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PAMELA R. FERGUSON* 



THE PRESUMPTION OF INNOCENCE AND ITS ROLE IN THE CRIMINAL PROCESS

ABSTRACT. Many international instruments proclaim that those who face criminal prosecution ought to be afforded a ‘presumption of innocence’, and the importance and central role of this presumption is recognized by legal systems throughout the world. There is, however, little agreement about its meaning and extent of application. This article considers the purposes of legal presumptions in general and explores various, sometimes contradictory, conceptions of this most famous one. It is equated by many scholars to the requirement that the prosecution prove guilt beyond a reasonable doubt. As such, it is merely a rule of evidence (albeit an important one), with no application pre- or post-trial. The article advocates adoption of a broader, normative approach, namely that the presumption reflects the relationship which ought to exist between citizen and State when a citizen is suspected of breaching the criminal law. As such, it should be promoted as a practical attitude to be adopted by the key protagonists in the justice system, for the duration of the criminal process.

I INTRODUCTION

In August 2014 the Mayor of London suggested that UK criminal law be amended to deal with the dangers posed by the jihadist group ‘Islamic State’ (ISIS). In relation to British citizens who travel to certain ‘war areas’ such as Syria and Iraq: ‘The law needs a swift and minor change so that there is a “rebuttable presumption” that all those visiting war areas without notifying the [UK] authorities have done so for a terrorist purpose.’¹ In response to such calls for a ‘presumption of guilt’, recourse is often had to the rhetoric of the ‘presumption of innocence’, yet there is rarely any attempt to articulate what this means, or why such a presumption should operate

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¹ B. Johnston, ‘Do nothing, and we invite the tide of terror to our front door’ *The Telegraph*, 24 August 2014.

even in cases in which there is very strong evidence of guilt. This article explores the purposes of legal presumptions in general, and assesses various, often contradictory, conceptions of this most famous one. It is often treated as a rule of evidence, synonymous with the burden of proof being on the prosecution to prove guilt beyond a reasonable doubt, and therefore having no application beyond the trial itself. The article advocates a broader, normative approach, namely that the presumption reflects the relationship which ought to exist between citizen and State when a citizen is suspected of breaching the criminal law. It proposes that the presumption of innocence be promoted as a ‘practical attitude’: a mind-set which determines conduct.² This practical attitude should be adopted by the key protagonists in the justice system, for the duration of the criminal process.

II THE IMPORTANCE OF THE PRESUMPTION

The European Convention on Human Rights (ECHR) provides that ‘everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’.³ Similar guarantees are found in the Universal Declaration on Human Rights,⁴ and the Canadian Charter of Rights and Freedoms.⁵ Although not specifically stated in the US Constitution, the presumption has been held to be implied by the 5th, 6th and 14th amendments.⁶ It is not confined to Western European and Anglo-American legal systems; a version appears in such diverse instruments as the Brazilian,⁷ Columbian,⁸ Iranian,⁹

² As coined by Antony Duff: R.A. Duff, ‘Presuming Innocence’ in L. Zedner and J.V. Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford: Oxford University Press, 2012), 52.

³ ECHR, art 6(2).

⁴ Universal Declaration on Human Rights 1948, art 11(1).

⁵ Canadian Charter of Rights and Freedoms 1982, s 11(d).

⁶ *Coffin v US* 156 U S 432 (1895). For a history of the presumption in the USA, see J.N. Sorrentino, ‘Demystifying the Presumption of Innocence’ (1996) 15 *Glendale Law Review* 16–26.

⁷ Brazilian Constitution 1988, art 5.

⁸ Political Constitution of Columbia 1991, art 29.

⁹ Constitution of the Islamic Republic of Iran 1979, art 37.

Russian¹⁰ and South African¹¹ constitutions. The presumption has been referred to as ‘a human right’,¹² ‘the undoubted law, axiomatic and elementary’,¹³ and a ‘fundamental principle of procedural fairness in the criminal law’.¹⁴ Despite this international recognition, there is little agreement about its meaning, or extent of application.¹⁵

III THE PRESUMPTION OF INNOCENCE AND THE BURDEN OF PROOF

It is common for emphasis to be given to the presumption’s instrumental value, that is, to its role in securing the ‘right result’ by protecting against wrongful conviction.¹⁶ There is, however, little articulation of *how* it does this. One suggestion is that it is a mechanism for ensuring that illegitimate factors such as non-co-operation with the police investigation, the decision not to testify at the trial, or even the fact that the accused is facing a criminal trial, are not slipped into the scales of evidence on the side of the prosecution.¹⁷ Its most

¹⁰ Constitution of the Russia Federation 1993, art 49.

¹¹ Bill of Rights in the Constitution of the Republic of South Africa 1996, s 35(3)(h).

¹² H.L. Ho, ‘The Presumption of Innocence as a Human Right’ in P. Roberts and J. Hunter, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) 259, 259 n 1.

¹³ *Coffin v US* (n 6 above) 453.

¹⁴ A. Ashworth and J. Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 2013), 71.

¹⁵ Many scholars have pointed out this lack of clarity: J. Thaler, ‘Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial’ (1978) *Wisconsin Law Review* 441, 459 and 460; P.J. Schwikkard, ‘The Presumption of Innocence: What Is It?’ (1998) 11 *South African Journal of Criminal Justice* 396, 396; T. Weigend, ‘There is Only One Presumption of Innocence’ (2013) 42 *Netherland Journal of Legal Philosophy* 193, 193; C. Stuckenberg, ‘Who is Presumed Innocent of What by Whom?’ (2014) 8 *Criminal Law and Philosophy* 301.

¹⁶ N 14 above, 71. A similar point is made in relation to US law in J.G. Pickett, ‘The Presumption of Innocence Imperilled: The New Federal Rules of Evidence and the Use of other Sexual-Offense Evidence in Washington’ (1995) 70 *Washington Law Review* 883, 899.

¹⁷ In *Taylor v Kentucky* 436 U S 478, 485 (1978) the US Supreme Court stated that the presumption ‘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 R.D. Friedman, ‘A Presumption of Innocence, Not of Even Odds’ (1999–2000) 52 *Stanford Law Review* 873, 880.

famous expression in English law is from the case of *Woolmington v DPP*¹⁸ in 1935. The trial judge had directed the jury that where the prosecution had established that someone had died due to the accused's acts, this was presumed to be murder unless the accused could satisfy the jury that the death was manslaughter, an accidental killing or justifiable homicide.¹⁹ This was held on appeal to be a misdirection, and Viscount Sankey's dictum, giving the decision of the House of Lords, has been often quoted: 'Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt ...'.²⁰ Although *Woolmington* is often treated as being a resounding endorsement of the presumption, it actually focused more on the burden of proof, and the two have often been treated as synonymous.²¹ The US²² and UK²³ Supreme Courts have each equated the two. Treating the presumption as merely another way of articulating the burden of

¹⁸ [1935] AC 462. For an appreciation of the case see J.C. Smith, 'The Presumption of Innocence' (1987) 38 *Northern Ireland Law Quarterly* 223, 224: 'Never ... has the House of Lords done more noble a deed in the field of criminal law than on that day'. Reservations about Lord Sankey's dicta have, however, been expressed by Ashworth in 'Four Threats to the Presumption of Innocence' (2006) 10 *International Journal of Evidence & Proof* 241, 245.

¹⁹ [1935] AC 462, 472.

²⁰ *Ibid.*, 481–482.

²¹ See, for example, A.N. Brown, *Criminal Evidence and Procedure: An Introduction* (London: Bloomsbury, 2010): 'The accused does not have to explain anything at all, ever, unless the prosecution case is sufficient in itself to justify a conviction. *This is the meaning of the presumption of innocence...*' (emphasis added). See also F. Picinali, 'Innocence and Burdens of Proof in English Criminal Law' (2014) 13: 4 *Law, Probability and Risk* 243; and B. Rea, 'The Presumption of Innocence in Criminal Cases' (1941–1942) 3 *Washington & Lee Law Review* 82, 84. The latter concludes: 'In truth then, the presumption of innocence has no independent significance. The rule that the accused is presumed to be innocent is synonymous with the rule that the prosecution has the burden of proof.'

²² See *Bell v Wolfish* 441 US 520, 533 (1979), per Mr Justice Rehnquist: 'The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials.'

²³ See *Sheldrake v DPP* [2005] 1 AC 264, 292–293 per Lord Bingham '...the underlying rationale of the presumption in domestic law and in the [European] Convention is an essentially simple one: that it is repugnant to ordinary notions of fairness for a prosecutor to accuse a defendant of crime and for the defendant to be then required to disprove the accusation on pain of conviction and punishment if he fails to do so.'

proof has led to a focus on whether ‘reverse onus’ provisions, which require the accused to prove a defence, breach the presumption.²⁴

I advocate an alternative approach: the presumption and the onus of proof are not synonymous. Further, in contrast to the generally accepted view that the presumption has no application beyond the trial itself,²⁵ I suggest that we should treat it as permeating the entire criminal process. The implications of this are considered further, below. Prior to describing this alternative approach, however, we must consider what it means to label something as a ‘legal presumption’, and how such presumptions operate in practice. We must also consider the nature of the ‘innocence’ which lies at the heart of the presumption of innocence.

IV THE NATURE OF LEGAL PRESUMPTIONS

Different sorts of presumptions are employed by the law. There are ‘irrebuttable ones’, and ‘rebuttable ones’, but the former may be said to operate as legal rules rather than as presumptions since no evidence can be led to challenge them. We can also draw a distinction between ‘derivative’ and ‘foundational’ presumptions. Where derivative presumptions apply, given proof of a fact ‘P’, a court may (or sometimes must) presume ‘Q’; the rule warrants the drawing of ‘Q’ as a conclusion from ‘P’ even if, without that rule, ‘P’ would not suffice to prove ‘Q’. With foundational presumptions, in contrast, ‘Q’ is rather a proposition that a court must initially accept, without any basis for ‘Q’ requiring to be proved in court.²⁶ Presumptions where, on proof of certain facts, a court *must* draw a particular inference have been described as ‘compelling’ presumptions, with those in which the court *may* infer the fact in issue being classed as ‘provi-

²⁴ See, for example, Duff (n 2 above); I. Dennis, ‘Reverse Onuses and the Presumption of Innocence: In Search of Principle’ (2005) *Criminal Law Review* 901; A. Gray, ‘Constitutionally Protecting the Presumption of Innocence’ (2012) 31 *University of Tasmania Law Review* 132; R. Shiner, ‘Corporations and the Presumption of Innocence’ (2014) 8 *Criminal Law and Philosophy* 485.

²⁵ See, for example, A. Stumer, *The Presumption of Innocence* (Oxford: Hart Publishing, 2010): he notes that the presumption could be viewed as requiring the accused to be treated as if innocent throughout the criminal process, but calls this approach a ‘vaporous euphemism for fairness’ and limits his assessment of the presumption to its relationship with the burden and standard of proof (at xxxviii). Stumer is quoting P. Healy, ‘Proof and Policy: No Golden Thread’ (1987) *Criminal Law Review* 355, 365.

²⁶ I am indebted to Antony Duff for clarifying these distinctions.

sional presumptions'.²⁷ Many legal presumptions are therefore just devices used by courts to 'speed up the process of proof'.²⁸

Two common presumptions which operate in Anglo-American legal systems include the presumption that children younger than a certain age lack criminal responsibility, and that a defendant was 'sane'/of sound mind at the time of the alleged offence(s). In relation to the former, the relevant English legislation states: '*It shall be conclusively presumed that no child under the age of 10 years can be guilty of any offence*',²⁹ thereby creating an irrebuttable/derivative/compelling presumption: once it is proved that a child is aged nine or under, a court must conclude that there is no criminal responsibility. It may be said that this is not really a presumption at all, but a conclusion. By contrast, the presumption of sanity is clearly a foundational but rebuttable one, with the burden of proving a 'mental disorder' capable of negating criminal liability being placed on the accused.³⁰ Applying this analysis to the presumption of innocence, it is clearly foundational but rebuttable; it places the onus of proving guilt on the State/the prosecution, but is of course routinely rebutted, in practice.

Some presumptions are based on common-sense and knowledge of how things generally are – what one might term 'real world' or 'empirically based' presumptions. It does not seem unreasonable to presume sanity; although many people suffer from mental disorders, some of which may affect responsibility for criminal behaviours, most people's mental states are such that they may be treated as 'responsible'. In some jurisdictions, such as England and Scotland, the presumption that a child under a certain age cannot be guilty of an offence is also empirically based, since very young children are, as a

²⁷ T. Denning, 'Presumptions and Burdens' (1945) *Law Quarterly Review* 379, 379.

²⁸ F. Raitt, *Evidence: Principles, Policy and Practice* (Edinburgh: W. Green, 2013), para 6–18.

²⁹ Children and Young Persons Act 1933, s. 50 as amended by Children and Young Persons Act 1963, s. 16(1) (emphasis added). The wording of the equivalent Scottish provision is identical, save that the relevant age in Scotland is eight. Children under the age of 12 are not prosecuted in Scotland but are subject to the Children's Hearing System, which focusses on their welfare. For a critique of these provisions, see C. McDiarmid, 'An Age of Complexity: Children and Criminal Responsibility in Law' (2014) 13 *Youth Justice* 145.

³⁰ For English law see *McNaghten* (1843) 10 Cl & F 200, 8 ER 718; *Bratty v A-G for Northern Ireland* [1963] AC 386. In Scotland this is governed by statute: Criminal Procedure (Scotland) Act 1995, s. 51A: 'Mental disorder' must be proven by the accused on the balance of probabilities.

matter of fact, incapable of forming the requisite mental element necessary to commit a crime. However, the age of criminal responsibility varies from country to country: it is 15 in Norway, for example. In some jurisdictions the choice of one age rather than another may be said to be based on policy, rather than on empirical evidence. It reflects the attitude which that particular society takes towards its children. Even if a Norwegian prosecutor were able to demonstrate that a specific 14 year old child – or even that the majority of 14 year old children – had sufficient maturity to be called to account in a criminal court, this would not allow a prosecution to go ahead. This, then, is more of a legal rule than a presumption, embodying the normative proposition that society ought to treat children in a particular way. Likewise, the presumption of innocence may be said to be a normative proposition, reflecting policy. But what exactly is that policy? To answer this we must first consider: to what sort of ‘innocence’ does the presumption of innocence refer?

V ‘FACTUAL’ AND ‘LEGAL’ GUILT AND INNOCENCE

A distinction can be drawn between ‘factual guilt’ (the accused did, as a matter of fact, perform the criminal act with the requisite *mens rea*), and ‘legal guilt’ (the prosecution was able to establish beyond a reasonable doubt and in conformity with due process that the accused performed the criminal act, etc.) The corollary of labelling those who ‘did it’ as ‘factually guilty’ is that those who did not ‘do it’ may be described as being ‘factually innocent’.³¹ Some accounts do seem to suggest that the presumption of innocence is a ‘real world’ or ‘empirically based’ presumption based on the likelihood that the accused is factually innocent, but this is surely not the case. It may be that most people are ‘good, honest and free from blame’,³² but those who are accused of having committed a criminal offence are not to be equated with ‘most people’ since the vast majority of *accused* persons

³¹ ‘Factual innocence’ and ‘factual guilt’ are the terms used in H.L. Packer, ‘Two Models of the Criminal Process’ (1964) 113 *University of Pennsylvania Law Review* 1; H.L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968), 161. Stuckenberg draws a similar distinction, contrasting ‘real’ and ‘formal’ innocence (n 15 above), 307–308. Laudan uses the terms ‘material innocence’ and ‘probatory innocence’: see text at n 35, below.

³² J.B. Thayer, ‘The Presumption of Innocence in Criminal Cases’ (1896–1897) 6 *Yale Law Journal* 185,189.

have, in fact, committed a crime and are therefore ‘factually guilty’ rather than ‘factually innocent’.

The distinction between ‘factual guilt’ and ‘legal guilt’ recognises that even one who is ‘factually guilty’ may not necessarily be convicted. Perhaps eye-witnesses are unable to identify the accused as the perpetrator; perhaps the prosecutor inadvertently reveals the accused’s previous convictions to the jury at the start of the trial, necessitating an acquittal. There are many ways in which a prosecution may fail. The rules of evidence vary from one jurisdiction to another, but all have due process requirements, breach of some of which can mean that even a ‘factually guilty’ accused must be acquitted. Of course, the great majority of accused persons plead guilty or are convicted after trial. Thus the presumption of innocence postulates neither that it is more likely than not that the accused is factually innocent, nor that he is legally innocent, since both are empirically false. The presumption of innocence is not a predictor of anything. Rather, as suggested previously, I contend that it is best viewed as a normative proposition, reflecting a policy decision that the State should treat its citizens in a particular way.

The proposal being advocated here builds on Herbert Packer’s approach: he regarded the presumption of innocence as primarily ‘a direction to officials how they are to proceed’.³³ It seems, however, that Packer’s focus was on ‘legal’ rather than ‘factual’ innocence:

... the presumption of innocence serves to force into play all the qualifying and disabling doctrines that limit the use of the criminal sanction against the individual, thereby enhancing his opportunity to secure a favorable outcome ... the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment.³⁴

Larry Laudan draws a similar distinction between what he calls material innocence or ‘innocence_m’ (the accused ‘did not commit the crime’) and probatory innocence or ‘innocence_p’ (the accused ‘was acquitted or otherwise released from judicial scrutiny’).³⁵ Laudan later makes clear that at the pre-trial stage, innocence_p means that the

³³ Packer (n 31 above). For a similar approach see L.H. Tribe, ‘An Ounce of Detention: Preventive Justice in the World of John Mitchell’ (1970) 56 *Virginia Law Review* 371.

³⁴ Packer, *ibid.*, 17 and 167, respectively.

³⁵ L. Laudan, *Truth, Error, and Criminal Law: An Essay in Legal Epistemology* (New York: Cambridge University Press, 2006), 12. See also L. Laudan, ‘The Presumption of Innocence: Material or Probatory?’ (2005) *Legal Theory* 333, 339.

legal system has not yet established guilt/there is as yet no inculpatory evidence. He too contends that the ‘innocence’ which is to be presumed should be probatory innocence. He argues that since an acquittal does not mean that the jury believe that the defendant ‘didn’t do it’ (innocence_m), but rather means only that the jury is not satisfied that guilt has been established beyond a reasonable doubt (innocence_p), it is unnecessary for them to start with a presumption of material innocence. He also points out that since jurors know nothing about the defendant or the case prior to the trial, they have no basis for assuming material innocence. Since they are well aware that the State does not prosecute people without good reason, asking jurors to assume material innocence is to insult their intelligence. He concludes: ‘By contrast, instructing the juror to assume she has seen as yet no evidence of the defendant’s guilt correctly mirrors the juror’s own epistemic situation and thus is an injunction that she can act on in good conscience.’³⁶ Laudan does, however, accept that jurors do in fact construe ‘innocence’ as meaning ‘material innocence’.³⁷

It seems to me that a trial judge who focussed on innocence_p in her address to the jury would in effect be saying ‘you must presume that the guilt of the accused has not yet been proved’— which seems to be stating the obvious, and is arguably more insulting to jurors’ intelligence than asking them to presume that the accused is materially innocent. Since Laudan treats the presumption as ‘a mechanism for allocating the burden of proof’, he holds that its sole application is during the trial.³⁸ By contrast, I advocate a broader role for the presumption, namely that the key players in the criminal process (professionals such as police, prosecutors and judges, as well as lay participants such as jurors) should adopt the presumption of innocence as a practical attitude. I will consider broad and narrow applications for the presumption in the following section. For present purposes, however, it is important to note that the broader application I advocate relates to innocence_m: irrespective of their personal beliefs in the material guilt or innocence of the suspect/accused they must endeavour to behave *as if* they were dealing with a person who has *done nothing wrong*, to the extent that this is possible. Laudan is

³⁶ Laudan, *Truth, Error, and Criminal Law*, *ibid.*, 105.

³⁷ ‘When a judge instructs jurors that they should presume the defendant to be innocent until proven otherwise, they will almost certainly interpret that as committing them to believe that the defendant did not perpetrate the crime.’ (*Ibid.*, 96).

³⁸ ‘[T]here is not the slightest warrant for supposing that the [presumption of innocence] governs events beyond the trial itself.’ (*Ibid.*, 94).

right to say that an acquittal does not mean that the accused has been declared to be ‘innocent’ – the choice of verdict is between ‘guilty’ and ‘not guilty’, and a fact-finder who delivers the latter verdict may well have some level of belief that the accused did, in fact, commit the crime, but is not satisfied that this has been established beyond a reasonable doubt. Nevertheless, I suggest that Laudan is not correct to insist that the presumption of innocence must refer to innocence_p. In the event of an acquittal, the presumption requires us to put aside any lingering doubts or suspicions about the defendant. Henceforth, he is to be treated in the same way as any other citizen: not merely as someone whose guilt the prosecution has been unable to establish, but as someone who has committed no crime, in other words, he benefits from a presumption of *material* innocence.

VI BROAD AND NARROW APPLICATION FOR THE PRESUMPTION

The approach being proposed in this article is a controversial one, with many scholars arguing that the presumption has no application other than at trial. Some doubt that it is sensible to presume innocence at any stage. One such was Jeremy Bentham:

The defendant is not in fact treated as if he were innocent, and it would be absurd and inconsistent 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, then immediately should the procedure against him drop: everything that follows is oppression and injustice.³⁹

Bentham highlights the contradiction inherent in the State declaring that an accused benefits from a presumption of innocence, while simultaneously acting in ways which suggest quite the opposite. As we have seen, Laudan dismisses any suggestion that the presumption applies beyond the confines of the trial. He regards suggestions that it might have a broader application as merely ‘wishful thinking’, since pre-trial there is ‘a host of decisions’ made by State officials which are incompatible with such an approach. For example, the police who

³⁹ J. Bentham, *Principles of Judicial Procedure*, Chapter XXIX: ‘Natural and Technical Systems Compared’. Similarly, it has been suggested that Packer regarded the presumption of innocence as ‘an unrealistic command’ to ignore the presumption of guilt ‘even though in most cases the suspect is guilty’: S. Baradaran, ‘Restoring the Presumption of Innocence’ (2011) 72 *Ohio State Legal Journal* 723, 756.

arrest a suspect cannot plausibly believe that he is innocent, since one can only be arrested if there is probable cause,⁴⁰ and a judge who denies bail to an accused is clearly not presuming innocence.⁴¹ There are, however, traces of a broader approach in the French *Declaration of the Rights of Man and of the Citizen* (1789), Art 9 of which states:

As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.

This recognises that some harsh treatment may be unavoidable – a suspect may have to be arrested – but declares that such treatment should be limited to that which is necessary for the proper investigation of the crime. Likewise, I accept that a suspect cannot be treated entirely the same as a non-suspect citizen: once suspicion of criminality focuses on a particular individual, his status does change, and his rights to liberty and to bodily integrity may be curtailed. For instance, he may be required to attend for police questioning, and will not generally be free to terminate the interview at a time of his choosing. He may have to submit to the taking of fingerprints and photographs, to participate in an identification parade, to a search of his home, office, or person, and to attend court for trial. This is regrettable, but unavoidable if the state is to fulfil its responsibility to investigate allegations of criminal wrongdoing. The crucial point is that although becoming a suspect does impose certain burdens, it is not to be equated to the status of one whose guilt has been formally established. If police and other state officials maintain an awareness of this distinction, infringement of rights is more likely to be kept to the minimum required to further the investigation, and the attitude of such officials towards the suspect is less likely to degenerate into one of disrespect, or even disdain.

Although the majority of courts and commentators take the view that the presumption has no application pre-trial, some authors have advocated a broader role – often a very broad role indeed.⁴² Thus

⁴⁰ In the UK, 'reasonable suspicion' rather than 'probably cause' is the threshold for arrest, but Laudan's argument is equally applicable in the UK.

⁴¹ Laudan, *Truth, Error, and Criminal Law*, 95.

⁴² For example, Ashworth (n 18 above), 249; Baradaran (n 39 above), 723; H. Stewart, 'The Right to be Presumed Innocent' (2014) 8 *Criminal Law & Philosophy* 407; P. DeAngelis, 'Racial Profiling and the Presumption of Innocence' (2014) *Netherland Journal of Law and Philosophy* 43; P. Tomlin, 'Could the Presumption of Innocence Protect the Guilty?' (2014) 8 *Criminal Law and Philosophy* 431; V. Tadros,

Patrick Tomlin argues that since it is grounded in a concern to avoid inappropriate punishment, the presumption should be applied to ensure that we avoid excessively punishing those who have been convicted, hence a sentencing judge should be satisfied beyond a reasonable doubt that the sentence being imposed is not an excessive one.⁴³ My theory differs from this; although I do believe that the presumption of innocence can have implications for how we treat *acquitted* persons, post-trial, I am of the view that following a conviction the presumption of innocence has no further application. Tomlin believes that the presumption ‘on its own, is not much to write home about’⁴⁴ and that ‘to have any teeth ... [it] must be coupled with a robust epistemic standard ... of “beyond reasonable doubt”’.⁴⁵ Thus his approach relates more to the standard of proof than the presumption of innocence.

Victor Tadros also favours a broader role for the presumption, and explores its implications for substantive law.⁴⁶ He contends that a breach of the presumption of innocence occurs where a legislature lowers the standard of proof, or removes some of the conditions of liability from the definition of an offence, with a view to making it easier to secure a conviction:

Where this is done the state warrants the conviction of defendants without meeting the standard of proof that the conditions of liability have been fulfilled. This implies the attitude that it is permissible to publicly condemn and punish citizens without reaching the epistemic standard appropriate for these activities.⁴⁷

Again, this seems more about the standard of proof than the presumption.

Antony Duff suggests that we recognise several presumptions of innocence, each of which operates in different ways and with different

Footnote 42 continued

‘The Ideal of the Presumption of Innocence’ (2014) 8 *Criminal Law and Philosophy* 449.

⁴³ Tomlin, *ibid.*, 432.

⁴⁴ *Ibid.*, 433.

⁴⁵ *Ibid.*

⁴⁶ Tadros, (n 42 above).

⁴⁷ *Ibid.*, 459.

results.⁴⁸ Thus Duff argues that under English law, a presumption of innocence prevents a prosecution from going ahead without their being ‘a realistic prospect of conviction’, while a different and more familiar presumption of innocence operates during the trial. Duff suggests that we recognize presumptions of innocence that operate beyond the criminal process, and indeed, beyond the law, in the interactions between citizens, and between citizen and state.⁴⁹ The approach adopted in the present article differs from those proposed by Tomlin, Tadros or Duff, in that it confines the operation of the presumption of innocence to the criminal process.

VII THE PRESUMPTION OF INNOCENCE AS PRACTICAL ATTITUDE AND POLITICAL STATEMENT

The reality, of course, is that once suspicion focuses on a particular individual, the mind set of many players in the criminal justice system is that the suspect ‘is probably guilty’.⁵⁰ It might be thought that this is an entirely appropriate stance for the police to take, and perhaps also for the prosecution, and prosecution expert witnesses; they are, after all, in the business of helping to build a case against the suspect. I suggest that treating the presumption of innocence as a practical attitude serves to remind them to challenge this and helps to alert investigators to the dangers inherent in assuming guilt. These dangers are twofold: first, it may blind them from considering alternative explanations, such as that the perpetrator may be someone else entirely. Presuming innocence makes it more likely that the police will look for evidence which might exonerate the suspect, rather than focussing only on incriminating evidence. Secondly, treating suspects as ‘probably guilty’ makes it easier for the police to ‘justify’ threatening or even physically abusing suspects, heightening the dangers of false confessions; requiring the police to treat suspects as if they were

⁴⁸ R.A. Duff, ‘Who must Presume Whom to be Innocent of What?’ (2013) 42 *Netherland Journal of Law and Philosophy* 170, 179. See also Duff (n 2 above).

⁴⁹ R.A. Duff, ‘Presumptions Broad and Narrow’ (2013) *Netherland Journal of Law and Philosophy* 268.

⁵⁰ See Packer (n 31 above) 160–161.

innocent makes such practices less likely.⁵¹ Both dangers increase the likelihood of wrongful conviction.

As the case builds against the suspect and the trial approaches, it is inevitable that many of the players in the criminal justice system will have formed the hypothesis, if not in fact reached the conclusion, that the accused is indeed guilty. But just as good scientists test their hypotheses by trying to find consequences which would render them false,⁵² so too should those in the criminal justice system strive to consider scenarios and explanations which are inconsistent with the guilt of the accused. Fact-finders (whether judges or jurors) should take a cautious and somewhat sceptical approach to the evidence due to its potential fallibility. They should be particularly sceptical of the types of evidence which have been shown to be unreliable, such as ‘fleeting glance’ identifications, where the perpetrator and witness were not acquainted prior to the incident, and the witness saw the perpetrator for a short time.⁵³ Evidence may be given by a ‘jailhouse informant’ – the accused’s cell mate may claim that the accused confessed to the crime. A high degree of scepticism seems appropriate here too, particularly where a deal has been struck with the State such that testimony is given in exchange for a reduced sentence for the informant.⁵⁴ Michael Risinger’s work reminds us that even scientific evidence is susceptible to human error. He has highlighted the dangers of wrongful conviction when an expert is given independent reasons to assume that the suspect is indeed the perpetrator.⁵⁵ For instance, a scientist who has been asked to compare a suspect’s fingerprints with a print left at the crime scene may learn that the suspect has already been identified as the perpetrator by an eyewitness.

⁵¹ See A. Leo et al., ‘Bringing Reliability Back In: False Confessions and Legal Safeguards in the 21st century’ (2006) 2 *Wisconsin Law Review* 479. Exoneration studies in the USA have estimated that false confessions account for 15–16% of wrongful conviction cases. For a useful summary of the literature see F. Stark, ‘Confession Evidence’ in J. Chalmers, F. Leverick and A. Shaw (eds.), *Post-Corroboration Safeguards Review Report of the Academic Expert Group* (2014), available at: <http://www.gov.scot/Resource/0046/00460650.pdf>.

⁵² K. Popper, *The Logic of Scientific Discovery* (London: Routledge, 1959).

⁵³ E.F. Loftus, *Eyewitness Testimony* (Harvard: Harvard University Press, 1979); S. Rabner, ‘Evaluating Eyewitness Identification Evidence in the 21st Century’ (2012) 87 *New York University Law Review* 1249.

⁵⁴ S.A. Drizin and R.A. Leo, ‘The Problem of False Confessions in the Post-DNA World’ (2003–2004) 82 *North Carolina Law Review* 891.

⁵⁵ D.M. Risinger, ‘NAS/NRC Report on Forensic Science: A Glass Nine-tenths Full (This is about the Other Tenth)’ (2009) 50 *Jurimetrics* 21.

Risinger cites several empirical studies which demonstrate that such 'expectancy-inducing information' can bias the results of forensic examinations.⁵⁶ Taking a sceptical approach to potentially unreliable evidence is, of course, an epistemic requirement, but it is all too easy for police and prosecutors to lose sight of this in the desire to solve the case, particularly if the crime is a serious one. Adopting the presumption of innocence as a practical attitude helps guard against this.

It might be objected that this is taking things too far. Surely it is enough that officials, forensic experts, jurors etc. refrain from operating according to a 'presumption of guilt'? Might it not be sufficient for them to suspend all judgment, neither presuming guilt nor innocence? Richard Posner suggests that a 'principle of neutrality' could be employed instead. At the start of a trial an 'unbiased fact-finder' such as a judge or juror should begin with 'prior odds of 1 to 1 that the ... prosecutor has a meritorious case'.⁵⁷ Sometimes called 'even odds' or '50/50', where prior odds of 1:1 are given for a particular proposition, this represents an assessment that a proposition is just as likely to be true as to be false. Similarly to Packer and Laudan, Posner is clearly referring to probatory innocence: fact-finders should begin the trial believing that it is equally likely that the prosecution or the defence will prevail. Thus it might be suggested that the right to a 'fair' hearing by an 'independent and impartial tribunal', safeguarded by Art 6(1) of the ECHR and other international conventions,⁵⁸ would require a judge or juror to adopt Posner's 1:1 assessment, neither favouring the accused nor the prosecution. Richard Friedman criticises Posner's approach.⁵⁹ Friedman points out that if 'Observer' was asked to assess the likelihood that 'Passerby' (a stranger Observer encounters on the street) had assaulted Passerby's neighbour on a particular occasion, Observer would be likely to assess the odds that Passerby had committed such an assault as very low: after all, as Friedman reminds us, 'most people do not violently assault their neighbors on or about a given date, and Observer has no information concerning Passerby that would increase the odds.'⁶⁰ The reader is then asked to imagine that Observer has now become Juror, and

⁵⁶ *Ibid.*, 29.

⁵⁷ R. Posner, 'An Economic Approach to the Law of Evidence' (1999) 51 *Stanford Law Review* 1477, 1514.

⁵⁸ For example, art 11(d) of the Canadian Charter.

⁵⁹ Friedman (n 17 above).

⁶⁰ *Ibid.*, 880.

Passerby is now the Accused. If at the start of the trial Juror would assess the likelihood that Accused is guilty of having assaulted the neighbour as being even odds, this can only be based on the change of venue. In other words, Juror is allowing the fact that Accused is on trial as itself evidence of guilt – and it is this very assessment which the presumption of innocence is designed to prevent. Thus Friedman concludes that Posner's approach breaches the presumption of innocence.⁶¹

A common allegorical personification depicts justice as a woman who is holding a set of balance scales, comprising a balanced beam and two pans. The evidence for the prosecution is to be weighed on one pan of the scales, with evidence for the accused being weighed on the other. According to the neutrality principle, at the start of the trial the fact-finder should regard the pans as equally balanced. The standard of proof – 'beyond a reasonable doubt' – means that conviction can only follow where the evidence causes the scales to tilt so heavily in favour of the prosecution case that there remains no reasonable doubt but that the accused is guilty. In contrast to this, I suggest that, at the start of a trial, fact-finders should not approach the prosecution and defence positions as being similar to a set of evenly balanced scales. Instead, the presumption of innocence requires that the starting point is for one side of the scales to be tipped in favour of the accused. This means that rather than the prosecution presenting its case to jurors who are 'neutral' or open-minded about the accused's guilt or innocence, it faces an uphill struggle to change their minds from believing that the accused did *not* commit the crime, to being convinced of the opposite. The requirement for proof of guilt to be established 'beyond a reasonable doubt' tells the jurors where they must end up in order to convict. The presumption of innocence tells them from *where they must begin* – with our scale pans on the side of 'not guilty'.

The neutrality principle fails to recognize that it is the accused who has most to lose. This is reflected in Blackstone's claim that 'it is better that ten guilty persons escape, than that one innocent party suffer'.⁶² Blackstone's maxim is often quoted, but its rationale is

⁶¹ Friedman (n 17 above), 874. Laudan reaches the same conclusion: *Truth, Error, and Criminal Law*, 105.

⁶² W. Blackstone, *Commentaries on the Law of England* (1765), 713.

rarely articulated.⁶³ Others quote different ratios, such as 100 guilty to 1 innocent. Some have tried to devise the 'correct' ratio, believing that the proportions we decide upon reflect the extent to which we are prepared to tolerate false convictions.⁶⁴ I believe that fixating on whether we should refer to '10 to 1', '50 to 1' or '100 to 1' is beside the point. Saying that it is better that 10, 50 or 100 guilty persons escape than that one innocent party suffer should not be taken to mean that an error rate in wrongful convictions of 10%, 2% or 1% (as the case may be) is acceptable. Rather, the maxim reflects the sentiment that while we accept that no justice system can be infallible, we regard wrongful convictions as a particularly grave injustice.⁶⁵ Why should this be so? Both outcomes are equally detrimental to the victim of the crime, for the true perpetrator has not received his just deserts in either case. But with a wrongful conviction the State punishes an innocent person, depriving him of his liberty, and in some jurisdictions, perhaps even his life. Even in less serious cases where the punishment is more likely to be a monetary one, a verdict of guilty involves stigma and loss of reputation. The 'encumbrances of a criminal conviction'⁶⁶ can include forfeiture of civil rights, such as the right to sit on a jury and the right to vote in parliamentary elections,

⁶³ As Halvorsen notes, that wrongful convictions are much worse than wrongful acquittals is 'more or less taken for granted as self-evidently true'. (V. Halvorsen, 'Is it Better that Ten Guilty Persons Go Free Than that One Innocent Person be Convicted?' (2004) 23 *Criminal Justice Ethics* 3).

⁶⁴ *Ibid.* For an entertaining account of the many different ratios which have been proposed, see A. Volokh, 'n Guilty Men' (1997–1998) *University of Pennsylvania Law Review* 173.

⁶⁵ Not all authors are persuaded that this is self-evident. Youngjae Lee argues that since the State owes its citizens a duty of physical security, if it has to choose between conviction of defendants using a lower standard of proof, or instead accepting that the higher proof standard will mean that more murderers will be acquitted and thus more innocent citizens will be killed, it is not obvious that the latter is morally preferable. (Y. Lee, 'Deontology, Political Morality, and the State' (2010–2011) 8 *Ohio State Journal of Criminal Law* 385, 391).

⁶⁶ J. Schonsheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (The Hague: Kluwer Law International, 1994), 5–6. See also G.J. Chin, 'What are Defence Lawyers For? Links between Collateral Consequences and the Criminal Process' (2012–2013) 45 *Texas Tech Law Review* 151, 152 who argues that 'in many cases, collateral consequences, not fine or imprisonment, are the most significant consequences in criminal cases. ... What is at stake for many defendants facing criminal charges is not a long stretch in prison, but a lifetime with a criminal record. Accordingly, if attorneys want to help clients, they must think about collateral consequences.'

and impacts on the convict's ability to find employment. Since punishment involves harsh treatment, it requires strong justification and it is the fact that a person has been *convicted* – that he has been shown to a high level of certainty ('beyond a reasonable doubt') to have breached the norms of the criminal law – which justifies its infliction. The presumption of innocence reminds us that unless and until an accused person's guilt is proved beyond a reasonable doubt, following a fair trial and according to due process, the State lacks moral legitimacy if it inflicts harsh treatment or imposes unpleasant consequences on a citizen. In the case of *In re Winship*⁶⁷ the US Supreme Court stressed that all of us, as citizens, need to be confident that if we are ever charged with a crime we cannot be convicted unless the prosecution can establish our guilt to a high degree of certainty. Youngjae Lee makes a similar point when he argues that

...fundamental legal protections that are promised to individuals ... are not merely requirements that flow directly from laws of morality that dictate how individuals ought to treat one another. They also spell out the proper relationship between the government and the governed, and they are among the many conditions that attach to the government's exclusive possession and use of the power to criminalize and punish.⁶⁸

The legal protections Lee has in mind are the requirement for proof beyond a reasonable doubt, and the principle that punishment should not exceed that which is deserved, but it may equally be said – and it is the focus of my argument – that the presumption of innocence is a legal protection which reflects the proper relationship which should apply between citizen and State.

It may, however, be suggested that failure to convict a guilty murderer, for example, will lead to greater loss of life, since the murderer may go on to kill yet more people. However, a wrongful conviction does not change this: the real murderer remains at liberty to perpetrate further murders. Perhaps the wrongful conviction will prevent some killings, since the knowledge that a person has been imprisoned, or even executed, for murder may deter other would-be murderers. On this basis, a wrongful conviction might be said to be justified on utilitarian grounds. However, as even Bentham accepted, the discovery that an innocent person has been convicted – or even the suspicion that this might be so – can have a much more detri-

⁶⁷ 397 U.S. 358, 363–364 (1970).

⁶⁸ N 65 above, 399.

mental impact on people's confidence in the criminal process than the knowledge that some guilty people manage to escape their just deserts. That society needs to be confident that convicted people are in fact guilty was also stressed by the Court in *Winship*. In England, following a spate of wrongful convictions, the UK Government established a Royal Commission to recommend changes to the criminal process. The Commission noted:

The great majority of criminal trials are conducted in a manner which all the participants regard as fair, and we see no reason to believe that the great majority of verdicts, whether guilt or not guilty, are not correct... But the damage done by the minority of cases in which the system is seen to have failed is out of all proportion to their number.⁶⁹

Loss of public confidence in criminal trials may lead to fewer crimes being reported to the police, a reluctance on the part of witnesses to come forward, and calls for changes to be made to the criminal process.⁷⁰ Thus the presumption has high instrumental value: it helps secure the rectitude of verdicts, reducing the likelihood of factually innocent people being convicted, and contributes to public trust in the justice system. Its normative value is equally crucial: it conveys an important message about the relationship which ought to exist between the individual *qua* suspect/accused and the State. It serves to remind our key players that they must endeavour to treat the accused, so far as possible, as they would treat any other citizen. It also communicates to the accused that he remains part of the polity, with status and rights, even though suspected of breaking the polity's norms. Thus Thomas Weigend suggests that the presumption instructs law enforcement officials:

“Assume that the suspect did not commit the crime ...and then ask yourself whether you can do to him what you intend to do.” By that standard, any interference with the suspect's rights is illegitimate unless it can be based on valid grounds distinct from an assumption that he is in fact guilty.⁷¹

⁶⁹ Royal Commission on Criminal Justice, *Report*, Cmnd 2263, London: HMSO, 1993.

⁷⁰ R. Ricciardelli, J.G. Bell and K.A. Clow, ‘Student Attitudes toward Wrongful Conviction’ (2009) 51 *Canadian Journal of Criminology and Criminal Justice* 411, 413.

⁷¹ N 15 above, 196. See also T. Weigend, ‘Assuming that the Defendant is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice’ (2014) 8 *Criminal Law and Philosophy* 285, 287.

VIII IMPLICATIONS

Adoption of the presumption of innocence as a practical attitude has implications at several points in the criminal process, from first suspicion of wrongdoing to the stage of final conviction. A detailed examination of each of these may well merit an article in its own right: what follows is a brief sketch.

8.1 *Police Powers*

Police powers of search, detention and questioning almost invariably breach individuals' rights to privacy, bodily autonomy and liberty. The State routinely deprives *convicted* persons of these rights – but it is the very fact of conviction which justifies their abrogation. When formulating rules on police powers, therefore, legislators should keep in mind that these will apply to 'suspects', not 'convicts' – that is, to persons who are presumptively innocent. In general, police powers to stop, detain, question, or search citizens are contingent on them having 'reasonable suspicion' or 'probable cause' to believe that the person being detained or searched has committed a criminal offence.⁷² The presumption of innocence reminds law enforcement officers that they must exercise their powers with restraint. If reasonable suspicion/probable cause were synonymous with guilt, then more extensive police powers would be permissible. Instead, the presumption of innocence supports the demand for a minimalist approach: reasonable suspicion may justify the detention of an individual, but only for a limited (and relatively short) period, not indefinitely. Reasonable suspicion may be sufficient justification for an external body search, but for more invasive searches legal systems commonly require a court warrant, with the grounds for suspicion being verified by a member of the judiciary. Judicial oversight is required for these more intrusive searches, since, as a neutral arbiter, a judge should find it easier than a police officer or prosecutor to keep in mind the requirements of the presumption of innocence when weighing the epistemic value of the search against the inevitable invasion of privacy that this will entail for the suspect.

When the presumption is treated as an aspect of, or even equivalent to, the burden of proof, this lends weight to the notion that an

⁷² There are, however, exceptions to the general rule that reasonable suspicion is required. Controversially, the Terrorism Act 2000 gave the police in the UK power to stop, search and detain individuals in certain designated areas, without reasonable suspicion.

accused person should not co-operate with the state in any way, either before or during the trial: if it is for the state to prove guilt beyond a reasonable doubt, why should the accused be expected, far less required, to make this job any easier? This is not a helpful approach. It is not inconsistent with the presumption of innocence to require a suspect to co-operate to some extent with the police investigation. Clearly, a balance has to be struck between the interests of the (presumed innocent) accused and those of the State in the investigation of crime and the punishment of offenders. If the presumption of innocence were interpreted as meaning 'you are not expected to co-operate lest you help the prosecution establish its case against you', this would surely mean that we were operating under a presumption of *guilt!* Where a credible allegation of wrongdoing has been made against someone this must be rigorously investigated and, if need be, tested at trial. Adopting the presumption of innocence as a practical attitude means that during this process suspects must be afforded respect and treated in a way which preserves their dignity. They may be invited to attend the police station for questioning. If they are not willing to come, we may have to force them to do so, but only as a last resort. In the police station, we do not deny them refreshments or comfort breaks, and we try to minimize the period during which we deprive them of liberty. We may have to insist that suspects provide fingerprints, etc. A person against whom there is a reasonable suspicion of wrongdoing has both a moral and a legal duty to assist in the investigation: the moral duty arises because, as citizens, we should be ready to face up to accusations. The extent of the legal duty will vary from one jurisdiction to another. For example, in Scotland, legislation requires suspects to provide certain details which will enable their identity to be verified by the police, but they need not answer any additional questions.⁷³ Like their Scottish counterparts, suspects in police custody in America have a privilege against self-incrimination.⁷⁴ By contrast, in England a suspect must provide details of potential defences during police questioning, or risk adverse inferences being drawn by the fact finder if a defence is

⁷³ Criminal Procedure (Scotland) Act 1995, s. 14(9): 'A person detained [by the police for questioning]... shall be under no obligation to answer any question other than to give the information mentioned in subsection (10) below, and a constable shall so inform him both on so detaining him and on arrival at the police station or other premises.' Section 14(10): 'That information is – (a)the person's name; (b)the person's address; (c)the person's date of birth; (d)the person's place of birth ... and (e)the person's nationality.'

⁷⁴ *Miranda v Arizona* 384 U.S. 436 (1966); *Edwards v Arizona* 451 U.S. 477 (1981).

produced for the first time at trial.⁷⁵ Which of these jurisdictions strikes the right approach regarding how much co-operation society is entitled to expect from a suspect is beyond the scope of this article; the point is that in each jurisdiction the police can properly say to a suspect: ‘As a presumptively innocent person [i.e. *even though you may be innocent*] you have a duty to cooperate’.

8.2 *Incarceration Pre-trial*

The adoption of a broadly based presumption of innocence may have implications for other aspects of a State’s treatment of citizens pre-trial, for example, in relation to the use of racial profiling,⁷⁶ but it is most controversial in respect of pre-trial incarceration. The Irish Law Reform Commission (ILRC) noted the two approaches which may be taken here.⁷⁷ The more common approach, as previously described, treats the presumption as a procedural rule which operates only during the criminal trial and has no application outside that forum. The second treats it as ‘a principle governing all stages of the criminal process’:

If the first view of the presumption is correct, it would not necessarily be impermissible to impose restrictions on the accused designed to ensure purposes other than his attendance at trial. Thus pre-trial detention to prevent crime would be acceptable. However, if the second view of the presumption of innocence is adopted, restrictions prior to trial, if any, must be minimal and must be designed to ensure that his trial will take place.⁷⁸

⁷⁵ Criminal Justice and Public Order Act 1994, s. 34: ‘Where, in any proceedings against a person for an offence, evidence is given that the accused ... on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings ... the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.’ For criticism of the provision see D. Birch, ‘Suffering in Silence: a Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994’ [1999] *Crim. L.R.* 769; J. Jackson, ‘Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom’ (2001) *International Journal of Evidence & Proof* 145.

⁷⁶ DeAngelis (n 43 above).

⁷⁷ Law Reform Commission of Ireland, *Report on an Examination of the Law of Bail* (LRC 50–1995).

⁷⁸ *Ibid.*, para 5.29.

In 1951 the US Supreme Court declared that failure to recognise a right to pre-trial bail would make meaningless the presumption of innocence,⁷⁹ but by 1979 the Court had reached the opposite conclusion, holding that the presumption ‘has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun’.⁸⁰ By contrast, the courts in Ireland adopt the second of the views described by the ILRC.⁸¹ There is also a presumption in favour of bail in both English and Scottish law,⁸² but this is often explained as being required by the right to liberty. As we have seen, however, a convicted person has no such right, thus the presumption of innocence again reminds us that since an accused is not to be treated as if he has already been found guilty, pre-trial incarceration cannot be justified on the basis that the accused ‘is guilty’. Bail may be denied for someone who has previously absconded pre-trial, since they have shown that they are a flight-risk.⁸³ It is the past, ascertained behaviour (the failure to turn up for a trial) which justifies the denial of bail, rather than an assumption that they are guilty of this current charge. In the case of serious crimes such as murder, it may be reasonable to base bail decisions on generalizations: if it is the case that people who are bailed on a charge of murder often attempt to abscond, a jurisdiction could adopt a policy of remanding in custody all who face such charges. This does not imply that all of those who are accused of murder are guilty as charged. Pre-trial flight may not be synonymous with guilt: in some cases even an innocent accused may rate the chances of acquittal as low. While bail may be refused for crime-prevention purposes due to the accused’s previous convictions – a person’s record does tell us

⁷⁹ *Stack v Boyle* 342 US 1, 3 (1951).

⁸⁰ *Bell v Wolfish* 441 US 520, 533 (1979). This is also the position in Canada: *R v Pearson* (1993) 17 C.R. (4th) 1, 77 CCC (3rd) 124. For a history of bail in the USA, see: M.J. Hegreness, ‘America’s Fundamental and Vanishing Right to Bail’ (2013) 55 *Arizona Law Review* 909. See also D. Kiselbach, ‘Pre-trial Criminal Procedure: Preventive Detention and the Presumption of Innocence’ (1989) 31 *Criminal Law Quarterly* 168.

⁸¹ *O’Callaghan* [1966] IR 501. This is also the approach taken in New South Wales: P. Shrestha, ‘Two Steps Back: The Presumption of Innocence and Changes to the Bail Act 2013 (NSW)’ (2015) 37 *Sydney Law Review* 47.

⁸² England: Bail Act 1976, s 4; Scotland: Criminal Procedure (Scotland) Act 1995, s 23B.

⁸³ See the Criminal Procedure (Scotland) Act 1995, s. 23C(1)(a) which allows a court to refuse bail if there is a ‘substantial risk’ that the accused might abscond or fail to appear at the trial diet.

about propensity to behave in a particular fashion in future – it cannot be refused on the basis that solely by virtue of being charged with *this* crime, it is reasonable to conclude that an accused might commit ‘further crimes’ while awaiting trial. Similarly, while the strength of the case against the accused can be taken into account in determining the risk of flight, bail should not be denied solely on the strength of the case, since this is the very issue which has to be determined at trial.⁸⁴

The European Court of Human Rights (ECtHR) has stated repeatedly⁸⁵ that member states must have ‘due regard to the presumption of innocence’ in ensuring that pre-trial detention does not exceed a reasonable time, as required by Art 6(1) of the ECHR.⁸⁶ Of course, it may be argued that giving ‘due regard’ to the presumption of innocence means that *any* restrictions imposed when bail is granted are unjustified; after all, we do not subject non-accused citizens to equivalent forms of conditional liberty. The presumption of innocence tells us that if conditions are to be imposed in granting bail, these should be directed at ensuring that the trial takes place, rather than being based on the presumption that the accused committed the crime with which he is charged.⁸⁷

Adopting the presumption of innocence as a practical attitude also means that where bail is refused and suspects are remanded in custody awaiting trial, the conditions in which they are confined should reflect their un-tried/presumptively innocent status. Thus they should be kept separate from convicted prisoners, allowed to wear their own

⁸⁴ See R.A. Duff, ‘Pre-trial Detention and the Presumption of Innocence’ in A. Ashworth, L. Zedner and P. Tomlin (eds.), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013), 115; L. Stevens, ‘The Meaning of the Presumption of Innocence for Pre-trial Detention: An Empirical Approach’ (2013) 42 *Netherland Journal of Legal Philosophy* 239.

⁸⁵ *Letellier v France* (1991) 14 EHRR 83, para 35. See also *B v Austria* (1990) 13 EHRR 20, para 42; *Yargci and Sargin v Turkey* (1995), 20 EHRR 505, para 50.

⁸⁶ See also art 5(3) of the ECHR; art 14(3)(c) of the International Covenant on Civil and Political Rights; art 7.5 of the American Convention on Human Rights; art 20(4)(c) and art 21(4)(c) of the Statutes of the International Criminal Tribunals for Rwanda and for the former Yugoslavia, respectively; art 11(b) of the Canadian Charter of Rights and Freedoms; and art 7(1)(d) of the African Charter on Human and Peoples’ Rights.

⁸⁷ Art 5(3) of the ECHR provides that accused persons have a right ‘to trial within a reasonable time or to release pending trial’ and expressly states that pre-trial release ‘may be conditioned by guarantees to appear for trial.’ For an analysis of this in relation to English law, see P. Leach, ‘Automatic Denial of Bail and the European Convention’ (1999) *Criminal Law Review* 300.

clothes, be entitled to more generous visiting hours, and have greater access to legal advisors. While these distinctions are recognized in some jurisdictions (for example, Scotland), conditions elsewhere are less favourable with untried prisoners being kept in worse conditions than convicted criminals.⁸⁸ If the presumption of innocence was irrelevant to the issue of bail or conditions on remand, our desire to minimize pre-trial detention would stem from concerns over the degrading of evidence, or the stress delay causes witnesses, rather than from a sense that deprivation of liberty is an unacceptable way to treat a presumptively innocent person.

8.3 *Pre-trial or Post-conviction Suggestions of Guilt*

In some states in the USA, victims and their family members are permitted to wear t-shirts, buttons or ribbons, or display other written signs in court suggesting that the accused is guilty.⁸⁹ This practice is not in keeping with the presumption of innocence: establishing guilt is the function of the prosecution. As such, during the trial and prior to the verdict only the prosecution ought to be allowed to suggest that the accused is in fact guilty. Equally problematic is the so-called ‘perp walk’, in which a suspect’s arrest is engineered by the police or prosecution to occur when reporters and news cameras are present, in order to humiliate the suspect and encourage a guilty plea.⁹⁰ Challenges to the practice have focussed on whether it violates the Fourth Amendment to the US Constitution which protects citi-

⁸⁸ See R.L. Lippke, ‘Preventive Pre-trial Detention without Punishment’ (2014) 20 *Res Publica* 111, 112.

⁸⁹ See S. Elizabeth, ‘The Newest Spectator Sport: Why Extending Victims’ Rights to the Spectators’ Gallery Eroded the Presumption of Innocence’ (2008) 58 *Duke Law Journal* 275.

⁹⁰ K.J. Kaiser, ‘Twenty-first Century Stocks and Pillory: Perp Walks as Pretrial Punishment’ (2002–2003) 88 *Iowa Law Review* 1205. In *Government of the United States of America v Tollman* [2008] EWHC 184 the (English) court had to determine whether the defendants should be extradited to the USA. The court at first instance described as ‘reprehensible’ the US Prosecuting Attorney’s comment that he was looking forward to having ‘a perp walk’: ‘By this he meant that he intended to walk publicly through the streets of New York, from the processing centre to the court-house, with Mrs Tollman handcuffed and in leg-irons for the benefit of the press’ [para 38].

zens' right to privacy against unreasonable searches and seizures.⁹¹ The presumption of innocence has not generally been preyed in aid since, as we have already noted, US courts regard the presumption as having no pre-trial application. I suggest that the 'perp walk' is a breach of the presumption of innocence: even the term 'perp[etrator] walk' suggests that the person being arrested is the guilty party.

The approach outlined in this article also means that prior to trial or following an acquittal, there should be no comments made by police, prosecutors or judges which give the impression that the accused is in fact guilty of committing the crime. This is indeed the stance which has been taken by the ECtHR, which has repeatedly held that the protection guaranteed by Art 6(2) extends beyond the criminal trial itself to other situations where the state may be said to be undercutting the presumption of innocence.⁹² Thus the Court has held that the presumption operates before criminal proceedings are pending,⁹³ and can subsist after the discontinuation of such proceedings, or following an acquittal. In the recent case of *Cleve v Germany*⁹⁴ the Court reiterated that the presumption protects those who have been acquitted of a criminal charge from being treated by public officials and authorities as though they are in fact guilty.⁹⁵

8.4 Jury Majorities

If the prosecution is unable to establish guilt beyond a reasonable doubt, the presumption means that the accused is entitled to a verdict

⁹¹ Kaiser, *ibid.* See also R. Hagglund, 'Constitutional Protections Against the Harms to Suspects in Custody Stemming from Perp Walks' (2011–2012) 81 *Mississippi Law Journal* 1757; P. Paciocco, 'Pilloried in the Press: Rethinking the Constitutional Status of the American Perp Walk' (2013) 16 *New Criminal Law Review* 50.

⁹² Cases include *Sekanina v Austria* (1993) 17 EHRR 221; *Rushiti v Austria* (2000) 33 EHRR 1331; *Hussain v United Kingdom* (2006) 43 EHRR 22; *Geerings v Netherlands*, [2007] ECHR 191. For a helpful summary see L. Campbell, 'A Rights-based Analysis of DNA Retention: Non-conviction Databases and the Liberal State' (2010) *Crim LR* 889.

⁹³ *Allenet de Ribemont v France* App No 15175/89 (1995) 20 EHRR 557. See also *Butkevicius v Lithuania* App No 48297/99 (ECHR, 26 March 2002). Accused persons in France now have a right not to be referred to as if guilty, prior to trial: see F. Quintard-Morinas, 'The Presumption of Innocence in the French and Anglo-American Legal Traditions' (2010) 58 *American Journal of Comparative Law* 107, 140.

⁹⁴ App. No. 48144/09; [2015] ECHR 35.

⁹⁵ *Ibid.*, para 35.

of ‘not guilty’. This has consequences for jury majorities. In Scotland, 8 out of 15 jurors must favour conviction before a guilty verdict can be returned. As Gerry Maher has argued, it is questionable whether a conviction where 7 jurors have at least a reasonable doubt over guilt can be equated to proof beyond a reasonable doubt or is compatible with the presumption of innocence.⁹⁶ Commentators have traditionally founded on the requirement for corroborated evidence as a justification for the majority verdict. In 2013, the Scottish Government expressed its intention to abolish the requirement for corroboration, prompting a rethink of the ‘simple majority’ verdict.⁹⁷ In contrast to this, an English criminal jury comprises 12 jurors, at least 10 of whom must vote in favour of conviction *or acquittal*, otherwise a retrial will be ordered. That acquittal is not the outcome even when 9 out of 12 jurors favour a ‘not guilty’ verdict has been criticized as contrary to the presumption.⁹⁸

8.5 Retention of DNA samples

The presumption may have other implications post-trial, in respect of the retention by the State of DNA samples which have been taken from suspects who have subsequently been acquitted. In *S and Marper v UK*⁹⁹ the Grand Chamber of the ECtHR found that the retention of such samples could breach Art 8 of the ECHR (the right to privacy), and commented on the stigma involved in such retention. Liz Campbell has argued that DNA retention ‘denotes a degree of distrust on the part of state agents as to the future criminality of the person [whose sample is retained] and her likelihood of re-offending, and thus seems to relate to the presumption of innocence loosely speaking.’¹⁰⁰ Such a degree of mistrust may be justified where a person has been convicted of a serious crime, but arguably ought not

⁹⁶ G. Maher, ‘Jury Verdicts and the Presumption of Innocence’ (1982) 3 *Legal Studies* 146.

⁹⁷ Scottish Government, *Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration* (Consultation Paper 2013). For an analysis and critique see J. Chalmers and F. Leverick, ‘Majority Jury Verdicts’ (2013) 17 *Edinburgh Law Review* 90.

⁹⁸ Maher (n 96 above).

⁹⁹ (2009) 48 EHRR 50 [119].

¹⁰⁰ L. Campbell, ‘Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence’ (2013) 76 *Modern Law Review* 681, 687.

to be a sufficient reason for stigmatising a person whose guilt has not been established by a court.¹⁰¹

IX CONCLUDING REMARKS

This article has argued for a broader application of the presumption of innocence, suggesting that it be treated as a practical attitude which should be adopted by those engaged in the justice system. Adoption of this broader, normative approach leads to a reassessment of pre-trial criminal procedure, trial procedure, and some aspects of post-trial treatment of acquitted people. It also encourages both professional and non-professional actors (jurors) to adopt a questioning attitude towards the evidence, particularly those forms of potentially problematic evidence which have been associated with wrongful convictions. The traditional approach in which the presumption is treated as applicable only to the trial itself leaves those accused of crime, as well as those who have been tried but acquitted, in danger of being treated less favourably than other citizens. Treating the presumption of innocence as a practical attitude reminds us that those who are accused or suspected of criminality are not to be equated to those whose guilt has been formally established.

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¹⁰¹ See also Campbell (n 92 above).