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The Presumption of Innocence in the French and Anglo-American Legal Traditions

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Despite evidence that the presumption of innocence was something more than an instrument of proof, common law scholars in the nineteenth century reduced the doctrine to an evidentiary rule without acknowledging the role of the principle as a shield against punishment before conviction in both the civil and common law traditions. The resulting narrow conception of the presumption of innocence has since pervaded the legal and public discourse in the United States, where suspects are increasingly treated as guilty before trial. Using the French Declaration of Rights of 1789 and the English Prison Act of 1877 as points of reference, this Article retraces the origins and subsequent development of a fundamental principle of justice whose dual dimension—rule of proof and shield against premature punishment—has yet to be formally recognized in modern Anglo-American jurisprudence.

No legal principle of criminal law and procedure has generated more interest and debate than the rule that one is presumed innocent until proven guilty in a court of law.[1] This maxim has long epitomized the rivalry between the civil law and the common law, as reflected by the traditional dichotomy between the Latin presumption of guilt and the Anglo-American presumption of innocence.[2]

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1. On the origins of this maxim, see *infra* note 64. To date, over 100 articles on the presumption of innocence have been published in the United States and England.

2. *See, e.g., Sir John Scott on Criminal Procedure*, TIMES (London), May 25, 1900, at 11 ("At the Society of Arts, yesterday, Sir John Scott . . . was glad that the British presumption of innocence had prevailed over the Latin presumption of guilt . . . ."); People v. Molineux, 168 N.Y. 264, 291 (1901) (". . . that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at

Even though this—artificial—distinction resurfaces from time to time,[3] today no one would seriously deny the role played by the presumption of innocence in civil law jurisdictions.

Yet few studies have attempted to trace the development of the presumption of innocence as a doctrine in both legal traditions.[4] A close examination of the French and Anglo-American conceptions of the principle reveals a striking divergence between the two systems.[5] While law students in France learn in great detail that the presumption of innocence has two distinct functions, namely a rule of proof and a shield against punishment before conviction,[6] their counterparts across the Atlantic are taught briefly that the presumption of innocence amounts to little more than an evidentiary doctrine with no application before trial.[7] The latter, narrow conception of the presumption of innocence is prevalent in the American media as well, where columnists[8] and legal analysts[9] are quick to remind their audi-

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least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence . . . .").

3. *See, e.g.*, *Innocence and Guilt*, WALL ST. J. EUR., May 26, 2000, at 12 ("The lack of a presumption of innocence in the French legal system has long set it apart from the Anglo-American systems of justice.").

4. For a comparative analysis of the presumption of innocence in the civil and common law in the nineteenth century, see *The Presumption of Innocence in Practice: A Comparison Between the Common and the Civil Law*, 14 CRIM. L. MAG. & REP. 184 (1892).

5. One scholar touched upon the distinctive nature of the presumption of innocence in civil law countries. *See* Harold J. Berman, *The Presumption of Innocence: Another Reply*, 28 AM. J. COMP. L. 615, 622 (1980) ("What the presumption of innocence referred to in the French Declaration of Rights, and what it still refers to primarily, though not exclusively, in the legal traditions of most European countries, was (and is) the treatment of a suspect or accused person before trial.").

6. *See, e.g.*, Jean-François Chassaing, *Jalons pour une histoire de la présomption d'innocence,* in *Juger les juges: Du Moyen Âge au Conseil supérieur de la magistrature* 232 (2000); Robert Badinter, *La présomption d'innocence, histoire et modernité*, in *Etudes offertes à Pierre Catala: Le droit privé français à la fin du XXè siècle* 133, 134 (2001). Punishment must be understood here as the infliction of physical or emotional pain or discomfort, including shame and humiliation.

7. Of the sixteen American textbooks on criminal procedure consulted for the preparation of this Article, only one asked whether the presumption of innocence was something more than a rule of proof. *See* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES AND EXECUTIVE MATERIALS 1183 (2d ed. 2003).

8. *See e.g.*, Dick Cavett, *An Innocent Misunderstanding*, N.Y. TIMES, Mar. 28, 2007, http://cavett.blogs.nytimes.com/2007/03/28/an-innocent-misunderstanding ("The P. of I. has nothing whatever to do with you and me. We can talk, write, broadcast and even put up a billboard (if so foolish) stating that the accused is the one who did it. It has to do with our system. If you find yourself accused of a crime, you do not have to prove your innocence. The burden is on the other side. The prosecution has to prove your guilt. That's about it. And it is not even a rule of law. It is a rule of *evidence*, relevant only to the judge and the jury.") (alteration in original).

9. *See, e.g.*, Dan Abrams, *Presumed Innocent? Bernie Madoff?*, WALL ST. J., Feb. 27, 2009, at A15 ("But unless I am sitting in the jury box armed with that power I, and any other nonjuror for that matter, have no obligation, moral or legal, to embrace that legal fiction."). On the debate generated by Abrams's article, see The Presump-

ence of the procedural nature of the presumption of innocence to justify portraying the accused as guilty. A similar treatment of the accused in France would constitute a violation of law.[10]

One may be tempted to view this divergence as another "cultural difference" between the two nations. Yet nothing would be further from historical reality. Both the civil law and the common law once embraced the two sides of the presumption of innocence—rule of proof and shield against punishment. If France during the Old Regime[11] gradually departed from the rule of proof component by insisting that suspects establish their innocence,[12] it never completely disregarded, at least in theory, the right of the accused to be considered innocent before conviction.[13] In England, the adversarial nature of its legal system favored an early use of the maxim both before and during trial.[14] But an interesting twist occurred in the nineteenth century; while France was justly criticized in English and American circles for not affording adequate protections to the accused,[15] legal scholars across the Channel and across the Atlantic lost sight, somewhat purposely, of the presumption of innocence as a shield against punishment, concerned that an expansion of the doctrine beyond the courtroom would undermine the fight against crime. The resulting one-dimensional conception of the presumption of innocence, endorsed by the U.S. Supreme Court in 1979,[16] is more than a departure from the Anglo-American tradition. It challenges the very foundation of a social contract in which society, by prohibiting private vengeance and guaranteeing the right to be tried by an impartial jury, acknowledges that there is a time for innocence and a time for guilt. All too often suspects are treated as guilty by a society that owes them protection, even in light of the appalling nature of the alleged crime. But one cannot expect society to treat the presumption of innocence as an "article of faith"[17] outside the courtroom if those in charge of applying the law overlook the rationale for the maxim.

The purpose of this Article is to remind members of the legal community of the principles underlying the rule "innocent until

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tion of Innocence Belongs Only in the Courtroom. Discuss, http://blogs.wsj.com/law/2009/02/27/the-presumption-of-innocence-belongs-only-in-the-courtroom-discuss.

10. *See infra* note 315. On the tension between the presumption of innocence and the freedom of expression, see *infra* note 289.

11. The Old Regime or *Ancien Régime* refers to the social and political system in France before 1789.

12. *See infra* note 159.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* note 242.

16. *See infra* note 163.

17. Campbell v. McGruder, 580 F.2d 521, 529 n.14 (D.C. Cir. 1978) (Bazelon, C.J.: "[I]f the presumption of innocence is to be respected by judge and jury in the courtroom, it must be treated as an article of faith by all society outside the courtroom as well.").

proven guilty" through an exploration of its historical development and to caution against endorsing a narrow view of the principle to the detriment of justice and common decency.

This Article consists of four parts. Part I retraces the origins of the principle "innocent until proven guilty" with an emphasis on Roman law. Part II explores the history behind the formulation of the presumption of innocence as a shield against punishment in the French Declaration of Rights of 1789. Part III examines the reception of the doctrine in the common law, from an early use of the maxim by Bracton to the English Prison Act of 1877. Finally, Part IV analyzes the evolution of the doctrine in the nineteenth and twentieth centuries, including its elevation to a personality right in France and its progressive reduction to a rule of proof in Anglo-American jurisprudence.

I. ORIGINS

Because one can be accused of a crime without being a criminal, an elementary principle of justice requires that plaintiffs prove their allegations and that the accused be considered innocent in the interval between accusation and judgment. While there is no debate as to the ancient origins of the rule of proof component of the principle, some have argued that the second aspect—the right of suspects to be treated as innocent before sentence—developed much later in history.[18] A careful review of ancient law sources reveals that both ideas emerged essentially at the same time, one being viewed as a logical extension of the other.

A. Actori incumbit probatio

The principle that the accuser bears the burden of proving the guilt of the accused has its roots in antiquity.[19] One of the oldest written codes of laws, the Babylonian *Code of Hammurabi* (1792-1750 B.C.), already embraced it.[20] Anyone bringing a criminal accusation

18. *See, e.g.*, Chassaing, *supra* note 6 ("The paradox of the presumption of innocence is that these two principles [rule of proof and shield against punishment] that seem logically connected did not legally emerge at the same time.").

19. JOHN SASSOON, ANCIENT LAWS AND MODERN PROBLEMS: THE BALANCE BETWEEN JUSTICE AND A LEGAL SYSTEM 42 (2001) ("[T]he burden of proof rested in the third millennium BC where it would rest today—with the accuser.").

20. Allen H. Godbey, *The Place of the Code of Hammurabi*, 15 THE MONIST 199, 210 (1905) ("It is a fundamental principle of the code of Hammurabi that the presumption is always in favor of the innocence of the accused: the burden of proof is thrown upon the accuser . . . . Not merely is the burden of proof upon the accuser, but in all primitive society [sic] the entire burden of accusation or indictment falls upon him. In this respect the legal procedure of Babylonia seems to have been that of all early nations.").

was required to prove that the defendant was guilty.[21] In the event of a false accusation of a capital offense, the accuser was put to death.[22] As to plaintiffs claiming that defendants were in possession of stolen property, the Code required them to bring witnesses that could identify their property;[23] otherwise the plaintiffs were put to death.[24]

In Roman law, the burden of proof rested similarly on the plaintiff *(actori incumbit probatio)*.[25] "He who wishes to bring an accusation must have the evidence" proclaimed a constitution of the Emperor Antonin of A.D. 212.[26] The failure by the plaintiff to prove his allegations discharged the defendant *(actore non probante, reus absolvitur)* even though the defendant remained silent[27] or denied the alleged facts, for the burden of proof was on those who affirmed and not on those who denied.[28] Only after the charge was proved by sufficient evidence was the accused compelled to establish his innocence.[29]

In criminal matters, the proof had to be particularly compelling, especially in cases where the life of the accused was at stake. It was deemed better to absolve the guilty than to risk sentencing an innocent to death *(satius enim esse impunitum relinqui facinus nocentis quam innocentem damnari)*.[30] Calling into court "the reputation, the fortunes and finally the status and the life of another"[31] while having no proof of wrongdoing was a serious offense.[32] A constitution of the Emperors Gratian, Valentinian, and Theodose of A.D. 382 reminded all accusers that they could only bring an accusation sustained by reliable witnesses, documentary evidence or undoubted facts that

21. ROBERT FRANCIS HARPER, THE CODE OF HAMMURABI, KING OF BABYLON 11, §1 (1904).

22. *Id.* § 3.

23. *Id.* §§ 9-10.

24. *Id.* § 11.

25. WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 693 (1938). *See also* SAMUEL P. SCOTT, THE CIVIL LAW, INCLUDING THE TWELVE TABLES, THE INSTITUTES OF GAIUS, THE RULES OF ULPIAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTIONS OF LEO: TRANSLATED FROM THE ORIGINAL LATIN, EDITED, AND COMPARED WITH ALL ACCESSIBLE SYSTEMS OF JURISPRUDENCE ANCIENT AND MODERN 41 (Cincinnati, Vol. 13, 1932) ("The *onus probandi* rested on the plaintiff, who was obliged to establish his claim by affirmative evidence, as prescribed by the rule, *'Ei incumbit probatio qui dicit, non qui negat,'* a doctrine which has been adopted by all modern systems of jurisprudence.").

26. Code Just. 2.1.4 (Antonin 212).

27. *Id.*

28. Code Just. 4.19.23 (Diocletian & Maximian 304); DIG. 22.3.2 (Paul, Ad Edictum 69).

29. DIG. 48.1.5 (Ulpian, Disputationum 8).

30. DIG. 48.19.5 (Ulpian, De Officio Proconsulis 7). *Cf.* DEMOSTHENES, AGAINST MEIDIAS, ANDROTION, ARISTOCRATES, TIMOCRATES, ARISTOGEITON 231 (J.H. Vince trans., Harvard University Press 1935) (observing that it is "equally irreligious to let slip the guilty, and to cast out the innocent before trial.").

31. CODE THEOD. 9.1.11.

32. *Id.*

were clearer than light *(luce clarioribus expedita)*.[33] If the proof was incomplete or inconclusive, the benefit of the doubt was given to the defendant *(in dubio pro reo)*.[34]

B. Non statim qui accusatur reus est

Until guilt is established by conclusive evidence, society has no right to treat the accused as a criminal. One merely accused of murder cannot yet be called a murderer, protested the Greek orator Demosthenes in 352 B.C., "for no man comes under that designation until he has been convicted and found guilty."[35] Similarly, it is only when defendants are convicted after a proper trial that punishment can be inflicted upon them, "for then conscience permits us to inflict punishment according to knowledge, but not before."[36] Denying the accused the "intermediate process"[37] between accusation and conviction is violating an elementary principle of justice.

Well before the Magna Carta,[38] defendants had been guaranteed the right to be heard before being absolved or convicted. A decree issued by King Ptolemy VIII of Egypt in 118 B.C. prohibited government officials from arresting and imprisoning anyone "for a private debt or offence or owing to a private quarrel"[39] and directed them to bring suspects "before the magistrates appointed in each nome"[40] to be dealt with "in accordance with the decrees and regulations."[41]

If accusation does not equate conviction and if only conviction triggers punishment, it follows that suspects must be treated in a manner consistent with their status.

Except in cases of high treason,[42] Roman law allowed defendants to administer their property,[43] enter into wills,[44] make donations,[45]

33. Code Just. 4.19.25 (Gratian, Valentinian & Theodose 382).
34. DIG. 50.17.125 (Gaius, Ad edictum provinciale 5).
35. DEMOSTHENES, *supra* note 30, at 231.
36. *Id.* at 229.
37. *Id.* at 235.
38. 25 Edw. I, c. 29 (1297) (1215) ("No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land.").
39. Decree of King Ptolemy VIII dated Apr. 28, 118 B.C., *available at* http://www app.cc.columbia.edu/ldpd/app/apis/item?mode=item&key=berkeley.apis.263. This document, consisting of seven papyri found at the site of ancient Tebtunis, Egypt, at the end of the last century, is held by The Bancroft Library at the University of California, Berkeley.
40. *Id.*
41. *Id.*
42. DIG. 48.20.11.1 (Marcian, De Publicis Iudicis).
43. DIG. 49.14.46.6 (Hermogenian, Iuris Epitomarum 6).
44. DIG. 28.1.9 (Ulpian, Ad Edictum 45).
45. DIG. 39.5.15 (Marcian, Institutionum 3).

pay their debts[46] or receive money from their debtors so that they would not be deprived of the means to defend themselves.[47] Suspects retained their integral status pending appeal and did not become infamous unless a final judgment was pronounced against them.[48] As to accused officials, they could retain their rank;[49] they were only prohibited from seeking new dignities[50] or using the privileges of their functions to escape punishment.[51]

Roman citizens accused of an offense could post bail unless the gravity of the alleged crime warranted detention before trial.[52] For those in custody, Roman law prohibited any harsh treatment[53] and exhorted judges to start the instruction promptly so as to punish the guilty and discharge the innocent *(ut noxius puniatur, innocens absolvitur)*,[54] the purpose of detention being safe custody, but not punishment.[55] In the event defendants died before conviction or pending appeal, it was illegal to confiscate their property[56] and their heirs could receive the estate.[57]

A constitution of the Emperors Honorius and Theodose of A.D. 423 reminded consuls, praetors, senators, and tribunes of the people that defendants charged with a capital crime should not immediately be considered guilty merely because they had been accused, so that an innocent would not unjustly suffer *(non statim reus, qui accusari potuit, aestimetur, ne subjectam innocentiam faciamus)*.[58]

A similar maxim, which became part of Frankish law at the end of the eighth century when Charlemagne incorporated it into one of his capitularies,[59] was used by canonists as a *regula juris* throughout the Middle Ages to illustrate the idea that a defendant should not be considered guilty before conviction: it is not the accusation, but the

46. DIG. 46.3.42 (Paul, De Adulteriis 3).
47. DIG. 46.3.41 (Papinian, De Adulteriis 1).
48. DIG. 3.2.6.1 (Ulpian, Ad Edictum 6).
49. DIG. 50.1.17.12 (Papinian, Responsorum 1).
50. Code Just. 10.60.1 (Alexander Severus). *See also* DIG. 50.4.7 (Marcian, Publicorum 2).
51. Code Just. 9.22.21.1 (Constantine 316).
52. DIG. 48.3.1 (Ulpian, De Officio Proconsulis 2).
53. Code Just. 9.4.1 (Constantine 353). *But see* Yann Rivière, *Détention préventive*, in *Carcer: Prison et Privation de Liberté dans l'Antiquité Classique* 72 (1999) (cautioning against interpreting literally provisions reflecting imperial propaganda rather than a true commitment to justice).
54. Code Just. 9.4.1 (Constantine 353).
55. DIG. 48.19.8.9 (Ulpian, De Officio Proconsulis 9). *See also* DEMOSTHENES, *supra* note 30, at 269 ("When under arrest he will suffer no injury in gaol until after his trial.").
56. DIG. 48.21.3.7 (Marcian, De Delatoribus).
57. DIG. 49.14.45.1 (Paul, Sententiarum 5); Code Just. 7.66.2 (Alexander Severus 222).
58. CODE THEOD. 9.1.19.
59. 1 *Capitularia regum Francorum* 1079 (Paris, 1780) (cited in Louis Charondas le Caron, *Mémorables, ov observations dv droict François rapporté av romain civil et canonic* 166 (Paris, 1601)).

conviction that makes the criminal *(non statim qui accusatur reus est, sed qui convincitur criminosus).*[60] It followed that a defendant would not be suspended from communion during the accusation[61] and that a priest accused of adultery, but not yet convicted, could continue to give sacraments.[62]

"Everything has already been said" once wrote a famous moralist.[63] This brief overview of the origins of the ideas behind the principle "innocent until proven guilty" confirms this observation.

II. From Johannes Monachus to the French Declaration of Rights of 1789

We owe to the French canonist Johannes Monachus the modern formulation of the principle "innocent until proven guilty."[64] Commenting on a decretal of Pope Boniface VIII at the end of the thirteenth century, Monachus defended the right of the accused to due process, for everyone is presumed innocent until proven guilty *(quilibet praesumitur innocens, nisi probetur nocens).*[65] Coined on the basis of a letter written by Pope Innocent III to the archdeacon and

60. On the origins of this maxim, see Richard M. Fraher, *'Ut nullus describatur reus prius quam convincatur': Presumption of innocence in medieval Canon law?*, Proceedings of the Sixth International Congress of Medieval Canon Law, Berkeley, California, 28 July - 2 August 1980, at 493 (1985) (cited in Randy Martin Johannessen, Cardinal Jean Lemoine: Curial Politics and Papal Power 216 n.6 (1990) (unpublished Ph.D. dissertation, University of California, Los Angeles)).

61. Fraher, *supra* note 60, at 495 (citing the *De septem ordinibus ecclesiae*, a text attributed to Eusebius Hieronymus or Saint Jerome (342-420)).

62. *Id.* at 495-96 (citing a letter of Pope Nicholas I dated 866). An accusation of simony, heresy or notorious fornication stripped the accused of his rights, however. *Id.* at 502 n.28.

63. Selections From Les Caractères of La Bruyère 2 (Frederick M. Warren ed., D.C. Heath & Co. 1906) (1687).

64. *See* Walter Ullmann, *The Defence of the Accused in the Medieval Inquisition*, 63 The Irish Ecclesiastical Rec. 481, 486 (1950) (cited in Jerome E. Janssen, The Legal Procedure of the 13th Century French Inquisition 53 (1954) (unpublished Ph.D. dissertation, University of Wisconsin)). Ullmann appears to be the first modern scholar to have revealed the origins of the maxim "innocent until proven guilty." *See also* Gaines Post, *Ancient Roman Ideas of Law*, *in* 2 Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas 689 (Philip P. Wiener ed., 1973); Kenneth Pennington, The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition 157 (1993). Monachus's important contribution to criminal procedure is paradoxically ignored in France. The name of Monachus could not be found in any of the French studies on the presumption of innocence consulted for the preparation of this Article. On Johannes Monachus (d. 1313), see Ronald Albert Steckling, Jean Lemoine as Canonist and Political Thinker 205 (1964) (unpublished Ph.D. dissertation, Gaines Post dir., University of Wisconsin) (stressing that "Jean Lemoine did not create the presumption of innocence out of thin air. Nevertheless, his statement of principle was an original twist upon the existing presumptions, and was a valuable contribution to Western thought."). Monachus's maxim entered *The Yale Book of Quotations* in 2006. *See* The Yale Book of Quotations 614 (2006) (citing Pennington).

65. Ullmann, *supra* note 64, at 202. *See also* Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 The Jurist 106, 115 (2003).

provost of Milan in 1207,[66] the maxim spread rapidly. French students learned it as early as the fourteenth century at the Faculty of Law of Toulouse[67] and through the study of the customs of Brittany.[68] In the sixteenth century, Jean de Coras, a judge in the Parlement of Toulouse,[69] used both the principle and its exception[70] during the trial of Arnauld du Tilh, a French peasant who falsely claimed to be Martin Guerre in a famous case of marital imposture.[71]

It is commonly held that French criminal procedure during the Old Regime disregarded entirely the right of suspects to be considered innocent before conviction.[72] Yet an examination of sixteenth-, seventeenth-, and eighteenth-century French case law reveals a more nuanced picture.[73]

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66. PENNINGTON, *supra* note 64. Monachus cited Innocent III's decretal *Dudum* (X 2.23.16) to justify his statement. *Id.* at 162. The last sentence of the decretal *Dudum* reads as follows: "*cum prima facie praesumatur idoneus: nisi aliud in contrarium ostendatur.*" *See Decretales D. Gregorii papae IX: suae integritati unà cum glossis restituae: ad exemplar romanum diligenter recognitae* 796 (Lyon, 1584). Monachus replaced "*idoneus*" with "*innocens*" and applied the maxim to criminal matters. Monachus was not the first canonist to use Innocent III's letter as a basis for expressing the idea that everyone is presumed good until proven to the contrary. The earliest reference that I could find is in a gloss from the Italian canonist Bernard of Parma (d. 1266) to Innocent III's decretal *Dudum*. *See* Bernardus Parmensis, *Casus longi super quinque libros decretalium* (Speyer, 1481) ("*Nota [quod] quilibet presumitur idoneus nisi probatur contrarium.*"). *See also* Henricus de Segusio (d. 1271), *Summa Hostiensis super titulis decretalium compilata* (Venice, 1490) ("*presumit quod quilibet sit bone fidei, nisi probatur male.*"); Dinus de Mugello (d. 1300), *De regulis iuris* (Rome, 1476) ("*Quia quilibet presumitur bonus nisi probatur malus.*") (on file with the Library of Congress). The originality of Monachus was to transform the maxim into a rule of criminal procedure.

67. PENNINGTON, *supra* note 64.

68. Marcel Planiol, *La Très Ancienne Coutume de Bretagne* 142 (Rennes, 1896) (1320?) ("And all shall believe that [criminal suspects] are good until proven to the contrary.").

69. France was divided into judicial provinces in which thirteen *Parlements*, or high courts of justice, interpreted the laws. *See* ALEXIS DE TOCQUEVILLE, THE STATE OF SOCIETY IN FRANCE BEFORE THE REVOLUTION OF 1789, at 213 (Henry Reeve trans., John Murray 3d ed. 1888).

70. An important limitation of the presumption of innocence was the rule that one who had once been found guilty of a crime was no longer presumed to be innocent when later accused of the same crime *(semel malus, semper praesumitur esse malus).* Post, *supra* note 64, at 689.

71. *See* Jean de Coras, *Arrest mémorable, dv Parlement de Tolose, contenant une histoire prodigieuse de nostre temps* 46 (Lyon, 1561). As Monachus before him, see *supra* note 66, Coras cited Innocent III's decretal *Dudum* (X 2.23.16) as the source of the maxim "good until proven guilty." *Id. See also* Jean Auboux des Vergnes, *La véritable théorie pratique civile et criminelle des cours ecclésiastiques et officialitez* 254 (Paris, 1659) ("*Probandum enim est crimen allegatum: nam quilibet bonus praesumitur, nisi contrarium ostendatur. cap. Dudum. de praesumptionibus.*"). For a use of the maxim in a civil action brought before the Parlement of Paris in 1386, see Jean Le Coq, *Questiones Johannis Galli* 69 (Marguerite Boulet ed., 1944) (1400?) ("*Item hac non est presumundum fieri in fraudem, quia quilibet presumitur bonus de bonitate intrinseca, juxta c. quoniam de presump.*").

72. *See, e.g.*, Badinter, *supra* note 6, at 134.

73. One may regret that none of the doctoral dissertations on the presumption of innocence consulted for the preparation of this Article relied on these sources. *See,*

A. *It is Better that a Guilty Person Escape than One Innocent Suffer*

Suspects, unless caught in the act or likely to escape, could only be arrested upon a proper warrant executed by a judge following a complete investigation.[74] The law required judges to examine evidence for and against the accused[75] and in case of doubt the accused had to be acquitted.[76] Courts repeatedly quashed warrants delivered without prior investigation[77] or warrants that portrayed the accused as a criminal.[78] In 1536, the Parlement of Paris, echoing Demosthenes,[79] reminded judges that it was illegal to describe a suspect as a murderer, adulterer or thief in the arrest warrant;[80] only a mention that the suspect had been charged with a crime was allowed,[81] "otherwise we would speak as if the accused were convicted, which is only permitted after a definitive condemnation."[82] Similarly, ecclesiastical *monitoires*[83] ordered by judges to encourage witnesses of a crime to come forward could not identify suspects by name[84] or describe them in such a way that no doubt would remain as to their identity[85] because "there is no greater scandal than to cause injury to someone

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e.g., Pierre Ballandier, *Pour une défense de la présomption d'innocence* (Thèse Université de Droit, d'Economie et des Sciences d'Aix-Marseille, 1996); Véronique Massol, *La présomption d'innocence* (Thèse Université des Sciences Sociales de Toulouse I, 1996); Hélène Daoulas, *Présomption d'innocence et preuve pénale: étude comparée des droits Français, Anglais et Canadiens* (Thèse Université de Poitiers, 1999); Alexandra Tonglet, *La présomption d'innocence et les présomptions en droit pénal* (Thèse Université de Paris XIII, 1999).

74. Ordon. 1670, tit. 10.

75. Ordon. 1670, tit. 4, art. 1.

76. Ordon. 1670, tit. 25, art. 12.

77. Pierre Brillon, *Dictionnaire des arrets; ou, Jurisprudence universelle des parlemens de France, et autres tribunaux* 536 (Paris, 1727) (citing a decision of the Parlement of Grenoble dated July 28, 1628 and a decision of the Parlement of Provence dated Mar. 11, 1666).

78. Jean Papon, *Recveil d'arrestz notables des covrs sovveraines de France* 568 (Lyon, 3d ed. 1559).

79. *See supra* note 35.

80. Papon, *supra* note 78 (citing a decision of the Parlement of Paris dated May 26, 1536).

81. *Id.*

82. Antoine Bruneau, *Observations et maximes sur les matières criminelles* 103 (Paris, 1715).

83. *Monitoires* were letters written by church officials and affixed to the door of churches and other public spaces. *See* 1 Daniel Jousse, *Traité de la justice criminelle en France* 119 (Paris, 1771).

84. Ordon. 1670, tit. 7, art. 4. The Criminal Ordinance of 1670 imposed a fine of 100 livres on offenders. *Id. See also* Jousse, *supra* note 83, at 126 (stating that the purpose of this law was to prevent anyone "from injuring the honor or reputation of an individual that could be innocent.").

85. Ordon. 1670, tit. 7, art. 4. *See also* Brillon, *supra* note 77, at 395-96 (citing a decision of the Parlement of Bretagne dated Apr. 14, 1572, a decision of the Parlement of Dijon dated Mar. 27, 1575, a decision of the Parlement of Provence dated Nov. 23, 1664 and decisions of the Parlement of Paris dated Feb. 5, 1564 and June 16, 1625).

before conviction."[86] In the famous *Calas* case, where Jean Calas was executed for allegedly murdering his eldest son, the *monitoire* excluded the possibility that Marc Antoine Calas could have committed suicide,[87] thereby violating the spirit of the law by presuming Jean Calas guilty of murder.

Officials in charge of executing arrest warrants were asked to choose the time and place of the arrest carefully in order to minimize any grievance to the suspect that such arrest would almost inevitably cause.[88] Priests, judges or schoolteachers could not be apprehended while performing their functions[89] and a marriage ceremony could not be disturbed by the arrest of the groom or bride.[90] Courts enforced this principle, as evidenced by the condemnation of a sergeant who arrested with disgrace a priest who had just finished chanting.[91] Upon arrest it was illegal to confiscate the property of suspects so as not to hamper their right to defend themselves, a principle reiterated by the Parlement of Metz in 1697.[92]

Because one "can be charged with a crime and be very innocent,"[93] defendants were allowed to conduct business. As under Roman law,[94] suspects could inherit,[95] make donations[96] and wills,[97] pay their creditors[98] and sell goods[99] or land,[100] provided that they

86. Bruneau, *supra* note 82, at 83. Actions to protect the reputation of individuals facing criminal justice did not cease upon conviction. In the sixteenth century, a court ordered the jurist Jean Papon to remove from his case law report any reference to cases involving plaintiffs whose convictions of embezzlement were later reversed. *See* Brillon, *supra* note 77, at 279 (observing that "the urge to cite cases should not compromise the honor of families, [and] often the honor of persons unjustly accused [and] without proof.").

87. ORIGINAL PIECES RELATIVES TO THE TRIAL AND EXECUTION OF MR. JOHN CALAS, MERCHANT AT TOULOUSE 46 (London, 1762).

88. Bruneau, *supra* note 82, at 105.

89. *Id.*

90. *Id.*

91. 3 Jousse, *supra* note 83, at 196 (citing a decision dated Dec. 31, 1563).

92. *Arrest de la Cour de Parlement, Portant Réglement pour l'exécution des Décrets de Prise de corps* (Metz, 1697) ("[O]ne shall not at the same time seize the Body [and] the Goods of an Accused; that this Jurisprudence which is uniformly applied in the whole Kingdom, is based on the Rules of equity; because accused persons would almost be prevented from defending themselves if at the same time as we seize their Body, we take their Goods; . . . one shall always incline towards leniency in the interpretation of penal laws.") (on file with the Bibliothèque nationale de France).

93. 1 Claude-Joseph de Ferrière, *Dictionnaire de droit et de pratique* 26 (Paris, 1771).

94. See *supra* Part I.B.

95. 2 *Dictionnaire de Jurisprudence et des Arrêts, ou Nouvelle Edition du Dictionnaire de Brillon* 344 (Lyon, 1772) (citing a decision of the Parlement of Paris dated May 28, 1670).

96. *Id.* at 341 (citing a decision of the Parlement of Paris dated July 1, 1632).

97. *Id.* (citing a decision of the Parlement of Paris dated Feb. 5, 1665).

98. *Id.* at 340 (citing a decision of the Parlement of Dijon dated Mar. 11, 1758).

99. *Id.* at 337 (citing a decision of the Parlement of Paris dated July 3, 1567 and a decision of the Parlement of Rennes dated Oct. 24, 1571).

100. *Id.* at 338 (citing a decision of the Parlement of Rouen dated Mar. 4, 1608).

were not accused of high treason and that these transactions were done in good faith.[101] The same principle led the Parlement of Paris in 1552 to remind a priest that a person accused of a crime could not be prevented from taking part in the sacrament of penance and from receiving communion during Easter.[102]

In contrast to Roman law, where public officials retained their rank during an accusation,[103] the Criminal Ordinance of 1670, codifying a practice validated by the courts,[104] provided that a decree of bodily arrest[105] or a decree of personal summons[106] automatically suspended the functions of public officials.[107] A judge would cease being a judge[108] and a priest would be barred from officiating at weddings.[109] This disregard for the presumption of innocence,[110] tempered by the right of suspects to keep collecting the revenues associated with their functions,[111] was justified by practical considerations as the acts performed by public officials accused of a crime would have been constantly challenged, thus likely to result in "daily embarrassments and conflicts."[112] As to individuals seeking public office, an accusation would prevent them from being elected.[113]

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101. *Id.* at 337.

102. *Id.* at 336 (citing a decision of the Parlement of Paris dated Mar. 21, 1552). For an earlier application of this principle, see *supra* note 61.

103. *See supra* note 49.

104. *See, e.g.*, Hyacinthe de Boniface, 1 *Arrests notables de la Cour de Parlement de Provence, Cour des Comptes, Aydes & Finances du mesme Pays* 6 (Paris, 1670) (citing decisions of the Parlement of Provence dated Dec. 1, 1646 and Nov. 27, 1657 prohibiting judges accused of a crime to exercise their functions). The court cited the law *De dignitatibus* (Code Just. 12.1.12 (Gratian, Valentinian & Theodose 380)) to justify its 1657 decision. *Id.* It was a misreading of the law, which expressly referred to judges being convicted, not accused.

105. The decree of bodily arrest, or *décret de prise de corps*, was used for serious offenses and led to preventive detention. *See* Adolphe Wattinne, *L'affaire des trois roués: étude sur la justice criminelle à la fin de l'ancien régime* (1783-1789), at 18 (Mâcon, 1921).

106. The decree of personal summons, or *décret d'ajournement personnel*, only suspended officials of their functions without leading to detention. *Id*. A third decree, the decree to be heard, or *décret pour être oui*, was used for minor offenses. *Id.*

107. Ordon. 1670, tit. 10, art. 11.

108. *See, e.g.*, Laurent Jovet, *La bibliothèque des arrests de tous les parlemens de France* 409 (Paris, 1669) (citing a decision of the Parlement of Dijon dated Feb. 20, 1610).

109. *Consultation sur les effets des Décrets de prise de corps ou d'ajournement personnel décernés contre des Ecclésiastiques* 10 (Paris, 1754).

110. Pierre Louis de Lacretelle, *Discours sur le préjugé des peines infamantes* 212 (Paris, 1784) (denouncing a "manifest violation of this sacred rule [that suspects are innocent in the eye of the law], a presumption against innocence, a punishment before conviction, a ratification of public prejudice.").

111. *Consultation sur les effets des Décrets de prise de corps*, *supra* note 109, at 9.

112. *Procèz verbal des conférences tenues par ordre du Roy, pour l'examen des articles de l'ordonnance civile du mois d'avril, 1667 et de l'ordonnance criminelle, du mois d'août, 1670*, at 115 (Paris, 1709).

113. *See* 5 *Recueil général des anciennes lois françaises depuis l'an 420 jusqu'à la révolution de 1789 par MM. Jourdan, Decrusy, Isambert* 497 (Paris, 1822) [hereinaf-

The right of the accused to avoid detention by posting bail was established in several French provinces as early as the twelfth century.[114] Preventive detention would progressively become the rule, however, as the need to appear tough on crime in a nation plagued by violence became a priority for the royalty.[115] Only for minor offences were suspects allowed to be released on bail.[116]

B. One who Spares the Guilty Punishes the Innocent

The Roman law maxim "it is better that a guilty person escape than one innocent suffer,"[117] regularly proclaimed by French jurists from the thirteenth century[118] to the French revolution,[119] was gradually being overshadowed by another adage, less favorable to the accused: "one who spares the guilty punishes the innocent."[120]

Even though the law mandated judges to interrogate prisoners within twenty-four hours of their capture,[121] long detentions, sometimes for several months or years,[122] were becoming more common. Suspects were often confined with convicted criminals[123] in insalubri-

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ter *Jourdan*] (citing letters from King Charles V dated Jan. 1378 stating that a criminal defendant could not be elected consul in the town of Ouveillan, Languedoc).

114. *See, e.g.*, 1 *Jourdan, supra* note 113, at 155 (citing the customs given by King Louis VII to the inhabitants of Lorris in 1155). Notable exceptions concerned the accusations of murder, larceny, rape, treason, and heresy. *See, e.g., Coutumes de Montgaillard (1259)*, 24 Nouvelle revue historique de droit français et étranger 539, 542 (1900). An ordinance of King Louis IX of December 1254 regulated the right to bail in Languedoc. *See* 1 *Jourdan, supra* note 113, at 265.

115. ADHEMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE WITH SPECIAL REFERENCE TO FRANCE 174 (John Simpson trans., Augustus M. Kelley Publ. 1968) (1913). Persons of modest condition and vagrants accused of a crime would almost inevitably be detained without bail. *See* 3 Jousse, *supra* note 83, at 571.

116. 3 Jousse, *supra* note 83, at 571.

117. *See supra* note 30.

118. *Li Livres de Jostice et de Plet publié pour la première fois d'après le manuscrit unique de la Bibliothèque Nationale par Rapetti* 277 (Paris, 1850) (1260?) (cited in Jean-Marie Carbasse, *Histoire du droit pénal et de la justice criminelle* 168 (2000)).

119. *See, e.g.*, Claude Le Brun de la Rochette, *Le procès criminel, divisé en devx livres: le premier contenant les crimes: le second la forme de procéder aux matières criminelles* 73 (Lyon, 1610) (stating, well before Blackstone, that it is better that ten guilty persons escape than one innocent suffer); 2 Ferrière, *supra* note 93, at 33 (stating that it is better that 100 guilty persons escape than one innocent suffer).

120. Pierre-François Muyart de Vouglans, *Lettre de l'auteur des loix criminelles* 26 (1785) (citing Seneca's maxim "*Qui malis parcit, bonis nocet*.").

121. Ordon. 1670, tit. 14, art. 1. The most important law court in France had previously ordered first-level judges or *prévôts* to interrogate prisoners within twenty-four hours of their capture. *See* Brillon, *supra* note 77, at 869 (citing a decision of the Parlement of Paris dated Oct. 30, 1565). The right of the accused to be heard in criminal matters was recognized in France as early as the sixth century. *See* 7 *Jourdan, supra* note 113, at 60 (citing a constitution of King Clotaire I (497-561): "*Si quis in aliquo crimine fuerit accusatus, non condemnatur penitùs inauditus . . . .*").

122. 2 *Oeuvres de M. Duplessis* 17-18 (Paris, 1728) (observing that the Parlement of Paris regularly admonished judges who failed to abide by the Criminal Ordinance).

123. Charles Eléonor Dufriche de Valazé, *Loix pénales, dédiées à Monsieur, frère du Roi* 301 (Alençon, 1784) (pleading for a dual prison system, one for accused individuals and one for convicted criminals).

ous jails,[124] thereby enduring a punishment that the law itself prohibited.[125] But it was the legalization of torture, a practice established in France as early as the thirteenth century,[126] that violated the presumption of innocence most blatantly. Gradually restricted to death penalty cases in which proof against the accused was overwhelming,[127] torture was considered a necessary tool to extort a confession from individuals whose propensity to lie was presumed.[128] A century before Beccaria,[129] the French jurist Augustin Nicolas denounced, in a book dedicated to King Louis XIV,[130] a practice in which "punishment precedes conviction in an abominable *contretemps*"[131] in violation of the "presumption that is always in favor of innocence."[132] The relative indifference of the population to the plight of accused criminals,[133] combined with the widely shared opinion among jurists that torture was not a punishment[134] and that humanizing criminal procedure would encourage crime,[135] contributed to maintain a practice[136] that in-

124. 3 David Hoüard, *Dictionnaire analytique, historique, étymologique, critique et interpretatif de la Coutume de Normandie* 613 (Rouen, 1781).

125. Ordon. 1670, tit. 13, art. 1 ("Jails shall be safe and arranged in such a way that the health of prisoners is not affected."). King Louis XVI reiterated the prohibition of insalubrious jails by declaring that suspects would not "endure beforehand a rigorous punishment by their detention in gloomy and unwholesome places." *See* Carbasse, *supra* note 118, at 367 (citing the Declaration of Aug. 30, 1780 establishing new prisons).

126. Ordon. 1254, art. 22 (cited in Carbasse, *supra* note 118, at 169).

127. Ordon. 1670, tit. 19, art. 1.

128. Louis Lasseré, *L'art de procéder en Justice, ou La science des règles judiciaires, pour découvrir la Verité, tant en matière Civile, que Criminelle* 198 (Paris, 2d ed. 1680).

129. CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 58 (London, 4th ed. 1775) (1764) ("If guilty, he should only suffer the punishment ordained by the laws, and torture becomes useless, as his confession is unnecessary. If he be not guilty, you torture the innocent; for in the eye of the law, every man is innocent, whose crime has not been proved.") (cited in Badinter, *supra* note 6, at 137).

130. Augustin Nicolas, *Si la Torture est un moyen seur à vérifier les crimes secrets* (Amsterdam, 1682) (cited in ESMEIN, *supra* note 115, at 352).

131. Nicolas, *supra* note 130, at 46. On torture as punishment, see JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT REGIME 66 (1977).

132. Nicolas, *supra* note 130, at 84.

133. ESMEIN, *supra* note 115, at 178.

134. *See Procès-verbal des conférences tenues par ordre du Roi*, *supra* note 112, at 224 ("[T]orture is not ordered as a punishment and the one that suffers it is not rendered infamous . . . .") (cited in ESMEIN, *supra* note 115, at 235).

135. 2 Pierre-François Muyart de Vouglans, *Les loix criminelles de France, dans leur ordre naturel* 319 (Paris, 1781).

136. During the conferences preceding the promulgation of the Criminal Ordinance of 1670, Guillaume de La Moignon, Chief President of the Parlement of Paris, indicated that there were great reasons for torture to be abolished. *See* ESMEIN, *supra* note 115, at 235. His plea remained unanswered. King Louis XVI eventually abolished the use of torture prior to final sentencing or *question préparatoire* on August 24, 1780. *See* Carbasse, *supra* note 118, at 367.

creasingly fell into disuse in France at the end of the seventeenth century.[137]

If any doubt remained as to the culpability of the accused at the end of the investigative procedure, judges often ordered further inquiry[138] without any legal basis,[139] thus prolonging the detention of individuals who should have been declared innocent had the maxim *in dubio pro reo* been observed.[140] Suspects who had not confessed were occasionally released from jail, but judges were cautious not to declare them innocent for fear of being accused of unjust prosecution.[141] Neither perfectly innocent nor entirely guilty, they suffered the stigma reserved to convicted criminals.[142] As to accused individuals who managed not to confess under torture, they could still be punished upon discretion of the judge.[143]

Frequently invoked by French jurists denouncing the abuses of criminal procedure practice in the seventeenth[144] and eighteenth[145]

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137. Antoine Astaing, *Droits et garanties de l'accusé dans le procès criminel d'Ancien Régime XVIè et XVIIIè siècles: Audace et pusillanimité de la doctrine pénale française* 32-33 (1999).

138. *See, e.g., Arrêt de la Cour de Parlement qui ordonne un plus amplement informé pendant trois mois, contre Jean Magré, Claude Maréchal et Marie Louise Thibault pendant lequel temps, lesdits Magré et Maréchal tiendront prison et ladite Thibault mise en liberté* (Paris, 1722).

139. The Criminal Ordinance of 1670 was silent as to the duration of criminal proceedings, thus leaving to the discretion of judges the decision to release or maintain suspects in jail.

140. Mohammed-Jalal Essaid, *La présomption d'innocence* 33 (1971).

141. Jean Boutiller, *Somme rural, ou, Le grand coustumier général de practique civil et canon* 229 (Paris, 1603).

142. *Oeuvres de M. Le Chancelier d'Aguesseau contenant les plaidoyers prononcés au Parlement en qualité d'Avocat Général, depuis le mois d'avril 1696, & dans les années 1697, 1698 & 1699*, at 451 (Paris, 1764) ("If we add the public noise, the judgments of the people, this voice . . . that does not wait for the accusation to discover the culprit, [and] that designates the victim a long time before the sacrifice . . . ."); Dufriche de Valazé, *supra* note 123, at 302 ("Public opinion forms a considerable part of the punishment. It prolongs its duration, [and] renders the reparation of the innocent almost impossible.").

143. Ordon. 1670, tit. 19, art. 2. The Criminal Ordinance of 1670 codified a practice permitted by the courts. *See* Boniface, *supra* note 104, at 7 (citing a decision of the Parlement of Provence dated June 17, 1667).

144. *See, e.g.*, Jovet, *supra* note 108, at 175 ("This prescription has been introduced in favor of innocence, for which we always presume . . . ."); d'Aguesseau, *supra* note 142, at 422 ("Would you leave these innocents groan in fetters and in the horror of a jail during the uncertain course of a long instruction? . . . Until then the law always presumes in favor of innocence . . . .").

145. *See, e.g., Comte de Mirabeau, Des Lettres de cachet et des prisons d'État. Ouvrage posthume, composé en 1778*, at 344 (Hambourg, 1782) ("An accusation does not negate the presumption of innocence, and until condemnation there is no culprit."); Jean-Baptiste Janéty, *Journal du Palais de Provence, ou Recueil des Arrêts rendus depuis les derniers Journalistes, par le Parlement & la Cour des Aides de cette Province. Années 1775, 1776, 1777 & 1778*, at 161 (Aix, 1785) ("Does a public officer not enjoy his condition until a judgment of condemnation? The presumption is always in favor of innocence" declared the lawyer of Me. Jérôme, notary, in a case in which the Parlement of Provence, in a decision dated May 27, 1777, quashed the disciplinary decision of a College of Notaries taken without Me. Jérôme being heard).

centuries, the right of the accused to be presumed innocent received royal blessing when King Louis XVI called it "the first of all principles in criminal matters" in his Declaration of May 1788[146] abolishing the humiliating use of the *sellette*,[147] prohibiting that suspects wear prison garb[148] and imposing the publication of judgments of acquittal[149] to reinstate accused individuals in the public opinion.[150] Several months later, when representatives of the nation received the opportunity to voice their grievances at the States-General in Versailles,[151] they referred to the presumption of innocence to request a better treatment of suspects[152] and their complete absolution in the event of insufficient evidence.[153]

At the National Assembly in Paris on August 22, 1789, a young deputy of the nobility named Adrien-Jean-François Duport,[154] shocked by the "barbarian usage"[155] in France to punish individuals before conviction, proposed that the presumption of innocence be inscribed in the Declaration of Rights, which was unanimously adopted.[156] Viewed not as a rule of proof[157] but as the right of suspects to be treated with humanity, the presumption of innocence was expressed in the Declaration of Rights as follows: "Every man being presumed innocent until he has been found guilty, if it shall be

146. *Déclaration du Roi, relative à l'Ordonnance Criminelle* 5 (Versailles, 1788) ("This formality openly offends the first of all principles in criminal matters that provides that an accused, even if sentenced to death in the first instance, is always presumed innocent in the eye of the Law until his sentence is confirmed on appeal.") (cited in Carbasse, *supra* note 118, at 368). The "formality" in question was the *sellette*.

147. *Id.* at 8. The *sellette* was a low wooden stool in which the accused was seated during interrogation. It was particularly humiliating for the accused, who was forced to stand lower than the judges in an uncomfortable posture.

148. *Id.* at 9 ("It shall be prohibited to strip defendants of the clothes distinctive of their status . . . ."). *Cf.* DIG. 48.20.2 (Callistrate, De Cognitionibus 6) (stating that a detainee will only be stripped of his clothing after conviction).

149. *Déclaration du Roi, relative à l'Ordonnance Criminelle*, *supra* note 146, at 10.

150. *Id.* at 7.

151. Albert Desjardins, *Les cahiers des Etats Généraux en 1789 et la législation criminelle* XXIX (Paris, 1883) (cited in Badinter, *supra* note 6, at 139 n.15).

152. Essaid, *supra* note 140, at 39.

153. Desjardins, *supra* note 151, at 317.

154. Pierrette Poncela, *Adrien Duport, fondateur du droit pénal moderne, in La révolution française et le droit*, 17 Droits 139-40 (1993).

155. 8 *Archives Parlementaires de 1787 à 1860*, at 471 (Paris, 1878). During the debates, Duport stated that he visited the Bastille twice and the cells of the Châtelet prison in Paris, which were "a thousand times more horrible." *Id.*

156. Eugène Blum, *La déclaration des droits de l'homme et du citoyen: texte avec commentaires* 202 (1902). For an earlier codification, see *Constitutionum Regni Siciliarum Libri III* 261 (Naples, Vol. 1, 1773) (1231) ("*Si tamen accusator in crimine prius offerat se probare per testes, & si in eorum probatione deficiat, tunc inquisitionis, & pugnae probatione minime locum habente, reus qui nocens non convincitur, & praesumitur innocens, absolvatur.*").

157. Legal historians have deplored the absence of reference to the presumption of innocence as a rule of proof in the French Declaration of Rights. *See, e.g.*, Carbasse, *supra* note 118, at 374.

deemed absolutely necessary to arrest him, every kind of rigor used, not necessary to secure his person, ought to be severely repressed by the law."[158]

If the Old Regime marked the decline of the presumption of innocence as a rule of proof,[159] one could still find judges reaffirming the right of suspects to be considered innocent before conviction, thus challenging the common assumption that the protection of the accused has no place in an inquisitorial system of justice.

III. From Bracton to the English Prison Act of 1877

In a seminal article published in the *Yale Law Journal* at the end of the nineteenth century,[160] James Bradley Thayer argued that the presumption of innocence constituted nothing more than an instrument of proof casting on the prosecution the burden of proving guilt.[161] This narrow conception of the presumption of innocence, reiterated by Carleton Kemp Allen in the 1930s[162] and endorsed by the Burger Court in 1979,[163] is contradicted by historical evidence. Contrary to widespread belief among legal scholars,[164] the principle

158. Blum, *supra* note 156, at 472. The words "presumed" and "by the law" were not included in the draft initially submitted by Duport. *See* 8 *Archives Parlementaires, supra* note 155. The "*présomption d'innocence*" was added to the Dictionary of the French Academy in 1798. *See Dictionnaire de L'Académie française* 358 (1798).

159. Chassaing, *supra* note 6, at 234. The Roman law principle that the burden of proof lies on the accuser and not on the accused *(actori incumbit probatio)* was well known among French jurists. *See, e.g.*, Carbasse, *supra* note 118, at 167-68. But in a legal system in which the confession of the accused was regarded as the "queen of proof" and the prohibition of defense counsel the rule in capital cases, suspects were compelled to prove their innocence. Failure to do so resulted in condemnation, notwithstanding inconclusive proof of guilt by the prosecution. *See, e.g.*, 1 Laurent Bouchel, *La bibliothèque, ov trésor dv droit François* 10 (Paris, 1671) (observing that the Roman law maxim *actore non probante, reus absolvitur* had no application in criminal matters and that suspects had to clear themselves). The jurist Muyart de Vouglans would make the same observation a century later. *See* Pierre-François Muyart de Vouglans, *Institutes au droit criminel, ou principes généraux sur ces matières* 68 (Paris, 1757).

160. James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 Yale L.J. 185 (1897).

161. *Id.* at 191.

162. Carleton Kemp Allen, Legal Duties and Other Essays in Jurisprudence 293 (1931).

163. Bell v. Wolfish, 441 U.S. 520, 545 (1979) (6-3 decision) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has ever begun."). *See also* Black's Law Dictionary 1225 (8th ed. 2004). *Contra* The Director of Public Prosecutions v. Broderick [2006] I.E.S.C. 34 (Ir.) (citing O'Callaghan v. Attorney General [1966] I.R. 501, 513: "The presumption of innocence is a very real thing and is not simply a procedural rule taking effect only at the trial."); R. v. Pearson, [1992] 3 S.C.R. 665, 683 (Can.) (Lamer, C.J.: "This operation of the presumption of innocence at trial . . . does not, in my opinion, exhaust the operation in the criminal process of the presumption of innocence as a principle of fundamental justice.").

164. *See, e.g.*, Allen, *supra* note 162, at 258 ("I have been unable to discover, however, that the dogma 'A man is presumed to be innocent until he is proved guilty,' in

"innocent until proven guilty" was formulated in England well before the nineteenth century. Cited early on by Bracton[165] and William of Ockham,[166] the canon law maxim *quilibet praesumitur bonus, donec probetur contrarium*[167] officially entered English popular culture in the early seventeenth century when the poet George Herbert recorded it in his *Outlandish Proverbs*.[168] By the end of the eighteenth century, the maxim had become commonplace in England as evidenced by its use in various plays and farces.[169]

Throughout the seventeenth and eighteenth centuries, common lawyers understood the adage in the same manner as the civilians: an individual before conviction is legally innocent, and he or she can-

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the form of a brocard anywhere occurs before the nineteenth century . . . . "); John M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 248 (1991) ("The presumption of innocence was not a rule of the criminal courts in Blackstone's day . . . ."); Pennington, *supra* note 65, at 107.

165. Thayer cited Bracton (1210-1268) as the source of the maxim: "But let us observe it in its earlier history. In Bracton, say in 1260, we find it in the most general form – *de quolibet homine presumitur quod sit bonus homo donec probetur in contrarium.*" Thayer, *supra* note 160, at 190. The attribution of the maxim to the common law would not remain unnoticed. In a letter to Thayer dated April 15, 1897, University of Iowa Law Professor Emlin McClain expressed his satisfaction: "My dear Dr Thayer: Your lecture on 'Presumption of Innocence,' recently received has been read with very great interest. I had always noticed with some surprise the loose method pursued by Justice White in tracing the presumption back to the Civilians . . . ." *See* Papers of James Bradley Thayer (1831-1902) (on file with the Harvard Law School Library, Box 17, Folder 5). The influence of Roman and canon law on Bracton has since been established. *See, e.g.*, Gaines Post, *A Romano-Canonical Maxim, 'Quod Omnes Tangit,' in Bracton*, 4 TRADITIO 197, 215-17 (1946).

166. William of Ockham (1285-1349), *Dialogus* (Paris, 1476) ("*Quia sicut unusquisque presumitur bonus nisi probetur contrarium* . . . .") (on file with the Northwestern University Library).

167. Everyone is presumed to be good until the contrary is proved. On the origins of this maxim, see *supra* note 66. *See also* GERARD MALYNES, CONSUETUDO, VEL LEX MERCATORIA, OR THE ANCIENT LAW-MERCHANT 362-63 (London, 1622) ("grounded upon that maxime of the Ciuile Law, *Omnis homo bonus, donec contrarium probetur* . . . ."); SIR PETER PETT, THE HAPPY FUTURE STATE OF ENGLAND 382 (London, 1688) ("That Presumption of the Civil Laws, both in our own, and all other Kingdoms . . . to wit, that every one is presumed to be good, until the contrary be proved by some outward Action . . . .").

168. GEORGE HERBERT, OUTLANDISH PROVERBS (London, 1640) ("All are presumed good, till they are found in a fault.") (cited in Donald F. Bond, *English Legal Proverbs*, 51 PMLA 921, 922 (1936)). The jurist Thomas Branch recorded the maxim in 1753. *See* PRINCIPIA LEGIS & AEQUITATIS 92 (London, 1753) ("*Quisquis praesumitur bonus* . . . .").

169. *See, e.g.*, THE UNIVERSAL MUSEUM; OR THE ENTERTAINING REPOSITORY, FOR GENTLEMEN AND LADIES. CONTAINING NOT ONLY A NUMBER OF ORIGINAL COMPOSITIONS, IN PROSE AND VERSE, BUT ALSO A GREAT VARIETY OF CURIOUS PIECES, BOTH ENTERTAINING, MORAL, AND POLITICAL 149 (Coventry, 1765) ("Why then, Sir, are we to condemn a ministry by *anticipation?* By our LAW every man is presumed to be innocent, until the contrary appears.") (alteration in original); HAMPTON COURT: A DESCRIPTIVE POEM. IN THREE CANTOS. TO WHICH IS ANNEXED, THE PHYSICAL METAMORPHOSIS; OR, A TREBLE DISCOVERY. A FARCE OF TWO ACTS. BY F. STREETER 69 (Rochester, 1778) ("*Lady F.* Here then, I'll be both ignorant and singular; besides, our laws suppose all persons, charged with a crime, to be innocent, until they are convicted . . . .").

not be treated or portrayed as a criminal. During the same period, the maxim was used in English and Scottish courts as another way of expressing the principle that the burden of proof in civil and criminal actions lies on the plaintiff and not on the defendant.

A. A Shield Against Punishment

One source readily available at the time Thayer published his article suggested that the presumption of innocence was something more than a rule of proof: the Rhode Island Constitution of 1842, which contains a provision prohibiting, on the basis of the presumption of innocence, any unnecessary act of severity against the accused.[170]

Using language borrowed from the French Declaration of Rights of 1789,[171] the Rhode Island Constitution, incorporating a provision already in the Rhode Island Bill of Rights of 1798,[172] expresses a principle recognized early in the common law.

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170. R.I. CONST. art. I, § 14 ("Every man being presumed innocent, until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person, shall be permitted.") (cited in Jeff Thaler, *Punishing the Innocent, the Need for Due Process and the Presumption of Innocence Prior to Trial,*1978 WIS. L. REV. 441, 460 (citing Hermine Herta Meyer, *Constitutionality of Pretrial Detention*, 60 GEO. L.J. 1381, 1439 (1972)). In 2000, Oregon became the second state recognizing the presumption of innocence as a shield against punishment. *See* OR. CONST. art. XV, § 10(2) (stating that the property of a person should not be forfeited by the government prior to conviction because a "basic tenet of a democratic society is that a person is presumed innocent and should not be punished until proven guilty."). Although not mentioned in the U.S. Constitution, the U.S. Supreme Court ruled that the presumption of innocence was "constitutionally rooted." Cool v. United States, 409 U.S. 100, 104 (1972).

171. The influence of the French Declaration of Rights on the Rhode Island Constitution of 1842 has been curiously overlooked. One author noticed the similarities between the two texts without elaborating further. *See* Meyer, *supra* note 170. In his famous work on the French Declaration of Rights, Georg Jellinek, arguing that the French Declaration was a pale copy of the American declarations, managed to miss the connection. *See* GEORG JELLINEK, THE DECLARATION OF THE RIGHTS OF MAN AND OF CITIZENS 35 (Max Farrand trans., Henry Holt and Co. 1901).

172. THE PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS, AS REVISED BY A COMMITTEE, AND FINALLY ENACTED BY THE HONOURABLE GENERAL ASSEMBLY, AT THEIR SESSION IN JANUARY, 1798, at 79-81 (Providence, 1798) ("*An Act declaratory of certain Rights of the People of this State* . . . . Sec. 10. Every man being presumed to be innocent, until he has been pronounced guilty by the law, all acts of severity that are not necessary to secure an accused person ought to be repressed."). Section 10 of the Rhode Island Bill of Rights of 1798 reproduces almost word for word the provision contained in Article 9 of the French Declaration of Rights of 1789. The similarities between the two texts can hardly be a coincidence. We can assume that the drafters of the Rhode Island Bill of Rights were familiar with the text of the French Declaration, which was published in English and American newspapers shortly after its adoption. *See, e.g., Copy of the Declaration of Rights as Finally Decreed by the National Assembly of France on Thursday, August 27*, TIMES (London), Sept. 3, 1789, at 2; *Copy of the Declaration of Rights*, THE PENNSYLVANIA GAZETTE, Oct. 28, 1789; *National Assembly of France. Declaration of the Rights of Man and of Citizens*, THE PROVIDENCE GAZETTE AND COUNTRY JOURNAL, June 11, 1791, at 1.

"*Lex Angliae est lex misericordiae*"[173] proclaimed Sir Edward Coke in his *Institutes of the Laws of England*.[174] As early as the thirteenth century, English courts ruled that individuals accused of a felony could not be treated as felons[175] because "felony is never fastened on any person before he is by judgment convicted as guilty of the deed."[176] It followed that suspects would not forfeit their goods or have their lands seized before conviction,[177] a Roman law principle[178] that became part of the statutes of the realm in the fifteenth century.[179] Bracton would emphasize that prisons are only for safe custody and not for punishment,[180] another Roman law principle[181] later reiterated by Blackstone, who stressed that prisoners "ought to be used with the utmost humanity" before trial.[182] The right of suspects to be released on bail, a "necessary consequence of the criminal being presumed innocent,"[183] was regulated by statute as early as 1275.[184] As to members of Parliament indicted of felony, they could remain in function until convicted,[185] for *non qui accusatur sed qui*

173. The Law of England is a Law of mercy. *See also* 4 Jac. I, c. 1, § 16 (1606) (Eng.) ("[I]t is most juste and necessarie to pvide as well that the guiltie shalt not escape, as that the innocent shall not be condemned . . . .").

174. SIR EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 315 (London, 1669).

175. 1 THE EARLIEST ENGLISH LAW REPORTS 128 (Paul A. Brand ed., Selden Society 1996) (citing a decision of the Court of Common Pleas of 1283).

176. 2 YEAR BOOKS OF THE REIGN OF KING EDWARD THE FIRST: YEARS XXI AND XXII 56-57 (Alfred J. Horwood ed., Longman & Co. 1873) (citing a decision of the Court of Common Pleas of 1293).

177. ABRAHAM FRAUNCE, THE LAWIERS LOGIKE, EXEMPLIFYING THE *PRAECEPTS* OF LOGIKE BY THE PRACTICE OF THE COMMON LAWE 151 (London, 1588).

178. *See supra* note 56. *See also* 2 FLETA 66 (London, Bernard Quaritch 1955) (1290?). *Fleta* was written in the thirteenth century by an anonymous author. *See Fleta*, 73 ENG. HIST. REV. 672 (1958).

179. 1 Rich. III, c. 3 (1483) (Eng.).

180. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 299 (Cambridge, Harvard University Press 1968) (1260?). *See also* THE MIRROR OF JUSTICES EDITED FOR THE SELDEN SOCIETY BY WILLIAM JOSEPH WHITTAKER 52 (London, Bernard Quaritch 1895) (1290?) ("And because it is forbidden that anyone be tormented before judgment the law wills that no one be placed among vermine or putrefaction, or in any horrible or dangerous place, or in the water, or in the dark, or any other torment . . . .").

181. *See supra* note 55.

182. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 300 (London, 11th ed. 1791) (1765-69). *See also* COKE, *supra* note 174.

183. DAINES BARRINGTON, OBSERVATIONS ON THE STATUTES CHIEFLY THE MORE ANCIENT, FROM MAGNA CHARTA TO THE TWENTY-FIRST OF JAMES THE FIRST 263 (London, 1766).

184. 3 Edw. I, c. 15 (1275) (Eng.).

185. THE JOURNALS OF ALL THE PARLIAMENTS DURING THE REIGN OF QUEEN ELISABETH, BOTH OF THE HOUSE OF LORDS AND HOUSE OF COMMONS 277, 283 (London, 1682) ("Anno Domini 1580 . . . Whereupon after the matter had been a while agitated and disputed of in the House, it was adjudged, that he ought to remain of the House till he were Convicted: for it may be any man's case who is guiltless to be accused, and thereupon indicted of Felony or a like Crime.").

convincitur reus est[186] declared a member of the House of Commons in 1621.[187]

Frequently mentioned in religious and political pamphlets in the seventeenth[188] and eighteenth[189] centuries, the maxim "innocent until proven guilty" served as a caution against hasty judgments whenever the good name, reputation, and honor of individuals were at stake. In the House of Commons in 1624, Sir Edwyn Sandys, concerned that the charge of corruption brought against Lord Treasurer Cranfield would cause him prejudice,[190] reminded everyone of an "ancient Rule, every Man is presumed to be innocent, till he be proved otherwise"[191] and called for a prompt examination of the matter.[192] Disparaging comments, such as calling individuals "malefactors"[193] or "prostituted criminals"[194] before conviction, or "acquitted felons"[195] after exoneration, or arrest warrants written in

186. On the origins of this maxim, see *supra* note 60.

187. COMMON DEBATES, 1621, at 133 (London, Oxford University Press 1935) ("MR. DENNY: *Non qui accusatur sed qui convincitur reus est.* He is non condemned. Lett him comm in, and we may sequester him after he deserve it."). The commitment of English law to rather spare the guilty than condemn the innocent would be tarnished by the use of torture. An instrument of state and not of law, torture was mostly used against prisoners accused of high treason until the seventeenth century. *See* DAVID JARDINE, A READING ON THE USE OF TORTURE IN THE CRIMINAL LAW OF ENGLAND PREVIOUSLY TO THE COMMONWEALTH 57 (London, Baldwin & Chadock 1837).

188. *See, e.g.*, WILLIAM BARLOW, AN ANSWER TO A CATHOLIKE ENGLISH-MAN 349 (London, 1609) ("The Law presumes every man to be good till hee bee apparantly naught . . . .").

189. *See, e.g.*, JOHN ALMON, A LETTER TO THE RIGHT HON. GEORGE GRENVILLE 15 (London, 1763) ("Have not your advocates, before any kind of proof is made . . . endeavoured to bias, and set the public against Mr. Wilkes? Is this fair, in a country, where, by the laws, every man is supposed to be innocent till convicted? Have they not prejudged him? condemned him?").

190. HOUSE OF COMMONS JOURNAL VOLUME 1 1547-1629 (1802) ("This will fly over all the Town, and receive divers Constructions . . . .").

191. *Id.*

192. *Id.*

193. THOMAS ELLWOOD, AN ANSWER TO GEORGE KEITH'S NARRATIVE 13 (London, 1696) ("He compares us to *Malefactors* . . . The Law calls no Man *Guilty*, until upon due *Trial*, he be proved and found *Guilty.* Till then the Law supposes him *Innocent.*") (alteration in original).

194. 2 TRIAL OF WARREN HASTINGS, ESQ. 481 (London, 1794) ("Mr. Burke . . . talked wildly of prostituted Criminals . . . . The Marquis Townshend spoke to order. He said . . . that to apply such an epithet to a gentleman under trial was contrary to the principle and the practice of the Law of England, which presumed every man to be innocent until he was legally pronounced to be guilty.").

195. WILLIAM WOODFALL, AN IMPARTIAL REPORT OF THE DEBATES IN THE TWO HOUSES OF PARLIAMENT IN THE YEAR 1795, at 326 (London, 1795) ("He thought it a principle of law so well and so generally understood—'That every man is to be deemed innocent until he is proved to be guilty,' that no English gentleman would deny it. If this was the fact, what was to be said of the case of men whom the law had acquitted? And yet the House had heard a Hon. Member make use of the phrase 'an acquitted felon.' What must his feelings be when he heard such a sentence in an English House of Commons?").

a way suggesting conclusive guilt,[196] were viewed as an infringement of the right to be presumed innocent.

The common portrayal of suspects as dangerous criminals in public papers caught the attention of the English magistrate and novelist Henry Fielding.[197] Reacting to an announcement published in *The General Advertiser* on February 5, 1752,[198] which implied that Mary Blandy, accused of parricide, had "barbarously and inhumanly"[199] poisoned her father, Fielding denounced a blatant violation of the presumption of innocence:

> That by the Law of England all Persons were presumed innocent, till found guilty by their Country; but that here a Woman was adjudged guilty of the most enormous of all Crimes before Conviction. That she was here stigmatized, and hung up as an Example of the blackest Iniquity to others, at a Time when her Trial is near approaching. This, the Court said, was to hang first and try afterwards . . . .[200]

Other prejudicial newspaper coverage drew similar criticism. Examples include the trial at the Old Bailey in 1767 of Elisabeth Brownrigg for the murder of her fourteen-year-old domestic servant,[201] the trial at the Old Bailey in 1790 of Renwick Williams, commonly known as "The Monster,"[202] for assaulting a young woman and cutting her clothes,[203] and the trial in the Court of Oyer and Terminer in New York City in 1800 of Levi Weeks for the murder of Gulielma Sands.[204]

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196. Money v. Leach, (1765) 97 Eng. Rep. 1075, 1083 (K.B.). *Cf.* Papon, *supra* note 80 (citing a decision of the Parlement of Paris dated May 26, 1536 holding that it was illegal to describe suspects as criminals in arrest warrants).

197. HENRY FIELDING, THE COVENT-GARDEN JOURNAL AND A PLAN OF THE UNIVERSAL REGISTER-OFFICE 84 (Bertrand A. Goldgar ed., Clarendon Press 1988) (1752).

198. *Id.*

199. *Id.* at 84.

200. *Id.* at 85. Fielding used a fictional court, the "Court of Censorial Enquiry," to make his point.

201. THE ORDINARY OF NEWGATE'S ACCOUNT OF THE BEHAVIOUR, CONFESSION AND DYING WORDS, OF ELISABETH BROWNRIGG 6 (London, 1767) ("He therefore who willfully does any act to create public prejudice, robs the party accused of the presumption of innocence . . . .").

202. JAN BONDESON, THE LONDON MONSTER: A SANGUINARY TALE (2001).

203. 1 THE LAWYER'S AND MAGISTRATE'S MAGAZINE. IN WHICH IS INCLUDED AN ACCOUNT OF EVERY IMPORTANT PROCEEDING IN THE COURTS AT WESTMINSTER 405-06 (Dublin, 1792) ("*Prisoner's Defense* . . . . [W]hile I revere the law of my country, which presumes every man to be innocent till proved guilty, yet I must reprobate the cruelty with which the Public Prints have abounded, in the most scandalous paragraphs, containing malicious exaggerations of the charges preferred so much to my prejudice, that I already lie under premature conviction, by an almost universal voice.").

204. A BRIEF NARRATIVE OF THE TRIAL FOR THE BLOODY AND MYSTERIOUS MURDER OF THE UNFORTUNATE YOUNG WOMAN, IN THE FAMOUS MANHATTAN WELL. TAKEN IN SHORT BY A GENTLEMAN OF THE BAR 4 (n.p., n.d.) ("A thousand rumors of vague and incongruous nature were circulated by the tongue of public report . . . . forgetful of

In their instructions to the jury, judges referred to the traditional function of the presumption of innocence as a shield against punishment.[205] Unnecessary confinements prior to trial were criticized by judges and sanctioned by juries[206] and the co-mingling of convicted felons with "those who are to be presumed Innocent"[207] was condemned in 1779 by a House of Commons Committee overseeing prison conditions.[208]

The scandal caused by a decision of the Court of King's Bench[209] refusing to allow suspects committed to prison before trial from receiving any food other than bread and water because they refused to work,[210] prompted the legislature to intervene. Following the same reasoning that led to the abolition of the practice of forcing pretrial detainees to wear prison garb,[211] the Gaols Act of 1824 ordered that pretrial detainees be allowed sufficient food without being obliged to

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that golden maxim, that we should deem every man innocent, until, to an impartial jury of his fellow citizens, his guilt is made manifest.").

205. *See, e.g.*, JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 111-12 (Boston, 1865) (Charge to the Grand Jury, 1765: "I would have you, Gentlemen, to inquire into the State of our Goal, for it has been represented and I believe it but too true, that it is a most shocking, loathsome Place. Our Goal is not intended as a Punishment, it is only to keep Offenders for Trial, or after Trial till Sentence is fulfilled. Every Man in the Eye of the Law is presumed innocent till proved guilty.").

206. THOMAS BATTYE, THE RED BASIL BOOK 53-54 (1797) ("This cruel practice of confinement in the New Bailey was justly reprehended by Judge Heath, at the Spring Assizes at Lancaster, 1795, in the case of a special constable who had confined a person in the New Bailey prison, and the jury, much to their credit, gave ample damages . . . . he observed, that the laws of the country presumed *every man innocent until pronounced guilty by a jury* . . . .") (alteration in original).

207. JOHN M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660-1800, at 341 (1986).

208. *Id.* The separation of convicted and unconvicted prisoners, initiated by the Gaols Act of 1823, was formally mandated by the Prison Act of 1865. *See* Prison Act, 1865, 28 & 29 Vict., c. 126, sched. 1 (Eng.) ("Prisoners before trial shall be kept apart from convicted prisoners.") (cited in *Unconvicted Prisoners*, 41 JUST. OF THE PEACE 641, 642 (1877)).

209. The King v. The Justices of the N. Riding of Yorkshire, (1823) 47 Eng. Rep. 390, 393 (K.B.).

210. 10 PARL. DEB., H.L. (2nd ser.) (1824) 138 ("[I]t was loudly called for, to put a stop to a proceeding unwarranted by the spirit of the law of the land, as it inflicted punishment before a jury had decided that any guilt existed."). *See also State of Crime in England and France, in* 1 THE JURIST, OR Q. J. OF JURIS. AND LEGIS. 469 (1827) ("[A]lthough the written language of our law breathes nothing but humanity, and expressly declares that every man shall be presumed innocent, until he is proved guilty, the practice of the law is too often directly the reverse . . . . Thus we find a decision of the Supreme Court of Criminal Justice, subjecting untried prisoners—presumed innocent—to the gratifying alternative of hard labour, in the midst of convicted felons, or the pampering fare of bread and water.").

211. Gaols Act, 1823, 4 Geo. 4, c. 64, § 10 (Eng.) ("[B]ut no prisoner before trial shall be compelled to wear a prison dress, unless his or her own clothes be deemed insufficient or improper, or necessary to be preserved for the purposes of justice; and no prisoner who has not been convicted of felony shall be liable to be clothed in a party-coloured dress; but if it deemed expedient to have a prison dress for prisoners not convicted of felony, the same shall be plain.") (cited in *Cruel Treatment of Untried*

work.[212] Improper treatment of suspects before trial continued, however. Common citizens wrote letters to newspaper editors complaining about the poor treatment of pretrial detainees.[213] Lawyers denounced as unduly oppressive unwholesome jails in which the health of their clients deteriorated rapidly.[214] By the Prison Act of 1877, the first English statute expressly referring to the presumption of innocence as a shield against punishment,[215] it was an established rule that unconvicted prisoners should be treated in accordance with their status.[216]

B. A Rule of Proof

The principle that the burden of proof lies on the accuser and not on the accused, eloquently stated by Lord Sankey in the *Woolmington* case,[217] had long been established in the common law. The earliest recorded formulation of the presumption of innocence as a rule of proof by an English (colonial) court is in a decision issued by the Gen-

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Prisoners, *in* THE WORKS OF THE REV. SYDNEY SMITH 201 (New York, D. Appleton and Company 1860).

212. Gaols Act, 1824, 5. Geo. 4, c. 85, § 17 (Eng.) (cited in *State of Crime in England and France*, *supra* note 210).

213. *See, e.g.*, Letter to the Editor, TIMES (London), Dec. 19, 1843, at 3 ("Sir . . . it is a maxim of our law that every one is presumed innocent until he is proved to be guilty. In practice, however, this principle appears to be reversed, and the accused, it seems, is presumed to be guilty until he proves his innocence. For how is he treated? I do not now allude to the custom of styling him 'murderer,' 'robber,' 'miscreant,' and so on, in many of the public journals, but I wish to speak of the mode of safe-keeping practiced by the authorities that be . . . . Is not the accused treated as one already convicted?").

214. *See, e.g., Police*, TIMES (London), Feb. 12, 1861, at 10 ("Mr. Metcalfe complained that his client . . . had been treated in the gaol at Newgate as if he were a convict . . . and that, at all events, a prisoner, whom the law presumed to be innocent until he was proved guilty, ought not to be treated as if he were a convict.").

215. Prison Act, 1877, 40 & 41 Vict., c. 21, § 39 (Eng.) ("*Special Rules as to Treatment of Unconvicted Prisoners and certain Other Prisoners.* 39. Whereas it is expedient that a clear difference shall be made between the treatment of persons unconvicted of crime and in law presumably innocent during the period of their detention in prison for safe custody only, and the treatment of prisoners who have been convicted of crime during the period of their detention in prison for the purpose of punishment . . . .") (cited in *Unconvicted Prisoners*, *supra* note 208). *See also* Prisons (Scotland) Act, 1877, 40 & 41 Vict. c., 53, § 45.

216. On the erosion of the rights of pretrial detainees in modern England, see Stephen Jones, *The Status of Unconvicted Prisoners*, 7 LEGAL ETHICS 144 (2004) (observing that "once incarcerated, the suspect is not only increasingly treated as a convicted offender, but in many respects suffers even worse conditions.").

217. Woolmington v. The Director of Public Prosecutions, [1935] A.C. 462, 481 ("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 . . . ."). *Woolmington* clarified that the presumption of innocence in homicide cases applies equally to both the actus reus and the mens rea. The prosecution must prove both the act of killing and the malice of the accused and no burden is thrown on the accused to prove that the act was accidental once the killing is established. *Id.*

eral Court of the Massachusetts Bay Colony in 1657.[218] Stating that "in the eye of the law every man is honest and innocent, unless it be proved legally to the contrary,"[219] the court held that in both civil and criminal cases it fell on "the court and jury to see that the affirmation be proved by sufficient evidence, else the case must be found for the defendant."[220] By the mid-eighteenth century the principle was expressed in general treatises and encyclopedias on English laws and customs.[221]

In one instance, an English ecclesiastical court relied solely on the adage to determine the outcome of a civil action, by stating that until the allegation was proved, a wife accused of bigamy was presumed innocent and, therefore, entitled to alimony to cover her legal expenses.[222] But it was in the context of criminal trials that the maxim flourished. Used mainly as a rhetorical tool by criminal defendants[223] and their lawyers,[224] the maxim served as a reminder to

218. Thayer, *supra* note 160, at 189. The second instance in which the maxim was used was in *Regina v. Best*, a case adjudged in the Court of Queen's Bench in 1705. On the question of whether an indictment for conspiracy to falsely charge someone with being the father of a bastard child, a spiritual offense, needed to assert that the person charged was not the father, Chief Justice John Holt answered that it was not necessary as "every man is presumed innocent until the contrary appears . . . ." (1705) 87 Eng. Rep. 941, 942 (Q.B.).

219. Thayer, *supra* note 160, at 189.

220. *Id.*

221. *See, e.g.*, LIBERTY AND PROPERTY: OR, A NEW YEAR'S GIFT FOR MR. POPE BEING A CONCISE TREATISE OF ALL THE LAWS, STATUTES AND ORDINANCES, MADE FOR THE BENEFIT AND PROTECTION OF THE SUBJECTS OF *England* 84 (London, 1736) ("A Man . . . shall be suppos'd innocent till found otherwise by his Peers, (on lawful Testimony) who pass Judgment on his Trial."); AN ACCOUNT OF THE CONSTITUTION AND PRESENT STATE OF GREAT BRITAIN 104 (London, 1759) ("In some cases, the man (who is always supposed innocent till there is sufficient proof of his guilt) is allowed a copy of his indictment, in order to help him to make his defence.").

222. Bird v. Bird, (1753) 161 Eng. Rep. 78, 79.

223. *See, e.g.*, THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1780, at 273 (London, 1781) (Proceedings at the Old Bailey: "Mr. Mascal began his defence by observing, that the humanity of the English law considered every man innocent, until he was convicted . . . ."). The earliest recorded use of the maxim by a criminal defendant appears to be during the trial at the King's Bench of Sir Henry Vane for high treason. *See* THE TRYAL OF SIR HENRY VANE, KT. AT THE KING'S BENCH, *Westminster* 68 (1662) ("For the Law always presumeth actions to be innocent, till the contrary be manifestly proved.").

224. *See, e.g.*, THE UNIVERSAL MUSEUM, OR GENTLEMAN'S & LADIES POLITE MAGAZINE OF HISTORY, POLITICKS AND LITERATURE FOR 1763, at 477 (London, 1763) (Proceedings at the Quarter Sessions in Manchester: "They then hastened to the defence [of John Unsworth], and several points of law were learnedly argued . . . that the law supposed a person innocent till proved guilty . . . ."); ADULTERY. TRIAL, IN THE COURT OF KING'S BENCH, BEFORE LORD KENYON, AND A SPECIAL JURY BETWEEN EDWARD DODWELL, ESQ. PLAINTIFF, AND THE REV. HENRY BATE DUDLEY, DEFENDANT 13 (London, 2d ed. 1789) ("DEFENCE. Mr. *Mingay*, being leading counsel for the Defendant Mr. Bate Dudley, entered upon the defence . . . . for it was leaning to the side of a favourite presumption, namely, innocence, unless guilt be proved.—No indifferent individual should ever presume guilt—jurymen would be scandalous if they did."). In one occasion the maxim was used by the prosecution at the Old Bailey to rebut the defense counsel's claim that a bank officer was not a competent witness to prove the

the jury that suspects could only be convicted upon sufficient evidence.

Beattie's assertion that defense counsel played an important role in shaping the maxim "as a working rule animating the trial"[225] is corroborated by a comparison of English and Scottish criminal records. Unlike England, where the right to counsel in criminal matters was long restricted,[226] Scotland, a mixed legal system based on civil law and common law principles,[227] allowed all criminal defendants to be represented by counsel by the Act of 1587.[228] It is, therefore, not surprising to find Scottish advocates using the maxim in defense of persons accused of felony as early as 1705[229] whereas a similar usage in English courts appeared in the late eighteenth century,[230] a period during which individuals accused of felony in England were increasingly permitted counsel.[231] Sir George Mackenzie, an eminent seventeenth-century Scottish lawyer and legal writer, included the right to be presumed innocent as part of the laws and customs of Scotland.[232] By the end of the eighteenth century, Scottish students were taught that the presumption of innocence was one of the "maxims of natural law relating to prosecutions."[233]

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forging of a bank note bearing his signature on the ground that he had a personal interest in swearing that it was a forgery to avoid prosecution for fraud. *See* Rex v. Newland, 168 E.R. 258, 259 (1784).

225. Beattie, *supra* note 164, at 249.

226. *Id.* at 221 ("Until the eighteenth century lawyers played little part in the trial of felonies in England . . . ."). *See also* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 287 (1978).

227. Christopher Gane, *Civilian and English Influences on Scots Criminal Law*, *in* A MIXED LEGAL SYSTEM IN TRANSITION: T. B. SMITH AND THE PROGRESS OF SCOTS LAW 218 (2005).

228. *See* Michael Wasser, *Defence Counsel in Early Modern Scotland: A Study Based on the High Court of Justiciary*, 26 J. Legal Hist. 183, 186 (2005). Another interesting feature of this statute was the provision prohibiting that the accused be prejudged before conviction. *See* 2 JAMES WATSON, A PRACTICAL VIEW OF THE STATUTE LAW OF SCOTLAND 34 (Edinburgh, Printed for Bell & Bradfute 1828) ("that the sute of the accuser be not tane *pro confesso*, and the partie accused, prejudged in ony sorte, before he be convicted be lauchfull tryall . . . .").

229. THE TRYAL OF CAPT. THOMAS GREEN AND HIS CREW, BEFORE THE JUDGE OF THE HIGH COURT OF ADMIRALTY OF SCOTLAND 25, 26 (Edinburgh, 1705) ("For in all criminal Prosecutions, the Accused are not to prove their Defences . . . . [I]f they be guilty, it ought to be found so, for till that be, they are presumed Innocent . . . .").

230. *See supra* note 226. *See also* Old Bailey Proceedings, Michael Druitt, Dec. 14, 1785, *available at* http://www.oldbaileyonline.org ("In the present case, you are not to convict a man because he cannot prove his innocence, but you must first give reasonable evidence of his guilt . . . .").

231. Beattie, *supra* note 164. *See also* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048 (1994).

232. SIR GEORGE MACKENZIE, THE LAWS AND CUSTOMES OF SCOTLAND IN MATTERS CRIMINAL. WHEREIN IS TO BE SEEN HOW THE CIVIL LAW, AND THE LAWS AND CUSTOMS OF OTHER NATIONS DO AGREE WITH, AND SUPPLY OURS 476 (Edinburgh, 1678).

233. ADAM FERGUSON, INSTITUTES OF MORAL PHILOSOPHY. FOR THE USE OF STUDENTS IN THE COLLEGE OF EDINBURGH 264 (Edinburgh, 2d ed. 1773).

It is true, though, that in some instances, the English legislature required suspects to prove their innocence,[234] particularly in cases where establishing the commission of a crime was difficult for the prosecution.[235] Individuals caught in possession of allegedly stolen goods who failed to explain how they acquired them could be convicted summarily of a misdemeanor. Such were exceptions, however, to the general rule.[236]

Termed a "great principle of social security"[237] by Alexander Hamilton, the maxim has been used, as a principle governing the burden of proof, in American courts by defense lawyers and judges instructing juries in the years following the American Revolution[238] to the present day.[239]

IV. Decline and Renewal

Two centuries were necessary for France to give full meaning to the fundamental principle of justice announced in Article 9 of the French Declaration of Rights. From the Law of Suspects[240] to the *Dreyfus* case[241] to the press regularly portraying defendants as criminals, the ambivalence that France displayed towards the presumption of innocence was regularly denounced by foreign observers.[242] The recent reforms that France implemented to strengthen the presumption of innocence, including elevating the doctrine to a personality right,[243] are in marked contrast with the

234. *See* Bruce P. Smith, *The Presumption of Guilt and the English Law of Theft, 1750-1850*, 23 Law & Hist. Rev. 133 (2005).

235. *Id.* at 154.

236. *Id.* at 155. On the earlier history, see Richard W. Ireland, *The Presumption of Guilt in the History of English Criminal Procedure*, 7 J. Legal Hist. 243, 250 (1986) ("Notable also is the evidence of the Statute of Wales 1284 c. 14 which states 'In theft if one is taken with the mainour he shall not be admitted to purgation but shall be holden for convict.'"). *See also* 2 Bracton, *supra* note 180, at 404. *Cf.* Clément Charles François de Laverdy, *Code pénal, ou recueil des principales ordonnances, édits et déclarations, sur les crimes et délits* 170 (Paris, 1755) (citing a Declaration of King Louis XIV of Mar. 23, 1688 stating that anyone caught in the countryside carrying salt will be punished as salt-smuggler, notwithstanding any declarations that the salt was purchased for personal use).

237. Selected Writings and Speeches of Alexander Hamilton 77 (Morton J. Frisch ed., 1985).

238. *See, e.g.*, State v. Lewis, 1 S.C.L. 1 (1783); Pendleton v. Lomax, Wythe 4 (Va. High. Ch. 1790); State v. Wilson, 1 N.J.L. 439 (1793); State v. Hopkins, 1 S.C.L. 372 (1794).

239. *See, e.g.*, Steichen v. Weber, 760 N.W.2d 381, 392 (S.D. 2009).

240. *See* Bernard, *infra* note 249.

241. *See infra* note 252.

242. *See, e.g., Unconvicted Prisoners Under the French Republic*, The Scotsman, Apr. 4, 1892, at 8; *French Justice*, Times (London), Feb. 5, 1955, at 7; *Innocence Denied*, The Economist, May 15, 1999, at 56.

243. Personality rights are rights inherent to the person, such as the rights to privacy, dignity, reputation, image and integrity. *See, e.g.*, European and US Constitutionalism 41 (Georg Nolte ed., 2005).

narrow view of the presumption of innocence as a rule of proof in modern Anglo-American jurisprudence.

A. The French Ambivalence

The ideals embodied in the French Declaration of Rights would be short-lived in the aftermath of the Revolution. Attending the trial of King Louis XVI in Paris in 1792, the Englishman James Fennell observed that by "all natural and civil laws, those of France excepted, a man is presumed innocent till he be proved guilty."[244] Portrayed as a tyrant in revolutionary pamphlets,[245] Louis was convicted before being judged. According to Robespierre, giving Louis the benefit of the presumption of innocence would have undermined the legitimacy of the Revolution itself: "But if Louis can be presumed innocent, what becomes of the Revolution?"[246]

The years immediately following the French Revolution abolished the distinction between "accused" and "convict." A High National Court was instituted in Orleans to try all persons suspected of being a counter-revolutionary.[247] The manner in which the court treated the accused was severely criticized across the Atlantic:

> The high national court is now met to judge Mr. Varnier . . . . The Constituent Assembly, aping the English, decreed, that every man was presumed innocent, until his guilt was pronounced; still M. Varnier has been, and continues to be, severely punished, though his judges have not, as yet, taken cognizance of his case . . . . Such is the obedience paid to the Laws on this side of the water.[248]

The Law of Suspects of September 17, 1793 authorized the detention of anyone who by their conduct, associations, comments or writings acted as enemies of liberty[249] or who were unable to justify their means of existence or the performance of their civic duties.[250] For those against whom there was no ground for indictment or who

244. JAMES FENNELL, A REVIEW OF THE PROCEEDINGS AT PARIS DURING THE LAST SUMMER 398 (London, 1792).

245. *See, e.g., Journal de la République Française, par Marat, l'Ami du Peuple, Deputé à la Convention Nationale. Du vendredi 28 Décembre 1792.*

246. DAVID P. JORDAN, THE KING'S TRIAL: THE FRENCH REVOLUTION VS. LOUIS XVI, at 74 (2004).

247. THE REVOLUTIONARY PLUTARCH: EXHIBITING THE MOST DISTINGUISHED CHARACTERS, LITERARY, MILITARY, AND POLITICAL, IN THE RECENT ANNALS OF THE FRENCH REPUBLIC. THE GREATER PART FROM THE ORIGINAL INFORMATION OF A GENTLEMAN RESIDENT IN PARIS 176 (London, John Murray 1806).

248. *Paris, December 5*, DUNLAP'S AMERICAN DAILY ADVERTISER, Mar. 16, 1792.

249. Guillaume Bernard, *Les critères de la présomption d'innocence au XVIIIe siècle: de l'objectivité des preuves à la subjectivité du juge*, in *La présomption d'innocence: Essais de philosophie pénale et de criminologie* 55 (2004).

250. *Id.*

had been acquitted of the charges brought against them, the law allowed their indefinite detention as "suspected persons."[251]

The *Dreyfus* case, in which Alfred Dreyfus, a Jewish captain in the French army, was falsely accused of high treason, crystallized in the common law world the widely shared belief that suspects in France were presumed guilty. The reporter covering the trial for *The Times* reminded his readers how fortunate they were to live in England.[252]

H. Cleveland Coxe, the assistant deputy consul general in the American Consulate in Paris, observed that the presumption of innocence was admitted in theory in the French Declaration of Rights, but that in practice innocence was not presumed.[253] Not all foreign observers lamented the condition of the accused, however, with some openly praising France's tough stance on crime.[254]

Essays commemorating the centenary of the French Revolution deplored the lack of improvement in the condition of the accused.[255] Many features of post-revolutionary French criminal procedure echoed those of the Old Regime: confessions under pressure, prolonged detention of suspects before trial, absence of defense counsel—the drive for a conviction took precedence over the protection of the accused.[256] If the rule that the burden of proof falls on the prosecution was admitted in theory,[257] the pressure exerted on the accused to cooperate in the pursuit of the truth negated it.[258]

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251. *Id*. In a case where an individual was accused of stealing a tobacco box, the tribunal found no evidence of theft, but nevertheless ordered the detention of the accused. *See Gazette des Tribunaux et Mémorial des Corps Administratifs et Municipaux* 343 (Paris, Vol. 11, 1795) (citing a decision of Dec. 1794).

252. *The Dreyfus Case. New Trial Ordered*, TIMES (London), June 5, 1899, at 7 ("I am writing in the paper of a country—and this may be noted with pride—in which the word 'accused' is not synonymous with 'condemned,' but where, on the contrary, every accused man is presumed innocent."). *See also The Territorial Expansion of the Common Law Ideal*, 4 MICH. L. REV. 1, 8 (1905) ("It is in France that a Dreyfus is compelled to prove his innocence of the accusation made. It is the Anglo-Saxon Common Law alone which holds that the prisoner is an innocent man unless and until he is proven guilty beyond a reasonable doubt.").

253. H. Cleveland Coxe, *Personal Liberty in France*, 13 YALE L.J. 215, 218 (1904).

254. *See, e.g.*, PARISIAN SIGHTS AND FRENCH PRINCIPLES SEEN THROUGH AMERICAN SPECTACLES 139 (New York, 1852) ("However salutary such a purgative might be in a city like New York, our institutions require that a citizen must be considered innocent until adjudged guilty by a jury of his countrymen. Consequently, we are compelled to await crime before we act. The French seek to prevent it, by placing society as much as possible out of the risk. We punish; they protect.").

255. *See, e.g.*, Blum, *supra* note 156, at 222.

256. *French Justice*, *supra* note 242.

257. Morris Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433, 436 (1934-35) ("If the presumption of innocence means that the burden of proof is upon the prosecution to prove its case, that the defendant does not have to exculpate himself, and is favored by a reasonable doubt, the presumption of innocence is as fundamental in Continental procedure as in England and America.").

258. Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 583 (1997).

The right to bail pending trial, permitted for most offenses by the Constitution of 1791,[259] was significantly restricted by the Code of Criminal Procedure of 1808, which established a system of preventive detention for all crimes except minor offenses.[260] The figure which became the symbol of French inquisitorial justice was the all-powerful *juge d'instruction*, a magistrate in charge of investigating crimes whose prerogatives, deemed "exorbitant,"[261] made him the "most powerful man in France."[262]

Slow progress was made towards the protection of the accused during the nineteenth and twentieth centuries.[263] A law of 1897 allowed the accused to have counsel present during the investigation by the *juge d'instruction.*[264] If suspects had the right to remain silent,[265] their refusal to furnish an explanation often resulted in pretrial detention.[266] Denounced as arbitrary and oppressive,[267] pretrial detention was intended to be an exception under the new Code of Criminal Procedure of 1958.[268] The long detention of suspects before trial remained the rule, however.[269] The change in terminology adopted in 1970—"provisional detention" in lieu of "preventive detention"[270]—was merely symbolic. Suspects in police custody could be interrogated for up to forty-eight hours without the assistance of counsel.[271]

Although not expressly mentioned in the Code of Criminal Procedure, the constitutional[272] principle "innocent until proven guilty"

259. W. Laurence Craig & William A. Dobrovir, *The French Experience with Preventive Detention*, 57 A.B.A. J. 565, 566 (1971).

260. *Id.*

261. *The Juge d'Instruction. From the Nineteenth Century*, N.Y. TIMES, Apr. 15, 1899.

262. Craig & Dobrovir, *supra* note 259, at 566.

263. Ploscowe, *supra* note 257, at 462.

264. Robert Vouin, *The Protection of the Accused in French Criminal Procedure*, 5 INT'L & COMP. L.Q. 1, 16 (1956).

265. Manfred Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585 (1962).

266. *Id.*

267. *See, e.g.*, Maurice Garçon, *Défense de la liberté individuelle* (1957).

268. A. E. Anton, *L'Instruction Criminelle*, 9 AM. J. COMP. L. 441, 448 (1960).

269. *Id.* at 453.

270. Craig & Dobrovir, *supra* note 259, at 569.

271. René Lévy, *Police and the Judiciary in France Since the Nineteenth Century: The Decline of the Examining Magistrate*, 33 BRIT. J. CRIMINOLOGY 167, 176 (1993) (observing that the police were "deeply convinced that a case which remains unresolved during the police phase—that is, the 24-48 hours when the police can act without restriction and without the suspect having recourse to a lawyer—will never be solved, and especially not by an examining magistrate.").

272. The *Conseil constitutionnel* affirmed the constitutional value of the presumption of innocence in 1981. *See* CC decision no. 80-127DC, Jan. 20, 1981, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 22, 1981, p. 308. *See also* CC decision no. 89-258DC, July 8, 1989, J.O., July 11, 1989, p. 8734; CC decision no. 93-326DC, Aug. 11, 1993, J.O., Aug. 15, 1993, p. 11599; CC decision no. 2009-580DC, June 10, 2009, J.O., June 13, 2009, p. 9675.

was regularly used by French courts to condemn abusive police practices[273] or to remind the prosecution that it bore the burden of proof.[274] In 1988, the Department of Justice instructed a commission presided over by Mireille Delmas-Marty, then a professor of law at the University of Paris XI, to submit proposals for reforming French criminal procedure.[275] Reaffirming the dual dimension of the presumption of innocence—rule of proof and shield against punishment[276]—the commission indicated that pretrial detention should remain the exception and that measures should be taken to avoid confessions under pressure—including the notification of suspects of their right to remain silent.[277] The indictment for corruption of a former treasurer of the Socialist Party prompted the Socialist legislature to implement reforms in 1993.[278] For the first time, suspects in police custody were allowed counsel, but only for thirty minutes and after twenty hours of detention.[279] The obligation for the police to notify suspects of their right to remain silent was not codified, but the right not to be handcuffed upon arrest or transfer was established.[280] An important reform was the insertion of a provision in the French Civil Code[281] elevating the presumption of innocence to

273. *See* Essaid, *supra* note 140, at 59 (citing a decision of the Bourges Court of Appeal dated Mar. 9, 1950).

274. *Id.* at 60 (citing a decision of the *Tribunal correctionnel de la Seine* dated Sept. 30, 1957). *See also* Tonglet, *supra* note 73, at 24 (citing decisions of the *Cour de cassation* dated Mar. 22, 1966, May 29, 1980, Mar. 19, 1986, and Feb. 22, 1993).

275. *La mise en état des affaires pénales: Rapport de la Commission Justice et Droits de l'homme* 2 (1991) [hereinafter *Rapport Delmas-Marty*]. The commission was established to examine the compatibility of French criminal procedure with the European Convention on Human Rights. *See* Jacqueline Hodgson, *Suspects, Defendants and Victims in the French Criminal Process: The Context of Recent Reform*, 51 I.C.L.Q. 781, 786 n.29 (2002).

276. *Rapport Delmas-Marty, supra* note 275.

277. *Id.*

278. *See* Inciyan Erich, *Les déclarations du chef de l'Etat à l'occasion des fêtes du 14 juillet. Procédure pénale: relancer la réforme*, LE MONDE, July 16, 1992.

279. Hodgson, *supra* note 275, at 800.

280. C. PR. PÉN. art. 803 ("No one may be forced to wear handcuffs or shackles unless she is considered to be a danger to others or to herself, or is likely to attempt to escape."). *Cf. The Bobbies of London Town*, N.Y. TIMES, Sept. 9, 1923, at 5 (noting that the "Duty Book" issued to all constables and section sergeants in London warned them "that all unconvicted persons are assumed to be innocent: 'A constable must not handcuff an unconvicted prisoner except in case of actual necessity, and in any case care must be taken not to expose a person to avoidable degradation.'"); Zeno, *To the Sheriffs of London*, TIMES (London), Jan. 13, 1785, at 1 (denouncing the chaining of presumably innocent suspects before conviction); Code Just. 9.3.2 (Gratian, Valentinian & Theodose 380) ("*Nullus in carcerem prius quam convincatur, omnino vinciatur* . . . ."). For a similar right during trial, see C. PR. PÉN. art. 318. *Cf.* Deck v. Missouri, 544 U.S. 622, 630 (2005) (7-2 decision) ("Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process.").

281. C. CIV. art. 9-1 ("Everyone has the right to the respect of the presumption of innocence."). The insertion of the presumption of innocence in the French Civil Code has been criticized. *See* Michèle-Laure Rassat, *Propositions de réforme du code de procédure pénale* 53 (Dalloz, 1997) ("[T]he presumption of innocence belongs to criminal law . . . It has no place in the Civil Code.").

a personality right.[282] Initially open to anyone under inquiry or preliminary investigation, the right to the respect of the presumption of innocence was subsequently restricted to suspects in police custody, placed under examination or formally charged.[283]

The change of presidency in 1995 lead to a new set of reforms in France. Observing that "human dignity and social harmony demand that the presumption of innocence be strictly respected,"[284] President Jacques Chirac, himself under suspicion of corruption, appointed a commission presided by Pierre Truche, first president of the *Cour de cassation*,[285] to reflect upon how to reinforce the independence of the judiciary and the presumption of innocence.[286] France was regularly condemned by the European Court of Human Rights for mistreatment of suspects in police custody,[287] excessive length of pretrial detention,[288] or public portrayal of suspects as guilty before judgment.[289] The commission issued a report in 1997 recommending, among other things, the presence of defense counsel from the beginning of police custody, the exclusion of the *juge d'instruction* from the decision to place suspects in pretrial detention, the extension of the presumption of innocence as a personality right to anyone under inquiry or preliminary investigation, and the obligation for the police to

282. *La présomption d'innocence*, 1 Revue européenne de philosophie et de droit 2 (1995) (observing that the presumption of innocence is a right against judges, police officers, journalists and the public). Prior to the 1993 reforms, several French courts used the doctrine to prevent the diffusion of prejudicial information against defendants, either on the basis of Article 1382 of the French Civil Code or on the ground that a fundamental principal of justice would be violated (*see, e.g.*, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, *Société de télévision T.F.1. v. Odile Mirroir*, Nov. 7, 1990, No. 12944/90, in which the court ordered the French television channel TF1 to suppress segments of a program portraying three recently indicted individuals as responsible for a train accident).

283. Law No. 93-1013 of Aug. 24, 1993, J.O., Aug. 25, 1993, p. 11991. This restriction was later repealed. *See infra* note 291.

284. *Rapport de la commission de réflexion sur la Justice* 5 (1997) [hereinafter *Rapport Truche*].

285. The *Cour de cassation* is the highest court for civil and criminal matters in France.

286. *Rapport Truche, supra* note 284.

287. Selmouni v. France, 1999-V Eur. Ct. H.R. 91-106.

288. Tomasi v. France, 241 Eur. Ct. HR. (ser. A) 41 (1992) (pretrial detention of five years and seven months); Muller v. France, 1997-II Eur. Ct. H.R. 34 (pretrial detention of four years).

289. Allenet de Ribemont v. France, 308 Eur. Ct. H.R. (ser. A) at 38 (1995) (suspect accused of murder at a press conference held by the French Minister of Interior and senior police officers. The Court observed that if officials cannot be prevented from informing the public about pending criminal investigations, they must do so "with all the discretion and circumspection necessary if the presumption of innocence is to be respected."). On a similar directive for journalists, see Du Roy and Malaurie v. France, 2000-X Eur. Ct. H.R. 34 ("Journalists reporting on criminal proceedings currently taking place must, admittedly, ensure that they do not overstep the bounds imposed in the interests of the proper administration of justice and that they respect the accused's right to be presumed innocent . . . .").

inform suspects of their right to remain silent.[290] These changes were finally implemented in 2000.[291]

The right of suspects to be presumed innocent until proven guilty is now solemnly stated in the French Code of Criminal Procedure.[292] Long recognized by French courts,[293] the symbolic nature of the codification of this principle remains highly significant.[294] The law provides that the *juge d'instruction* must gather evidence "of innocence as well as guilt"[295] and inform the *mis en examen*[296] of his or her right to remain silent.[297] Pretrial detention of a "person under judicial examination, presumed innocent," now ordered by a separate judge known as the "liberty and custody judge,"[298] must remain the exception[299] and cannot exceed a reasonable time.[300] All necessary measures must be taken to prevent a person handcuffed or shackled from being photographed or filmed.[301] Jurors must swear "to betray neither the interests of the accused nor those of society" and "to remember that the accused is presumed innocent."[302]

The procedure before the trial judge is oral, public, and adversarial.[303] The burden of proof falls on the prosecution, which must

290. *Rapport Truche, supra* note 284. *See also* Pierre Truche, *Présomption d'innocence*, LE MONDE, May 12, 1998.

291. Law No. 2000-516 of June 15, 2000, J.O., June 16, 2000, p. 9038. On this important reform, see Hodgson, *supra* note 275. The obligation to inform suspects in police custody of their right to remain silent was repealed in 2003. *See* Law No. 2003-239 of Mar. 18, 2003, J.O., Mar. 19, 2003, p. 4761. Suspects may be held in police custody for up to two days (ordinary crimes), four days (organized crime) and six days (terrorism). *See* C. PR. PÉN. arts. 63, 63-64 and 706-88. Access to counsel is granted at the start of police custody (ordinary crimes), after two days (organized crime), three days (suspicion of terrorism) or four days (imminent act of terrorism), in all cases not to exceed thirty minutes. *Id.* For a denunciation of the increase in the number of suspects held in police custody and a call for habeas corpus, see Jean-Pierre Dintilhac, Jean Favard & Roland Kessous, *Introduire l' "habeas corpus" dans notre droit*, LE MONDE, Dec. 4, 2009.

292. C. PR. PÉN. prelim. art. ("III. Every person suspected or charged is presumed innocent until her guilt has been established. Infringements on her presumption of innocence are proscribed, compensated and punished in accordance with the law.").

293. *See supra* note 274.

294. Serge Guinchard & Jacques Buisson, *Procédure pénale* 304 (4th ed. 2008).

295. C. PR. PÉN. art. 81. For a similar obligation under the Criminal Ordinance of 1670, see *supra* note 75.

296. A person *mis en examen* is a person against whom there is strong and concordant evidence that she may have participated in the commission of the alleged crime. *See* C. PR. PÉN. art. 80-1. Following the *Outreau* affair, where seventeen persons were falsely accused of belonging to a pedophilia ring and one died in prison in unclear circumstances, the decision to place a suspect under formal investigation will be taken by a college of three *juges d'instruction*. *See* Law No. 2007-291 of Mar. 5, 2007, J.O., Mar. 6, 2007, p. 4206.

297. C. PR. PÉN. art. 116.

298. C. PR. PÉN. art. 137-1.

299. C. PR. PÉN. art. 137.

300. C. PR. PÉN. art. 144-1.

301. C. PR. PÉN. art. 803.

302. C. PR. PÉN. art. 304.

303. Jean-Claude Soyer, *Droit pénal et procédure pénale* 346 (20th ed. 2008).

prove all the elements of the alleged offense.[304] Except as otherwise provided by law, offenses may be proved by any means of evidence,[305] but only evidence produced and challenged in an adversarial manner may be considered by the judge.[306] Judges freely assess the evidence and decide according to their inner conviction.[307] Any doubt as to the guilt of the accused must be resolved in favor of the accused.[308] In some instances, the burden of proof is transferred to the accused, either through statutory presumptions of guilt[309] or when the accused raises affirmative defenses such as duress, necessity or self-defense.[310] The *Conseil constitutionnel*[311] has validated reverse burden of proof provisions, provided that the presumptions are refutable, the rights of the defense are respected, and the facts tend to confirm the likelihood of the commission of the alleged act.[312]

In France, the protection of the presumption of innocence is not confined to the realm of criminal procedure. Expanding the protection of the accused contained in Article 9 of the French Declaration of Rights of 1789, the French Civil Code now recognizes the right not to be publicly described as guilty before conviction.[313] Reminiscent of the jurisprudence of the Parlement of Paris in the sixteenth century,[314] the *Cour de cassation*, applying the new law, held that a press article leaving no doubt as to the culpability of the accused

304. *Id*. at 107. On the role of the prosecution in France, see JACQUELINE HODGSON, FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE (2005).

305. C. PR. PÉN. art. 427.

306. *Id.* The evidence does not have to be disclosed to the opposing party before the hearing. *See* Cass. crim., Nov. 10, 2004, Bull. crim., No. 285 (holding that evidence likely to exonerate the suspect, but not communicated prior to trial, could not be suppressed).

307. *Id.*

308. Cass. crim., Mar. 21, 1990, Bull. crim., No. 125.

309. *See, e.g.,* C. PÉN. 225-6 (stating that persons unable to account for resources compatible with their lifestyle while living with prostitutes are presumed to act as procurers).

310. Bernard Bouloc, *Procédure pénale* 108-10 (21st ed. 2008).

311. The *Conseil constitutionnel* is a political body in charge of reviewing the conformity of statutes to the Constitution.

312. CC decision no. 99-411DC, June 16, 1999, J.O., June 19, 1999, p. 9018; CC decision no. 2009-580DC, June 10, 2009, J.O., June 13, 2009, p. 9675 (holding, on the basis of Article 9 of the French Declaration of 1789, that violated the presumption of innocence a law imposing on Internet subscribers the burden of proving that copyright infringements were due to the fraud of third parties).

313. C. CIV. art. 9-1 ("Everyone has the right to the respect of the presumption of innocence. Where, before any sentence, a person is publicly shown as being guilty of facts under inquiries or preliminary investigation, the court, even by interim order and without prejudice to compensation for the injury suffered, may prescribe any measures, such as the insertion of a rectification or the publication of a communiqué, in order to put an end to the infringement of the presumption of innocence, at the expense of the individual or legal entity liable for that infringement.").

314. *See supra* note 80.

would violate the presumption of innocence.[315] Similarly, the author of a book cannot use the word "murderer" to describe a person not yet convicted[316] and a radio[317] or television[318] report cannot imply that the suspect committed the alleged crime. Without being fully aware of it, French courts have finally vindicated Fielding's vision.[319] Time will tell whether the recent reforms that France adopted will help overcome the long-time view of the presumption of innocence as a "solemn hypocrisy."[320]

B. The English Deviation

The common law world presents a very different picture. The transformation of the presumption of innocence into merely an evidentiary rule in common law jurisdictions[321] is the result of a process that started in the nineteenth century[322] and culminated in the United States with *Bell v. Wolfish*.[323] From Greenleaf[324] to Ros-

315. Cass. 1e civ., July 12, 2001, Bull. civ. I, No. 222. *See also* Cass. 1e civ., Mar. 20, 2007, Bull. civ. I, No. 124 (holding that a press article expressly referring to the accused as "guilty" violates the presumption of innocence).

316. Corinne Jubeau, *L'utilisation du terme "meurtrier" à propos d'une personne mise en examen constitue une atteinte à la présomption d'innocence*, JCP 2003 no. 43-44 (citing a decision of the Paris Court of Appeal dated Oct. 7, 2003).

317. Cass. 2e civ., July 8, 2004, Bull. civ. II, No. 387 (holding that the tone of a radio broadcast, purposely dramatic, left no doubt as to the culpability of the accused, thus violating the presumption of innocence). Announcing an indictment, however, is protected by the freedom of information and does not violate the presumption of innocence. *See* T.G.I. Bordeaux, Mar. 31, 2000, Légipresse 2000, No. 172, I, at 77.

318. T.G.I. Nanterre, Mar. 9, 2005, No. 05/00760 (ordering a broadcasting company to issue a communiqué about the presumption of innocence before the diffusion of a documentary fiction describing the accused as guilty of a double murder).

319. *See supra* note 200.

320. Jean-Denis Bredin, *Cette justice qui nous ressemble*, LE MONDE, July 31, 1997. The recent *Outreau* affair (see *supra* note 296) illustrates the dangers that arise when legal principles are forgotten. From the police officers to the *juge d'instruction* and the medias, all openly disregarded the fundamental principles of justice announced in the Code of Criminal Procedure and the Civil Code. *See generally Rapport No. 3125 fait au nom de la commission d'enquête chargée de rechercher les causes des dysfonctionnements de la justice dans l'affaire dite d'Outreau et de formuler des propositions pour éviter leur renouvellement*, *available at* http://www.assemblee-nationale.fr/12/pdf/rap-enq/r3125-t1.pdf. Part of the solution resides in legal training. *Id.* at 213 (observation of Me. Jean-Louis Pelletier: "One must change mentalities. The notion of presumption of innocence must be anchored in the minds. Young lawyers must know about it. Young judges must be taught about it constantly. Perhaps only then will justice function a little better.").

321. HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE 105 (7th ed. 1998). For notable exceptions, see *supra* note 163.

322. Thaler, *supra* note 170, at 460.

323. *See supra* note 163. On the application of the presumption of innocence as a rule of proof in England, see Meredith Blake & Andrew Ashworth, *The Presumption of Innocence in English Criminal Law*, [1996] CRIM. L. REV. 306. *See also* Regina v. Director of Public Prosecutions, [2000] 2 A.C. 326, 377 (citing *Woolmington*).

324. 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 29 (Boston, Little, Brown and Co. 1853).

coe,[325] Wharton,[326] Best,[327] and Stephen,[328] the leading legal authorities of the time came to view the maxim as simply another way of expressing the traditional rule putting the burden of proving guilt beyond a reasonable doubt on the prosecution. The U.S. Supreme Court termed the doctrine an "instrument of proof"[329] while distinguishing it from the "reasonable doubt" standard.[330] During the same period, the English legislature recognized the presumption of innocence as a substantive right,[331] Rhode Island reaffirmed, on the basis of the presumption of innocence, the right of the accused to be treated with humanity,[332] and the office of the Assistant Attorney General for the Post Office Department[333] issued an opinion denying jailers the authority to withhold or open letters addressed to pretrial detainees because the "law presumes every man innocent until the contrary is established by a legal procedure"[334] and suspects may not be subject to any more restraint than is reasonably necessary to secure their presence in court.[335]

Whether legal scholars deliberately omitted these sources or were simply unaware of them is unclear. The unfavorable view of the presumption of innocence in traditionally conservative legal circles favors the first hypothesis. Thayer's statement that the doctrine had been "overdone in our hysterical American fashion of defending accused persons"[336] is echoed in the writings of prominent lawyers[337]

325. HENRY ROSCOE, A DIGEST OF THE LAW OF EVIDENCE IN CRIMINAL CASES 15 (Philadelphia, T. & J. W. Johnson 1854).

326. 1 FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES: COMPRISING A GENERAL VIEW OF THE CRIMINAL JURISPRUDENCE OF THE COMMON AND CIVIL LAW 365 (Philadelphia, Kay & Brother 1861).

327. WILLIAM MAWDESLEY BEST, THE PRINCIPLES OF THE LAW OF EVIDENCE 309 (London, Sweet and Maxwell 1893).

328. SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE 105 (London, Macmillan and Co. 1893).

329. Coffin v. United States, 156 U.S. 432, 459 (1895) (cited in Thayer, *supra* note 160).

330. *Id.* (stating that reasonable doubt "is the result of the proof, not the proof itself."). On the reasonable doubt doctrine, see BARBARA J. SHAPIRO, BEYOND REASONABLE DOUBT AND PROBABLE CAUSE: HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE (1991); JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008).

331. *See supra* note 215.

332. *See supra* note 170.

333. The Post Office Department, now known as the United States Postal Service, was part of the executive branch of the U.S. Government from 1872 to 1971.

334. 1 OFFICIAL OPINIONS OF THE ASSISTANT ATTORNEYS-GENERAL FOR THE POST-OFFICE DEPARTMENT FROM JUNE 23, 1873, TO APRIL 28, 1885, at 658 (1905) (Opinion No. 268, dated Sept. 12, 1881, by Alfred A. Freeman to the Postmaster-General).

335. *Id.*

336. Thayer, *supra* note 160, at 190.

337. *See, e.g.*, ARTHUR TRAIN, COURTS AND CRIMINALS 14 (1921) ("The most presumptuous of all presumptions is this 'presumption of innocence.'"). *See also* Abraham Benedict, *The Presumption of Innocence*, 1 N.Y. L. REV. 442 (1923) ("This misconceived and entirely unnecessary presumption has been treated in the United States in

and judges[338] in the 1920s. These criticisms reflected the concern that breathing life into the doctrine by extending it beyond the courtroom would undermine the fight against crime.[339] It was argued that no one could ever be arrested and placed in detention if the presumption were taken literally[340] and that the presumption of innocence constituted nothing more than a "pleasant fiction."[341] Dissent was raised, however, by a wide range of actors—from an anonymous author declaring that "much greater vitality could be infused into the presumption of innocence if every possible consideration and courtesy were extended to the accused person"[342] to state courts stressing the illegality of punishing presumably innocent detainees before conviction.[343]

Yet, during most of the twentieth century, the prevailing view reduced the presumption of innocence to a rule of proof.[344] In a legal treatise on evidence that became the reference for generations of law students, John Henry Wigmore reiterated the position that the presumption of innocence was merely another way of expressing the principle that the burden of proof lies on the prosecution.[345] Courts generally concurred,[346] with only a few proclaiming that the presumption of innocence was not merely procedural, but substantive though this view had no practical consequences for the defendants.[347]

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a metaphysical fashion that has made it a real obstacle to the enforcement of the criminal law.").

338. *See, e.g.*, MARCUS KAVANAGH, THE CRIMINAL AND HIS ALLIES 229 (1928) ("Frankly, this book has no concern with the reformation of criminals, the alleviation of their sufferings in prisons, or with excuses for or palliation of their misdeeds . . . . One sometimes hears . . . the suggesting that at all times until finally convicted, one accused is presumed to be innocent till proved guilty beyond a reasonable doubt. That idea is not the law and never was the law. The presumption of innocence constitutes merely a rule of evidence for the trial . . . .").

339. *See, e.g.*, Benedict, *supra* note 337; *Our Administration of Criminal Justice*, 1 HARPER'S WKLY, Feb. 14, 1857 ("What did our pendulum do? Swing, of course, to the opposite extreme. Taking for our motto the maxim, 'Every man is supposed to be innocent till he is proved to be guilty,' we have pushed it to lengths the most absurd and fantastical. When a culprit is arrested in other countries, he is examined—severely and closely examined.").

340. KAVANAGH, *supra* note 338, at 230.

341. TRAIN, *supra* note 337, at 3.

342. *The Presumption of Innocence*, XC JUST. OF THE PEACE 269, 270 (1926).

343. *See, e.g.*, Commonwealth v. Brines, 29 Pa. Dist. 1091 (1920) ("It seems to be forgotten that an accused is not a convict, and that it is only strong necessity that compels his detention *before* trial. It is a restraint of the liberty of his person which is unavoidable. It certainly should not be aggravated by the infliction of any unnecessary indignity . . . . His rights are not different because he is accused of a crime. He has not been convicted and he is presumed to be innocent.") (alteration in original).

344. Thaler, *supra* note 170, at 461.

345. *Id*.

346. *See, e.g.*, State v. Brauneis, 79 A. 70, 72 (Conn. 1911); Carr v. State, 4 So.2d 887, 888 (Miss. 1941); *In re* Davidson, 186 P.2d 354, 523 (Nev. 1947); Brock v. State, 91 Ga. App. 141, 142 (1954).

347. *See, e.g.*, State v. Barton, 236 S.W.2d 596, 789 (Mo. 1951) (Hollingsworth, J., concurring: "This no mere procedural presumption. It is substantive, basic; there is no

Denigration of the doctrine continued, from Carleton Kemp Allen,[348] who cautioned against allowing the presumption of innocence to become "obscured by rhetoric and sentiment"[349] to John MacArthur Maguire, who called it "an outrage to common sense"[350] that made it "almost shameful to bring in a verdict of guilty."[351]

The reform of the federal bail system in the 1960s gave rise to impassioned debates between proponents and opponents of the doctrine. Following an earlier line of thought adopted by Chief Justice Vinson in *Stack v. Boyle*,[352] the Bail Reform Act of 1966[353] was enacted on the premise that unnecessarily detaining defendants unable to post bail violated the presumption of innocence.[354] When the Nixon administration attempted to legitimize preventive detention in non-capital cases by allowing judges to consider "danger to the community" in the setting of bail,[355] many commentators expressed

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exception."); People v. Gazulis, 212 N.Y.S.2d 910, 943 (N.Y. City Ct. 1961) ("It is, perhaps, unfortunate that the 'presumption of innocence' is loosely referred to by the judiciary and the bar as a 'presumption'; it is all of that and more . . . . The 'presumption' of innocence is a substantive right and not a procedural or evidentiary rule."). *See also* Otis H. Fisk, *Presumptions*, 11 CORNELL L. Q. 37 (1926) ("'Presumption of innocence' in a criminal case is a rule or maxim of the substantive law, which has been erroneously engrafted on the law of proof. It should be cut off and restored to its proper place, namely, in the substantive law. The rule or maxim should 'hold', instead of 'presume', that one is innocent until proven guilty.").

348. *See* ALLEN, *supra* note 162.

349. *Id.* at 294.

350. JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 191-92 (1947).

351. *Id.*

352. Stack v. Boyle, 342 U.S. 1, 4 (1951) ("This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.") (cited in Thaler, *supra* note 170, at 461). In the eighteenth century, the English lawyer Daines Barrington termed the right to bail "a necessary consequence of the criminal being presumed innocent." *See* BARRINGTON, *supra* note 183. *See also* Dir. of Pub. Prosecutions v. Broderick, [2006] I.E.S.C. 34 (Ir.) (Kearns, J.: "At the outset it must be stressed that an applicant for bail is entitled to a presumption of innocence and, as such, is *prima facie* entitled to bail.").

353. 80 Stat. 214 (1966) (repealed 1984).

354. *See* S. REP. No. 89-750, at 1 (1965) ("FINDINGS AND PURPOSE Sec. 2. (a) The Congress finds that—(1) Present Federal bail practices are repugnant to the spirit of the Constitution and dilute the basic tenets that a person is presumed innocent until proven guilty by a court of law and that justice should be equal and accessible to all."). Considered unnecessary by the Senate Committee on the Judiciary, the findings were subsequently deleted.

355. Christopher Lydons, *Congress Gets Nixon Bill for Preventive Detention*, N.Y. TIMES, July 12, 1969, at 1. The bill was not adopted. In 1970, Congress enacted the District of Columbia Court Reform and Criminal Procedure Act, which allowed judges to deny bail in non-capital cases based on the perceived dangerousness of suspects. *See* 84 Stat. 473 (1970). The Bail Reform Act of 1984 now allows federal courts to order the preventive detention of suspects deemed dangerous or likely to flee. *See* 18 U.S.C. §§ 3141-3156 (1988 & Supp. II 1990). The U.S. Supreme Court upheld the constitutionality of the statute in 1987. *See* United States v. Salerno, 481 U.S. 739 (1987) (6-3 decision). A provision of the Bail Reform Act of 1984 is often cited in support of the proposition that right to bail and presumption of innocence are inextricably re-

concerns that a broad interpretation of what constitutes a threatening defendant would cause "irreparable harm"[356] to a quintessential common law principle.[357]

Through coordinated responses in newspapers[358] and scholarly journals,[359] the Department of Justice dismissed such criticism by arguing that the presumption of innocence was merely a rule of evidence with no application to pretrial proceedings.[360] The Department of Justice further contended that giving the doctrine a broader meaning would *de facto* invalidate the long standing practice of preventively detaining defendants charged with capital crimes or likely to escape.[361] This argument was largely irrelevant, however, as no one seriously contested the need to deprive suspects of their liberty in such circumstances.[362] The main issue was whether these individuals, once in jail, would be treated in accordance with their status of unconvicted detainees.

Not much had changed since de Beaumont and de Tocqueville's account of the penitentiary system in the United States in the nineteenth century,[363] in which they denounced the "mixtures of indicted and convicted prisoners"[364] in overcrowded jails.[365] Detainees awaiting trial, who are "sometimes innocent and always supposed to be

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lated. *See, e.g.*, United States v. Montalvo-Murillo, 495 U.S. 711, 724 n.4 (1990) (Stevens, J., dissenting) (citing 18 U.S.C. § 3142(j): "Nothing in this section shall be construed as modifying or limiting the presumption of innocence."). The legislative history reveals that this provision was only meant to address the U.S. Supreme Court ruling in *Bell v. Wolfish*. *See* S. REP. No. 98-225, at 25 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3208 ("The rule of evidence known as the presumption of innocence has been found by the Supreme Court to have 'no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.' Thus, this provision states what the [Senate Committee on the Judiciary] understands to be the correct relationship of the presumption of innocence to pretrial release and detention authority.").

356. Abraham S. Goldstein, *Jail Before Trial*, THE NEW REPUBLIC, Mar. 8, 1969, at 824.

357. 115 CONG. REC. 36302 (1969) (statement of Rep. Mikva). *See also Mr. Nixon on Crime*, N.Y. TIMES, Feb. 1, 1969, at 28; *Diluting Democracy*, WALL ST. J., July 31, 1969, at 10.

358. Letter to the Editor, *Pretrial Detention*, WALL ST. J., Aug. 29, 1969, at 8.

359. John N. Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 99 (1969) (cited in Thaler, *supra* note 170, at 463).

360. *Id.* at 101.

361. *Id.*

362. Lawrence Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 404 (1970).

363. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE (Francis Leiber trans., Carey, Lea & Blanchard 1833) (cited in Brief of the National Prison Project of the American Civil Liberties Union Foundation, as Amicus Curiae at 10-11, Bell v. Wolfish, 441 U.S. 520 (1979) (No. 77-1829)).

364. *Id.* at 12.

365. *Id*.

so,"[366] were regularly subject to degradations and restrictions that could reasonably be seen as punishment.[367]

When the Court of Appeals for the Second Circuit ruled that most of the restrictions imposed on pretrial detainees incarcerated in New York's Metropolitan Correctional Center were not justified by the necessities of jail administration and thus violated their right to be treated as innocent until proven guilty,[368] the Department of Justice found a sympathetic ear in Supreme Court Justice William H. Rehnquist, a former assistant attorney general in the Nixon administration, whose conservatism was unquestioned.[369] Writing for the majority, Justice Rehnquist, citing Wigmore and prior decisions of the Court,[370] denied that the presumption of innocence had any application before trial.[371] In a rare public display of discontent, Justice Thurgood Marshall criticized the Court's opinion, stressing that "the Supreme Court decided the presumption didn't exist at all."[372]

366. *Id.* at 14.

367. *See* Brief for the Petitioners at n.7, Bell v. Wolfish, 441 U.S. 520 (1979) (No. 77-1829) ("These included, *inter alia*, overcrowding; undue length of confinement; improper monitoring of personal mail; improper strip searches after contact visits; inadequate visiting hours; inadequate access to legal materials; inadequate recreational, educational and employment opportunities; inadequate telephone service; restrictions on religious freedoms; restrictions on the purchase and receipt of items of personal property; inadequate and unsanitary food; objectionable uniforms; poor ventilation; insufficient staff; unannounced transfers; and inadequate services for non-English-speaking inmates."). *See also* William G. Nagel, Address at the Fourth National Symposium: Quest or Question? The Presumption of Innocence and the American Jail (Apr. 8, 1977).

368. Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978).

369. *See, e.g.*, Linda Greenhouse, *Justice Rehnquist: Firm Ways, Witty Means*, N.Y. TIMES, July 12, 1981, at E22.

370. Bell v. Wolfish, 441 U.S. 520, 533 (1979) (citing Taylor v. Kentucky, 436 U.S. 478 (1978), Estelle v. Williams, 425 U.S. 501 (1976), *In re* Winship, 397 U.S. 358 (1970) and Coffin v. United States, 156 U.S. 432 (1895)).

371. *Id*. While recognizing the right of pretrial detainees to be free from punishment, the Court cautioned against interfering with prison management and concluded that absent a showing of intent to punish the restrictions imposed by the facility officials were reasonable responses to legitimate security concerns. *Id.* at 561. The necessity for the petitioner to show punitive intent or arbitrariness from prison officials has been deemed a burden "likely to be insurmountable." *See* Keith A. Hassler, *Bell v. Wolfish: The Rights of Pretrial Detainees*, 6 NEW ENG. J. ON PRISON L. 129, 141 (1979). In his first draft of the *Bell v. Wolfish* opinion, Justice Rehnquist indicated that the presumption of innocence was "principally" a rule of proof: "The presumption of innocence is principally an evidentiary doctrine that allocates the burden of proof in criminal trials." *See* Memorandum to the Conference, Mar. 6, 1979. When Justice William J. Brennan Jr., citing *Stack v. Boyle*, replied that he viewed the presumption of innocence as something more than a rule of proof and that Justice Rehnquist's memorandum merely established that the presumption had evidentiary implications, not that it was only evidentiary in nature, see Memorandum to the Conference, Mar. 7, 1979, Justice Rehnquist subsequently revised his draft opinion by deleting the word "principally." *See* Memorandum to the Conference, Mar. 12, 1979 (on file with the Library of Congress, Manuscript Division, Papers of Thurgood Marshall, Box 218).

372. Tom Goldstein, *In Rare Attack, Justice Marshall Says Court Erred*, N.Y. TIMES, May 28, 1979, at A1. *See also Marshall Presses Court Dissents*, WASH. POST, May 28, 1979, at A15. The legal historian Harold Berman denounced an "unnecessary

Thirty years after *Bell v. Wolfish*, the distinction between accused persons and convicted offenders has become staggeringly blurred in the United States.[373] From the relaxation of the requirement to segregate pretrial detainees from convicted inmates in Federal prisons[374] to the *New York Post* showing on its front page an accused in shackles with the headline "Monster in Chains"[375] to a U.S. Supreme Court justice recently suggesting during oral argument that treating arrestees harshly may serve a useful deterrent purpose,[376] it is increasingly forgotten that a suspect is not a convict and cannot be treated as one. This is scarcely surprising, however, given the place that the presumption of innocence occupies in current legal discourse. The presumption of innocence will remain an "unreflective cliché"[377] as long as judges,[378] legal scholars[379] and members of the

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restriction" of the doctrine. *See* Berman, *supra* note 5, at 623 n.13. Some courts have since distanced themselves from the *Bell v. Wolfish* ruling. *See, e.g.*, People v. Purcell, 325 Ill.App.3d 551 (2001) ("[W]e must disagree with those jurisdictions that have held the presumption of innocence is not operative until the time of trial."); Simpson v. Owens, 85 P.3d 478, 486 (C.A. Ariz. 2004).

373. On a similar trend in England, see Jones, *supra* note 216.

374. 28 C.F.R. § 551.104 (1994) ("To the extent practicable, pretrial inmates will be housed separately from convicted inmates."). Prior to the 1994 revision, the provision read as follows: "Unless a threat is posed to institution security or good order, staff shall house pre-trial inmates separately from convicted inmates." *See* 28 C.F.R. § 551.104 (1980). Another evidence of the erosion of the rights of pretrial detainees is the 1996 regulation mandating outgoing mail inspection. *See* 28 C.F.R. § 540.14(b) (1996). Acknowledging that "pretrial inmates retain[ed] the presumption of innocence," the Department of Justice justified the change by the "unsettled nature of their status" that could result in the "misuse of the correspondence privilege." *See* 61 Fed. Reg. 64954 (1996).

375. *See* Jim Rutenberg, *Presumed Innocence? Not on Cable TV News*, N.Y. TIMES, Apr. 26, 2003. *See also Albany's Gallery of Rogues*, N.Y. TIMES, Oct. 27, 2009, *available at* http://www.nytimes.com/interactive/2009/10/27/opinion/editorial-albany-ethics.html (displaying on its website the picture of former New York State Senator Joseph Bruno and current New York State Senator Pedro Espada Jr. under the caption "Albany's Gallery of Rogues" one week before the trial for corruption of the former and while the latter had not been charged). *Cf.* S.L. ALEXANDER, COVERING THE COURTS: A HANDBOOK FOR JOURNALISTS 161 (1999) ("presumption of innocence . . . A journalist has to remain wary not to imply guilt of any defendant prior to a court's verdict."). The same caution applies to the Department of Justice. *See* U.S. ATTORNEY'S MANUAL 1-7.600 ASSISTING THE NEWS MEDIA (2003) ("A news release should contain a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.").

376. Transcript of Oral Argument at *22, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (No. 99-1408) (Scalia, J.), *available at* 2000 WL 1801617. *Cf.* Houchins v. Kqed, Inc., 438 U.S. 1, 37-38 (1978) (Stevens, J., dissenting) ("Certain penological objectives, *i.e.*, punishment, deterrence, and rehabilitation, which are legitimate in regard to convicted prisoners, are inapplicable to pretrial detainees. Society has a special interest in ensuring that unconvicted citizens are treated in accord with their status.").

377. ALLEN, *supra* note 162, at 293.

378. *See, e.g.,* In the Matter of Wayne, 467 N.Y.S.2d 798, 801 (N.Y. Fam. Ct. 1983) ("The notion that the 'sealing' statutes are grounded in the presumption of innocence is based upon the non-legal or lay sense of that term, in effect an articulation of a philosophy which is far different from the precise legal meaning of that term as defined by the highest tribunal of the land . . . . It is to be hoped that counsel who cite

media[380] keep referring to it without acknowledging the historical role of the doctrine as a shield against premature punishment.

The issue is ultimately, as intimated by Justice Stevens in a Memorandum to the Conference circulated prior to the issuance of the *Bell v. Wolfish* opinion,[381] whether persons accused of crime are treated with the dignity and respect due to presumably innocent individuals. James Q. Whitman's assertion that there is little reason to believe that Americans will choose dignity over liberty any time soon, as evidenced by the fact that "American law simply does not endorse the general norm of personal dignity found in Europe,"[382] presupposes that American law reflects the values and fundamental beliefs of the American people. The problem with this argument is that it fails to acknowledge the obstacles that a common law system of binding precedent poses to the judicial recognition of elementary principles of justice. When then Judge John G. Roberts Jr.'s main rationale for upholding the degrading treatment of a twelve-year-old African-American girl arrested for eating a single french fry in a Washington, D.C. subway station[383] was that, three years earlier,[384] the U.S. Supreme Court had upheld the degrading treatment of a woman arrested in Texas for failure to wear a seat belt,[385] one can

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the presumption of innocence in court will do so based upon its legal rather than philosophical implications."); Peter Reinharz, *Innocence Presumed: Analyzing America's Favorite Presumption*, 212 N.Y. LAW J. 1, 2 (1994) ("The public, the media and the judicial system need to understand the presumption of innocence for what it is and, more importantly, for what it is not. It is not a global umbrella covering a defendant from time of arrest onward."); Bursac v. Suozzi 868 N.Y.S.2d 470, 480 (N.Y. Sup. Ct. 2008) (rejecting petitioner's contention that the publication on a website known as the "wall of shame" of his name and mug shot following his arrest for drunk driving violated his right to be presumed innocent on the ground that the presumption of innocence was only a rule of proof as set forth in *Bell v. Wolfish*).

379. *See, e.g.*, Butler D. Shaffer, *The Unwritten Law: 'Innocent Until Proven Guilty': Familiar Saying is a Product of Science, Not a Notion of Liberty*, LOS ANGELES DAILY J., Apr. 29, 1983, at 4 (cited in Joseph Sorrentino, *Presuming Too Much? 'Innocent Until the Contrary Is Proved' Comes Under Fire*, LOS ANGELES DAILY J., Dec. 7, 1995). For a notable exception, see Tribe, *supra* note 362, at 404 ("[T]he presumption of innocence of which the Supreme Court spoke in *Stack v. Boyle* 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.") (cited in Sorrentino, *supra*).

380. *See supra* note 8.

381. Memorandum to the Conference, Mar. 7, 1979 (observing that "the question [is] whether a practice invades the basic dignity of an individual who has not yet been convicted of any crime.") (on file with the Library of Congress, Manuscript Division, Papers of Thurgood Marshall, Box 232).

382. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1221 (2004).

383. Hedgepeth v. Wash. Metro. Area Transit Auth., 386 F.3d 1148 (D.C. Cir. 2004).

384. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

385. *Hedgepeth*, 386 F.3d at 1157 ("This claim quickly runs into the Supreme Court's recent holding in Atwater . . . . Given the undisputed existence of probable cause, Atwater precludes further inquiry into the reasonableness of Ansche's arrest

measure the difficulty facing an advocate bold enough to argue in an American court that presumably innocent arrestees have the right to be treated with dignity. All hopes are permitted, however.[386]

V. CONCLUSION

Developed in antiquity and formulated in its modern form at the end of the thirteenth century, the principle "innocent until proven guilty" has a dual dimension: a rule of proof casting on the prosecution the burden of proving guilt, it is also a shield that prevents the infliction of punishment prior to conviction. Both the civil law and the common law recognized these two aspects of the presumption of innocence at various times in history. While France recently reinforced the presumption of innocence by elevating it to a personality right, Anglo-American jurisdictions tend to view the doctrine as a mere rule of proof without effect before trial. Denying that the presumption of innocence has any application before trial ultimately legitimizes the unnecessary indignities inflicted upon a growing number of persons accused of crime. A revitalization of this cardinal principle of Anglo-American jurisprudence is much needed at a time when the words "accused" and "convict" are becoming increasingly synonymous.

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under the Fourth Amendment."). Judge Roberts became Chief Justice of the U.S. Supreme Court on September 29, 2005.

386. Two common law courts, the Supreme Court of Canada and the Irish Supreme Court, ruled that the presumption of innocence was a substantive principle protecting the dignity of the accused. *See* R. v. Pearson, [1992] 3 S.C.R. 665, 683 (Can.) (citing *R. v. Oakes*, [1986] 1 S.C.R. 103, 119 (Can.): Dickson, C.J.: "The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice."); PO'C v. The Director of Public Prosecutions, [2000] 3 I.R. 87, 103 (Ir.) (Murray, J.: "The presumption of innocence is personal to the dignity and status of every citizen. It means that he or she is entitled to the status of a person innocent of criminal charges until such has been proven in a trial conducted in accordance with law.").