the prosecution's burden to prove everything—beyond a reasonable doubt—and the presumption of innocence, which means the defendant does not have to do anything. And, of course, there is the usual litany about the insignificance of the indictment. As a prosecutor, nothing pleases me more than to hear this palaver. . . . It tells the jury nothing but that your defendant is likely guilty—although the prosecution may have its difficulties proving it.")

223. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the state is required disclose evidence that is favorable to accused and "material to either guilt or to punishment"); U.S. v. Agurs, 427 U.S. 97, 104 (1976) (stating that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial"); U.S. v. Bagley, 473 U.S. 667 (1985) (holding that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

224. *Cf.* Weatherford v. Bursey, 429 U.S. 545 (1977); Moore v. Illinois, 408 U.S. 786 (1972); Cicenia v. Lagay, 357 U.S. 504 (1958), *overruled by*, Miranda v. Arizona, 384 U.S. 436 (1966).

225. *See, e.g.*, United States v. Regan, 937 F.2d 823, 826–27, *amended*, 946 F.2d 188 (2d Cir. 1991); United States v. Goss, 650 F.2d 1336, 1344 (5th Cir. 1981); United States v. Casperson, 773 F.2d 216, 222–24 (8th Cir. 1985); United States v. Hopkins, 744 F.2d 716 (10th Cir. 1984); United States v. Opdahl, 930 F.2d 1530, 1535–36 (11th Cir. 1991).

226. At first glance it appears that the need to introduce evidence of innocence is a simple function of the strength of the defense's case or the weakness of the state's case. But the reasonable doubt rule in concert with certain defense strategies often preclude the need for resort to proof of innocence. Instead of relying on evidence of factual innocence, the defense focuses on proof of legal innocence. For an interesting comparison of the American criminal trial with the Continental trial, see Van Kessel, *supra* note 93, at 480–82.

227. W. Lance Bennett and Martha S. Feldman, *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture* 93–115 (1981). *See also* Janine Warsaw, *Masters of Trial Practice: Techniques of 22 Nationally Recognized Advocates* (1988).

228. Bennett & Feldman, *supra* note 227, at 98. This is considered the weakest defense strategy, used only when the prosecution's case is inconsistent or inadequate standing alone. *Id.* at 101.

"redefinition strategy" gives different meanings to incriminating evidence that is central to the state's case, and yet also appears ambiguous.[229] Finally, a "reconstruction strategy" is adopted when it is difficult to challenge or reinterpret the prosecution's case. Here the defense may present its version and interpretation of the facts. All three strategies are designed to raise reasonable doubt in the prosecution's case.[230] As Professor Amsterdam cautions, "[a]though the prosecution must prove all the elements of its case, the defense needs to destroy only one. It is seldom profitable to take on more than one or, at most, a couple."[231]

While the role of factual innocence in many criminal trials is slight, the perception of this role is affected by the language and conventions that courts use to describe the absence of legal guilt. This is more than apparent with verdicts of innocence.[232] In case after case, judges have

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229. Bennett & Feldman, *supra* note 227.

230. *See, e.g.*, State v. Ward, 374 A.2d 168, 171 (Conn. 1976) (noting that "[i]t was crucial to the defense strategy to attack those figures in the hope of instilling a reasonable doubt in the jurors' minds that any money actually had been taken from the toll lanes"); State v. Thomas, 570 So. 2d 1023, 1026 (Fla. Ct. App. 1990) (noting that "[c]onsistent with the defense strategy to create a reasonable doubt of guilt by featuring the absence of the available scientific evidence, the defendant, while on the witness stand, made a point of the fact that the State could have, but failed to conduct a DNA test on the bedsheet sample"), *dismissed*, 577 So. 2d 1330 (Fla. 1991); People v. Monet, 282 N.W.2d 391, 392 (Mich. Ct. App. 1979) (observing that "[t]he defense strategy in each of the defendant's trials was to create a reasonable doubt in the minds of the jury by contesting the voluntariness of defendant's confession and by presenting alternative theories explaining the decedent's death").

231. Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases: Proceedings Through Arraignment* 182 (1988).

232. *See, e.g.*, Wells v. Murray, 831 F.2d 468, 479 (4th Cir. 1987) (Murnaghan, J., dissenting) (stating that "[a]t least five jurors who served on petitioner's jury had been sharply criticized by another judge for returning a verdict of innocent in the last criminal case in which they had participated"); United States v. Bissell, 772 F.2d 896 (3d Cir. 1985) (stating that "your verdict should be guilty", but "[i]f you don't believe it, your verdict should be innocent"); United States v. Young Bros., Inc., 728 F.2d 682, 686 (5th Cir.) (stating that "[t]he jury returned verdicts of innocent on all counts with respect to defendants Miller and Young, and guilty on all counts with respect to appellant, Young Brothers"), *cert. denied*, 469 U.S. 881 (1984); United States v. Hart, 640 F.2d 856, 860 (6th Cir. 1981) (stating "that the government had the burden of proving each element of the offense beyond a reasonable doubt, that Hart had no burden of producing any evidence and that if two conclusions could be reached the jury should reach a verdict of innocent"), *cert. denied*, 451 U.S. 992 (1981); United States v. Jones, 597 F.2d 485, 489 n.3 (5th Cir. 1979) (stating that "[t]he policies behind both rules fully encompass any knowledge possessed by the defendant before the verdict whether it be innocent or not"), *cert. denied*, 444 U.S. 1043 (1980); United States v. Patterson, 510 F.2d 967, 967 (4th Cir. 1975) (stating that "[s]ince we find that the evidence presented at trial was sufficient to support verdict of guilty, our conclusion is inescapable that it was not so deficient as to have required the court to direct a verdict of innocent"); United States v. Simpson, 460 F.2d 515, 519 n.12 (9th Cir. 1972) (stating that "[j]urors are not computers; sometimes they do come in with a verdict of innocent when a computer would say that the facts add up to guilt

found defendants "innocent" when no such disposition exists. Courts have simply blurred the distinction between factual innocence and the absence of guilt—or legal innocence. Commentators have not done much better.[233] And, predictably, the media have been nothing short of notorious.[234] Unfortunately, the role of factual innocence is also affected by language and conventions after conviction, where innocence assumes an entirely different meaning and form.

C. *Innocence and Guilt in Collateral Attacks and Appeals*

At first glance it appears both surprising and ironic that one of the first positive considerations of factual or actual innocence occurs after trial and conviction, in hearings on petitions for habeas corpus relief.[235] Such

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and that the defendant should be punished"); United States v. Markman, 193 F.2d 574, 577 (2d Cir. 1952) (stating that "[f]inally, both appellants cite as reversible error a portion of the trial judge's charge to the jury to the effect that a verdict of innocent must follow "if the scales in which you weigh the evidence in this case are equally balanced"), *cert. denied*, 343 U.S. 979 (1952); Santoli v. New York, 612 F. Supp. 938, 939 (S.D.N.Y. 1985) (stating that "[i]t was urged that Santoli's reversal amounted to a verdict of innocent"); Neville v. United States, 462 F. Supp. 614, 618 (E.D. Mo. 1978) (stating that "[h]owever, the Court has carefully considered his allegations and determines that even if true they would not have likely resulted in a verdict of innocent"); Dorman v. State, 622 P.2d 448, 462 n.22 (Alaska 1981) (stating that "[t]his instruction suffers the same defect Dorman ascribes to that given to the jury—there is no statement that a verdict of innocent is appropriate even where an interpretation points more to guilt than to innocence, if a reasonable doubt remains about guilt"); Gonzalez v. State, 455 So. 2d 1131, 1132 (Fla. Dist. Ct. App. 1984) (stating that "[t]he jury returned a verdict of innocent as to the trafficking charge against the defendant, but guilty of the charge of conspiring to traffic in cocaine").

233. *See, e.g.*, Joseph G. Casaccio, *Illegally Acquired Information, Consent Searches, and Tainted Fruit*, 87 Colum. L. Rev. 842, 855 n.101 (1987) (stating that "[t]he district court suppressed the testimony of Hennessy as 'fruit of the poisonous tree' and granted a directed verdict of innocence"); Note, *Criminal Procedure: Minnesota Adopts the Larrison Standard for Granting a New Trial Because of Newly Discovered Evidence: State v. Caldwell*, 67 Minn. L. Rev. 1314, 1327 (1983) (stating that "the court should grant a new trial only when it appears probable that a verdict of innocent would be rendered on retrial"); Peter David Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 Am. U. L. Rev. 775, 795 (1991) (stating that "the initial findings seem to suggest that those judges expecting a guilty verdict prior to trial outcome are more likely to agree with a jury verdict of guilt than with a verdict of innocence").

234. *See, e.g.*, George Varga, *Jackson's Actions Won't Buy Back the Public's Trust*, San Diego Union-Tribune, Jan. 30, 1994, at E-3 (stating that "[o]nly by receiving a verdict of innocent could this self-acknowledged drug abuser have fully vindicated himself and silenced the easily titillated tabloid media"); Tom Demoretcky, *Man Guilty in Death During Auto Incident*, Newsday, Mar. 23, 1994, at A31 (stating that "Ray's attorney Martin Efman said he felt the jury's verdict—innocent of manslaughter and guilty of assault—indicated that the jury felt Ray perceived the danger of serious injury"); Tim Bryant, *Jurors Agonized Over Killing At Fish Fry*, St. Louis Post-Dispatch, Mar. 5, 1994, at 1B (stating that "he sobbed after returning the verdicts of innocent").

235. The irony is not only that factual innocence is at issue after conviction, but that those calling for a consideration of factual innocence as a prerequisite to federal review hope to use a pervasive and conclusive presumption of petitioner guilt to limit constitutional challenge to confinement. The

hearings pose legal tests that require, to varying degrees, inquiry into the innocence of the petitioner or appellant.[236] Once again, however, the inquiry into innocence is less substantive than it first appears. In fact, it seems as if inquiry into innocence after conviction is most always limited to a gatekeeping function.

In 1970 Judge Henry J. Friendly called for a restoration of the great writ of habeas corpus from its inevitable collapse under the strain of "current excesses."[237] Concerns over an inundation of frivolous and repetitious petitions from state prisoners moved Judge Friendly to argue that a petitioner's innocence must be established in order for a federal court to engage in habeas review.[238] Judge Friendly referred to the "proverbial man from Mars" to prove his point that there is something terribly wrong with a system of criminal justice that allows repeated attacks on judgments of conviction.[239] With all the constitutional safeguards, from the provision of counsel to the right to remain silent throughout trial, those subsequently convicted try repeatedly to undo the

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source of this presumption of guilt is familiar. It is not conviction alone that leads to this presumption; conviction merely confirms earlier predilections of culpability. As evidence, Judge Friendly refers to the frustrations of two Justices who dread to entertain petitions from the obviously guilty. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970). Consider Chief Justice Burger's comments in an address before the Association of the Bar of the City of New York on a case that necessitated five trials: "The tragic aspect was the waste and futility, since every lawyer, every judge and every juror was fully convinced of the defendant's guilt from the beginning to the end." N.Y. L.J., Feb. 19, 1970, at 1; Record of N.Y.C.B.A. 14, 15–16 (Supp. 1970). Justice Schaefer of Illinois in a speech before the Center for the Study of Democratic Institutions in June, 1968, noted: "What bothers me is that almost never do we have a genuine issue of guilt or innocence today.... You know very well that the man is guilty; there is no doubt about the proof. But you must always ask, for example. Was there something technically wrong with the arrest? You're always trying something irrelevant." Friendly, *supra* at 143.

236. It must be noted that factual innocence is not grounds for relief on federal habeas corpus, but rather a required gateway to review. Successful review in such hearings require an independent constitutional violation that occurred at trial. Townsend v. Sain, 372 U.S. 293, 317 (1963), *overruled in part*, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Herrera v. Collins, 113 S. Ct. 853, 860 (1993). For criminal malpractice cases, evidence of factual innocence serves a similar function.

237. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 143 (1970).

238. *Id.* at 145. Judge Friendly referred to earlier calls for such a consideration by Mr. Justice Black in Kaufman v. United States, 394 U.S. 217, 242 (1969) (Black, J., dissenting) (stating that "the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant.... In collateral attacks... I would always require that the convicted defendant raise the kind of constitutional claim that casts some shadow of a doubt on his guilt."); and Mr. Justice Jackson, who in Brown v. Allen, 344 U.S. 443, 532 (1953), raised the specter of "floods of stale, frivolous and repetitious petitions [for federal habeas corpus by state prisoners which] inundate the docket of the lower courts and swell our own."

239. Friendly, *supra* note 235, at 145.

efforts of judges and juries without regard to their guilt or innocence. The astonishment of the man from Mars, Judge Friendly wrote, "would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime."[240]

Judge Friendly makes the case that there is a serious burden associated with collateral attack of a criminal conviction. This burden has to be balanced against a prisoner's interest in gaining access to a forum to challenge the constitutionality of confinement.[241] Thus, a petitioner's interests must be weighed against the fact that: (1) successive collateral attacks postpone the initiation of correctional rehabilitation;[242] (2) time delays create problems with the reliability of factual determinations in court;[243] (3) repeated petitions drain judicial and community resources;[244] (4) meritless petitions tend to cast doubt over those with merit;[245] and (5) the sense of certainty and finality typically associated with criminal conviction is defeated.[246] The solution is to require a colorable showing of innocence. Prisoners must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt."[247] This very test was adopted by the court in *Kuhlmann v. Wilson*,[248]where Justice Powell wrote that the "ends of justice" require that successive federal habeas review should be rarely granted, and only

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240. *Id.*

241. *See* Stone v. Powell, 428 U.S. 465, 491–92 (1976). Empirical evidence of the burdening of federal courts by state prisoner petitions should be found in filing statistics. From 1980 to 1991 filings increased from 7031 to 10,325. This increase in state prisoner petitions, however, must be considered along with a 246% increase in state correctional population during the same period (from 305,400 to 707,500). In fact, when the rise in state prison population is taken into account, it becomes apparent that the rate of habeas petition filing actually decreased over the eleven year period. *See* U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics* 524 (1993).

242. Sanders v. United States, 373 U.S. 1, 24–25 (1963).

243. Engle v. Isaac, 456 U.S. 107, 127–28 (1982).

244. Friendly, *supra* note 28, at 148. *See, e.g*, Spalding v. Aiken, 460 U.S. 1093 (1983) (noting that successive petitions impose significant burdens on the criminal justice system).

245. Friendly, *supra* note 28, at 149.

246. *Id.* at 147–49. McCleskey v. Zant, 499 U.S. 467 (1991) (stating that successive habeas petitions compromise finality and deprive the law of its deterrent effect). *See also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963).

247. Friendly, *supra* note 28, at 160.

248. 477 U.S. 436, 454 (1986).

in cases where there are colorable claims of innocence.[249] Failure to hear such claims must amount to a miscarriage of justice.[250]

Courts have extended the analysis in *Kuhlmann* to cases involving death sentenced inmates, who are required to show "actual innocence" of the death penalty prior to the court hearing the merits of any claim.[251] In capital cases, proof of innocence requires "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[252] The Supreme Court has narrowly construed the meaning of actual innocence, ruling in a host of cases that petitioners' alleged constitutional error: (1) failed to preclude the development of true facts or the admission of false facts;[253] (2) may have impeached a witness for the prosecution and changed the jury's determination of guilt, but did not mean that "no reasonable juror" would have found the petitioner guilty;[254] (3) might have affected the accuracy of the capital sentence, but did not amount to a showing of actual innocence;[255] or (4) resulted in an admission of inculpatory evidence that did nothing to alter the determination of guilt.[256]

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249. The court in Sanders v. United States, 373 U.S. 1, 15 (1963), had announced that successive habeas petitions would be reviewed only if "the ends of justice" were served by relitigation. This is an exception to the requirement that a petitioner show cause and prejudice before hearing the merits of a habeas petition. Wainwright v. Sykes, 433 U.S. 72 (1977). Notably, the language used in the court's "ends of justice" test (or exception) was borrowed from the federal statute that governed habeas review in 1963. *See* 28 U.S.C. § 2244 (1988 & Supp. 1993) for identical wording concerning successive petitions. The burden of proof for this test was with the prisoner, but until *Kuhlmann*, there was little guidance as to the kind of proof required to meet such a test. The court in *Kuhlman* provided the first definition. For earlier efforts to restrict the reach of habeas review, see Stone v. Powell, 428 U.S. 465, 494 (1976) (holding that the goal of furthering a petitioner's Fourth Amendment's rights is "outweighed by the acknowledged costs to other values vital to a rational system of criminal justice") *See also* Kimmelman v. Morrison, 477 U.S. 365 (1986); Rose v. Mitchell, 443 U.S. 545 (1979); Jackson v. Virginia, 443 U.S. 307 (1979); Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966).

250. Smith v. Murray, 477 U.S. 527, 537 (1986).

251. *See, e.g.*, Sawyer v. Whitley, 112 S. Ct. 2514 (1992); Herrera v. Collins, 113 S. Ct. 853 (1993). The court in *Sawyer* acknowledged that the notion of a prisoner being "innocent of death" stretches the natural meaning of the words. The phrase, however, seeks to capture the narrow meaning of actual innocence in the context of a capital case. In essence, the court is trying to find intuitively simple terms that reflect a wrongful conviction. As Justice Blackmun noted in *Sawyer*: "A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime." *Sawyer*, 112 S. Ct. at 2519.

252. 112 S. Ct. at 2517.

253. Smith v. Murray, 477 U.S. 527 (1986).

254. *Sawyer*, 112 S. Ct. at 2524.

255. Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989).

256. McCleskey v. Zant, 499 U.S. 467 (1991).

In concurring and dissenting opinions, Justices Blackmun, Brennan, and Stevens have questioned the application of the actual innocence or miscarriage of justice standard in such cases as *Smith v. Murray*, *Dugger v. Adams*, *McCleskey v. Zant*, and, most recently, in *Coleman v. Thompson*, *Herrera v. Collins*, and *Delo v. Blair*.[257] Their attempt to find consistency and logic in the application of this evolving standard has led to nothing less than outright frustration.[258] Focusing on factual innocence, they argue, is inconsistent with the grant of habeas corpus jurisdiction. Focusing on factual innocence, they maintain, overemphasizes the place of ensuring the accuracy of guilt determinations through federal habeas review. Why, asks Justice Blackmun, did the court shift the focus of federal habeas review from "the preservation of constitutional rights to a fact-based inquiry into the petitioner's innocence or guilt[?]"[259] Finally, in *Sawyer v. Whitley*, Justice Blackmun questions why Warren McCleskey and Roger Keith Coleman had to be the first victims of this "new habeas."[260]

Justices Blackmun, Brennan, and Stevens have interpreted the words of their colleagues too literally. Actual innocence, rhetoric aside, does not serve as a proxy for factual innocence in habeas cases. The miscarriage of justice exception, like the innocence of death standard, also fails as a proxy for factual innocence. These standards of proof and their application in a host of cases following Kuhlmann reflect an increasingly strict standard of legal innocence:[261] In light of all the

257. 113 S. Ct. 2922, 2924 (1993) (Blackmun, J., dissenting) (stating that "[i]n this case, Blair has submitted seven affidavits tending to show that he is innocent of the crime for which he has been sentenced to death"). *See also* Schlup v. Delo, 11 F.3d 738 (8th Cir. 1994), *vacated*, 115 S. Ct. 851 (1995)

258. Signs of frustration and resignation appeared in the words written by Justice Blackmun in Callins v. Collins, 114 S. Ct. 1127, 1138 (1994) (stating that "[t]he Court's refusal last term to afford Leonel Torres Herrera an evidentiary hearing, despite his colorable showing of actual innocence, demonstrates just how far afield the Court has strayed from its statutorily and constitutionally imposed obligations").

259. Sawyer v. Whitley, 112 S. Ct. 2514, 2526 (1992) (Blackmun, J., concurring). The point is made again by Blackmun in Herrera v. Collins, 113 S. Ct. 853, 880 (1993) (Blackmun, J., dissenting).

260. *Sawyer*, 112 S. Ct. at 2529 (Blackmun, J., concurring). *See also* Eric D. Scher, *Sawyer v. Whitley: Stretching the Boundaries of a Constitutional Death Penalty*, 59 Brooklyn L. Rev. 237 (1993).

261. The State of Texas has increased its standards of proof to a point that may make a successful claim impossible. Petitioners must meet two distinct standards. As a threshold barrier to obtain a hearing, there must be newly discovered evidence that, "if true would create a doubt as to the efficacy of the verdict to the extent that it undermines confidence in the verdict and that it is probable that the verdict would be different." State *ex rel.* Holmes v. 3d Court of Appeals, 885 S.W.2d 389, 398 (Tex. Crim. App. 1994). At a hearing, the petitioner must show that, considering

evidence, is there a fair probability that the trier of fact would have entertained a reasonable doubt of guilt? Is there clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the accused eligible for the death penalty? Actual innocence, in this context, is a misnomer. What is meant is simply legally inadequate or insufficient evidence of guilt.

The failure of the Court to distinguish between legal innocence and innocence in fact is important. On occasion the Court has taken its rhetoric too seriously by suggesting that innocence is more than a just a gateway to habeas review.[262] This tendency should not be mistaken as an interest in or concern for the petitioner's innocence in fact. Federal habeas review seeks to ensure that prisoners are not deprived of their liberty in violation of the Constitution. It does not review alleged errors of fact even in cases of impending execution where the petitioner brings forth significant evidence of factual innocence.[263] As Justice Holmes noted over seventy years ago, "what we have to deal with [on habeas review] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."[264] The court has ingeniously used the rhetoric of innocence to reduce judicial discretion in habeas review, further closing the door to federal review of successive state prisoner claims. Inquiry into innocence is nothing more than gatekeeping.[265]

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the new and existing evidence "no rational trier of fact could find proof of guilt beyond a reasonable doubt." *Id.* (citing Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

262. *See, e.g.*, Harris v. Reed, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring) (finding that habeas review must be a "kind of 'safety valve' for the 'extraordinary case'" of a defendant who is factually innocent); McCleskey v. Zant, 499 U.S. 467, 545 (stating that "[t]he miscarriage of justice exception to cause serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty,'").

263. Nowhere is this made more clear than in Herrera v. Collins, 113 S. Ct. 853 (1993), where a petitioner made a respectable showing of factual innocence with newly discovered evidence. The court held that absent an independent constitutional claim, alleging factual innocence, no matter how convincing, is insufficient for the purposes of habeas review. According to Justice Rehnquist, "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id.* at 869.

264. Moore v. Dempsey, 261 U.S. 86, 87–88 (1923). Justice Scalia was equally eloquent in writing: "There is no basis in text, tradition, or even contemporary practice (if that were enough), for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction." *Herrera*, 113 S. Ct. at 874.

265. Innocence is also raised in claims of criminal malpractice, where former clients allege that the actions or inactions of their lawyers failed to meet the standards of a reasonably competent attorney. For a general overview of this cause of action see, e.g., O.M. Kaus and Ronald. E. Mallen, *The Misguiding Hand of Counsel—Reflections on "Criminal Malpractice"*, 21 UCLA L. Rev. 1191, 1201–03 (1974); Susan M. Treyz, *Criminal Malpractice: Privilege of the Innocent Plaintiff*,

D. *Innocence Compensation Schemes*

The search for a genuine consideration of factual innocence in the criminal process ends with state and federal statutes that are devised to compensate the wrongfully convicted and imprisoned.[266] State and federal legislation are similar in requiring both the reversal of a conviction based on the result of a new trial, successful appeal, or pardon, as well as proof that the petitioner did not commit any of the acts charged.[267] When successful, proceedings brought pursuant to these

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59 Fordham L. Rev. 719 (1991); David H. Potel, Note, *Criminal Malpractice: Threshold Barriers to Recovery Against Negligent Criminal Counsel*, 1981 Duke L.J. 542; John M. Burkoff, *Criminal Defense Ethics* § 3.1(c) (1992); Ronald. E Mallen and Jeffrey M. Smith, *Legal Malpractice* § 21.3 (3d ed. 1992). In a growing number of jurisdictions, plaintiffs must satisfy two requirements in addition to evidence of a breach of a duty of reasonable care, and proof of causation. To bring a criminal malpractice action, a plaintiff must demonstrate ineffective assistance of counsel in order to show damages and, in some states, must prove actual innocence as an element of the malpractice claim. Failure to prove actual innocence breaks the causal connection between the attorney's alleged breach and the plaintiff's purported injuries. According to one court, this chain also may be broken by the defendant attorney proving "by a preponderance of the evidence that, even though he may have been negligent, the plaintiff, his former client, would have lost the underlying case anyway." Glenn v. Aiken, 569 N.E.2d 783, 787 (Mass. 1991). Requiring the element of actual innocence in malpractice cases is justified as a bar against the possibility of guilty parties profiting from their commission of a crime. Bailey v. Tucker, 621 A.2d 108, 113. (Pa. 1993) (stating that "[i]f a person is convicted of a crime because of the inadequacy of counsel's representation, justice is satisfied by the grant of a new trial. However, if an *innocent person* is wrongfully convicted due to the attorney's dereliction, justice requires that he be compensated for the wrong which has occurred.") (emphasis added). Courts have defined actual innocence using at least two variants of the same standard of proof: (1) proof by a preponderance of evidence that the plaintiff did not commit any of the unlawful acts with which he was charged, as well as any lesser offenses, and (2) proof by a preponderance of the evidence that but for the attorney's negligence the verdict would have been not guilty. Again, innocence has been used by courts as gatekeeping, neglecting its other meaning as well as restricting its value to the criminal process.

266. Innocence compensation statutes are designed to provide citizens a remedy from the state or government for loss of liberty due to wrongful prosecution and/or wrongful imprisonment. As the Fifth Circuit noted some years ago: "This Act is a remedial act designed by a fair-minded government as a means of at least partially righting an irreparable wrong done to one of its citizens." Osborn v. United States, 322 F.2d 835, 839 (5th Cir. 1963) (quoting McLean v. United States, 73 F. Supp. 775, 778 (W.D.S.C. 1947). The legislative history of the federal compensation act is reviewed in United States v. Keegan, 71 F. Supp. 623, 627–36 (S.D.N.Y. 1947). The forerunner of the present statute was the Borchard Bill introduced in the U.S. Senate in 1912. This bill allowed for indemnification of those wrongly convicted and imprisoned. The burden was placed on the claimant to affirmatively prove innocence by showing "that the crime was not committed at all, or, if committed, was not committed by the accused." *Id.* at 628 (quoting S. Doc. No. 947, 63rd Cong., 3d Sess. 31) (1912).

267. Congress first enacted unjust conviction legislation in 1933. For the most recent codification of this law, see 28 U.S.C. § 2513 (1988 & Supp. 1993):

Unjust conviction and imprisonment:

(a) Any person suing under section 1495 of this title must allege and prove that:

statutes result in a certificate of innocence, or like determination, that allows for the payment of damages from the state or federal government.[268]

Unjust conviction and imprisonment compensation statutes are remarkable in three respects.[269] First, they are the only direct judicial determinations of factual innocence in the entire criminal process.[270]

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(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the United States Court of Federal Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed the sum of $ 5,000.

Id.

268. State statutes do vary considerably in defining innocence, and in the amount of damages available. *See* N.Y. Ct. Cl. Act § 8-b (Mckinney 1994) (requiring "innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned"). *See also* Reed v. State 574 N.E.2d 433 (N.Y. 1991); Ivey v. State, 606 N.E.2d 1360 (N.Y. 1992). For other state statutes with differing provisions see W. Va. Code § 14-2-13a (1993); D.C. Code Ann. § 1-1222 (1993); 14 Me. Rev. Stat. § 8241–44 (1994); Ohio Rev. Code Ann. § 2743.48. Courts in Ohio have been particularly generous in awarding damages based on wrongful imprisonment. In O'Neil v. State, 469 N.E.2d 1010 (Ohio Ct. App. 1984), the court overruled a court of claims judgment of $6967 for an "erroneous incarceration" of three and one half years. The court remanded the case for consideration of attorneys' fees, court costs, related legal fees, loss of liberty and separation from family and friends, damage to reputation, and costs associated with his adjustment to incarceration. The Ohio Court of Claims in Cox v. State, 552 N.E.2d 970 (Ohio Ct. 1988), awarded a wrongfully imprisoned individual $10,000 for the costs associated with a one year and 267 day period of incarceration. *See also* Gover v. State, 616 N.E. 2d 207 (Ohio 1993); Walden v. State, 547 N.E.2d 962 (1989); Wright v. State, 591 N.E.2d 1279 (Ohio Ct. App.1990); Dragon v. State, 548 N.E.2d 246 (Ohio Ct. App. 1988).

269. *See, e.g.*, 28 U.S.C. § 2513(b) (1988 & Supp. 1993).

270. A certificate of innocence is granted when a petitioner demonstrates that she was innocent in fact of all criminal charges. A determination of what constitutes innocence is deliberately placed within the sound discretion of the court. Certainly, evidence of innocence in the form of a reversal of conviction based on Fourth or Fifth Amendment violations at time of arrest or seizure of property goes to a determination of legal innocence and is thus irrelevant. Innocence based on procedural or technical grounds is insufficient. United States v. Keegan, 71 F. Supp. 623, 633–34 (D.N.Y. 1947)

Unlike more orthodox guilt determinations, where the inquiry centers on the sufficiency or insufficiency of culpability, compensation statutes provide for the determination and often the certification of innocence.[271] Unlike in habeas review and other appellate proceedings, factual innocence plays a central role and serves a primary function. Second, the federal compensation statute allows for the recovery of a very small award of damages.[272] Even so, meeting the statutory requirements for recovery is difficult, indeed, and few petitioners are successful. Finally, most statutes require that the misconduct or neglect of the petitioner must not have brought about the prosecution. Legislators have tried to avoid compensating those whose inadvertence was a direct cause of the unjust conviction.[273]

II. INNOCENCE RHETORIC

Blackstonian maxims suggesting that society places greater value on freeing the guilty over convicting the blameless underscore the disutility of erroneous convictions.[274] Given the reverence for this disutility it is not surprising that rhetoric has developed around those stages of the criminal process where guilt determinations are made.[275] Courts have made it clear that the presumption of innocence not only reflects broad societal concerns of justice and fairness, but is the fundamental premise

(citing H. Rep. No. 2299, 75th Cong., 3rd Sess.); United States v. Brunner, 200 F.2d 276, 279–80 (6th Cir. 1952) (stating that "[e]ven though proofs in a criminal case failed to establish guilt beyond a reasonable doubt, it did not preclude the court from finding that the petitioner had failed to establish that he did not commit the offense charged in the indictment. . . . Innocence of the petitioner must be affirmatively established and neither a dismissal nor a judgment of not guilty on technical grounds is enough.") *See also* Betts v. United States, 770 F. Supp. 457, 460 (C.D. Ill. 1991), *rev'd and remanded*, 10 F.3d 1278 (7th Cir. 1993). Most statutes require a judicial determination of factual innocence which is limited to a decision by the judge that she is convinced that the petitioner is innocent in fact. *See supra* note 268.

271. *See, e.g.*, Rigsbee v. United States, 204 F.2d 70 (1953). A not guilty verdict is insufficient for the purposes of a certificate of innocence. The trial judge must certify that he is convinced that the petitioner did not commit the acts charged. *Id.* at 71 (citing 28 U.S.C. § 2513).

272. The federal statute allows for awards of no more than $5000. 28 U.S.C. § 2513 (e) (1988 & Supp. 1993).

273. *See, e.g.*, Betts v. United States, 770 F. Supp. 457 (C.D. Ill. 1991) (holding that petitioner was at least partially responsible for bringing about his own prosecution and was therefore not entitled to a certificate of innocence).

274. *See* Connolly, *supra* note 71 and accompanying text. Justice Harlan discussed this disutility in his concurring opinion in *In re* Winship, 397 U.S. 358, 372 (1970) (noting that "in a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty").

275. *See supra* note 17 and accompanying text.

of our legal system.[276] As Justice Stewart once noted, "No principle is more firmly established in our system of criminal justice than the presumption of innocence that is accorded to the defendant in every criminal trial."[277]

Innocence plays a central role in post-conviction and appellate proceedings, as well as in compensation claims.[278] Again, a body of rhetoric has emerged. It is surprising how disconnected this rhetoric is from a true presumption of factual innocence. Rhetoric of innocence has been stretched mercilessly in post-conviction and appellate proceedings.[279] Beneath the surface of the rhetoric appears an ever-growing frustration with the speed, efficiency, and institutional constraints of the accusatory system of justice—a frustration that seems to be tempered or cured by borrowing and reinterpreting the notion of innocence. Courts and commentators alike have acknowledged limits to their interest in pursuing the rights of the accused.[280]

A. *Innocence as Burden Allocation and Gatekeeping*

As discussed in part I, courts are increasingly using innocence as a device for burden allocation and gatekeeping. Innocence, as a burden-allocating presumption, serves what some consider to be a complementary role with the reasonable doubt rule. Innocence, in this context, is an assumption of legal innocence or a reasonable doubt of guilt. Innocence has also taken on a gatekeeping function after conviction where both actual and factual innocence control the number of reviewable post-conviction petitions and appeals. At least seven tests of innocence for these three qualitatively different types of innocence may be found in state and federal law. Comparable tests have been developed for legal, actual, and factual guilt (see Table One).

The rhetoric of legal innocence is deceptively simple. At first glance, the idea of presuming innocence appears to require a preliminary factual assumption. Jurors first hear the instruction, "You are required to pre-

276. *See supra* note 44 and accompanying text.

277. Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (Stewart, J., dissenting).

278. *See supra* notes 235–73 and accompanying text.

279. In an ironic twist, when innocence becomes relevant after conviction, it is used by courts to restrict the rights of petitioners to have a claim reviewed. *See supra* notes 235-73 and accompanying text.

280. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 208 (1977) (holding that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person").

Table One

Types of Innocence	Standards of Proof	Utilization
Legal Innocence	A reasonable doubt of guilt	Presumption of innocence; Trial
Actual Innocence	Clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under state law; or	Standard of proof required to have court review habeas petition from a state inmate convicted of capital murder
	No rational trier of fact could find proof of guilt beyond a reasonable doubt; or	Texas standard for successive habeas review
	A fair probability that, in light of all the evidence, the trier of fact would have entertained a reasonable doubt of guilt; or	Standard of proof required for hearing on successive habeas petitions (e.g., *Dugger*)
	A constitutional violation has probably resulted in the conviction of one who is actually innocent; or	Same
	Probative evidence reveals a colorable claim of factual innocence.	Same
Factual Innocence	The accused did not, in fact, commit the criminal offense as charged.	Wrongful prosecution (28 U.S.C. §2513 (1994))

Types of Guilt	Standards of Proof	Utilization
Legal Guilt	Proof beyond a reasonable doubt	Trial
Actual Guilt	Proof by a preponderance of the evidence that the plaintiff committed the criminal conduct that was the subject of a prior criminal proceeding	Legal malpractice actions
Factual Guilt	The accused did in fact commit the offense as charged.	None

sume innocence," or "The law presumes every person charged with a crime to be innocent." But in most state and federal instructions, the venire are then told to: (1) abandon this belief when and if there is evidence of guilt beyond a reasonable doubt, and (2) find the accused not guilty if evidence is insufficient.[281] The presumption of innocence has a definite duration that expires when offset by evidence. But the notion of the presumption of innocence as an "adequate substitute for affirmative evidence"[282] and the intermingling of burden allocative instructions narrow the meaning of the presumption of innocence. How should jurors interpret an instruction that it is the presumption of innocence that "places upon the State the burden of proving him guilty beyond a reasonable doubt"?[283] Courts are suggesting that the presumption of innocence means an accused is not guilty, or is legally innocent, unless or until the state satisfies its burden. If the state fails to carry its burden, the defendant is acquitted. Where the state is successful, the accused is found guilty.[284]

If there is doubt that this obscures any distinction between the presumption of innocence and the reasonable doubt rule, one must ask whether a criminal trial would be different without a presumption of innocence.[285] Let us suppose that jurors were not instructed to presume innocence. Rather, they would be told that it is the state that bears the burden of proof beyond a reasonable doubt. Thus, the accused is not guilty unless or until the government presents proof beyond a reasonable doubt. Here jurors would be required to forestall any fixed belief in guilt or innocence in much the same manner as they do now, pending proof beyond a reasonable doubt. A defendant would be acquitted if the state failed in its burden of proof. In short, there would be no appreciable difference if the presumption of innocence were omitted. Even courts have acknowledged the insignificance of a legally based presumption of

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281. "This presumption of innocence requires a verdict of not guilty unless you are convinced by the evidence that the defendant is guilty beyond a reasonable doubt." Delaware Pattern Jury Instructions.

282. Delo v. Lashley, 113 S. Ct. 1222, 1228 (1993) (Stevens, J., dissenting).

283. California Jury Instructions, CALJIC § 2.90.

284. Justice Stewart, in Kentucky v. Whorton, 441 U.S. 786, 790 (1979) (dissenting), tried to prove this very point: "In *In re Winship*, the Court held that the Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of a defendant's guilt. I believe that the Due Process Clause of the Fourteenth Amendment equally requires the presumption that a defendant is innocent until he has been proved guilty." This latter presumption, of course, is implicit in the reasonable doubt rule.

285. This question assumes a legally based presumption of innocence.

innocence by ruling that due process guarantees do not require a presumption of innocence instruction, and that a failure to instruct a jury on the presumption of innocence is harmless, so long as a reasonable doubt rule instruction has been given.[286]

The rhetoric surrounding actual and factual innocence represents the notion of deservedness of review. After conviction, when the presumption of innocence has expired, courts rightly presume guilt.[287] This presumption makes it difficult for many to justify the expenditure of diminishing resources on what appear to be frivolous appeals, petitions, and claims by those whose culpability is generally without question.[288] Some gatekeeping is required, and what better proxy for the deservedness of review or compensation than innocence? What better way to support the conservation of scarce judicial resources than to provide notice that there are definite limits to the review of technical legal violations, and that federal courts are not going to be converted into forums for the relitigation of state trials? Due process theorists respond, predictably, that the only appropriate proxy is a meritorious appeal, petition, or claim. Standards, rules, and procedures are not devised for the innocent alone.

The strength of both of these views is undercut by the transparent meaning of innocence rhetoric throughout the criminal process. The issue is not one of limited resources, deservedness, or the abandonment of fundamental due process rights. The critical issue is the difference between the legal rhetoric that supports the notion of innocence and the immateriality of innocence in practice. It is ironic that a concept so axiomatic and fundamental in rhetoric has been reduced to the task of gatekeeping, ensuring that state prisoners do not abuse the legal system in their persistent efforts to be reviewed by federal courts. A genuine sense of loss is associated with this irony. There are few comparable legal constructs with as much potential for ensuring a fundamental fairness at trial.

286. *See* Arizona v. Fulminante, 499 U.S. 279, 291 (1991) (White, J., dissenting) (stating that "[w]hile it may be possible to analyze as harmless the omission of a presumption of innocence instruction when the required reasonable-doubt instruction has been given, it is impossible to assess the effect on the jury of the omission of the more fundamental instruction on reasonable doubt"). *See also* Sullivan v. Louisiana, 113 S. Ct. 2078 (1993).

287. Ross v. Moffitt, 417 U.S. 600, 610–11 (1974).

288. Herrera v. Collins, 113 S. Ct. 853, 861 (1993).

B. Neglecting Factual Innocence and the Risk of Fundamental Error at Trial

Discussing innocence as rhetoric would be an interesting but largely academic exercise if the connection between an accused's factual innocence and the possibility of error were not so strong. At least in theory, few legal constructs could have more to do with the prevention of a wrongful conviction than the presumption and consideration of an accused's innocence. For instance, if the presumption of innocence were conceptualized as a factual presumption separate and distinct from its burden-allocative function, courts would have a potentially powerful weapon against predispositions, impressions, opinions, and beliefs of jurors that are inconsistent with innocence.[289] The presumption of innocence would survive, in large part, to battle juror partiality and provide a context for the review of evidence as it is presented at trial.

The systematic elimination of juror partiality is impossible to achieve, and this is surely not a realistic task for a factually based presumption of innocence.[290] Furthermore, a number of impressive empirical studies suggest that jurors, generally, are competent factfinders.[291] The seminal work of Harry Kalven and Hans Zeisel in the University of Chicago Jury Project and more recent experimental and quasi-experimental studies suggest that jurors tend to base their decisions on the evidence presented in court.[292] The fact that these decisions tend to turn on the probative

289. Because all jurors will have definite beliefs, strongly held values, and biases, impartiality is an unattainable ideal, with or without well-crafted efforts to ensure impartiality. It has been noted that the issue of jury impartiality is made far more complex by the fact that lawyers, as adversaries, look for jurors who are partial. "Lawyers would do their clients a not easily explained disservice if they rejected a juror believed to be disposed to their side in favor of one thought to be neutral." Gobert, *supra* note 159, at 271. The point is, however, that effective presumption of innocence instructions will target specific opinions, impressions, and beliefs.

290. Any attempt to address juror predispositions must be approached realistically. As Judge Learned Hand noted in relation to the limits of voir dire: "It is of course true that any examination on the *voir dire* is a clumsy and imperfect way of detecting suppressed emotional commitments to which all of us are to some extent subject, unconsciously or subconsciously. It is of the nature of our deepest antipathies that often we do not admit them even to ourselves; but when that is so, nothing but an examination, utterly impracticable in a courtroom, will disclose them, an examination extending at times for months, and even then unsuccessful. . . . If trial by jury is not to break down by its own weight, it is not feasible to probe more than the upper levels of a juror's mind." United States v. Dennis, 183 F.2d 201, 226 (2d Cir. 1950).

291. *See* Valerie P. Hans, *Jury Decision Making*, in *Handbook on Psychology and Law* 56 (Dorothy Kagehiro and William S. Laufer, eds., 1991).

292. *See* Harry Kalven, Jr. & Hans Zeisel, *The American Jury* (1966); Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 Law & Soc'y Rev. 781 (1979); John R. Hepburn, *The Objective Reality of Evidence and the Utility of Systematic Jury Selection*, 4 Law &

value and weight of evidence, however, does not diminish the critical role or immense value of an active presumption of innocence. All jurors begin their service with impressions, suspicions, beliefs, and opinions regarding the accused. [293] Evidence is weighed by jurors in the context of these social cognitions, and with the inevitable assumptions, biases, prejudgments, and social stereotypes found in all complex social psychological interactions.[294] Thus, the issue is not whether jurors are swayed by victim or defendant characteristics, or whether jurors with an authoritarian personality are more punitive.[295] Correlates of prejudgment are academic concerns.[296] The task of the presumption of innocence is to ensure, to the greatest extent possible, that juror predispositions and subsequent dispositions are consistent with the accused's right to a fair trial.[297] As one court recently noted, jurors "must be as nearly impartial 'as the lot of humanity will admit.'"[298] With this task in mind, the

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Hum. Behav. 89 (1980); Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 Law & Soc'y Rev. 423 (1986).

293. *See* Edmond Costantini & Joel King, *The Partial Juror: Correlates and Causes of Prejudgment*, 15 Law & Soc'y Rev. 9 (1980–81).

294. An exclusive focus on identifying and describing the content of these orientations, biases, and prejudgments neglects their existence. The relations between demographic characteristics and juror decision making, or personality factors and juror verdicts, make for fascinating academic research, but are seemingly irrelevant in law. *See, e.g.*, Virginia R. Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 Wis. L. Rev. 734, 746 (stating that "[t]his study was designed to demonstrate that certain measurable attitudinal predispositions that have no obvious legal relevancy can in fact be used to predict how individuals will judge and interpret a criminal case. The results of this study seem to show that these attitudinal predispositions do in fact affect the way jurors respond to evidence"); *Cf.* Vicki L. Smith, *supra* note 162.

295. *See* Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 Law & Hum. Behav. 1 (1987); Freda Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. Rev. of L. & Soc. Change 1 (1973).

296. *See* Costantini & King, *supra* note 293.

297. King v. Lynaugh, 828 F.2d 257, 259 (5th Cir. 1987) (noting that "the right to an impartial jury is basic to our system of justice. This right carries with it the concomitant right to take reasonable steps designed to ensure that a jury is impartial."), *vacated, en banc*, 850 F.2d 1055 (5th Cir. 1988). None of this is to suggest that it is easy to affect juror predispositions. There is more than enough evidence to the contrary. *See, e.g.*, Advisory Committee On Fair Trial and Free Press, A.B.A. *Standards Relating to Fair Trial and Free Press* 62 (1968) (stating that "[a]vailable data also suggest that once formed, an impression or belief is extremely difficult to change, even when the individual is confronted with objective facts that tend to refute it. . . . [T]he individual is likely to select elements of observed phenomena which reinforce his preexisting beliefs and to neglect others or even distort his perceptions so that they will confirm his beliefs.").

298. *See, e.g.*, State v Lumumba, 601 A.2d 1178, 1187 (N.J. Super. Ct. 1992). The task is not to rule out partiality, but to ensure an impartiality that reflects certain legal assumptions. *See* Gobert, *supra* note 159, at 313. Thus, impartiality requires an attitudinal indifference and openness to evidence, coupled with an acceptance of factual assumptions.

presumption of innocence should: (1) impress upon jurors the importance of their initial assumption in the factual innocence of the accused, and (2) reduce the risk that as evidence is presented, the revision of all impressions, suspicions, opinions, and beliefs will not be colored by earlier predispositions that are inconsistent with the presumption of innocence.[299] Courts have concluded that the moral legitimacy of the criminal law depends on proof that overcomes a presumption of innocence.[300] Without a strong factual assumption, overcoming the presumption of innocence is a meaningless exercise.[301]

A reconsideration of the presumption of innocence has much more meaning given empirical evidence that Type I judicial errors occur in approximately one half of one percent of all trials resulting in convictions.[302] There is also a vast amount of impressive empirical and anecdotal evidence that innocents are sentenced to death, and are sometimes executed.[303] Most commentators have focused attention on five sources of error that may lead to a wrongful conviction: (1) witness

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299. *See King*, 828 F.2d at 259 (stating that "[t]he right to an impartial trial is basic to our system of justice. This right carries with it the concomitant right to take reasonable steps designed to ensure that a jury is impartial"); *Lumumba*, 601 A.2d at 1187 (stating that "[t]he right of a defendant to an impartial jury is of exceptional significance and the triers of fact must be as nearly impartial 'as the lot of humanity will admit'") (Citations omitted).

300. *See* Jackson v. Virginia, 443 U.S. 307, 319 (1979).

301. The reasonable doubt rule is indispensable, according to the Supreme Court, because it "is a prime instrument for reducing the risk of convictions resting on factual error." *In re* Winship, 397 U.S. 358, 363 (1970). Of course, standards of proof are inextricably tied to the risk of erroneous convictions. The court, however, has underemphasized the active role that could be played by the presumption of innocence as a separate and distinct guard against juror partiality and, thus, convictions resting on factual error. The presumption of innocence can and should be more than a subtle suggestion for jurors to put aside pre-existing beliefs. Wigmore, *supra* note 35, at 407. *See also* United States v. Thaxton, 483 F.2d 1071–75 (5th Cir. 1973) (holding that the presumption of innocence serves two purposes: it reminds jurors of the reasonable doubt rule, and "it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced"). *See also* United States v. Dilg, 700 F.2d 620 (11th Cir. 1983).

302. Huff et al., *supra* note 33, at 523. Type I errors occur where a factually innocent person is convicted. No doubt, type II judicial errors, where a guilty party is acquitted, occur with greater frequency.

303. *See, e.g.*, Committee on the Judiciary, *Innocence and the Death Penalty: Assessing the Danger of Mistaken Executions* (1993) (finding that the House Judiciary Committee identified 48 people since 1973 who served time on death row before proving their innocence and being released); Michael L. Radelet et al., *In Spite of Innocence* (1992); Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21 (1987); Hugo A. Bedau, *Murder, Errors of Justice, and Capital Punishment*, in *The Death Penalty in America* 434–52 (H.A. Bedau ed., 1967) (Eighty-one people were erroneously convicted of capital crime between 1883 and 1962). *Cf.* Stephen J. Markman and Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 Stan. L. Rev. 121 (1988).

error, e.g., eyewitness misidentification or witness perjury; (2) police error, e.g., coerced confessions, negligence, and perjury; (3) judicial error, e.g., denying the admissibility of exculpatory evidence; (4) defense error, e.g., ineffective assistance of counsel; and (5) prosecutorial error, e.g., suppressing exculpatory evidence.[304] A discussion of factual innocence and the normative environment within which innocence is reviewed is absent in prior research and commentary.[305] This is so despite the fact that the normative environment within which the presumption of innocence is maintained does little to support such a presumption. Add to this the fact that jurors often fail to understand what the presumption of innocence and reasonable doubt rule mean; that jurors are often predisposed to distribute their uncertainty of the accused's factual guilt and innocence equally or to favor guilt; that predispositions of guilt change the way in which jurors interpret both inculpatory and exculpatory evidence; and that it is exceedingly difficult for an accused's innocence to be reviewed once convicted.[306]

No one expects a guarantee that only the guilty will be convicted and the innocent will be acquitted.[307] The criminal process has ultimate ends

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304. *See* Martin Yant, *Presumed Guilty: When Innocent People are Wrongly Convicted* (1991); Huff et al., *supra* note 33, at 525; Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 Law & Hum. Behav. 283 (1988); Bedau & Radelet, *supra* note 303, at 57; Samuel Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395 (1987); Elizabeth F. Loftus, *Eyewitness Testimony* (1979); Edward D. Radin, *The Innocents* (1964); Jerome Frank & Barbara Frank, *Not Guilty* (1957); Edwin M. Borchard, *Convicting the Innocent: Errors of Criminal Justice* (1932).

305. Commentators have noted that these sources do not fully capture the role of error in criminal cases. Police and prosecutorial overzealousness, Rattner argues, as well as a sense of urgency to solve a case, serve as primary sources of error. Others have suggested that racial prejudice contributes significantly to error. *See* House Judiciary Committee, *supra* note 303, at 8. All researchers focus on human error and fail to examine those constructs, like innocence, that are integral to the normative environment of the criminal process. Perhaps the sole exception is Borchard, who credits juries with certain predispositions: "Juries seem disposed more readily to credit the veracity and reliability of the victims of an outrage than any amount of contrary evidence by or on behalf of the accused, whether by way of alibi, character witnesses, or other testimony." *See supra* note 304, at 367.

306. Notwithstanding jurors' assurances to the contrary, any predisposition toward guilt will likely change the way in which a factfinder evaluates information and evidence at trial. *See* Derek J. Koehler, *Explanation, Imagination, and Confidence in Judgment*, 110 Psych. Bull. 499 (1991).

307. As Frank and Frank noted: "Assume the most decent police, the most conscientious prosecutor, the fairest trial judge and jury. Still an innocent man may be found guilty." Frank & Frank, *supra* note 304, at 199. *See also* Speiser v. Randall, 357 U.S. 513, 525 (1958) (noting that "[t]here is always in litigation a margin of error, representing error in factfinding, which both parties must take into account").

that are dual and conflicting.[308] But what should be done when there appears to be an imbalance in Blackstone's 10:1 ratio?[309] What should be done when erroneous convictions are no longer treated that much more seriously than erroneous acquittals?[310] What should happen when the failure to instruct jurors on the presumption of innocence, or the miscomprehension of instructions on the presumption of innocence, is considered by state courts to be harmless error?[311]

C. *Giving Substance to the Rhetoric of Innocence: Trial Error and Factual Presumptions*

The solutions to these problems can be found by giving substance to the rhetoric of innocence.[312] State courts must restore importance to the presumption of innocence by reexamining the application of the harmless error rule to defective and omitted presumption of innocence instructions. The landmark decision in *Chapman v. California*[313] set in motion a reconsideration of the effect of constitutional error at trial. Constitutional errors, such as overbroad jury instructions at the sentencing phase of a capital case,[314] the admission of evidence in violation of the Sixth Amendment's Right to Counsel,[315] jury instructions

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308. A tension exists between the goals of acquitting the innocent and convicting the guilty. *See* Hall, *supra* note 100. While no one expects total impartiality, the law does require that jurors put aside their initial beliefs if favorable to guilt. While the Sixth Amendment to the United States Constitution does grant the right to an impartial trial, commentators have noted that courts have been less than clear as to what is meant by the construct of impartiality. Duncan v. Louisiana, 391 U.S. 145 (1968); Ristaino v. Ross, 424 U.S. 589 (1976). According to Gobert, "[p]latitudes about its value abound, but giving content to this concept has proven more difficult and challenging. The difficulty springs from the fact that all adults have beliefs, values, and prejudices which make impartiality in the *tabula rasa* sense impossible." Gobert, *supra* note 159, at 271.

309. *See supra* note 17.

310. Legal scholarship assumes agreement on preferences for the outcome of a criminal case (from best to worst): (1) acquitting the innocent, (2) convicting the guilty, (3) acquitting the guilty, and (4) convicting the innocent. *See* Connolly, *supra* note 71.

311. Kentucky v. Whorton, 441 U.S. 786 (1979). *Cf.* United States v. Fernandez, 496 F.2d 1294 (5th Cir. 1974) (holding that failure of the court to provide a presumption of innocence charge at any time during the trial amounted to plain error); United States v. Dilg, 700 F.2d 620 (11th Cir. 1983) (requiring a new trial when the court gave the presumption of innocence instruction to the jury venire, but failed to instruct jury during trial).

312. Any effort to reset this tension necessarily resets the probability meter of guilt or innocence in algebraic and probability models of juror decisionmaking.

313. 386 U.S. 18 (1967).

314. Clemons v. Mississippi, 494 U.S. 738 (1990).

315. Satterwhite v. Texas, 486 U.S. 249 (1988).

with an erroneous conclusive presumption,[316] erroneous exclusion of exculpatory testimony regarding the accused's confession,[317] the denial of an accused's right to be present at his trial,[318] and the improper comment on accused's silence at trial, [319] are all harmless errors. After *Kentucky v. Whorton*,[320] a failure to give presumption of innocence instructions at any time before or during trial is likely harmless error as well.[321]

In the recent decision of *Arizona v. Fulminante*,[322] the Supreme Court discussed the common thread connecting cases of harmless constitutional errors. Each involved a "trial error" during the presentation of the case to the jury that could be quantitatively assessed in the context of the whole trial.[323] This may be contrasted with cases where there was a "structural defect" in the constitution of the trial mechanism. In determining whether there is a trial error or a structural defect, courts look to the effect that the error had on the guilty verdict. In examining this effect, the inquiry turns on a consideration of fairness. Modern harmless error analysis focuses on the underlying fairness of a trial rather than the presence of immaterial error. It does so by preserving the

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316. Carella v. California, 491 U.S. 263 (1989).

317. Crane v. Kentucky, 476 U.S. 683 (1986).

318. Rushen v. Spain, 464 U.S. 114 (1983).

319. United States v. Hasting, 461 U.S. 499 (1983).

320. 441 U.S. 786, 789 (1979) (stating that "the failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution. Under *Taylor*, such a failure must be evaluated in light of the totality of the circumstances—including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors—to determine whether the defendant received a constitutionally fair trial."). *See* Taylor v. Kentucky, 436 U.S. 478 (1978); United States v. Payne, 944 F.2d 1458 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1598 (1992); United States v. Dilg, 700 F.2d 620 (11th Cir. 1983).

321. Justice Stevens, in a dissenting opinion, did suggest that while the failure to instruct in state courts might not violate due process, "[i]n a federal court it is reversible error to refuse a request for a proper instruction on the presumption of innocence." 436 U.S. at 491. *See also* United States v. Hill, 738 F.2d 152, 153 (6th Cir. 1984) (holding that "[j]ury instructions concerning the presumption of innocence and proof beyond reasonable doubt are fundamental rights possessed by every citizen charged with a crime in these United States").

322. 499 U.S. 279 (1991). *See* Kenneth R. Kenkel, *Arizona v. Fulminante: Where's the Harm in Harmless Error?*, 81 Ky. L.J. 257 (1992–93). For a critical review of *Fulminante*, see Jill Adler, *The U.S. Supreme Court's "Harmless Error": An Essay on Arizona v. Fulminante*, 1 Tilburg Foreign L. Rev. 15 (1991).

323. *Fulminante*, 499 U.S. at 307 (Rehnquist, J., dissenting). The court asked whether the effect of the error was harmless in terms of the entire fact-finding process. *See also* Delaware v. Van Arsdall, 475 U.S. 673 (1986).

principle that the resolution of factual questions of guilt and innocence are the central purpose of a criminal trial.[324]

Neglecting to give presumption of innocence instructions is indeed harmless if this presumption has nothing to do with factual innocence. Failure to give an instruction on the presumption of legal innocence is more than compensated for by an instruction on the reasonable doubt rule. Failing to instruct jurors on the presumption of innocence is also harmless if presuming innocence bears no relation to the underlying fairness of a trial.[325] The presumption of innocence is insignificant if its omission is not a structural defect. But if presumption of innocence rhetoric is to have any meaning, as it should, it must guarantee a presumption of factual innocence. A presumption of factual innocence is inextricably tied to the fairness of trial, so that its omission "can never be treated as harmless error."[326] Once substance of the presumption of innocence is on par with its rhetoric, as will be proposed in part III, the omission of a presumption of innocence instruction must be considered more than trial error.[327] Failure to instruct the jury on an assumption of innocence compromises a basic protection "without which a criminal trial cannot reliably serve its function."[328]

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324. *Fulminante*, 499 U.S. at 307 (Rehnquist, J., dissenting). The notion of examining the omission of a presumption of innocence instruction in such a context was promoted recently in *Delo v. Lashley* which held that: "An instruction is constitutionally required only when, in light of the totality of the circumstances, there is a "genuine danger" that the jury will convict based on something other than the State's lawful evidence, proved beyond a reasonable doubt." Delo v. Lashley, 113 S. Ct. 1222, 1226 (1993). Thus, the decisions in *Chapman, Fulminante*, and *Delo* turn on two simple but powerful inquiries: Did the error significantly influence the jury in reaching its judgment? And did the error create a genuine danger that the jury will convict on something other than lawful evidence?

325. As the Fifth Circuit noted:

> We must be confident that the scales of justice are not tilted, are not skewed. The Chapman harmless error rule was not intended to be a cover-up for every prosecutorial error. It was really intended as a Band-Aid for what is, under the circumstances, a minor, albeit constitutional, legal abrasion. The constitution speaks in cosmic concepts or cosmic principles, and they are not to be grudgingly applied nor miniaturized. We must be careful lest the purgatory of the harmless error doctrine erode our sacred constitutional rights.

United States v. Hammond, 598 F.2d 1008, 1013–14 (5th Cir. 1979)

326. *See* Chapman v. California, 386 U.S. 18, 23 (1967).

327. The majority in *Fulminante* again acknowledged that, in the absence of a presumption of innocence instruction, a reasonable doubt rule instruction is adequate for due process purposes. Omission of reasonable doubt rule instructions would distort the trial process by creating an untenable risk that the jury would convict on proof of less than a reasonable doubt. Omission of the presumption of innocence merely removes an additional safeguard beyond that provided for by the reasonable doubt rule. 499 U.S. at 291.

328. Sullivan v. Louisiana, 113 S. Ct. 2078 (1993) (upholding the critical importance of reasonable doubt rule instructions in criminal cases).

In the past, federal courts have taken a conservative path by invalidating only those convictions in which the proceedings were so infected by error that the verdict was compromised.[329] For example, courts have ruled that constitutional error is no longer harmless where there is a total deprivation of the right to counsel,[330] where the judge is biased,[331] and where the accused is deprived of the right to self-representation.[332] If the substance of the presumption of innocence approaches its rhetoric, a failure to give jury instructions on this basic and fundamental legal safeguard will be seen as something more than harmless error.[333]

The presumption of innocence is recast as a factual presumption in part III. Jury instructions are proposed that consider certain peculiarities of human cognition and information processing. First, a body of experimental research suggests that the formation of an initial impression or belief tends to make subjects (e.g., jurors) less susceptible to alternate impressions or beliefs. A juror's reliance on an initial impression, when given additional information or evidence, is more commonly known as a primacy effect. Second, a number of impressive laboratory studies support the notion that initial impressions or beliefs persevere even in the face of persuasive counterexplanations and contrary evidence. Third, a related body of social psychological research also supports the fact that jurors may overvalue evidence and information that would confirm initial impressions, while undervaluing or ignoring disconfirming evidence. And, finally, experimental attempts to undo initial impressions, beliefs, and assumptions by psychologists suggest that it is unlikely that jurors will produce counterexplanations and thus change assumptions unless prompted to do so. By clearly stating the factual assumptions with which all jurors are required to begin trial, the jury instructions proposed in part III consider the primacy effects of initial

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329. The focus is squarely on the effect of the error on the verdict, not the effect of the error on a reasonable jury. *See Chapman*, 386 U.S. at 18.

330. Gideon v. Wainwright, 372 U.S. 335 (1963).

331. Tumey v. Ohio, 273 U.S. 510 (1927).

332. McKaskle v. Wiggins, 465 U.S. 168 (1984).

333. *See* Ealey v. State, 232 S.E.2d 620 (Ga. Ct. App. 1977) (granting a new trial because court failed to instruct on the presumption of innocence); Schuh v. State, 258 S.E. 2d 328 (Ga. Ct. App. 1979). Notably, some states have codified the requirement that jurors must be instructed on the presumption of innocence in all criminal cases. *See, e.g.*, S.D. Codified Laws Ann. § 23A-25-3.1 (1994). However, even in such jurisdictions courts are hesitant to find reversible error where instructions are omitted. *See* State v. Holmes, 464 N.W.2d 612 (S.D. 1990) (holding that failure to instruct on the presumption of innocence does not automatically result in an unfair trial and may be harmless error).

predispositions, the perseverance of beliefs, the tendency to differentially value and gravitate toward confirming evidence, and the need for prompting. Both preliminary and charging instructions will specifically address the pivotal importance of juror factual and legal assumptions.

A consideration of these cognitive processes and effects gives specific meaning to the rhetoric of the presumption of innocence. The effort to recast the presumption of innocence as a factual assumption, more generally, recognizes the important function that the presumption of innocence may serve as a guard against juror partiality.[334] It recognizes that the normative environment of the criminal process, while alternating over time between ideological polarities, has moved far along in the direction of a retributive formalism.[335] Recasting the presumption of innocence also acknowledges that jurors frequently misunderstand existing presumption of innocence and reasonable doubt rule instructions.[336]

Finally, this reconstruction of the presumption of innocence is testament to the limitations of voir dire to identify and foil juror bias.[337] Few would contest that jury selection can be an important and powerful means of dealing with the fixed opinions and biases of prospective jurors.[338] But the use of voir dire as a mechanism to root out predispositions is often compromised by the adversarial nature of the criminal process. Both defense counsel and the prosecution seek to

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334. There are, admittedly, only a few procedures and processes that control for impartiality, e.g., effective questioning during voir dire, effective use of peremptory challenges, and supervision of deliberations. *See* Note, *Juror Bias—A Procedural Screening and the Case for Permitting its Use*, 64 Minn. L. Rev. 987 (1980). Courts have approved juror questionnaires with increasing frequency over the last decade. For a report on the receptivity of California judges, see David B. Graeven, *Enhancing Voir Dire with Paper*, The Recorder, November 3, 1993, at 8.

335. A strong, widely held ideological consensus, no matter which variety, affects juror presumptions, perceptions, and considerations of innocence. For a fascinating account of the role of criminal justice values and ideological consistency in juror decisionmaking, see Jonathan D. Casper & Kennette M. Benedict, *The Influence of Outcome Information and Attitudes on Juror Decision Making in Search and Seizure Cases*, in *Inside the Juror* 65–83 (Reid Hastie ed., 1993). *See also* Reid Hastie, *Algebraic Models of Juror Decision Processes*, in *Inside the Juror* 84–115 (Reid Hastie ed., 1993).

336. *See supra* notes 161–83 and accompanying text.

337. Voir dire is one of a handful of mechanisms to achieve impartiality. *See* Gobert, *supra* note 159, at 315. There is also juror polling, impartiality training, and a series of bias questionnaires. *See* Sand & Reiss, *supra* note 171.

338. *See* Neil Vidmar & Julius Melnitzer, *Juror Prejudice: An Empirical Study of a Challenge for Cause*, 22 Osgoode Hall L.J. 487 (1984); Valerie P. Hans, *The Conduct of Voir Dire: A Psychological Analysis*, 11 Just. Syst. J. 40 (1986) (stating that individual, sequestered, and open-ended questioning is superior method for uncovering bias); Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 Stan. L. Rev. 545 (1975).

empanel jurors whose dispositions are partisan.[339] The use of peremptory strikes, for instance, may decrease the impartiality of the venire.[340] The value of jury selection is further compromised by the law's commitment to juror representations of impartiality.[341] As one court has observed, "[n]atural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial."[342] Add to this that the effectiveness of voir dire in identifying fixed opinions or strongly held biases is inconstant. Voir dire, for example, is an inadequate shield against racial bias and prejudice.[343] Slight impressions, suspicions of guilt, and predispositions toward guilt are not generally identified in voir

339. *See* Valerie P. Hans & Neil Vidmar, *Judging the Jury* 74 (1986) (arguing that "[l]awyers begin the selection process by claiming to the jury panel that their wish is for fair and impartial jurors. Yet they do not desire impartiality but rather favorability."); Jerome Frank, *Courts on Trial* 121–23 (1949).

340. *See* J.E.B. v. Alabama *ex rel.* T. B., 114 S. Ct. 1419 (1994). *Cf.* Dale W. Broeder, *Voir Dire Examination: An Empirical Study*, 38 So. Cal. L. Rev. 503 (1965); Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Jury Candor*, 11 Law & Hum. Beh. 131 (1987).

341. *Cf.* Smith v. Phillips, 455 U.S. 209, 215 (1982) (stating that "[g]iven the human propensity for self-justification, respondent argues, the law must impute bias to jurors in [the respondent's] position. We disagree.").

342. United States v. Dellinger, 472 F.2d 340, 375 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). The problem of social desirability is significant in voir dire. Jurors do not want to appear impartial or uninformed. Candid response to questions are often colored by self-presentations of fairness. To avoid public embarassment, some jurors claim not to have an opinion. This is not only a problem in voir dire. Throughout trial, jurors' representations of impartiality are accepted uncritically. In some cases, the cautionary instruction given by the judge is both naive and, inadvertently, humorous:

> Now, is there any member of the jury panel as it is now constituted that feels that they could not put the fact that the Defendant is shackled out of their mind for the purpose of weighing the evidence or determining the issue of the Defendant's guilt or any other issue in this case. If you feel that would prejudice you, please raise your hand. I am instructing you that if you are selected to sit on this jury to put that fact out of your mind for the purpose of determining the Defendant's guilt or any other issue in this case. If you can't follow the instruction, raise your hand.

Billups v. Garrison, 718 F.2d 665, 667 (4th Cir. 1983), *cert. denied*, 469 U.S. 820 (1984).

343. For a comprehensive review of empirical research in juror bias, see Sheri L. Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611 (1985). State and federal courts have adopted a host of procedures to screen out racial bias from juries. This includes sequestered voir dire and content questioning. *See also* American Bar Association Standards for Criminal Justice, 8-3.5(a) (1980). The success of these efforts, however, must be seriously questioned. Mu'Min v. Virginia, 500 U.S. 415 (1991) (holding that the Constitution does not require content questioning of jurors in cases involving pretrial publicity). In addition, the Supreme Court has responded inconsistently to the exclusion of blacks or whites from petit juries by the use of peremptory challenges following its ruling in Batson v. Kentucky, 476 U.S. 79 (1986). *See, e.g.*, Powers v. Ohio, 499 U.S. 400 (1991); Holland v. Illinois, 493 U.S. 474 (1990).

dire.[344] Finally, and perhaps most important, it is rare that courts disqualify jurors on the basis of opinions, biases, or even fixed opinions where it appears from representations and demeanor that the juror can lay aside the opinions or biases and impartially render a verdict.[345] In such cases, voir dire merely identifies juror biases and predispositions.[346] In fact, some state legislatures have passed competence statutes that explicitly allow for juror predispositions toward guilt.[347]

The revision of the presumption of innocence maintains the distinction, discussed throughout this Article, between the notion of legal guilt or innocence and factual guilt or innocence. Below, this distinction will be explored in relation to initial assumptions (ai) at the start of a trial, and those belief states (di) that are maintained at the end of a trial, concurrent with the decision to convict or acquit.

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344. *See* Broeder, *supra* note 340, at 505; Hans Zeisel & Shari S. Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Examination in a Federal District Court*, 30 Stan. L. Rev. 491, 528 (1978) (concluding that "[o]ur experiment suggests that, on the whole, the voir dire as conducted in these trials did not provide sufficient information for attorneys to identify prejudiced jurors").

345. Great deference is given to juror representations of impartiality. *See* Aldridge v. United States, 283 U.S. 308, 313 (1931):

> As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. . . . [T]o ask a person whether he is prejudiced or not against a party, and (if the answer is affirmative), whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is, probably, the only sure method of fathoming his thoughts and feelings.

346. *See* Irvin v. Dowd, 366 U.S. 717 (1961). This point was supported by Justice John Marshall in the trial of Aaron Burr:

> [T]o say that any man who had formed an opinion on any fact conducive to the final decision of the case would therefore be considered as disqualified from serving on the jury, would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony, and would perhaps be applying the letter of the rule requiring an impartial jury with a strictness which is not necessary for the preservation of the rule itself.

United States v. Burr, 25 F. Cas. 49, 51 (C.C.D.Va. 1807).

347. In a remarkable legislative effort, the State of Mississippi has enacted a juror incompetence statute that captures a growing view of juror impartiality:

> Any person, otherwise competent, who will make oath that he is impartial in the case, shall be competent as a juror in any criminal case, notwithstanding the fact that he has an impression or an opinion as to the guilt or innocence of the accused, if it appear to the satisfaction of the court that he has no bias...except that to which the evidence may conduct. Any juror shall be excluded, however, if the court be of opinion that he cannot try the case impartially, and the exclusion shall not be assignable for error.

Miss. Code. Ann. § 13-5-79 (1993).

III. RECONSTRUCTING THE MEANING OF THE PRESUMPTION OF INNOCENCE

At a meeting of the American Law Institute's Council on the Model Penal Code in 1955, members decided to transform the presumption of innocence into an assumption of innocence. The justification for this change was simple: "Since this is not a true presumption, we speak of the innocence of the defendant as 'assumed.'"[348] If the presumption of innocence were a true presumption, it would impose a burden of production on an opponent of the party who bears the burden of persuasion.[349] Assumptions, on the other hand, allocate burdens of persuasion. Thus, an assumption of innocence would impose a burden of persuasion on the prosecution with regard to the defendant's guilt. While the assumption of innocence is in effect, it is assumed that the accused is not guilty.[350]

This semantic change does not give substance to the presumption of innocence.[351] Presumption of innocence rhetoric may be given meaning only by moving away from the notion that this assumption is a burden allocation device, and toward the view that factual innocence of the accused must be assumed. After all, the presumption of innocence is not held out as a fundamental right because it amplifies the burden of proof or conveys intangible messages to criminal justice functionaries.[352]

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348. *See* American Law Institute, Model Penal Code, (*Tentative Draft*, No. 4 (1955)). This change remained in the Official Draft of the Model Penal Code § 1.12(1): "No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed." Model Penal Code § 1.12(1) *See also* Harold A. Ashford & D. Michael Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969). As noted in McCormick, *supra* note 26, at § 342, the presumption of innocence "is probably better called the 'assumption of innocence' in that it describes our assumption that, in the absence of contrary facts, it is to be assumed that any person's conduct upon a given occasion was lawful."

349. *See* Otis Harrison Fisk, *The Law of Proof in Judicial Proceedings* (1928).

350. Ashford & Risinger, *supra* note 348, at 173.

351. "Although the phrase is technically inaccurate and perhaps even misleading in the sense that it suggests that there is some inherent probability that the defendant is innocent, it is a basic component of a fair trial." McCormick, *supra* note 26, at § 342.

352. *See, e.g.*, McCormick, *supra* note 26, at § 342 (noting that "[m]ost courts insist on the inclusion of the phrase in the charge to the jury, despite the fact that at that point it consists of nothing more than an amplification of the prosecution's burden of persuasion"). *See also* Taylor v. Kentucky, 436 U.S. 478, 491 (1978) (observing that "[t]he function of the instruction is to make it clear that the burden of persuasion rests entirely on the prosecutor. The same function is performed by the instruction requiring proof beyond a reasonable doubt.") (Stevens, J., dissenting).

The presumption of innocence should earn its rhetorical prominence by constraining the uninformed partiality of jurors.[353] The presumption of innocence should operate as both an evidentiary restriction and a constraint on partiality, deriving its meaning and authority from the right to a fair trial, as well as the right to trial by an impartial jury. The Court in *Estelle v. Williams*,[354] *Taylor v. Kentucky*,[355] and *Kentucky v. Whorton*,[356] found the unarticulated constitutional authority of the presumption of innocence in the Fourteenth Amendment's Due Process Clause. In each case, the constitutional derivation of the presumption of innocence was found in the right to a fair trial and, more specifically, in the right to be judged on evidence presented at trial. The presumption of innocence guards against extra-legal suspicion and unwarranted inference. The right to be judged on evidence at trial and not on suspicion and inference is also a basic element of the right to an impartial jury, which is guaranteed by the Sixth Amendment, as well as the Fourteenth Amendment's Due Process and Equal Protection Clauses.[357] Impartiality requires that the jury represent a cross-section of the community and that the jury base its verdict on evidence presented in court. Given this second element of impartiality, it is likely that the constitutional guarantee of impartiality will become more meaningful as the presumption of innocence increasingly reflects an assumption offactual innocence.[358]

The constitutional guarantees reflected in a factually based assumption further distinguish a presumption of innocence from the reasonable doubt

353. Specifically, instructions will be proposed that focus on juror assumptions that are grounded in bias, prejudice, and social stereotypes. An effort will be made to inhibit commonly observed cognitive biases that accompany initial impressions, suspicions, beliefs and opinions. *See infra* notes 437–50 and accompanying text.

354. 425 U.S. 501, 503 (1976).

355. 436 U.S. 478, 484–85 (1978).

356. 441 U.S. 786, 788–89 (1979).

357. The Sixth Amendment right to an impartial jury is made applicable to the states through the due process clause of the fourteenth amendment. Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968). *See also* Witherspoon v. Illinois, 391 U.S. 510 (1968); Parker v. Gladden, 385 U.S. 363 (1966); Turner v. Louisiana, 379 U.S. 466 (1965); Irvin v. Dowd, 366 U.S. 717 (1961); Dennis v. United States, 339 U.S. 162 (1950).

358. Not surprisingly, courts have assumed a constitutional connection between the principles of a fair and impartial jury trial, and the presumption of innocence. *See, e.g.*, United States v. Hollis, 971 F.2d 1441, 1453–54 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1580(1993); United States v. Vario, 943 F.2d 236, 239 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 882 (1992); United States v. Walsh, 811 F.2d 608, 609 (6th Cir. 1986) (holding that "[t]he right to a fair trial encompasses the right to an impartial jury and, most importantly, the right to the presumption of innocence"), *cert. denied*, 484 U.S. 831 (1987).

rule. An assumption of innocence is a constitutional standard that equates impartiality with a "mental attitude of appropriate indifference."[359] The requirement of proof beyound a reasonable doubt is a decision rule that reflects a state of mind (doubt) related to the degree of proof required for conviction. This is not to say that the reasonable doubt rule is only in effect at the end of trial, or that jurors fail to form beliefs in the legal adequacy of evidence until a verdict is reached. As discussed below, jurors bring to the court and then develop a vast array of factual and legal assumptions.

A. Juror Assumptions and Initial Belief States

The five initial belief states discussed earlier inadequately account for juror predispositions.[360] As Table Two reveals, the initial assumptions of jurors range widely, from the assumption of factual innocence (a1) to the assumption that it is more likely than not that the accused is guilty in fact (a14).[361] There is little doubt that these states are transient once evidence is introduced. Moreover, while at first glance they may appear theoretically distinct, most are not exclusive. Some jurors, for example, have no predispositions regarding the accused's legal guilt (a5), but consider it more likely than not that the accused is factually guilty (a11). Other jurors may believe at first that the accused is factually guilty (a4) and also assume legal guilt (a3).

In any given criminal case, legal and factual assumptions may run parallel as evidence is presented. If so, combinations of legal and factual beliefs, depicted as multiple opinion meters, move from an initial belief stage (bi) to an informed, decision stage (di) following the presentation

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359. The idea that impartiality derives from an attitude of indifference comes from E. Coke, *Commentary Upon Lettleton* § 155(b) (1832). *See also* Reynolds v. United States, 98 U.S. 145, 154 (1878). In the words of Chief Justice Hughes, "[i]mpartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." United States v. Wood, 299 U.S. 123, 145–46 (1936). A more recent application of "indifference" as impartiality appeared in Turner v. Murray, 476 U.S. 28, 33 (1986). As Gobert has noted, however, jurors should not begin as indifferent factfinders. Their mental state should be "biased in favor of the accused." Gobert, *supra* note 159, at 276. Thus, the word "appropriate" must take on special meaning. The presumption of innocence should mean that "appropriate indifference" is an assumption of factual innocence in favor of the accused.

360. *See supra* notes 203–07.

361. These assumptions (a_1 to a_{14}) would replace s_0 in a weighted average equation. Alternatively, the relation between factual and legal innocence/guilt may be represented as a simple function $\int f(L,F)$.

and weighing of evidence.[362] Alternatively, jurors' opinions may not be reducible to the dichotomous and discrete judgments of a single meter. Even multiple dichotomous meters may be inadequate representations of juror cognitions. Fuzzy set theory, for example, would suggest the presence of a host of continuous meters for all the features and dimensions that comprise the calculus of guilt and innocence. Thus, jurors might have composite meters that integrate a series of "fuzzy" meter readings.[363]

Existing presumption of innocence and reasonable doubt jury instructions tend to influence all consistent legal assumptions of jurors. When understood, such instructions require an assumption of legal innocence (a2), but would allow for other assumptions, including a1, 5,

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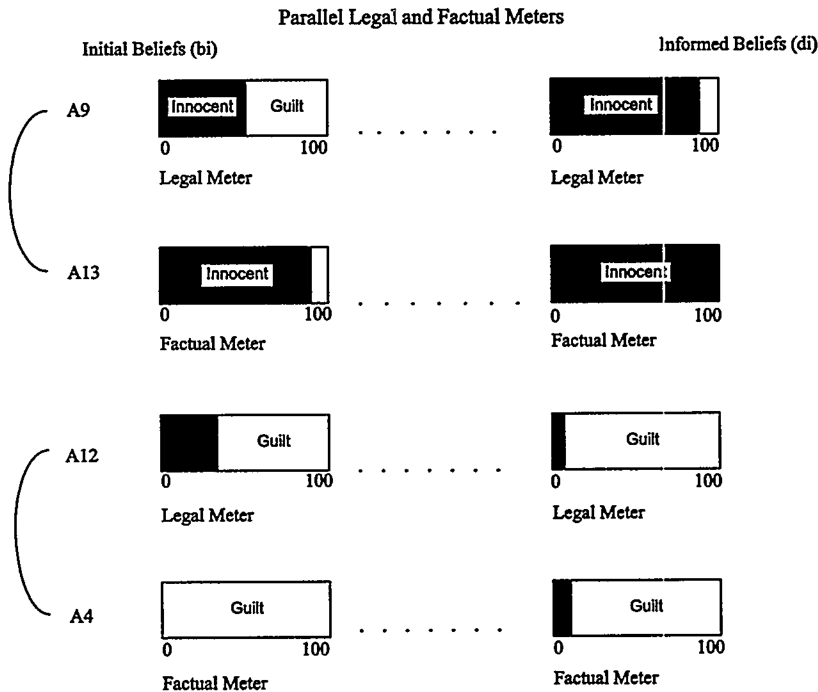
362. Meter models assume that evidence is received by the factfinder in independent "packets" that vary in intensity. Over the course of trial, opinions become increasingly informed. Notably, the association and concordance between legal and factual beliefs is not perfect. This may be illustrated in at least two ways. First, the relation between a_9 and a_{13} or a_{12} and a_4 may be depicted as parallel meters.



363. *See* Lola Lopes, *Two Conceptions of the Juror*, in *Inside the Juror* (Reid Hastie ed., 1993) (discussing multiple meters in regard to fuzzy set theory). *See also* L. A. Zadeh, *Fuzzy Sets as a Basis for a Theory of Possibility*, 1 Fuzzy Sets & Sys. 3 (1978).

Table Two

Assumptions	Construct Definition
Assumption of Factual Innocence (a_1) (F=0)	Assumption that the accused did not, in fact, commit the offense
Assumption of Legal Innocence (a_2) (L=0)	Assumption that the accused is legally innocent unless and until there is proof to the contrary
Assumption of Legal Guilt (a_3) (L=1)	Assumption that there exists evidence beyond a reasonable doubt of guilt.
Assumption of Factual Guilt (a_4) (F=1)	Assumption that the accused did, in fact, commit the offense
No Predisposition/ Legal Guilt (a_5)	No initial assumption concerning the sufficiency of incriminating evidence
No Predisposition/ Legal Innocence (a_6)	No initial assumption concerning the sufficiency of exculpatory evidence
No Predisposition/ Factual Guilt (a_7)	No initial assumption concerning whether the accused is guilty in fact
No Predisposition/Factual Innocence (a_8)	No initial assumption concerning whether the accused is innocent in fact
Balanced Uncertainties/Factual Guilt/Innocence (a_9) ($F \approx .5$)	Equally likely that the accused is factually guilty or innocent
Balanced Uncertainties/ Legal Guilt/Innocence (a_{10}) ($L \approx .5$)	Equally likely that the accused is legally guilty or innocent
Imbalanced Uncertainties/ Factual Guilt (a_{11}) ($0 < F < 1$)	More likely than not that the accused is factually guilty
Imbalanced Uncertainties/ Legal Guilt (a_{12}) ($0 < L < 1$)	More likely than not that the accused is legally guilty
Imbalanced Uncertainties/ Factual Innocence (a_{13}) ($0 < F < 1$)	More likely than not that the accused is innocent in fact
Imbalanced Uncertainties/ Factual Guilt (a_{14}) ($0 < F < 1$)	More likely than not that the accused is guilty in fact

9, 11, 13, 14. Federal and state pattern jury instructions, however, do little to ensure a juror's assumption of factual innocence. As observed below, an assumption of factual innocence (a1) is inconsistent with all other factually based states.

The factual and legal assumptions in Table Two, while more elaborate than earlier conceptions, fail to reveal the intensity of beliefs and opinions that underlie the social cognitions of jurors. Is a juror's assumption of factual guilt (a3), for example, based on a superficial impression? Is a juror's assumption that it is more likely than not that the accused is factually guilty (a11) grounded in a suspicion? Or, is it the product of a fixed opinion? These differences are far from subtle and may reflect an acceptable level of suspicion or an unacceptable bias. Once it is determined that a juror has a suspicion or fixed opinion, is it based on knowledge of material facts (evidenced-based) or is it hypothetical?[364] Any revision of presumption of innocence instructions to ensure juror impartiality must consider the continuum of both hypothetical and evidence-based predispositions.

For any juror assumption a1-14, there are at least five cognitive constructions ranging in intensity from: impressions (c1), suspicions (c2), beliefs (c3), opinions (c4), to fixed opinions (c5).[365] These constructions may be either hypothetical (h) or evidence-based (e).[366] An impression is a perception of the attributes, characteristics, status, and traits of an object. Courts have not considered "light," "superficial," or "slight" impressions that yield to testimony or evidence as obstacles in juror selection.[367] Suspicions are impressions with a definite orientation.[368] A juror, for example, may suspect that the accused is

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364. For obvious reasons, courts accord far less weight to the hypothetical cognitions of jurors. *See* Smith v. Phillips, 455 U.S. 209 (1982).

365. C_{1-5} would replace the w_0 term in an algebraic weighted equation.

366. Examples of assumptions and constructions that are either hypothetical or evidence-based, include: a_4hc_2 (assumption of factual guilt, grounded in a hypothetical suspicion), $a_{11}hc_3$ (assumption that it is more likely than not that the accused is factually guilty, grounded in a hypothetical belief), and $a_{13}hc_1$ (assumption that it is more likely than not that the accused is factually innocent, grounded in a hypothetical impression).

367. Mu'Min v. Virginia, 500 U.S. 415 (1991). *See also* Irvin v. Dowd, 366 U.S. 717, 723 (1961) (noting that "[t]o hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption or a prospective juror's impartiality would be to establish an impossible standard"); United States v. Blanton, 719 F.2d 815, 830 (6th Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984); People v. Butts, 527 N.Y.2d 880 (1988); Durham v. Cox, 328 F. Supp. 1157 (W.D. Va. 1971). For an informative discussion of preconceived impressions, see Sheppard v. Maxwell, 346 F.2d 707 (6th Cir. 1965), *rev'd*, 384 U.S. 333 (1966).

368. *See* United States v. Moreno Morales, 815 F.2d 725, 733 (1st Cir.), *cert. denied*, 484 U.S. 966 (1987).

guilty because he was arrested and then indicted by the grand jury.[369] Once again, suspicions that give way to evidence are not necessarily incompatible with juror competence. Beliefs are learned predispositions to respond in a certain manner to a particular object. Beliefs, like attitudes, tend to have three components: (1) cognitive, i.e., what the juror thinks; (2) emotional, i.e., what the juror feels; and (3) behavioral, i.e., how the juror acts.[370] Courts have distinguished between uninformed and informed beliefs. Opinions are informed beliefs.[371] Where jurors have qualified opinions regarding the accused's guilt, there is implied bias or bias presumed as a matter of law.[372] And, finally, fixed opinions are unqualified, unchangeable, settled beliefs.[373] Courts have found fixed opinions toward guilt to be evidence of actual bias, or bias in fact.[374]

Earlier it was noted that impressions, like suspicions, beliefs, opinions, and fixed opinions, are subject to primacy effects.[375] Initial

369. *See, e.g.*, People v. Torpey, 472 N.E.2d 298 (N.Y. 1984) (finding that juror suspected that the accused was a "hit man" for the Mafia); United States v. Bruscino, 687 F.2d 938 (7th Cir. 1982) (a suspicion was planted in jurors' minds that the accused was a member of the Mexican Mafia), *cert. denied*, 459 U.S. 1228 (1983).

370. *See, e.g.*, Perryman v. State, 558 So. 2d 972 (Ala. App. 1989).

371. *See* State v. Massey, 382 A.2d 801 (R.I. 1978); State v. Fuller, 87 S.E.2d 287 (S.C. 1955); State v. Mittle, 113 S.E. 335 (S.C. 1922). According to the court in *Dowd*, "the influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. . . ." *Dowd*, 366 U.S. at 722.

372. *See* Smith v. Phillips, 455 U.S. 209 (1982) (dismissing the significance of an implied juror bias and holding that the Sixth Amendment is concerned only with actual bias); Sharon R. Gromer, *Supreme Court Review: Sixth Amendment—The Demise of the Doctrine of Implied Juror Bias: Smith v. Phillips, 102 S. Ct. 940 (1982)*, 73 J. Crim. L. & Criminology 1507 (1982); Leonard v. United States, 378 U.S. 544 (1964) (per curiam).

373. Ala. Code § 12-16-150 (7) (1986). *Cf.* Cal. Civ. Proc. Code § 229 (West Supp. 1995).

374. *See Phillips*, 455 U.S. at 223–24. The court noted the proof problems associated with juror bias in citing Crawford v. United States, 212 U.S. 183, 196 (1909):

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

See also State v. Green, 392 S.E.2d 157 (S.C.), *cert. denied*, 498 U.S. 881 (1990); Nobis v. State, 401 So. 2d 191 (Ala. Crim. App.), *cert. denied*, 401 So. 2d 204 (Ala. 1981) (noting that a fixed opinion closes the mind of a juror and combats the testimony). According to the court in *Dowd*, "[t]he influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Dowd*, 366 U.S. at 727.

375. *See* R. E. Nisbett & Lee Ross, *Human Inference: Strategies and Shortcomings of Social Judgment* (1980); Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 Soc. Psychol. Q. 285 (1983); Robert F. Ahlering & Lisa D. Parker, *Need for Cognition as a Moderator of the Primacy Effect*, 23 J. Res. Personality 313 (1989); Wendy J. Palmquist, *Formal Operational Reasoning and the Primary Effect in Impression Formation*, 15 Developmental Psychol. 185 (1979).

impressions tend to cast a certain light on subsequent cognitions.[376] It was also stated that the formation of impressions tended to make subjects resist alternative explanations,[377] that beliefs often persevere in the face of counterexplanations,[378] and that prompting was required to overcome allegiances to certain predispositions.[379] Some researchers argue that these cognitive effects and biases result from subjects' adopting a conditional reference frame that allows for an estimate of the plausibility of assumptions.[380] Framing, broadly defined as a decisionmaker's conception of the acts, contingencies, and outcomes of a particular choice, changes the way in which a problem is perceived.[381] Important alternatives may be overlooked.[382] Evidence is interpreted in favor of the frame that is currently in place.[383] Framing also tends to result in a confirmation bias, or the tendency to acquire evidence that confirms predispositions.[384] Finally, framing limits or truncates the search for disconfirming evidence.[385]

Efforts to manipulate counterexplanations reveal the importance of tasks that reduce confidence in existing assumptions, i.e., tasks that will

376. *See* Lee Ross & C. A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in *Judgment Under Uncertainty: Heuristics and Biases* 129–52 (Daniel Kahnemam et al. eds. 1982).

377. *See, e.g.*, Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979); S. J. Sherman et al., *Social Explanation: The Role of Timing, Set and Recall on Subjective Likelihood Estimates*, 44 J. Personality & Soc. Psychol. 1127 (1983).

378. *See* L. Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. Personality & Soc. Psychol. 880 (1975).

379. *See* Craig. A. Anderson, *Innoculation and Counter-explanation: Debiasing Techniques in the Perseverance of Social Theories*, 1 Soc. Cognition 126 (1982); Craig A. Anderson & Elizabeth S. Sechler, *Effects of Explanation and Counterexplanation on the Development and Use of Social Theories*, 50 J. Personality & Soc. Psychol. 24 (1986).

380. *See* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Science 453 (1981). For an outstanding review of the framing literature, see Derek J. Koehler, *supra* note 306. A general introduction to framing appears in Scott Plous, *The Psychology of Judgment and Decision Making* (1993).

381. Tversky & Kahneman, *supra* note 380, at 453.

382. *See, e.g.*, A. Tesser & C. Leone, *Cognitive Schemas and Thought as Determinants of Attitude Change*, 13 J. Experimental Soc. Psychol. 340 (1977).

383. *See* Loren J. Chapman & Jean P. Chapman, *Genesis of Popular but Erroneous Psychodiagnostic Observations*, 72 J. Abnormal Psychol. 193 (1967).

384. Mark Snyder & William B. Swan, Jr., *Hypothesis-testing in Social Interaction*, 36 J. Personality & Soc. Psychol. 1202 (1978).

385. *See* Harriet Shaklee & Baruch Fischhoff, *Strategies of Information Search in Causal Analysis*, 10 Memory & Cognition 520 (1982). For a discussion of the analogous concept of selective processing, see Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. Personality & Soc. Psychol. 726 (1988).

encourage strong consideration of alternative impressions, beliefs, and opinions. Following a brief review of existing state and federal pattern jury instructions, new jury instructions for an assumption of innocence will be fashioned that address such a task.

B. The Elements of an Assumption of Factual Innocence

In the early 1970s, the National Commission on Reform of Federal Criminal Laws ("Brown Commission") substituted the word "assumed" for "presumed" in relation to the presumption of innocence, and changed the word "defendant" to "accused" throughout the proposed code. The Brown Commission also added some detail to the presumption of innocence instruction, all to "dispel the cloud of suspicion hanging over the accused, to dispel the jurors' notion that where there is smoke, there is fire."[386] The present effort follows in this tradition by assuring, to the greatest extent possible, that all impressions, suspicions, beliefs and opinions are consistent with factual innocence. The intended effect of a factually based assumption of innocence is to guide permissible assumptions (for some, counterassumptions) before the presentation of evidence.[387] (see Figure One).

Current state and federal pattern jury instructions poorly reflect the rhetoric surrounding the presumption of innocence. To be fair, some federal pattern instructions are clear in their admonition that an indictment is not indicative of guilt, and that the accused begins with a clean slate.[388] Others, however, have unclear provisions that make

386. National Commission on Reform of Federal Criminal Laws, 1 *Working Papers of the National Commission on Reform of Federal Criminal Laws* 14 (1970).

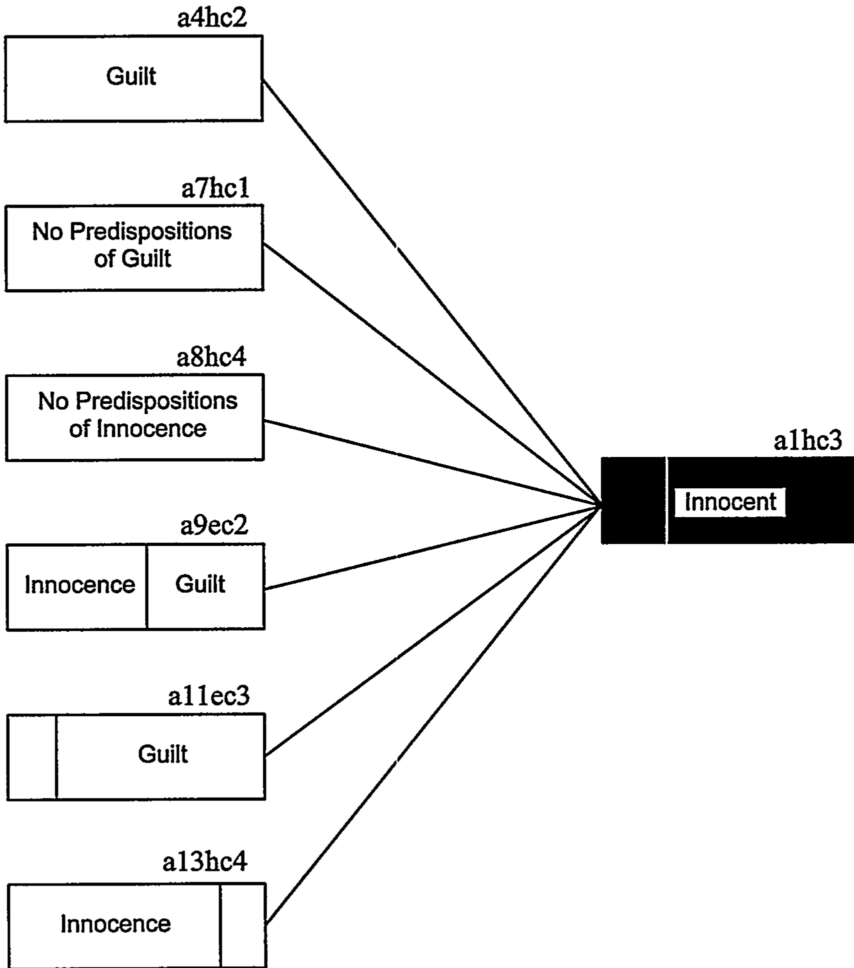
387. The purpose, however, is not to provide a frame of reference that would result in confirmation bias and the overestimation of evidence favorable to the defense.

388. *See, e.g.*, Committee on Pattern Criminal Jury Instructions, Sixth Circuit, *Pattern Jury Instructions* § 1.03(1)–(3) (1991):

> (1) As you know, the defendant has pleaded not guilty to the crime charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crime he is accused of committing. It does not even raise any suspicion of guilt. (2) Instead, the defendant starts the trial with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that he is guilty. (3) This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

Figure One

Intended Effect of a Factual Assumption of Innocence on Factual Meters



the distinction between the reasonable doubt rule and obscure the presumption of innocence meaningless.[389] State pattern and non-pattern instructions vary considerably, ranging from implicit references to factual innocence to complete rehearsals of reasonable doubt rule instructions. Sometimes the only presumption of innocence instruction given simply restates the reasonable doubt rule or its basic premises.[390]

There are at least six different kinds of provisions found in countless numbers of presumption of innocence pattern instructions: (1) innocence as a required presumption, (2) legally required initial beliefs, (3) duration, (4) burden allocation, (5) specific proof required to overcome innocence, and (6) accused's obligation to offer proof of innocence. Typically, these pattern instructions, and other creative variations, are

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389. *See* United States v. Walker, 861 F.2d 810, 812–14 (5th Cir. 1988) (per curiam). *Walker* upheld use of the following pattern instruction even though it was found to be insufficiently clear:

> [t]he indictment or formal charge against any defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all. The Government has the burden of proving a defendant guilty beyond a reasonable doubt, if it fails to do so you must find the defendant not guilty.

Id. See also United States v. Castro, 874 F.2d 230, 233 (5th Cir.), *cert. denied*, 493 U.S. 845 (1989). In *Castro*, the judge explained the presumption of innocence on at least six occasions, in addition to giving the following instruction which, admittedly, was unclear:

> I remind you that the indictment is merely the formal charge against the defendants; it is not evidence of guilt. Indeed, the defendants are presumed to be innocent. The law does not require a defendant to prove innocence or produce any evidence at all, and no inference whatsoever may be drawn from the election of a defendant not to testify.

Id.; United States v. Stewart, 879 F.2d 1268 (5th Cir.), *cert. denied*, 493 U.S. 899 (1989); United States v. Shaw, 894 F.2d 689 (5th Cir.), *cert. denied*, 498 U.S. 828 (1990). For additional pattern instructions with less than adequate provisions, see Josephine R. Poluto et al., *Federal Criminal Jury Instructions* §1.04A (1991):

> The defendant has pleaded not guilty. You are required to presume that (he)(she) is innocent. The defendant does not have to offer evidence, but if (he)(she) does you must consider it along with the evidence that the government offers. The Presumption of innocence means that you must find the defendant not guilty unless and until you decide that the government has proved (him)(her) guilty beyond a reasonable doubt.

Id.

390. Bear in mind that the Defendant is presumed to be not guilty of the charge against him, until and if the State proves by legal and competent evidence the guilt of the Defendant beyond a reasonable doubt. . . . Neither the fact that this [complaint] has been filed nor the Defendant is here in Court is any evidence of guilt. As I stated earlier the Defendant must be presumed not guilty until his guilt is established by legal and competent evidence beyond a reasonable doubt.

City of Crestline v. Gantzler, No. 3-91-15, (Ohio Ct. App. Jan. 14, 1992). Surprisingly, courts have not found that it is misleading to instruct jurors that an accused is presumed innocent "until you are satisfied from the evidence beyond a reasonable doubt that he is guilty." State v. Brugier, 286 N.W.2d 1 (S.D. 1979). An instruction on the reasonable doubt rule compensates for the failure to mention "unless."

given to prospective jurors before or during voir dire, to a newly selected and sworn-in jury as a preliminary charge, to a sitting jury as a limiting instruction or an admonishment during the case-in-chief, or to jurors as a charging instruction after the close of evidence.[391] The timing, frequency, and substance of the instructions determine their effectiveness.[392] In any evaluation of effectiveness, courts tend to look at

391. Presumption of innocence instructions or admonitions may be given at any time, depending on the need and circumstance. For example, in State v. Phippen, 494 P.2d 1137, 1140 (Kan. 1972), a trial judge had to admonish the jury after the following remarks were made by the prosecutor during voir dire:

> Now, you realize that the State will present evidence to back up the facts—back up the charge; that the criminal defendant, Vera Phippen has the opportunity to testify, and you can expect that if she does testify, she is going to deny everything that the State says, or she is going to try to contradict it. If she didn't do that, we wouldn't be here today.

Id. The trial judge responded:

> I feel I should say something. In the first place, any person charged with a crime is presumed to be innocent. That presumption goes with them until their guilt is established to the satisfaction of the jury beyond a reasonable doubt. No person is required to give any evidence. I don't know whether this lady is going to take the stand or not. She may testify; she is not required to. If she does, or if she doesn't, you will be appraised in the Court's instructions as to any effect this may have....Now, I don't think Mr. Tomasic [the prosecutor] meant anything wrong by saying that she would take the stand and deny it. He can't know this. She may take the stand and deny it or she may not take the stand at all. . . . I think you may go ahead.

Id. The prosecutor continued:

> Thank you, Your Honor. Ladies and gentlemen of the jury: What I was getting at is after the State presents its evidence, the defendant will have the opportunity, if she desires, to present evidence. Then when this is finished, you people—the twelve that are selected—will have a job to do. You are going to have to make a decision, and if you feel that the evidence warrants a conviction, you will have to come back to this courtroom and tell the Judge and tell the attorneys and tell Vera Phippen that you believe that she is guilty. . . . Now, what I want to know is, is there anyone here who feels that either he or she cannot return to this courtroom and tell the Judge that they feel the evidence warrants Vera Phippen being guilty? If anyone feels that they can't do that, we would like to know right now.

Id.

392. A judge's repeated effort to instruct the jury on the presumption of innocence may, in certain cases, overcome any error attributable to jury instructions that have inadequate provisions. *See, e.g.*, United States v. Solomon, 856 F.2d 1572, 1575–78 (11th Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989). In *Solomon*, the timing and substance of the instructions given by the trial judge were overlooked in favor of frequency. The judge first instructed the jury after it had been sworn in and before testimony was heard:

> I want to caution you [that] the fact that the grand jury has returned a bill of indictment against these defendants is not evidence, [or] a hint or inference of guilt. . . . I further caution you [that] each of these defendants comes[s] into court with the presumption of innocence in their favor. That is they are presumed innocent of any offense there might be until the government produces evidence which is sufficient to show guilt beyond a reasonable doubt and the government has that burden.

Id. In a set of charging instructions, the judge then told the jury:

the totality of the circumstances—at the testimony of witnesses, argument of counsel, strength of evidence, instructions given by the judge, context in which the instructions are given, and the way in which a reasonable jury could have interpreted the instruction.[393] A single instruction that is defective must be considered in the context of the overall charge, as well as counsel's objection, if any.[394]

C. *Jury Instruction Content*

Justice Jackson once quipped that it would be naive to assume that prejudice could be overcome by the presentation of jury instructions. All practicing lawyers would know this "to be unmitigated fiction."[395] There are no naive assumptions that juror predispositions will be "overcome" by an assumption of innocence instruction. One reason, however, that jury instructions may not be effective is that they are inadequately conceived and poorly drafted.[396] As noted earlier, jury instructions often

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> The law does not require the defendants to prove innocence or produce any evidence at all if they don't want to. The return of the indictment places upon the government the burden of proving each of the defendants guilty beyond a reasonable doubt and if it fails to do so, then you must find each of the defendants not guilty.

Id.

The Federal Rules of Criminal Procedure give great latitude to judges as to when instructions may be given: "The court may instruct the jury before or after the arguments are completed or at both times." Fed. R. Crim. P. 30. *See also* United States v. Valencia, 773 F.2d 1037, 1039 (9th Cir. 1985) (upholding presumption of innocence instruction given after all the evidence had been presented but before closing arguments). The petitioner had claimed that it was prejudicial for "the prosecutor's closing rebuttal argument. . . [to be] the last impression left with the jury" before deliberations. To the petitioner's credit, this decision was governed by an earlier version of Rule 30, providing that "the [trial] court shall instruct the jury after the [closing] arguments are completed." *Id.*

393. *See* Sandstrom v. Montana, 442 U.S. 510 (1979); Cupp v. Naughten, 414 U.S. 141, 146–47 (1973).

394. *See* Kentucky v. Whorton, 441 U.S. 786 (1979); Peek v. Kemp, 784 F.2d 1479 (11th Cir.), *cert. denied*, 479 U.S. 939 (1986); United States v. Smegal, 772 F.2d 659 (10th Cir. 1985). As noted in United States v. Polowichak:

> [A] trial judge is not some patriarch upon whose shoulders falls sole responsibility for every detail of the enterprise. A successful trial is rather a communicative and cooperative venture in which able counsel shoulder their burdens too. 'It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court.'

United States v. Polowichak, 783 F.2d 410, 421 (4th Cir. 1986) (citations omitted).

395. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (concurring opinion) (citations omitted).

396. *See supra* notes 168–208 and accompanying text. *See also* United States v. Walker, 861 F.3d 810, 813 (5th Cir. 1988) (noting that "[t]he genesis of the concern over the adequacy of the

blur the distinction between the presumption of innocence and the reasonable doubt rule.[397] The blurred lines between the reasonable doubt rule and the duration and burden allocation provisions, for example, reflect a conceptual muddle. Also, references to specific elements of the presumption of innocence are nearly impossible to find in pattern instructions. Even courts have acknowledged that existing presumption of innocence instructions are ambiguous.[398] Such provisions only superficially cover aspects of legal innocence and burdens of proof. It is no wonder that jurors are confused.[399]

The model presumption of innocence instructions proposed below consider (1) innocence as a legally required assumption and (2) the requirements of an assumption of factual innocence. The first assumption of innocence instruction is restricted in scope to jurors' factual assumptions. It is intended as a preliminary instruction.[400] The second also considers the assumption of innocence's duration and integrates reasonable doubt rule provisions. It is designed as both a preliminary and charging instruction.[401] Unlike existing pattern instructions, provisions in both instructions focus exclusively on the accused's factual innocence (a1). References to burdens of proof flowing from the reasonable doubt rule or presumption of innocence are

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instruction on the presumption may be traced to the realization that jurors frequently do not fully comprehend instructions read to them").

397. Presumption of innocence instructions are legally inaccurate with a syntax that lacks clarity. *See* Severance et al., *supra* note 166, at 200–01.

398. *See, e.g.*, United States v. Walker, 861 F.2d 810 (5th Cir. 1988).

399. *See supra* notes 163–73 and accompanying text.

400. Assumption of innocence instructions are designed to be administered before the presentation of evidence as preliminary instructions, as part of a substantive preinstruction, or in concert with general instructions. The effectiveness of an assumption of innocence is contingent on an administration prior to the weighing of evidence by jurors. Empirical evidence overwhelmingly supports the importance of preliminary instructions and preinstructions. *See* Janice C. Goldberg, *Memory, Magic, and Myth: The Timing of Jury Instructions*, 59 Or. L. Rev. 451 (1981); Vicki L. Smith, *Impact of Pretrial Instruction on Jurors' Information Processing and Decision Making*, 76 J. Applied Psychol. 220 (1991); Vicki L. Smith, *The Feasibility and Utility of Pretrial Instruction in the Substantive Law: A Survey of Judges*, 14 Law & Hum. Behav. 235 (1990); Lynne Forster Lee et al., *Juror Competence in Civil Trials: Effects of Preinstruction and Evidence Technicality*, 78 J. Applied Psychol. 14 (1993); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, 37 J. Personality & Soc. Psychol. 1877 (1979).

401. Assumption of Innocence Instruction II allows jurors to be pre- and post-instructed. Pre- and post- instruction is most effective in reducing juror reliance on stereotypes. Studies also suggest that pre- and post-instruction contributes to the formation of impressions, beliefs and opinions based on evidence before the court. *See* Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. Personality & Soc. Psychol. 857 (1991).

drafted in relation to the required factual assumptions of the assumption of innocence.

Assumption of Innocence Instruction I

A person accused of a crime is presumed by law to be innocent. This means that you, as jurors, must begin with an assumption that [*X*] did not commit the offense(s) with which he (she) is charged. The assumption of [*X*'s] innocence is a commitment to the idea that a person accused of committing a crime is no different from any other innocent member of the community.

The fact that [*X*] was arrested is not evidence of guilt and should not result in any suspicions, beliefs or opinions on your part that he (she) is guilty. The fact that the [*X*] was indicted for [or charged with] [*Y*] is not evidence of guilt. The indictment [or charge] is just a formal way of the state telling [*X*] what crime(s) he is accused of committing. Once again, an indictment [or charge] should not result in any suspicions, beliefs, or opinions on your part that [*X*] is guilty.

[*X*] starts the trial with a clean slate, with no evidence against him (her) and with no suspicions of guilt. A clean slate means the only assumption the law allows is that [*X*] did *not* commit the crime(s) charged. You should not assume that [*X*] may have or could have committed the crime charged. I instruct you that, at this stage of the proceedings, you must assume [*X*] did *not* commit the crime charged.

Assumption of Innocence Instruction II

A person accused of a crime is presumed by law to be innocent. This means that you, as jurors, must assume that [*X*] did not commit the offense(s) with which he (she) is charged. The assumption of [*X*'s] innocence is a commitment to the idea that a person accused of committing a crime is no different from any other innocent member of the community.

The fact that [*X*] was arrested is not evidence of guilt and should not result in any suspicions, beliefs or opinions on your part that he (she) is guilty. The fact that the [*X*] was indicted for [or charged with] [*Y*] is not evidence of guilt. The indictment [or charge] is just a formal way of the state telling [*X*] what crime(s) he(she) is accused of committing. Once again, an indictment [or charge]

> should not result in any suspicions, beliefs, or opinions on your part that [*X*] is guilty.
>
> [*X*] starts the trial with a clean slate, with no evidence against him and with no suspicions of guilt. A clean slate means the only assumption that the law allows is that [*X*] did *not* commit the crime(s) charged. You should not assume that [*X*] may have or could have committed the crime charged. You must assume that [*X*] did *not* commit the crime charged.
>
> This assumption of innocence stays with [*X*] in relation to the entire indictment [information or charge], through each stage of the trial, until and unless it is overcome by evidence presented by the prosecution. At no time must [*X*] take the stand and testify. At no time must [*X*] present any evidence that would suggest that he (she) is innocent. In our system of justice, a person accused of a crime does not have to prove his (her) innocence. The burden of proof is on the prosecution to establish [*X*'s] guilt. In a separate charge, you will be instructed that the obligation to prove guilt remains with the prosecution. The prosecution must prove each and every element in the complaint [indictment] beyond a reasonable doubt.

Model assumption of innocence instructions suggest that factual innocence is capable of definition.[402] As noted earlier, most courts avoid defining reasonable doubt.[403] Two Federal Courts of Appeals have even warned district judges not to provide jurors with definitions.[404] Definitions of "doubt" tend to confuse jurors, and only reinforce their lack of comprehension.[405] Understanding what constitutes a "reasonable" doubt adds further difficulty. The same may not be said of the assumption of innocence. A factual assumption of innocence is not ambiguous. It is not a concept that is best left to the intuitions and common sense of the jury. Carefully worded jury instructions on factual

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402. It has been said that "No jury instruction can clarify a law that is itself ambiguous." Harvey S. Perlman, *Pattern Jury Instructions: The Application of Social Science Research*, 65 Neb. L. Rev. 520, 539 (1986).

403. *See* Victor v. Nebraska, 114 S. Ct. 1239 (1994).

404. United States v. Adkins, 937 F.2d 947, 950 (4th Cir. 1991) (observing that "[t]his circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof") (citation omitted); United States v. Hall, 854 F.2d 1036, 1039 (7th Cir. 1988) (noting that "at best, definitions of reasonable doubt are unhelpful to a jury. . . . An attempt to define reasonable doubt presents a risk without any real benefit").

405. *See* Note, *Defining Reasonable Doubt*, 90 Colum. L. Rev. 1716 (1990).

innocence, building on the two presented above, would guide permissible assumptions and counterassumptions before and during the presentation of evidence.[406] These instructions also would consider framing effects and biases that change the way in which jurors process inculpatory and exculpatory evidence.[407]

There are, no doubt, limitations to the notion of an assumption of innocence. Many of the steps taken toward a factually based presumption raise empirical questions that deserve further inquiry. But, to borrow from the Court's reasoning in *King v. Lynaugh*,[408] the right to a presumption of innocence is basic to our system of justice. This right carries with it the concomitant right to take reasonable steps to ensure that no matter what crime has been committed, and how strong the evidence appears to be, a person accused of a crime is assumed innocent. I have argued that there are at least five reasonable steps that may be taken. These include a recognition that the presumption of innocence must be considered more than a rhetorical device; that a presumption of factual innocence is necessary for a fair and impartial trial; that existing instructions do little, if anything, to counter factual and legal predispositions of jurors; that the failure to properly instruct a jury on the presumption of innocence amounts to more than harmless error; and that the proposed assumption of innocence instructions counter juror predispositions and provide a basis for recognizing the importance of factual innocence at trial.

IV. CONCLUSION

In hearing the voices of pragmatist philosophers, we are reminded by Richard A. Posner that objective truth at trial is unattainable.[409] The impossibility of recovering the past with complete confidence casts a shadow on the truth-seeking function of the criminal process. We should be cautious, Posner argues, in allowing additional post-conviction review

406. Robin Reed, *Jury Simulation: The Impact of Judge's Instructions and Attorney Tactics on Decisionmaking*, 71 J. Crim. Law & Criminology 68 (1980).

407. Results of experimental studies of presumption of innocence instructions with mock jurors show significant reductions in the ambiguity surrounding juror decisionmaking. In one study of the effect of jury instructions on juror racial bias, it appeared that the instructions provided simulated jurors "with guidelines that enable them to focus on legally relevant information such as the elements of the crime rather than on their prejudicial attitudes when evaluating the guilt of the defendant." Jeffrey E. Pfeifer & James R.P. Ogloff, *Ambiguity and Guilt Determinations: A Modern Racism Perspective*, 21 J. Applied Soc. Psychol. 1713, 1721 (1991).

408. *See supra* note 305.

409. Richard A. Posner, *The Problems of Jurisprudence* 217–18 (1990).

with the faint hope of obtaining a final determination as to whether or not an accused's constitutional rights were violated. We must balance the "slight gains in reducing one type of error (violating the defendant's rights) against the costs in increasing another type of error (mistaken acceptance of the defendant's claim of right). . . ."[410]

Lay pragmatists and hardened utilitarians alike read annual surveys of victimization and official police reports with considerable frustration. They watch as those accused of crime are subjected to increasingly difficult standards of proof. They observe the good faith efforts of police and the neutrality of magistrates at arraignment. They see the impartiality of judges in preliminary hearings and the objectivity of the grand jury in exercising their power to indict. It should come as no surprise then that many find the presumption of innocence at trial to be counterfactual. Experience with the criminal process, whether personal or vicarious, often leads to a conclusion that there is more than adequate consideration of factual innocence.

To those who understand the evidentiary value of an indictment, the critical importance of plea bargaining, the likely meaning of the accused's decision not to testify, and the importance of placing realistic limits on the review of post conviction petitions, the meaning of factual innocence, and its place in the criminal process, is tempered by experience. Experience and a pragmatic vision may be realistic and logical, but together both fail to acknowledge that the basic dilemma of the criminal process is greater than the frustration and disappointment of critics and reformers.[411] Beyond the realities of crime and our administration of justice is a commitment to rational procedure, i.e., presuming innocence while rationally determining culpability. Honoring this commitment may at times seem strange and, in some cases, may even appear to be irrational. But with this commitment comes an acknowledgment that the more readily we assume guilt, the less important an accused's innocence becomes. With this commitment comes a caution not to abandon fundamental values embodied in the Constitution in the name of pragmatism. Finally, with this commitment comes an obligation to honor the rhetoric of innocence with meaning and substance. Justice Thurgood Marshall once noted that "[h]onoring the presumption of innocence is often difficult; sometimes we pay substantial social costs as a result of our commitment to the values we

410. *Id.* at 218.

411. Jerome Hall, *Objectives of Federal Criminal Procedural Reform*, 51 Yale L.J. 723, 728–30 (1942).

espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves."[412] The same may be said of the notion of innocence throughout the law.

412. United States v. Salerno, 481 U.S. 739, 767 (1987).