Buffalo Law Review

Volume 71 | Number 4 Article 5

10-30-2023

Walking with Shadows and Phantoms: The Presumption of Innocence and Bail Determinations

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COMMENT

Walking with Shadows and Phantoms: The Presumption of Innocence and Bail Determinations

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One-hundred and twenty-eight years after "the Supreme Court of the United States had an opportunity to clear up the confusion and ambiguity that hang[s] over the common talk about the presumption of innocence,"[1] the confusion persists. This lingering confusion is at its most stringent in federal bail determinations where, despite legislative intent, precedent, and logic to the contrary, it is invoked to discount the weight of the evidence against the defendant in deciding what conditions will secure presence at trial or safety to the community. Furthermore, the presumption's path from an instrument of proof to its status as a right is largely taken for granted. A close examination of that history shows such exaltation is not warranted. This Comment aims to provide a roadmap for advocates who wish to challenge the—assumed correct—application of the presumption pre-trial, as this has recently gone uncontested. Such a roadmap is more appropriate than ever as the conversation regarding the presumption and its unquestioned status continues "to encourage that feeble administration of our criminal law

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1. James Bradley Thayer, *Presumption of Innocence in Criminal Cases*, 6 YALE L.J. 185, 185 (1896).

which is doing so much in these days to render it ineffectual."[2]

INTRODUCTION

Growing up in Appalachia builds within a child a love for story. Many nights, communities found relief from the torment sprung forth by rambunctious children thanks to those grandmothers and grandfathers who used the Appalachian folklore tradition to captivate, for a time, those young minds. One story often told is that of the Bell Family, who lived in Tennessee in the early nineteenth century. One telling has it that John Bell, the father, obtained a portion of his large plot through a shady deal with a woman, Katie. Katie, derided by the untoward dealing of John, came to the farm one morning and cursed the Bells and their decedents.

Despite John's initial dismissive attitude, the curse's effects began to show. Loud knocking could be heard from inside the walls of their family home, large black dogs would circle the grounds in the early mornings, and bite marks would appear on the legs of their beds. The phenomena progressed. John began to find an inability to speak when contracting to sell crops or buy supplies, bite marks would now appear on the legs of the children, and the dogs would come from the woods and stalk the Bells on their evening strolls. Word of the Bell Witch soon grew, and most believed unquestionably in the witch. Even the few skeptics in the area would come and leave convinced of the witch's existence.[3]

Today, this legend is nothing more than that. The fear the Bell Witch evoked is gone—aside from the few grandchildren fortunate enough to hear the story passed

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2. *Id.*

3. The above story is one of the many versions of the Bell Witch story I heard growing up.

down. It is understood that the Bell Witch was nothing but a fiction. A great story was conjured, not evil spirits.

But some fictions do not earn their place as such so easily, and often, what is conjured up can still be heard knocking on the Halls of Justice. What the courts' collective chant of *"praesumptio innocentiae"* summons forth still chews the foot of the bench and certainly leaves its marks. The presumption of innocence has transformed into something akin to superstition[4] and is the most regularly misapplied legal doctrine today—if it can even be labeled as such. Whether the courts are discussing what the presumption of innocence is, what it does, or when it applies, confusion and contradiction are sure to be the hallmarks of those discussions.

This confusion is most obvious and of greatest consequence at bail hearings. During bail hearings, the presumption of innocence is often invoked to discount the weight of the Government's evidence against the defendant.[5]

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4. "The presumption of innocence and the doctrine of 'reasonable doubt' have been so constantly impressed upon juries that these principles have come to possess . . . some of the characteristics of superstition." CARLETON KEMP ALLEN, *The Presumption of Innocence*, *in* LEGAL DUTIES AND OTHER ESSAYS IN JURISPRUDENCE 252, 255 (1931).

5. While many other examples will be discussed in the forthcoming sections, one especially illustrative opinion where the presumption of innocence is invoked resulting in an erroneous weighing of the factors, can be seen in a recent decision where the Western District of New York wrote:

> At oral argument, the government instead implored this Court to ask: 'what if?' To be sure, that is a powerful question and one that haunts this Court in every case in which it must decide whether an individual accused of a crime should be released. But it is not the question that the law requires this Court to ask—and with good reason. If 'what if' were the proper inquiry, virtually no one indicted for a serious crime would ever go free. And that would undermine the constitutional pillar that one is assumed innocent until proven guilty.

United States v. Fox, 602 F. Supp. 3d 434, 443 (W.D.N.Y. 2022), *aff'd*, No. 22-1043, 2022 U.S. App. LEXIS 18835 (2d Cir. July 8, 2022). *But see* United States v. Zhe Zhang, 55 F.4th 141, 152 & n.2 (2d Cir. 2022) (criticizing the use of the

This misapplication is so abundant that there is very little commentary discussing the presumption of innocence in a way that reflects the Supreme Court's understanding of what it is and when it applies.[6] In a way, the presumption of innocence is "presumed" to be something greater than it is, and when it is invoked, it is done in that vein without justification.

In one of the first Supreme Court cases offering a substantial discussion of the presumption of innocence, Justice White remarked that it "is stated as unquestioned in the text-books and has been referred to as a matter of course in the decisions of this court and in the courts of the several States."[7] This observation holds true today regarding the popular discourse about the presumption of innocence and is the issue of the Comment in its content. While reading, I encourage the reader set aside what is believed to be known and obvious about the presumption of innocence. The popular understanding of the term, years of education undoubtedly exalting it, lessons learned in fiery admonishments of Assistant United States Attorneys, and the conception of it as the "undoubted law, axiomatic and elementary"[8] all serve to place the conclusion arrived at in this Comment in doubt from the outset.

Of equal importance is that the argument must contend against any predispositions tending towards what James Bradley Thayer gracefully described as the "hysterical

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presumption of innocence pre-trial and directly citing *Fox* to that end).

6. Two great exceptions are Larry Laudan, *The Presumption of Innocence: Material or Probatory?*, 11 LEGAL THEORY 333 (2005), RICHARD LIPKE, TAMING THE PRESUMPTION OF INNOCENCE (2016). However, it should be noted that both authors, although expressing a realist view on what the doctrine is, support certain measures for expanding its application or usefulness. However, it should be noted that both authors, although expressing a realist view on what the doctrine is, support certain measures for expanding its application or usefulness.

7. Coffin v. United States, 156 U.S. 432, 454 (1895).

8. *Id.* at 453.

American fashion of defending accused persons."[9] Admittedly, this Comment does highlight a frequent error whose correction would lead to more favorable decisions for the Government. However true that may be, the same resolution would be a bulwark against allowing implicit and explicit biases from running bail determinations and eliminate certain issues that proponents of the modern bail reform movement often invoke in support of their cause.[10]

I forward the points above in hopes of making clear what this work is—and what it is not. This Comment is not critiquing years of established precedent, arguing "the foundation . . . of our criminal law"[11] should be overturned, or any other academic exercise that would do my reader a disservice. Like those skeptics who visited the Bell Family in hopes of challenging the then "axiomatic and elementary"[12] belief in witches, this Comment merely intends to dispel belief in the witch that haunts us today.[13]

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9. Thayer, *supra* note 1, at 190. Judge Learned Hand seemed to have shared a similar sentiment which sheds a more reasonable light on Thayer's accusation against the American legal culture. In a case concerning a defendant's request for grand jury minutes, Judge Hand wrote:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

10. *See* discussion *infra* Section I.B.

11. *Coffin*, 156 U.S. at 453.

12. *Id.*

13. Stated otherwise, using the words of Larry Laudan: "My task here is,

Part I begins by detailing the precedent regarding pre-trial detention, moves to the relevant provisions and legislative history of the Bail Reform Act of 1984, and then provides examples of the presumption of innocence's misapplication. A brief discussion of the consequences of this misapplication and its unsound nature will follow. In Part II, the history of the presumption of innocence will show the presumption of innocence is nothing but a compelling way to describe the axiomatic principle that those who present a claim must be the ones who prove it by presenting evidence. Its evolution from that basic evidentiary standard was a truly radical one. Finally, Part III concludes by briefly discussing some theoretical concerns with the presumption of innocence to encourage further discussion of such a critical doctrine.

I. THE PRESUMPTION AND THE BAIL REFORM ACT OF 1984

A. *The Precedent, the Bail Reform Act, and The Presumption's Misapplication*

In *Bell v. Wolfish*, the Supreme Court held that pre-trial detention is not punishment.[14] The Court applied the

rather, that of reminding ourselves that there *is* a difference between wanting to believe something and having good reasons for believing it." Larry Laudan, *A Confutation of Convergent Realism*, 48 PHIL. SCI. 19, 49 (1981).

14. Bell v. Wolfish, 441 U.S. 520, 535–37 (1979) ("Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense, however. Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does to convert the conditions or restricts of detention into 'punishment.'").

punitive-versus-regulatory test that examines the purpose of an action to determine its constitutionality, stating: "[i]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"[15] This holding aligns with other Supreme Court cases that have recognized the prevention of future criminal acts as a valid legislative objective that justifies a lesser standard of proof, such as the civil commitment of persons with mental illness who have been deemed dangerous[16] or allowing confinement of minors who might commit a crime prior to their return date.[17]

What may seem obvious—but what this Comment seeks to dispel—is the notion that preventive detention of this type has implications regarding the presumption of innocence. In *Wolfish*, the court made clear that the presumption of innocence "has *no application* to a determination of the rights of a pre-trial detainee during confinement before his trial has ever begun."[18] The Court noted the quote from

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15. *Id.* at 539 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1979)).

16. *See* Addington v. Texas, 441 U.S. 418, 427–31 (1979) (holding due process clause of Fourteenth Amendment allows confinement of people with mental illnesses who the state considers dangerous upon a standard that is greater than a preponderance, but less than beyond a reasonable doubt).

17. *See* Schall v. Martin, 467 U.S. 253, 2604–72 (1984) (holding there was a valid legislative objective in protecting society from possible criminal acts which overcame a child's liberty interest to be free from custody and applying the same *Mendoza-Martinez* test to determine whether pre-trial confinement is regulatory or punitive).

18. 441 U.S. at 533 (emphasis added). An earlier decision from the D.C. Circuit Court of Appeals used very similar language in stating that, although "the presumption of innocence is the expression of one of the most important principles of Anglo-American . . . law" the presumption of innocence did not apply to situations outside of trial and "the history of criminal jurisprudence in this country and England . . . reveals the inapplicability of the presumption to pretrial detention." Blunt v. United States, 322 A.2d 579, 584 (D.C. Cir. 1974), *overturned on other grounds by* Best v. United States, 651 A.2d 790, 792 (D.C. Cir. 1994).

Coffin, discussed in the introduction, that the presumption of innocence is "the undoubted law, axiomatic and elementary" but concluded, nonetheless, that the presumption of innocence does not apply to the pre-trial detainee.[19] Instead, the presumption of innocence was, essentially, a synonym for the burden of proof at criminal trials.[20] This was not merely dicta but a direct response to the Second Circuit's previous ruling that relied on the presumption of innocence in holding the appellees' rights were violated.[21] With the introduction of the Bail Reform Act of 1984, which made substantial changes to pre-trial detention in the federal system, the court reaffirmed this principle again.[22]

Despite the connotations its name possesses that may mislead one to believe it created a more "defendant-friendly" bail system, the Bail Reform Act of 1984[23] did not do much to liberalize bail.[24] It was meant to relax the standards required to detain an individual pre-trial under the Bail Reform Act

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19. *Bell v. Wolfish*, 441 U.S. at 533.

20. *Id.*

21. *See* Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978) ("Fundamental to the Anglo-American jurisprudence of criminal law is the premise that an individual is to be treated as innocent until proven guilty by a jury of his or her peers."), *rev'd*, 441 U.S. 520 (1979).

22. *See generally* United States v. Salerno, 481 U.S. 739, 762–66 (1987) (Marshall, J., dissenting) (although the majority never directly mentions the presumption of innocence, the challenge was raised and Justice Marshall's dissent was focused, in-large part, on what he believed was the degradation of the presumption of innocence when the Court upheld the Bail Reform Act of 1984). Other courts have interpreted the absence of the presumption of innocence's direct mention in the majority, in conjunction with its regular mention in Marshall's dissent, to stand for the proposition it does not apply at bail hearings, or in the pre-trial context generally. *See* United States v. Zhe Zhang, 55 F.4th 141, 151–52 (2d Cir. 2022).

23. The Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3151.

24. *See* Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1414–15 (2017) (discussing procedural protections the Bail Reform Act of 1984 removed).

of 1966.[25] Congress' first stated aim was to "permit consideration of danger to the community in setting pre-trial release conditions."[26] With this goal in mind, the Bail Reform Act of 1984 allows a court to detain a defendant after a hearing if the court determines that no conditions will reasonably assure "the appearance of the person as required" or "the safety of any other person [or] the community."[27]

In line with the general aim of the statute to make pre-trial detention easier, the Bail Reform Act also created a rebuttable presumption against the defendant that detention is appropriate if they are alleged to have committed an offense while on pre-trial release, were released from prison in the preceding five years, or, *inter alia*, are alleged to have committed a violent felony or felony drug offense where the maximum term of imprisonment is more than ten years.[28] In addition to the statute's rebuttable presumptions, Congress intended for many types of crimes to operate as a quasi-rebuttable presumption even if the specific circumstances did not trigger the statutory one.[29] In

25. Despite the Bail Reform Act of 1984's controversial nature today, it was about as bipartisan of a bill as possible. It was co-sponsored by forty-six Senators from thirty-four states, thirty-two Republicans and fourteen Democrats, passing in the Senate with a vote of 84-0. One of the co-sponsors was—at the time Senator from Delaware—Joseph R. Biden, Jr. In fact, when laying out the procedure of the day to the President Pro Tempore, Senator Howard Baker of Tennessee made the following prediction of the bill and upcoming vote which ultimately proved correct: "I anticipate that it will take a fairly brief time to dispose of that." The Record shows only three Senators made fairly brief statements regarding the bill the day of the vote, two about a tangential amendment to the Speedy Trial Act which ultimately failed. 130 CONG. REC. S1810–23 (daily ed. Feb. 3, 1984).

26. S. REP. NO. 98-147, at 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3186. However, it should be noted that some statements in the Senate suggest the primary focus was to "deemphasize the use of monetary bonds in the Federal courts because that often results in disproportionate pretrial incarceration of indigent defendants." 130 CONG. REC. S1815 (statement of Senator Mitchell).

27. 18 U.S.C. § 3142(e)(1).

28. *Id.* § 3142(e)–(f).

29. The Senate report noted that even though the circumstances of a

determining whether detention is appropriate, the court is to consider the "nature and circumstances of the offense charged; the weight of the evidence against the person; [and] the history and characteristics of the person," which includes employment, financial resources, family ties, and history of drug abuse.[30]

Recognizing that many people raise the presumption of innocence to challenge pre-trial detention, Congress also wrote into the statute subsection (j): "Nothing in this sections shall be construed as modifying or limiting the presumption of innocence."[31] Understandably, given the exaltation and unquestioning acceptance the presumption of innocence receives, courts,[32] advocates,[33] and academics regularly

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particular case does not fit into the circumstances that trigger a rebuttable presumption of dangerousness under the statute, the circumstances may be "so strongly suggestive of a person's willingness or inclination to resort to criminal violence as to warrant the inference that the person would be a danger to society even if released on the most restrictive conditions." The Committee proceeds to give the example of a person alleged to have possessed a firearm or a destructive device; notable, as possession alone is not exactly the most heinous crime that would tend to predict a defendant is *especially* prone to violence. S. REP. NO. 98-147, at 46–47.

30. 18 U.S.C. § 3142(g). The common critique that our criminal law should be one of "bad acts" not "bad-persons" is applicable here. The risk of allowing biases to control bail determinations due to the "history and characteristics" factor's heavily weighted status in many courts will be discussed in greater detail below, which is especially problematic given the discounting of the other factors; especially the "weight of the evidence" factor.

31. *Id.* § 3142(j).

32. *See, e.g.*, United States v. Crowell, No. 06-CR-291E(F), 2006 U.S. Dist. LEXIS 88489, at *12 (W.D.N.Y. Dec. 7, 2006) ("[T]he understandable legislative desire to suppress the potential to continue the misconduct by persons while on release pending trial on such charges does not allow Congress to override fundamental constitutional safeguards of the accused who, despite the reprehensible nature [of] the offenses, continue to enjoy the presumption of innocence in setting conditions of release." (citing 18 U.S.C. § 3142(j))).

33. For instance, Magistrate Judge J. Elizabeth McBath, who at the time of writing her truly exceptional article was an Assistant United States Attorney, made this understandable mistake, writing of subsection (j): "In the end, Congress attempted to balance a defendant's presumption of innocence with the

misinterpret subsection (j) to say the presumption of innocence still applies at a defendant's bail hearing and is balanced against the government's proffer of evidence. However, subsection (j) was included to bookmark the *Wolfish* holding that the presumption of innocence *does not* affect the rights of the defendant pre-trial.[34] In fact, the Senate labeled the presumption of innocence nothing but an "evidentiary rule" when discussing their purpose for including subsection (j).[35]

Given the statute, legislative history,[36] and the Supreme Court's clear statement that the presumption of innocence is an evidentiary rule that operates at trial—with no effect on a defendant's rights at a bail hearing[37]—it is curious that the

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government's duty and mandate to protect the public while a defendant awaits trial." J. Elizabeth McBath, *A Case Study in Achieving the Purpose of Incapacitation-based Statutes: The Bail Reform Act of 1984 and Possession of Child Pornography*, 17 WM. & MARY J. WOMEN & L. 37, 46 (2010). Although the Senate Report she references does consider constitutional safeguards to the pretrial detainee, the Committee also noted the argument pretrial detention is violative of the presumption of innocence was rejected by the Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 (1979). *See* S. REP. NO. 98-225, at 8, n.25 (1983). The Committee also refers readers to Senate Report 98-147, cited *infra* note 33, 34, for a discussion of the presumption of innocence. S. REP. NO. 98-225, at 25, n.79.

34. S. REP. NO. 98-147, at 13–18.

35. *Id.* at 13.

36. *See supra* notes 33–35 and accompanying text.

37. Bell v. Wolfish, 441 U.S. 520, 533 (1979) ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials . . . [and] an admonishment to the jury . . . . It is 'an inaccurate, shorthand description of the right of the accused to "remain inactive, and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion . . . ."' But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."); Nelson v. Colorado, 581 U.S. 128, 135 n.8 (2017) ("Our opinion in [*Bell v. Wolfish*] . . . held only that the presumption does not prevent the government from 'detain[ing a defendant] to ensure his presence at trial . . . so long as [the] conditions and restrictions [of his detention] do not amount to punishment, or otherwise violate the Constitution.'"). *See* United States v. Salerno, 481 U.S. 739, 762–63 (1987) (Marshall, J., dissenting) (arguing that the majority's holding that the Bail Reform Act of 1984 was constitutional in instituting preventive detention arose from the "specious

presumption of innocence is so regularly misapplied at bail hearings. This misapplication leads to the weight of the evidence against the defendant being considerably less important than the defendant's personal characteristics[38] and, as will be discussed, is the most relevant factor in determining dangerousness or risk of non-appearance.[39] Even more curious, such application typically goes unchallenged by the litigators to whom the detriment of such application is awarded. Anthony Amsterdam's characterization of the Supreme Court as the Oracle of Delphi, whose words are viewed with the utmost importance but "from the practical point of view . . . d[o] not matter much,"[40] understates the issue. In regard to the Court's presumption of innocence jurisprudence, the Supreme Court is the Oracle on the street corner; neither the words are respected nor have practical impact.

The district courts within the Second Circuit have been particularly frequent offenders in misusing the presumption of innocence in bail determinations, but they are not alone. Given the trend, it is surprising that the Court of Appeals for the Second Circuit has repeatedly stated there is no presumption of innocence pre-trial, and it does not affect the Section 3142(g) factors—even once since this article's drafting began.[41]

In response to a defendant's misinterpretation of subsection (j) and his contention that the weight applied to

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denial of the role of the Bail Clause and the Due Process Clause in protecting the invaluable guarantee afforded by the presumption of innocence." Although the majority does not mention the presumption of innocence, Justice Marshall is correct that the Court was in accord with *Bell v. Wolfis*h's proclamation).

38. Bail Reform Act of 1984, 18 U.S.C. § 3142(g)(2)–(3).

39. *See* discussion *infra* Section I.B.

40. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 785–86 (1970).

41. *See* United States v. Zhe Zhang, 55 F.4th 141, 152 (2d Cir. 2022).

the strength of the evidence violated the presumption of innocence, the Second Circuit held—again—the presumption of innocence does not limit "a district court's ability to engage in fact-finding as to pre-trial detention. Instead, [subsection (j)] must be read only to emphasize that the outcome of pre-trial detention hearings can have no bearing on the presumptions owed to a defendant in the ultimate determination of guilt at trial."[42] The Court continued, stating more explicitly: "[A]s we have explained, a preliminary assessment of the strength or the weakness of the evidence can be a key consideration in whether the defendant is dangerous or poses a flight risk, and such a finding does *not in fact impinge upon the presumption of innocence*."[43]

"As we have explained" is certainly an understatement. They have been explaining this for forty years. In 1983, the Second Circuit found "no merit in the . . . contention that consideration of the weight of the evidence contradicts the presumption of innocence in criminal cases."[44] In 2000, again, the Second Circuit stated, "Clearly, Congress in passing this Act did not believe the presumption of innocence should bar the pre-trial detention of defendants who seriously threaten the safety of the community" in rejecting a similar argument.[45] Again, in 2007, the Second Circuit held the strength of the evidence went against the defendants and cited subsection (j) to clarify that the "Defendants will, of

42. *Id.* at 152 (citing United States v. Salerno, 481 U.S. 739, 755 (1987)). The Court here also, aptly, points out that pre-trial fact finding occurs with great frequency in the district courts, such as the requirement of finding a conspiracy exists by a preponderance in order for the co-conspirator hearsay exception to apply. *Id.* n.1.

43. *Id.* (emphasis added).

44. United States v. Kostadinov, 721 F.2d 411, 413 (2d Cir. 1983).

45. United States v. Dillard, 214 F.3d 88, 102–03 (2d Cir. 2000).

course, enjoy a presumption of innocence *at trial*."[46]

Despite this, the district courts within the Second Circuit regularly bring the presumption of innocence where it does not belong: the bail hearing.[47] For instance, *United States v. Fox* certainly did not live up to its opening quote that "[i]t is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law."[48] In *Fox*, the defendant was charged with distributing heroin and cocaine base, maintaining a drug premise, possessing a firearm in furtherance of drug trafficking, distributing heroin causing serious bodily injury, and sex trafficking by coercion.[49] Those charges arose from a lengthy period where the defendant would *allegedly* leverage victims' addiction to heroin to coerce and force them into degrading and unusual sex acts. This includes "anally raping [the victims], [electro-shocking] the [victims] in their vaginas using [a device] and restraining the [victims] to a large 'X'

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46. United States v. Sabhnani, 493 F.3d 63, 76 n.17 (2d Cir. 2007) (emphasis added).

47. Many of these cases cite to *United States v. Motamedi* for the notion that the weight of the evidence is the least important factor due to the presumption of innocence. Although *Motamedi* does state it is the least important factor, likely incorrectly as will be discussed and despite the statute not creating such a hierarchy, it does not do so because of the presumption of innocence like the Second Circuit decisions that cite it do. In fact, in *Motamedi*, the court writes:

> Whatever validity [the] language linking pretrial release and the presumption of innocence . . . was seriously undermined by language in . . . *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) . . . which stated that '[t]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials,' and 'has no application to a determination of the rights of a pretrial detainee during confinement before his trial has ever begun.'

United States v. Motamedi, 767 F.2d 1403, 1413 n.1 (9th Cir. 1985).

48. United States v. Fox, 602 F. Supp. 3d 434, 436 (W.D.N.Y. 2022) (quoting United States v. Clark, 96 U.S. 37, 49 (1977) (Harlan, J., dissenting)), *aff'd*, No. 22-1043, 2022 U.S. App. LEXIS 18835 (2d Cir. July 8, 2022).

49. *Id.* at 438.

type structure" amongst other things.[50]

The pertinent evidence provided at the bail hearing was the defendant's recorded admissions that he purchased heroin and gave it to drug-addicted victims in exchange for sex, that two of the victims overdosed on the heroin the defendant provided, and that he owned a firearm because the people he was procuring drugs from were potentially dangerous.[51] Additionally, witnesses described being bound and raped by the defendant, and the government proffered text messages, internet searches, and a number of images evidencing the defendant forced victims into non-consensual sex acts and possessed heroin.[52]

The mandatory minimum sentence was fifty-five years on counts four, five, six, and seven.[53] These specific offenses, along with the mandatory prison time faced, triggered the rebuttable presumption that the defendant is a risk of non-appearance or danger to the community as codified in the Bail Reform Act.[54] Moreover, the defendant never produced any rebuttal evidence that he did not commit the crimes alleged other than a general denial of the claim he engaged in non-consensual sex.

When analyzing the "weight of the evidence" factor set forth in Section 3142(g), the court stated, "The weight of the evidence 'is considered the least important' of the Section 3142(g) factors" because the "defendant must be presumed innocent" and the government's case before trial is difficult to assess.[55] The only substantial piece of evidence discussed

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50. *Id.* at 440.

51. Brief for Appellant at 4, United States v. Fox, 602 F. Supp. 3d. 434 (W.D.N.Y. 2022) (Not.22-1043-CR).

52. *Id.* at 5.

53. *Fox*, 602 F. Supp. 3d at 441.

54. Bail Reform Act of 1984, 18 U.S.C. §§ 3142(e)(3)(A)–(B).

55. *Fox*, 602 F. Supp. 3d at 441.

in the analysis of this factor was the defendant's general denial of ever engaging in non-consensual sex under a polygraph, which, notably, is not an element of any of the nine counts alleged in the indictment.[56]

To summarize, the government had proffered the defendant's admissions that constituted the elements of the charged offenses, crime-scene photographs, photographs allegedly taken by the defendant of the victims while the crimes were being committed, photographs evidencing possession of heroin, internet searches, text messages, and victim testimony. As long as the jury pool did not consist of venirepersons ready to nullify the laws protecting women from rape, a conviction was virtually certain based on this evidence.[57] In addition, the nature of the charges triggered the statutory rebuttable presumption, which operates as independent evidence weighed against the defendant. The defendant produced no evidence to rebut it.

Because of the presumption of innocence's misapplication, the weight of the evidence factor was not considered in favor of the government. Even if it did weigh in favor of the government, it would have been the "least

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56. *Id.* Other than the fact consent, or lack-thereof, is not an element of any charge, the widespread knowledge that polygraphs are known to be unreliable—to such an extent their use is banned at trial—and the common-sense conclusion that the Defendant might actually believe he never has never engaged in non-consensual sex despite the law's opinion on the matter, makes the Judge's noting of this evidence extremely strange.

57. This, of course, is at trial. When you consider the rate of conviction based on plea, it is unquestionably certain. Even then, the contention that the Government's case is difficult to assess is odd. As noted before, the Court is called upon to be the fact-finder before trial on many occasions. The Bail Reform Act, as Congress intended and as the Second Circuit interprets it, is but one example of many. For instance, the co-conspirator hearsay exception requires a finding by the preponderance that the declarant and defendant were engaged in a conspiracy. *See* United States v. Zhe Zhang, 55 F.4th 141, 152 n.1 (2d Cir. 2022). Following the Court's logic in *Fox*, this would be violative of the presumption of innocence and too difficult to assess.

important factor" due to the presumption of innocence as well.[58] The defendant was ultimately released. Accordingly, *United States v. Fox*'s erroneous use of the presumption of innocence was criticized by the Court of Appeals in their most recent reminder.[59]

Improper use of the presumption of innocence like this is nothing new or unusual.[60] It has been noted for as long as the presumption of innocence has been around, which—despite the academics who cite *Coffin* and each other for the notion it is ancient—saw its first reference in the form it takes today in the nineteenth century.[61]

A similar misapplication of the presumption of innocence and misinterpretations of subsection (j) can also be seen in most other Circuits.[62] While the Second Circuit examples

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58. *Fox*, 602 F. Supp. 3d at 441.

59. *See Zhe Zhang*, 55 F.4th at 152 n.2.

60. *See* JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 197–98 (1825) (offering a utilitarian justification for the Blackstone Principle, which is inextricably linked to conversations about the presumption of innocence, but warning against "those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence," a warning that is fitting to what the referenced district courts are doing today). For a great discussion of Bentham's views on punishing the innocent, *see* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L. J. 115 (2000).

61. This historical point will be discussed *infra* Part II. However, it is important to note at this point in the Comment that the presumption of innocence is discussed as a human right in *Coffin* and by scholars then and today, separate-and-distinct from the burden of proof at criminal trials. Discussion of it as the substantive doctrine and human right finds no basis in pre-nineteenth-century history. *See* ALLEN, *supra* note 4, at 258.

62. *First Circuit:* The various district courts, especially the District of Puerto Rico, appear to give a correct analysis under the Bail Reform Act in regard to the presumption of innocence. Still, the courts regularly state the presumption of innocence applies pre-trial, which is incorrect. *See, e.g.*, United States v. Orta-Castro, 104 F. Supp. 3d 190, 192 n.1 (D.P.R. 2015).

Third Circuit: E.g., United States v. Grimes, No. 16-59, 2020 U.S. Dist. LEXIS 100614, at *19 (E.D. Pa. June 9, 2020) (appearing to undertake an analysis similar to the analysis in *Fox*, which reduces the strength of the "weight

of the evidence" factor due to the presumption of innocence and generally stating it applies pre-trial); United States v. Strothers, No. 21-385-18, 2022 U.S. Dist. LEXIS 118197, at *16–17 (W.D. Pa. July 6, 2022) (hedging the weight of the evidence against the presumption of innocence, pre-trial).

Fourth Circuit: E.g., United States v. Singh, 860 Fed. Appx. 283, 286 (4th Cir. 2021) (misinterpreting subsection (j) to say presumption applies pre-trial).

Fifth Circuit: E.g., United States v. Singleton, No. 22-CR-0264, 2022 U.S. Dist. LEXIS 209121, at *9 (W.D. La. Nov. 17, 2022) (following the same analysis as the Second Circuit holding weight of evidence as the least important factor); United States v. Anderson, No. 5:15-MJ-116, 2015 U.S. Dist. LEXIS 190763, at *5–6 (N.D. Tex. Dec. 9, 2015) (stating "because the defendant is presumed innocent" and because of the defendant's personal characteristics, a 50-50 situation requires release, despite the standard being less than a preponderance).

Sixth Circuit: E.g., United States v. Fei Guo Tang, 3:19-CR-00014, 2019 U.S. Dist. LEXIS 98602, at *9 (E.D. Ky. June 12, 2019) (presuming the defendant innocent of allegations of witness tampering brought forward for the purpose of the bail hearing alone but finding the allegations "somewhat influential" on the court's decision, nonetheless. It is unclear if the presumption here is performative or the allegations being only "somewhat" influential are due to the presumption's misapplication).

Seventh Circuit: E.g., United States v. Grooms, No. 22-CR-128, 2022 U.S. Dist. LEXIS 73802, at *4, *9–10 (N.D. Ill. April 22, 2022) (applying the same analysis as the Second Circuit, holding the weight of evidence is "less significan[t]" due to the presumption of innocence, and misinterpreting subsection (j)); United States v. Brown, No. 18-CR-237, 2019 U.S. Dist. LEXIS 6320, at *4–5 (E.D. Wis. Jan. 14, 2019) (giving limited weight to strength of evidence due to presumption of innocence, same as the Second Circuit).

Eighth Circuit: E.g., United States v. Stenger, 536 F. Supp. 2d 1022, 1025 (S.D. Iowa 2008) (adding a parenthetical after a cite to subsection (j) saying it "not[es] that the presumption of innocence remains in effect" at the pre-trial stage); United States v. Wolf, No. 14-50093-JLV, 2015 U.S. Dist. LEXIS 169168, at *4–5 (D.S.D. Dec. 18, 2015) (stating the presumption applies pre-trial, misinterpreting subsection (j) for that point, and appearing to weigh the presumption against the weight of the evidence, which would be incorrect even if it did apply pre-trial as the presumption is not independent evidence, but a bursting bubble).

Ninth Circuit: E.g., United States v. Gentry, 455 F. Supp. 2d 1018, 1020 (D. Ariz. 2006) (stating bail should only be denied for the strongest reasons because of the presumption, despite contrary legislative history and the presumption of innocence not applying pre-trial). *But see* case cited *supra* note 47 and accompanying text.

Tenth Circuit: E.g., United States v. Baker, 349 F. Supp. 3d 1113, 1116 (D.N.M. 2018) (stating the burden rests on the Government at bail hearing due to the presumption of innocence although quoting *Coffin* for the notion it is a

indicate the application of the presumption pre-trial changes the analysis under the Bail Reform Act, in many cases, it is unclear what the presumption of innocence is doing at the pre-trial stage. Frequently, it appears to be an empty pronouncement on its face, being referenced only in passing to say the presumption of innocence protects the defendant before trial. However, even this requires correction. The presumption of innocence does not apply anywhere but the trial; it is an evidentiary standard.[63] Nonetheless, one can assume the courts that reference the presumption are doing so with meaning, and if they are saying it, it likely affects their analysis. Therefore, leaving open the opposite possibility, the improper use of it in those circumstances is either a less-explicit version of the Second Circuit's analysis that disfavors the strength of the evidence, or it is entirely performative.[64]

B. *The Most Relevant (Predictive) Factor and the Presumption's Consequences*

Contrary to the view of those courts, the strength of the evidence is the most relevant factor in ensuring community safety or risk of non-appearance. To that end, the presumption of innocence's use pre-trial reduces the predictive ability of our courts. Additionally, a heavier weight given to the strength of the evidence would avoid

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"basic component of a fair trial" and despite the Legislative enactment of a rebuttable presumption against the defendant).

Eleventh Circuit: E.g., United States v. Knight, 636 F. Supp. 1462, 1469 (S.D. Fla. 1985) (balancing the presumption of innocence with Government's interest in community safety at bail hearing); United States v. Hurtado, 779 F.2d 1467, 1478 (11th Cir. 1985) (stating the purpose of the Bail Reform Act of 1984 was to balance the public interest with the presumption of innocence). *But see supra* notes 28–36 and accompanying text.

63. *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979). *See also* discussion *infra* Part II.

64. *See* discussion *infra* Part III.

injustice by decreasing the number of those ultimately acquitted from being detained prior to trial.

The argument that "the more likely an individual is to be convicted, the more likely the individual is to flee" is attended with a common sense[65] that undeniably informs its inclusion in bail laws spanning centuries.[66] Since the enactment of the Statute of Westminster in 1275, the strength of the evidence has been considered in determining the risk of non-appearance.[67] Unfortunately, but for obvious reasons, it is practically impossible to compile data on the weight of the government's evidence pre-trial in connection to the risk of non-appearance or danger, unlike the other easily quantifiable factors. Despite this, some observations tend to show the defendant's perception regarding the likelihood of conviction is relevant in their decision to flee.[68]

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65. If the repeated use of a statement in popular media is evidence, then this idea certainly appeals to the common intuition. *See* HOT FUZZ (Rogue Pictures 2007) ("Innocent people don't run!"—an exclamation by character PC Nicholas Angel); *Suits: Tricks of the Trade* (USA Network television broadcast July 28, 2011) ("And not to mention, innocent people don't run."—a quote by character Harvey Specter).

66. Lauryn P. Gouldin, *Defining Flight Risk*, 75 U. CHI. L. REV. 677, 707 (2018).

67. Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 804 (2012).

68. The principle that the greater the probability of conviction, the more likely an individual will flee might be the forcing mechanism for such observations as defendants accused of crimes involving weapons are less likely to flee when the weapon was not found in their possession, *see* Mary A. Toborg, *Pretrial Release: A National Evaluation of Practices and Outcomes*, 1981 NAT'L INST. JUSTICE i, xi, those possessing drugs more likely to flee than those accused of violent crimes; the latter being likely more serious, *see* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 546–47 (2012), or teenagers with a prior failure to appear brought in on possession charges being the least likely to appear of all defendant categories. *Id.* at 547. In each circumstance, whether it is weapons or drugs, the knock-down evidence of being found in possession of a criminal item is correlated with flight. While other factors might be at play, the fact violent offenders—who typically face stiffer penalties, but a lower perceived

For risk of danger, outside of an individual's criminal record, a focus on personal characteristics to predict danger to the community walks an invisible line between what Congress has dictated as relevant and legislatively sanctioned discrimination.[69]

On the other hand, those easily quantifiable factors, such as a person's character, financial resources, community ties, length of residence in the community, employment, and history of alcohol abuse,[70] have shown to be inaccurate predictors of flight or dangerousness;[71] all have an attenuated nexus to the likelihood of non-appearance or violence and are uniquely susceptible to the implicit biases of the presiding judge.[72]

Further casting doubt on the predictive power of a

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likelihood of conviction given the nature of the evidence presented—are more likely to stick around is especially telling and gives good reason to believe the perceived probability of conviction is a significant factor in the decision to not appear in court.

69. *See infra* pp. 19–21 and notes 76–80.

70. A partial list of the factors set forth in the Bail Reform Act of 1984, 18 U.S.C. § 3142(g)(3).

71. Researchers disagree on whether it is possible to predict danger or flight of a defendant. However, it is rare to find any claim that a defendant's personal characteristics are relevant predictors. Many studies do find various, and sometimes contradictory, trends relating to likelihood of flight or danger with a defendant's personal characteristics, but the general consensus is that there is no identifiable set of characteristics that are consistently predictive outside of the defendant's criminal record and the circumstances of the charged offense. *See* Toborg, *supra* note 68, at xi–xii. Prior failures to appear and the nature of the charge are the best, and maybe only, (quantifiable) predictors of pre-trial crime and flight. Baradaran & McIntyre, *supra* note 68, at 545–50, 557. Many other interesting trends have been observed, such as the general rule that past criminal conduct is predictive does not apply if the individual is a teenager and is charged with a felony. In those cases, the likelihood of rearrest is higher than average and equal to that of other teenagers regardless of prior run-ins with police. *Id.* at 550. The research on this area is complicated and often conflicting, but the general takeaway is that a defendant's personal characteristics are not good predictors, but the nature of the charges and their past criminal conduct is.

72. *See infra* pp. 19–21 and notes 76–80.

defendant's personal characteristics, the difference between the risk of flight and the risk of non-appearance is a meaningful one.[73] The Bail Reform Act directs the court's attention to what conditions will "reasonably assure the appearance of the person as required."[74] Many of the factors might appear on their face to be predictive of flight risk—common sense would dictate someone with no money, five children, and who has never left the area is unlikely to end up in another country while the international billionaire probably will. However, those characteristics lose their predictive power when the court is called to predict whether the defendant will merely stay home, as is the case under the Bail Reform Act.[75]

When the defendant's characteristics are placed against weak evidence, they lose even more force. There is no reason to think defendants are not like the rest of us; they engage in risk-benefit analyses. Given this, even a record of non-appearance, one of the few factors with demonstrated predictive power, is limited when put alongside a defendant unlikely to be convicted. The consequences of not appearing in court are understood, and the accused are frequently reminded of them. The risk posed by non-appearance simply outweighs the risk posed by showing up to trial when the probability of conviction is low, and the probability of upending one's own life by not appearing is high.[76]

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73. Although only discussed briefly, this distinction makes a critical difference; especially in regard to what conditions are set if release is appropriate, which is beyond the scope of this Comment. However, for a discussion of much greater detail, *see* Gouldin, *supra* note 66, at 707–710 (distinguishing systems that focus on risk of flight (fleeing the jurisdiction), and those that focus on non-appearance (not showing up for court)).

74. 18 U.S.C. § 3142(e)(1).

75. *Id.*

76. Depending on the weight of the evidence, it might actually make sense to not appear. Placing this analysis into a risk-assessment formula, the following variables will be used: (1) *Likelihood of recapture.* According to a Report

published by the DoJ, taking a sample from the United States' seventy-five most populous counties, about a third of all felony defendants who failed to appear, were still fugitives a year later. Discounting the fact that many of that third are likely to be ultimately captured, 0.66 will stand for the likelihood of recapture. Brian A. Reaves & Jacob Perez, *Pretrial Release of Felony Defendants*, *1992: National Pretrial Reporting Program*, BUREAU JUST. STAT. BULL., Nov. 1994, at 10. As the likelihood of conviction for failure to appeal is essentially the likelihood you are apprehended (0.66), that factor will not be considered. (2) *Perceived likelihood of conviction.* As the defendant's subjective view on the matter is what is important, the perceived likelihood of conviction on the first charge will be L as a stand-in for the weight of the evidence. (3) *Sentence on initial charge.* The possible sentence given on the initial charge will be S_a. (4) *Sentence for failure to appeal.* The defendant's possible sentence for failure-to-appear depends on the original charge, and is either ten years, five years, two years, or no more than one year. *See* 18 U.S.C. § 3146(b). This will be S_b.

In formula A, we will take the .66 chance they are captured, multiply it by the possible sentence if captured, then add that against the likelihood of conviction on the underlying offense which is also multiplied by the possible sentence of the originally charged offense, all multiplied by the likelihood of recapture. Formula B is merely the likelihood of conviction multiplied by the possible sentence. If the product of B is greater than A, the defendant should probably do their best to not appear in court and vice-versa.

A: $(0.66 \times S_b) + 0.66(L \times. S_a)$.

B: $L \times S_a$

Let us imagine an individual with no criminal history is charged with Second Degree murder. The evidence against her is strong and if she went to trial, there is a 1% chance of acquittal—which is still higher than usual in a case where the evidence is particularly strong. In all cases, bad and good, the conviction rate is well over 90%. S_a will be an offense level of 36, a possible sentence of 235 months given an acceptance of responsibility adjustment. U.S. SENT'G COMM'N , U.S. SENT'G GUIDELINES MANUAL §§ 2A1.2, 3E1.1. (2021). S^b will be 120 months. *See* 18 U.S.C. § 3146(b)(1). Plugging it in:

A: $(0.66 \times 120) + 0.66(0.99 \times 235) = 228.72$

B: $0.99 \times 235 = 232.65$

In this case, B > A. If she is doing the math, it pays to flee. Given that criminals likely think they are better at avoiding police than they actually are, and their risk aversion is likely lower than average, this disparity would be greater from the defendant's perspective. In this circumstance, flight is likely. If we take the same defendant, but the evidence is weak (L = .2) and if she knows she is innocent—which would add an unquantifiable motivation to not flee due to the possibility of vindication not counted for below—we have the following:

A: $(0.66 \times 120) + 0.66(0.2 \times 235) = 110.22$

B = $0.2 \times 235 = 47$

Additionally, and as previously mentioned, a focus on a defendant's personal characteristics, while weakening the strength of the evidence, increases the likelihood that bias will be a controlling factor in determining bail.[77] Racial disparities in bail determinations are well documented[78] and are often attributed to the quickness in which bail determinations are made.[79] While that may be true in the various state systems where bail decisions are made with little argument, in the federal courts, the process given to defendants is expansive. Written submissions, oral arguments, presentation of evidence from both sides, frequent appeals, and a right to counsel are all customary. Lack of process and split-second decisions do not explain the disparity.

While reasonable people can disagree, there is little to indicate that intentional and malicious discrimination is frequently afoot in the federal courts. However, the force that implicit bias has on our decision-making is undeniable.[80] For

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Here, A > B. Therefore, if the defendant engages in a reasoned risk analysis, she should show up to trial. The weight of the evidence is the only changing variable, and the difference in whether it is wise to show up changed by a large margin.

77. Unsurprisingly, disparities indicative of discrimination in setting bail are frequently observed; even amongst judges in the same county. *See, e.g.*, Miguel F. P. de Figueiredo & Dane Thorley, *Pretrial Disparity and the Consequences of Money Bail*, 81 MD. L. REV. 557, 602–05, 606 fig.4 (2022) (finding in a sample of ten judges presiding in the same jurisdiction, showed relatively equal treatment of races in setting cash bail, except for three judges who required cash bail for black defendants significantly more often than other races and one judge who required it significantly less often for black defendants).

78. *See id.*; Yang, *supra* note 24, at 1466–71 (showing racial disparities in setting bail and arguing for incorporating objective evidence in place of heuristics to reduce bias; similar to the point being made here).

79. *See* Yang, *supra* note 24, at 1468 (attributing racial disparity, in part, to the fact "bail determinations are currently hastily conducted and insufficiently aligned with a consideration of the costs and benefits of detention.").

80. In an article discussing the presumption of innocence, Sir Carleton Kemp Allen wrote of juries, "and there are adventitious but not insignificant

example, many of the "defendant characteristics" factors in Section 3142(g) ask the judge to evaluate the defendant's social status and community to determine dangerousness or risk of non-appearance. Accordingly, much thought is unnecessary to understand how bias can be effectuated.

When the likelihood of biases playing a role in this analysis is coupled with our society, rife with inequalities, the issue is exacerbated. A defendant's race has a significant bearing on other socio-economic factors, such as educational opportunities, income, employment, and family ties—all of which are factors under the Bail Reform Act of 1984.

Suppose a judge places a heavy weight on the defendant's employment and education. The financial advisor who was a legacy admission at Harvard will certainly be treated differently than the Black man who grew up in a red-lined neighborhood and was not awarded the privileges that come with growing up wealthy and white. All else being equal, if the strength of the evidence is discounted due to the presumption of innocence, that analysis could result in remanding or setting cash bail on the Black defendant. In contrast, the white defendant is set free. If the weight of the evidence is given its proper weight, such discrimination would be tempered by an objective, *actually neutral*, analysis.[81]

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circumstances—for example, that most persons who are accused of being criminals *look* as if they were criminals—a detail which ought to be quite irrelevant, but, human prejudice being what they are, seldom is so in fact." ALLEN, *supra* note 4, at 256. Allen was certainly correct, that the appearance of the defendant ought to be irrelevant, but often is not. As the saying goes, the thing about implicit bias is *that it is implicit*. The disparities are well documented and there is no reason to think that our judges are not prone to the same unknowing human prejudice as our jurors.

81. A great amount of compelling literature criticizes another setting where the Court has focused on defendant characteristics, causing racial disparity: sentencing. The sentencing factors that look at defendant characteristics and the Section 3142(g) often overlap; both asking the judge to evaluate the defendant's social status and community. Both settings also rely heavily on recommendations

One of the often-cited reasons for the presumption of innocence's use as a jury instruction is ensuring bias has no effect in the deliberation room. Paradoxically, when invoked pre-trial, it helps the same bias be perpetuated by lifting a defendant's characteristics as particularly relevant, past even what Congress has dictated. It is in keeping with the goal of forming a fair system to reduce the use of criteria that act as triggering mechanisms for that bias and to eliminate the continued harm of historical racism by not elevating socio-economic factors in bail decisions.

The invocation of the presumption of innocence in bail determination harms defendants in other ways. A higher, or even equal, weight applied to the strength of the evidence in bail determinations would reduce the risk of individuals who are innocent from being detained before trial. An even more unreal dream than that of the innocent man convicted—but an accepted incident of remanding unlikely to appear or dangerous individuals prior to trial—is the "ghostly phantom of the innocent man" detained, not by jury verdict, but by a judge's ruling.[82] This "more unreal dream" is an often-heard criticism of the bail system from those who oppose it[83]—which is frequently the same authors who invoke the presumption of innocence as a right that pre-trial remand

created by probation officers which rely heavily on defendant characteristics in forming their conclusion; and the court treats these recommendations with great deference in both settings. While the history of considering defendant characteristics in setting bail might not be rooted in racial bigotry as is the case with sentencing, the harmful effects are the same. For a great source, amongst others, that discusses the affect and racial history of considering defendant characteristics, *see* Lisa M. Saccomano, *Defining the Proper Role of "Offender Characteristics" in Sentencing Decisions: A Critical Race Theory Perspective*, 56 AM. CRIM. L. REV. 1693 (2019).

82. Di Carlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925) (citing Judge Learned Hand's famous quote).

83. *See generally* LAST WEEK TONIGHT WITH JOHN OLIVER (HBO), *Bail Reform*, YOUTUBE (Oct. 31, 2022) https://youtu.be/xQLqIWbc9VM.

violates.[84] While such treatment of the presumption of innocence is incorrect, these sentiments highlight a problem that should be reduced. Such a reduction can occur, counter-intuitively, if the courts throw out their over-broad conception of the presumption of innocence.

United States v. Parker provides an illustrative example of how an innocent defendant can be harmed by the erroneous use of the presumption of innocence pre-trial.[85] Parker was charged with threatening the life of the President of the United States in violation of 18 U.S.C. § 871.[86] Parker allegedly told a Secret Service Agent that he intended to "shoot and kill the President" while undergoing in-patient psychiatric treatment he sought on his own accord.[87] The Agent claimed Parker relayed his whole plan to the Agent, stating he "need[ed] to find the President's schedule on the internet, find a gun then travel to where he was . . . wait till [the President] got out of the motorcade or came to shake hands" where he would then kill him and "all the people around" him because "voices" were telling him to do it.[88]

It is particularly important that the statement was made after the defendant voluntarily entered psychiatric treatment, as a privilege exists under Federal Rule of Evidence 501 for statements made to medical professionals

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84. Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV 1, 1–8 (2005) (telling the story of Samuel Moore, who was detained for months on bad evidence based, assumingly, on his personal characteristics, and ultimately having his charges dismissed to start his paper which ultimately criticizes the bail system as violative of the presumption of innocence).

85. United States v. Parker, 65 F. Supp. 3d 358 (W.D.N.Y. 2014).

86. *Id.* at 360.

87. *Id.* at 360–61.

88. *Id.*

and social workers in similar circumstances.[89] This statement formed the basis of the government's entire case. Additionally, 18 U.S.C. § 871 requires an "indicat[ion of] a serious intention to commit the act."[90] The statement also must be made "voluntarily and intelligently."[91] These elements are negated when one considers the statements were made while Parker was undergoing a mental crisis after voluntarily seeking treatment and being confined in a mental health facility. He does not look to the reasonable person like someone with an intention to commit the act. Predictably, Parker was acquitted two days after his trial began.[92] Unfortunately for Parker, he was detained pre-trial, taken out of the hospital where he originally was a patient,[93] and was not released for 269 days.[94]

At Parker's bail hearing, the court went through the analysis under the Bail Reform Act, starting with a determination of probable cause and moving to Section 3142(g) factors.[95] When discussing the "weight of the evidence" factor, the court stated it was the "least important consideration" because it is "inherently difficult to assess the

89. Jaffee v. Redmond, 518 U.S. 1, 15–16 (1996). This admittedly was not a valid defense in retrospect, and ultimately it did not prevail, as the statements were made to medical professionals, but also to a Secret Service agent who the privilege would not apply. Nonetheless, his state of mind and confinement casts doubt on the intent and "intelligently made threat" requirements that made a conviction extremely unlikely, even if it does pass the probable cause standard—something that could be debated in-itself.

90. Rogers v. United States, 422 U.S. 35, 44 (1975) (Marshall, J., concurring).

91. *See, e.g.*, United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983).

92. Parker v. Blackerby, 368 F. Supp. 3d 611, 617 (W.D.N.Y. 2019).

93. *Parker*, 65 F. Supp. 3d at 366–67.

94. Two hundred sixty-nine days might be shorter than the actual period he was in custody away from the hospital at which he was originally a patient given the defendant was likely detained prior to the bail hearing. However, officially, he was ordered detained on December 15, 2014, *id.*, and finally acquitted on September 10, 2015. *Parker*, 368 F. Supp. 3d at 617.

95. *Parker*, 65 F. Supp. 3d at 362–64.

Government's case before trial and a defendant *must be presumed innocent*."[96] The court acknowledged the weaknesses in the government's case discussed above, stating the "weight of the evidence against the [d]efendant may not support detention as strongly as the other [Section] 3142(g) factors," but, nonetheless, concluded that the presumption of innocence makes the factor the least important.[97] The court did not state in whose favor the "evidence" weighed. After the comment regarding it being the least important factor, it does not seem like the likelihood of conviction or the evidence against the defendant was considered when determining whether detention was appropriate.

It is especially strange that the court applied the presumption of innocence to Parker's detriment; the reasoning behind the "least important factor rule" is the mistaken belief that the presumption operates like a fundamental right that applies pre-trial. Despite this, it was not utilized to prevent pre-trial incarceration with the mistaken belief it is essentially punishment or the like but to justify the court's refusal to consider the likelihood of conviction or actual danger to the President, which was close to zero on both fronts. Stated otherwise, Parker's "fundamental right" kept him confined for eight months on charges likely leading to acquittal—and which ultimately did.

This is especially alarming given that—unlike the defendants discussed, who were released despite clear-and-convincing evidence against them when a conviction was essentially certain, and whose liberty interest is essentially non-existent because the time in pre-trial confinement will be counted against their inevitable sentence—Parker's

96. *Id.* at 365.

97. *Id.*

liberty interest was usurped. No recourse is available to him for that time lost.

Although looking at the unfortunate detention of a person later acquitted might skew one's view on the morality of pre-trial detention, the fear of being wrong as it relates to another's liberty should nonetheless motivate us to ensure our actions today honor the mistakes our hindsight has revealed.[98] Hindsight shows us that pre-trial detention only impinges the liberty interest of the non-convicted. That is, if an individual is ultimately convicted of the crime charged, their liberty interest was not usurped. Any time spent in pre-trial detention will be counted against their ultimate sentence.

This distinction is not trivial. The reason why many articles, videos, and op-eds, which object to pre-trial

98. Although the position I am arguing would, in totality, increase the number of people detained pre-trial, a heavier weight on the strength of the evidence would primarily increase the number of people detained pre-trial who are ultimately found guilty and help keep those defendants likely to be acquitted from being detained at all. As only the non-convicted's detention is decried in the popular discourse as unjust when viewed retrospectively, the circumstances that spark outrage would not be increased by the detention of more people who are ultimately found guilty. Again, that time comes out in the wash at sentencing. In addition, bail determinations would be less prone to bias, and require a deeper of investigative techniques and possible police misconduct which trials and other arenas are not often accommodating to. Additionally, as more evidence comes to light, re-hearings that would benefit the defendant or society, depending on the nature of the evidence, would be more frequently allowed. While certain courts have decried such preliminary decision-making as too difficult, courts are called on to make preliminary determinations quite frequently relating to credibility. While they might not be confident of their own ability, I am confident in our learned judges to predict the likelihood of conviction; especially given the 90% plea rate and 80% conviction rate of those who exercise their right to a trial. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/. Even if one is not confident in the ability to predict the likelihood of conviction, they should be much less confident in the ability to judge dangerousness or risk of non-appearance based on the defendants' characteristics.

incarceration, start with a story of someone who spent a lengthy period incarcerated on bad evidence is no secret; such stories are compelling and provide immediate emotional support for the positions argued. But, more importantly, they highlight a serious injustice—albeit a necessary incidental—that the system would do well to reduce as much as possible.

For this reason, one would search in vain for an author attempting to spark the same emotional support by telling the story of someone who spent months detained prior to trial, ultimately to be convicted and sentenced to a period of years. Arguments concluding detention in those circumstances is unjust are unconvincing. Typically, the authors must invoke the presumption of innocence or discount the regulatory nature of pre-trial detention to form their argument, both having been decidedly foreclosed as viable rebuttals by the Supreme Court.[99]

This is the most important reason why the weight of the evidence matters so much. Conversely, as the weight of the evidence grows, so does the likelihood of conviction and, therefore, the likelihood pre-trial detention will ultimately count as punishment of the perpetrator of an alleged crime. As the weight of the evidence decreases, the chance of detaining an individual unjustly increases proportionately.

Said another way, as the weight of the proffered evidence approaches certainty, the legitimate liberty interest in the defendant correspondingly collapses, and the likelihood of flight or danger to the community increases in proportion.[100]

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99. *See generally* Bell v. Wolfish, 441 U.S. 520 (1979); United States v. Salerno, 481 U.S. 739 (1987). *See also* discussion *supra* Section I.A.

100. *See supra* notes 65–81 and accompanying text. To expand on this notion in addition to the discussion cited, as the weight of the evidence increases, the certainty that the court can state the defendant is dangerous increases. Typically, a risk of danger comes with an allegation of violent crime or possession of weapons. If the evidence is shaky, all the court can go off of is the defendant's

If the defendant's interests are on one side of the scale and the factors weighed by the court are on the other, the weight of the evidence is the only factor that adds weight to one side and subtracts from the other, and vice-versa. Therefore, the heavier the evidence against the defendant, the greater the justification is for remand.

In summary, our district courts regularly use the presumption of innocence to discount the weight of the evidence against the defendant in determining whether bail is appropriate. This practice reduces the predictive power of our courts,[101] elevates personal characteristics—thereby perpetuating bias[102]—and fails to consider the vast differences in the harm that pre-trial detention causes to those who are convicted compared to those who are acquitted.[103] When the presumption of innocence is invoked to that effect, the lofty language of *Coffin* is often quoted, and the presumption of innocence is exalted as if it were a fundamental right encoded in the very fabric of our legal system, following the defendant wherever she goes.[104] The popular conception of the presumption of innocence in our culture and academia also aligns with those courts' understanding. Despite this, the Legislature[105] and the Supreme Court[106] both consider the presumption of

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past criminal record and conduct; which would run afoul of the maxim *est odiosa et non praesumenda* and would discount the, at least purported, rehabilitative effect of incarceration; the maxim and the rehabilitative effect both being properly discounted by a proper analysis of the weight of the evidence given to the current charge which can show odiousness or a lack of rehabilitation.

101. *See supra* notes 65–76 and accompanying text.

102. *See supra* pp. 19–21 and notes 77–81.

103. *See supra* notes 82–84, 98–100 and accompanying text.

104. *See* Coffin v. United States, 156 U.S. 432, 454 (1895) (stating the presumption of innocence is the "undoubted law, axiomatic and elementary" amongst other things).

105. *See supra* notes 32–36 and accompanying text.

106. *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979).

innocence to be primarily a synonym for the burden of proof that does not apply pre-trial.

An examination of history shows that the presumption of innocence's path from an evidentiary standard to a fundamental right was a radical development, and any appeals to its historical foundation are largely mistaken.

II. THE ORIGIN OF THE PRESUMPTION

In much of the literature that treats the presumption of innocence with great adulation, its historical underpinnings are frequently referenced. Cries that some new policy, decision, or practice is violative of the presumption of innocence are often supported in pertinent part by the claim that our legal system has forgotten the historical glory the presumption of innocence once received. Unfortunately, in the majority of these writings, the authors point to Justice White's flawed historical analysis in *Coffin* instead of the primary sources themselves.[107] When those appeals to

107. *See, e.g.*, Danushka S. Medawatte, *Justice in Dire Straits: Unlawful Pretrial Detainees, Family Members and Legal Remedies*, 22 BUFF. HUM. RTS. L. REV. 189, 189–90 (2015–2016) (arguing overuse of pretrial detention and "indifference to the presumption of innocence" plagues our criminal justice system and the presumption of innocence has "lost [its] historical glory in light of laws pertaining to pretrial detention."). The author does, to their credit, acknowledge the difference between the "broad vernacular meaning attached to the presumption of innocence by international human rights advocates" and the "narrow meaning attributed to the phrase in U.S. Constitutional Law." *Id.* at 192. However, in noting there is a difference, it never quite shines through how the author believed that difference was meaningful. Either way, it appears it was underestimated just how narrow that conception of the presumption of innocence really was; as evidenced by the parenthetical quotes, amongst other things, and the previous highlighted misinterpretation of § 3142(j), stating it "reaffirms the applicability of the presumption of innocence" in regard to pre-trial detention. *Id.* at 198. *But Cf. supra* notes 31–35 and accompanying text. That being said, I believe it is worth recommending Medawatte's article for those interested in pre-trial detention; especially as it relates to human rights. The research and argumentation of Medawatte's article is truly excellent and was a valuable resource in forming this article.

history are made, very rarely are they supported by a discussion proportionate to the weight given to the contention. Possibly this practice is influenced by the commonly repeated language[108] of Justice White that the presumption of innocence is the "undoubted law" that "is stated as unquestioned in the text-books, and has been referred to as a matter of course in the decisions of this Court and the courts of the several [s]tates."[109] On the other hand, it is more likely that Justice White's description of the discourse that he treated positively was a negative that remains unchanged—what was an empty slogan in 1895 retained its status as such.

The objection largely revolves around what Justice White highlighted in his often-repeated quote. The historical underpinnings so often stressed as particularly pertinent support of the presumption of innocence are themselves "undoubted" and "unquestioned," along with the presumption of innocence itself.[110] History shows that such doubtlessness is unwarranted, and more questioning might finally put an end to those "watery sentiments" which drive

108. A Lexis+ search for the exact phrase "undoubted law, axiomatic and elementary" delivered 209 cases and 202 law review articles quoting Justice White's description of the presumption of innocence. (search conducted on Jan. 16, 2023). A search for the exact phrase "lies at the foundation of the administration of our criminal law" appears in 435 cases and 285 law review articles. (same). Most notably, it was quoted in Justice Marshall's *Salerno* dissent, where he vigorously defended the broad conception of the presumption of innocence many believe to be found in *Coffin* in response to the Supreme Court's apparent repudiation of that interpretation in *Wolfish* and *Salerno*. *See* United States v. Salerno, 481 U.S. 739, 763 (1987) (Marshall, J., dissenting).

109. Coffin v. United States, 156 U.S. 432, 453–54 (1895).

110. This point can be applied to the vast majority of the opinions or articles already cited which support the broad view of the presumption of innocence. However, Justice White does examine the history of the presumption of innocence. *See id.* at 454–55. Although I will argue his conclusion was improper in this section, he admittedly did not stop at stating it is undoubted, unquestioned, and the bedrock of our criminal law as many do.

the inadequate administration of our criminal law.[111] Until relatively recently, the idea that the presumption of innocence was distinct from the burden of proof was unheard of.[112]

Often those arguing the presumption of innocence is distinct from the burden of proof at criminal trials cite Deuteronomy for the earliest iteration of the presumption of innocence. Specifically, many authors discuss Deuteronomy's reference in Greenleaf's Evidence instead of the actual text.[113] In most works, the reference is even more

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111. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (using similar language used by Judge Learned Hand in warning that "[w]hat we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime" in discussing the advantages granted to the accused in our criminal procedure).

112. Many of the sources utilized in *Coffin*'s historical inquiry that academics reference in suggesting the presumption of innocence is a more expansive right than the burden of proof say nothing of the sort. For instance, one source often quoted is Lord Gillies' statement that "the presumption in favor of innocence is not to be reargued by mere suspicion. . . . [T]he public prosecutor treats this too lightly, he seems to think that the law entertains no such presumption of innocence. I cannot listen to this. . . . [T]his presumption is to be found in every code of law which has reason. . . . It is a maxim which ought to be inscribed in every judge and juryman." *Coffin*, 156 U.S. at 455 (quoting McKinley's Case, 33 State Tr. 275, 506 (1817)). However, what is ignored, and sometimes left out in academic papers arguing for an expansive view of the presumption, *see* Raymond E. Gazer, *The Presumption of Innocence: Why Should the Accused Care Whether He is Being Detained Before Trial for Regulatory or Punitive Reasons?*, 25 PACE L. REV 355, 355 (2005) (leaving out important point of quote in conversation of presumption's history), is Lord Gillies' final statement that, "I was happy to heard from Lord Hermand he is inclined to give full effect to [the presumption of innocence]. *To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only absolute certainty*." *Coffin*, 156 U.S. at 455, quoting McKinley's Case, 33 State Tr. at 506 (emphasis added). Even here, the presumption of innocence merely means "beyond a reasonable doubt" which is only a matter for the jury to consider. The most narrow and vilified conception of the presumption of innocence does not depart from than what Lord Gillies' assumingly considered it in the above quote; and is in-line with the understanding of nineteenth century legal scholars. *See infra* notes 114, 116–122.

113. Greenleaf's citation to Deuteronomy was briefly discussed in *Coffin*, which leads to many sources, unfortunately, stating the presumption of innocence was

attenuated: citing Justice White's citation to Greenleaf's citation to Deuteronomy.[114]

Given that attenuation, it is not terribly shocking that the reference does not stand for what those authors believe it does. Greenleaf's citation to Deuteronomy supports a discussion of the burden of proof, not a broad conception of the presumption of innocence.[115] In fact, the cited verses of Deuteronomy describe what sufficient evidence for conviction under Mosaic law is.[116] It is unclear how, if the presumption of innocence has a unique meaning untethered from the burden of proof at trial, such an assertion can be found in the Bible.

Moreover, Greenleaf's treatment of the presumption indicates he considered it a synonym for the burden of proof, nothing more.[117] Greenleaf starts the relevant section by stating the difference between civil and criminal cases is that there is a "*legal presumption in favor of innocence*" in

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encoded in Mosaic law. *Coffin,* 156 U.S. at 454. Of course, those commentators would be correct if their interpretation of the presumption of innocence was the Supreme Court's, (the burden of proof at criminal trials), instead of the broad conception that suggests it is a right that applies at pre-trial hearings.

114. *But see* Laudan, *supra* note 6, at 1 (expressing doubt in regard to Justice White's historical analysis, writing, "[The presumption of innocence's] historical pedigree has been traced as far back as that of any doctrine now current in the criminal law, even to Deuteronomy (if we are to believe the U.S. Supreme Court in *Coffin*)." It turns out, there was good reason to not believe in this circumstance).

115. 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE pt. 5, § 29, at 40 (15th ed. Boston, Little, Brown, and Co. 1892).

116. *Deut.* 17:4–7.

117. GREENLEAF, *supra* note 115, at 38–40. Greenleaf describes the presumption of innocence in-line with the narrow conception, stating the defendant is entitled to it in criminal cases and because of this, ". . . [i]t is, therefore, a rule in criminal law, that *the guilt of the accused must be fully proved.*" *Id.* at 38. Nowhere in the quoted Section, does Greenleaf's interpretation of the presumption of innocence depart from a simple description of the burden of proof placed upon the prosecution at a criminal trial.

criminal cases.[118] From this, the burden of proof in criminal trials is beyond a reasonable doubt. Greenleaf continues to explain beyond a reasonable doubt to be:

> [W]hen the facts proved coincide with and are legally sufficient to establish the hypothesis assumed, namely, the guilt of the party accused . . . . For it is not enough that the evidence goes to show his guilt; it must be inconsistent with the reasonable supposition of his innocence.[119]

Immediately following the above quote, he concludes the section with Lord Hale's maxim, "*tutius semper est errare in acquietando quam in puniendo; ex parte miserecordiae quam ex parte justitiae,*"[120] which has been since replaced in common usage by Blackstone's similar but more numerical—and less loquacious—principle.[121]

If Greenleaf's treatment of the presumption of innocence departs from the understanding that it stands for the basic principle that those forwarding a claim must be the ones to

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118. *Id.* (emphasis added).

119. *Id.* at 39.

120. *Id.* The maxim concludes Lord Hale's discussion of the burden of proof in criminal trials where he wrote "But of all difficulties in evidence there are two sorts of crimes, that given the greatest difficulty, namely rapes and witchcraft, wherein many times persons are really guilty, yet such evidence, as it is satisfactory to prove it, can hardly be found; and on the other side persons really innocent may be entangled under such presumptions, that many times carry great probabilities of guilt. *Tutius semper est errare in acquietando quam in puniendo; ex parte miserecordiae quam ex parte justitiae*." 2 SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 290 (Sollom Emlyn 1800). The maxim roughly translates to "It is always safer to err in acquitting than in punishing; on behalf of mercy than on behalf of justice." Hale's maxim was referenced regularly in early American case where evidentiary insufficiencies were at issues. *See e.g.*, Smith v. Commonwealth, 62 Va. 809, 821 (1871); Martin v. Alabama, 62 Ala. 240, 242 (1878).

121. That principle being the often-quoted ratio that "It is better for ten guilty persons escape, then that one innocent person suffer." This means the same thing as "it is always safer to err in acquitting than in punishing; on behalf of mercy than on behalf of justice" which is the ending maxim of Lord Hale's above referenced section.

prove it, it only does insofar as it implies the presumption of innocence is the motivating force behind that burden at criminal trials and the law does not assume any element of the charged offense against the defendant.[122] Nonetheless, his early-nineteenth-century text is often cited to highlight the historical foundation of the presumption that has been—according to those authors—recently cast aside. Other well-cited legal scholars of the time were more direct in stating the presumption and burden of proof are merely roses of another name. For example, Fitzjames Stephen defines the presumption of innocence as:

> If the commission of a crime is directly in issue in any action, criminal or civil, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.[123]

If it was historically considered something more substantial than the burden of proof, or motivator thereof, this fact would constitute the bulk of the discussion of the phrase in either of these renowned legal treatises. The above examples are not outliers who are expounding a uniquely narrow conception of the presumption of innocence. In fact, and somewhat unexpectedly, given the lofty language of the Court in *Coffin* and the regular use of the phrase, the presumption of innocence is very rarely in any English or American texts prior to the nineteenth century. When it is mentioned, it is of little, if any, importance in regard to the outcome of the case.

For example, Chancellor George Wythe is cited as having mentioned the presumption in a 1790 opinion adjourning a

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122. The second point is specific in its language, as Greenleaf notes elsewhere that a defendant cannot rely on the general presumption of innocence to rebut evidence of bad character when permissibly introduced; the defendant's ". . . good character must be otherwise proved." GREENLEAF, *supra* note 115, § 25, at 34 n.2.

123. JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE art. 94 (London, Macmillan & Co. 1876).

civil case. Wythe, who was specifically well-known for allusions to Roman and Greek law in his opinions,[124] suggested the reasoning behind the rule that when an intermediate court cannot come to a majority it must adjourn may be that a defendant is presumed innocent.[125] Why he formed this conclusion was not elaborated on.[126] Even if the meaning of this use corresponds with a broad or narrow conception of the presumption, a brief and inconsequential mention in a Chancery Court's footnotes cannot evidence widespread adoption in the English-speaking world prior to the nineteenth century. This is especially so when written by

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124. *See* Richard J. Hoffman, *Classics in the Courts of the United States*, *1790–1800*, 22 AM. J. LEGAL HIST. 55, 56–57 (1978) ("Wythe was an accomplished classicist. . . . Wythe's classicizing went further than his seal, the interplay of law and classics forming an important part of his opinions.").

125. Pendleton v. Lomax, Wythe 4, 6 n.a (Va. Ch. 1790). The mention of the presumption of innocence in an American case from 1790 is rather unusual. That being said, it should be noted that the work the case is printed in was accompanied by a few irregularities, compared to the typical reporter, that may cast doubt on its validity. Before discussing this, the mention does certainly fit in with Whyte's trend of quoting ancient Greek and Roman sources. It makes sense if someone were to bring it forth in a footnote without seeing it used by other American judges first, it would be Wythe. However, it should be noted that the reprint of this case came seventy-five years after its original writing, the case does not appear to have been originally published, and was compiled with notes, abstracts, and analysis by editors. In the preface of the work, the Editor writes that the original idea for the first edition was a simple reprint of the cases, but turned into a "more enlarged plan, embracing *copious annotations* and references to cases . . . the [e]ditor was willing to undertake the task" but for various reasons, the plan was not adopted. *See* DECISIONS OF CASES IN VIRGINIA BY THE HIGH COURT OF CHANCERY, at vii. (B. B. Minor & William Green ed., 2d ed. 1865) (emphasis added). When the second edition was made, the previous editor "evinced a deep interest in the enterprise, and to make it more successful, freely tendered the use of his notes and references." *Id.* at ix. The second edition adopted the more expanded design originally intended. Further, unlike the databases and official reporters of the day, the cases came from a folio copy given to the editors by Justice Peter Daniel. While *Decisions of Cases in Virginia by the High Court of Chancery* is cited as if it was a reporter, it is really a collection of opinions for the purpose of studying a well-known judge with uniquely interesting opinions.

126. *See generally Pendleton*, Wythe 4.

a uniquely well-read scholar of classic European texts.[127]

Other than Whyte's quote, Rhode Island also mentions the presumption in its 1798 declaration of rights. Section ten reads, "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 out to be repressed."[128] While this is a notable source utilizing the phrase, its mention resulted from the almost exact copying of the section from the French Declaration of Rights.[129] Rhode Island's use of the phrase when so little else can be found is not evidence of American adoption. If anything can be gleaned from it, the otherwise nonexistence of the presumption proves that Rhode Island copied the French text but not much else.

Many other authors—even ones who argue in support of a broad presumption—have also noted their inability to find the presumption of innocence mentioned prior to the nineteenth century.[130] This is not a curious fact. Given the thousands executed in England, often without the ability to present witnesses in their defense in the seventeenth century, and the use of torture to extract confessions even in the American colonies,[131] a broad conception of the presumption of innocence in the English-speaking world

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127. The presumption of innocence, or the idea of "innocent until proven guilty" was regularly used in Continental texts prior to English speaking adoption. *See* discussion *supra* notes 133–46.

128. 1798 R.I. Pub. Laws 84.

129. See Francois Quintard-Morenas, The Presumption of Innocence in the French and Anglo-American Legal Traditions, 58 AM. J. COMP. L. 107, 125 n.172 (2010).

130. Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 63 JURIST 106, 107 (2003). *See also* ALLEN, *supra* note 4, 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 the form of a Brocard, anywhere occurs before the nineteenth century.").

131. Thayer, *supra* note 1, at 185–86.

prior to the eighteenth century is a fantasy.

Justice White avoids this issue by arguing that, although the genesis of the principle in its express form only goes back to 1802, "if the principle had not found formal expression in the common law writers at an earlier date . . . the practice which flowed from it has existed in the common law from the earliest time."[132] It is unclear where his certainty comes from, especially given the procedural barbarism discussed in the paragraph above. Further, he is expounding on what he later concludes is a substantive doctrine that acts as independent evidence weighed in favor of the accused.[133] It is outstanding that such a substantial doctrine is claimed to be found within sources that express only generalized sentiments of mercy in the criminal process.

The only other source he cites for the presumption of innocence's historical foundation that mentions the phrase at all is William Mawdesley Best's *A Treatise on Presumptions of Law and Fact*.[134] However, even this source came with its own problems and was written only fifty years previous. Moreover, as the Court highlights, Best's editor, Chamberlayne, included a note stating "apparently all that is meant by the statement thereof, as a principle of law, is this—if a man be accused of crime, he must be proved guilty beyond reasonable doubt."[135]

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132. Coffin v. United States, 156 U.S. 432, 455 (1895).

133. *Id.* at 459–60.

134. *See* Pennington, *supra* note 130, at 108–09 (coming to the same conclusion).

135. *Coffin*, 156 U.S. at 457 (citing W. M. BEST, A TREATISE ON PRESUMPTION OF LAW AND FACT, at 304 n.a (Chamberlayne ed., 1845). I have been unable to locate the Chamberlayne edition of Best's work. However, in other editions, Chamberlayne does state the defendant is entitled to a presumption of innocence as the Court notes, and given the material discussed in the text above is directly quoted by the court and works against their ultimate conclusion, I find no reason to doubt the quote's presence in the text.

Turning to Roman and Continental law, Justice White utilizes sources ranging from papal decrees to Justinian's Code as evidence of the presumption's historical foundation.[136] These also never explicitly state a defendant is presumed innocent.[137] The quoted excerpts are all more reflective of the merciful sentiments expressed by the Blackstone principle or the Rule of Lenity.[138]

The Court's citation to the writings of Pope Gregory IX is especially interesting. In later writing by Gregory IX, he commanded those found to be infamous on *mere suspicion to be excommunicated unless they prove their innocence* and, if the accused persisted, they would be sentenced to death as heretics without any legal argument or appeals on the accused's behalf.[139] While more defendant-friendly advocates might say Gregory IX's writings reflect the presumption of innocence's status in American law, he certainly has shown himself to be a bad place to look for a broad conception's historical foundation. Given Justice White's citation to him, amongst the other issues already discussed, it seems like *Coffin* is equally improper. Despite these issues, the Court's flawed historical analysis that resulted in the declaration

136. *See id.* at 454–57.

137. *See* Pennington, *supra* note 130, at 108.

138. These sources include Lord Hale's merciful musings discussed *supra* note 119, Lord Gillies' discussion of the burden of proof discussed *supra* note 111, and a quotation by Fortescue which only deviates from sources already cited in that it uses twenty accused persons instead of five or ten in his iteration of the Blackstone principle.

139. In the Latin: "Qui autem inventi fuerint sola suspicione notabiles nisi juxta considerationem suspicionis qualitatemque persone propriam innocentiam congrua purgatione monstraverint, anatematis gladio feriantur et usque ad satisfactionem condignam ab omnibus evitentur ita quod, si per annum in excommunicatione persiterint, extune velut heretici condempnentur. Item proclamationes aut appellationes hujusmodi personarum minime audiantur." Statute of Pope Gregory IX against the heretics communicated to the Archbishop of Trier (June 25, 1231), in CORPUS DOCUMENTORUM INQUISITIONIS HAERETICAE PRAVITATIS NEERLANDICAE, 77–78 (Paul Fredericq ed. 1889).

that the presumption of innocence is independent evidence in favor of the accused[140] proved convincing enough to cite as truth by many.[141]

The actual historical path is a long and complicated one. Despite the rich historical inquiry conducted since *Coffin*'s publication, it remains unclear how the maxim transformed into the concept that causes the continuing blunders of the district courts in bail determinations.[142] Historically, the idea was of little importance and certainly did not possess the inviolability accompanying its mention today. The presumption's use was consistent with that of an aphorism, a pithy statement reiterating the idea that a defendant must be determined guilty in front of the court before she is considered such. As far as research has revealed, until its appropriation by the English, it was never expressed as a legal doctrine of consequence.

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140. *See Coffin* at 454–55.

141. Citing to *Coffin* instead of the original sources for the historical analysis of the presumption of innocence is extremely common in academic writings, as well as the writing of the courts. Other than a handful of papers actually devoted to discussing the history of the idea, I have had little luck in finding anyone who uses primary sources in their historical analysis instead of relying on the validity of the survey done by Justice White. As I continued to see instances of this trend repeated, I was reminded of a Jeremy Bentham passage where he criticized the French. Bentham wrote of French writers:

> An historical work without authorities would be received in England very nearly as a plea without proofs, or as a romance. But in France, a great number of historians have considered it unnecessary to give references to original authorities: the condition they impose upon their readers is to believe them on their word. But if the author had the original documents before him, why did he not cite them?

JEREMY BENTHAM, ESSAY ON POLITICAL TACTICS, ch. xi, § 5 (1791), *reprinted in* 2 THE WORKS OF JEREMY BENTHAM (William Tait ed., 1843). It certainly seems like much of the scholarship has gone the way of the French writers Bentham had the (apparent) displeasure of reading. However, those authors cannot be blamed. A presumption that is usually worth giving is to the accuracy of factual assertions in Supreme Court opinions.

142. *See* discussion *supra* Part I.

An illustrative example of its use in the Continental tradition can be seen in the first known record of the phrase from the fourteenth century by Johannes Monachus. Monachus reasoned that even God afforded Adam the opportunity to respond to the charge of eating the apple;[143] from this, the same must be done by earthly authorities.[144] After presenting that undeniable bit of reasoning, Monachus put a cap on his argument by placing the first iteration of the idea on paper in the form of the Latin maxim "*item guilbet presumitur innocens nisi probetur nocens*."[145]

This is markedly different from the mystical concept engrained in the American psyche. The rights that correspond to its reference by Monachus and others are all trial rights: the right to answer accusations and the incidentals of that right.[146] If it were left in the status it originated, it would fit well amongst those legal aphorisms which only add flare to defense summations and the opinions of our more quotiferous judges.

To be clear, it is evident that the presumption of innocence and similar phrases such as "innocent until proven

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143. As evidenced to my frequent citation to his work, Professor Kenneth Pennington does an excellent job tracing the origin of the maxim. My summary of it certainly leaves out important steps. Accordingly, his work should be consulted. Nonetheless, my attempt at a brief summary felt necessary, as it lends support to the argument that the presumption of innocence was not as substantive and certainly was not developed with pre-trial procedure in mind. *See* Pennington, *supra* note 130, at 111–16. Except for certain classes of crime: Judge, Pope, or Prince could not initiate proceedings against a Defendant without summons and the Defendant's presence. *Id.* at 114–15. As Pennington puts it, "if God had to respect the rights of defendants, then the rules of procedure must transcend positive law." *Id.* at 114.

144. *Id.* at 115. After wide publication, this argument eventually led to the accused being entitled to certain procedural rights—notice, presence, and two witnesses against them—before judgment could be entered. *Id.*

145. *Id.* According to Pennington, Monachus also cites to Innocent III for the maxim as Justice White did in *Coffin* despite it not appearing there. *Id.*

146. *See supra* note 135 and accompanying text.

guilty" received great use in Continental Europe prior to the English-speaking adoption of it in the nineteenth century.[147] It was the catchphrase for the natural right derived from Genesis to face one's accusers, the right to present a defense, and a reminder that all people, regardless of differences, were entitled to those same procedural protections.[148] Later, it was utilized to argue against the barbaric practice of torture.[149] As noted by others, what the presumption stood for prior to its English development was even broader than today in many ways. Although not applied as evidence in favor of the accused or anything more than a maxim, many of the procedural rights afforded to criminal defendants today by the United States Constitution were summarized by the phrase "innocent until proven guilty" in Continental Europe.

In particularly American style, what was gained from across the Atlantic has since been transformed into something unrecognizable. What once was an aphorism standing for a bundle of procedural rights is now spoken of like a legal doctrine of consequence, applied without reasoning and assumed to be based on a rich history that cannot be traced. When that ahistorical and expansive conception is analyzed, it reveals itself unsound.

III. REEVALUATING THE PRESUMPTION OF INNOCENCE

Thayer asked: "Now what does the presumption of innocence mean?" in 1895.[150] Despite his best efforts at explaining the issue, the confusion persists, and the emphasis placed upon it still far exceeds the general idea

147. Pennington, *supra* note 130, at 124.

148. *Id.* at 117–24.

149. *Id.* at 124.

150. Thayer, *supra* note 1, at 189.

that a person cannot be found guilty until proven so. As shown, legislative enactments and precedent cut against the presumption's use in bail determinations.[151] The consequence of such misapplication is the reduction of the predictive power of our courts in determining the risk of non-appearance and risk of danger while increasing the risk of perpetuating bias in bail determinations.[152] This Comment then examined the historical basis for a broad conception of the presumption of innocence first forwarded in *Coffin*, leading to the conclusion that the understanding of the presumption as a foundational pillar of American and English criminal law is ill-informed.[153] In addition to the "presumed" precedential and historical support for the broad conception of the presumption of innocence, theoretical support for the idea looks more like those general ideas of mercy expressed in *Coffin* instead of the substantial doctrine that the Court ultimately concluded it was.[154] When the theoretical considerations are examined, its exalted status and application pre-trial becomes even more perplexing.

That being said, compared to any other legal doctrine, it is not particularly strange that the presumption of innocence would be misconstrued. It is uniquely abstract and counterintuitive. Presumptions in the law typically mark something considered true, barring other evidence, given certain probabilities. As scholars for years have been noting, the presumption of innocence is not really a legal presumption at all for that reason.

Given the well-known conviction rates, nearing one hundred percent,[155] and the professional policing of today,

151. *See* discussion *supra* Section I.A.

152. *See* discussion *supra* Section I.B.

153. *See* discussion *supra* Part II.

154. *See* discussion *supra* notes 134–38.

155. *See* Gramlich, *supra* note 97 and accompanying text.

the presumption of innocence escapes common sense further. The days of private prosecution, neighbors filing and litigating complaints, and quick trials are over. The cases in the federal system are rarely spur-of-the-moment affairs. Defendants are not dragged off the street on a whim, and cases are thoroughly investigated. Given this, it does not actually make sense for a judge to presume innocence. If one is brought before a judge, and probable cause is shown, she can be almost statistically certain the defendant did what is alleged—or at least that the proceedings will ultimately end in a finding of legal guilt through a plea. Based on this same reasoning, late into the nineteenth century, our judges *presumed guilt* at bail hearings based on the indictment and evidence proffered by the government.[156]

Larry Laudan described the idea of a "presumption of innocence [that] follows the defendant right through the sequence of decisions made by the justice system" as a "bit of wishful thinking [that] simply cannot be right."[157] In coming to this conclusion, Laudan examined the various roles in the criminal justice system and pointed out that the regular conduct and expectations of those roles contradict such a broad conception. In a particularly relevant paragraph, he also concluded the historical use of pre-trial remand contradicts the existence of a pre-trial presumption.[158]

Although the contention may seem radical, similar observations are employed, and popularly supported, by critics of the justice system who are more defendant friendly.

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156. *See* Thayer, *supra* note 1, at 198 (discussing several cases where guilt was presumed pre-trial, such as *Ex Parte Ryan*, 44 Cal. 555 (1872) where the court stated, "except for the purposes of a fair and impartial trial before a petit jury, the presumption of guilt arises against the prisoner on finding the indictment.").

157. Laudan, *supra* note 6, at 337.

158. *Id.* at 338 (quoting People v. Tinder, 19 Cal. 539, 543 (1862) ("If [an indictment] furnished no such presumption [of guilt] it would not justify the exaction of bail or the detention of the defendant.").

Simply put, the operation of our courts does not comport with a broad presumption of innocence. However, those advocates often fail to note that we really do not expect them to so comport.

For instance, if we are charging judges to presume innocence despite there being no factual basis for the benefit of the small percentage who are innocent, do they let the mass murderer out on bail pursuant to the maxim that it is better to err on the side of mercy than justice? Certainly not. Such an argument would be untenable and cuts against the intuition of even the most compassionate among us. While this example is certainly extreme and may seem like a strawman, the broad example is only used to highlight an important point regarding the debate and reveal where our intuition lands. If the presumption of innocence prohibits that same so-called "pre-trial determination of guilt" for many but not for the mass-murderer, then it cannot be said one is basing their reasoning on the presumption of innocence being an inalienable fundamental right. Both are legally innocent, and the same detention is being sought for both. If the difference in our opinion stems from the allegation, then differences in policy, not rights, are the basis of the disagreement.

Similarly, many of the duties a judge must undertake at trial, duties we take for granted, conflict with any assertion that judges must presume innocence.[159] Admittedly, there might exist a general tendency to err on the side of the defendant. For instance, even without invocation of the presumption of innocence, pre-trial proceedings rarely place the burden upon the defendant to prove anything.[160] But,

159. *See supra* text accompanying note 42.

160. The Bail Reform Act of 1984, 18 U.S.C. § 3141 (1984). This sets the burden on the prosecution to prove by clear and convincing evidence the defendant is a risk of flight, with the exception of the rebuttable presumption against the defendant for certain types of allegations.

even then, what we consider proper and what is actually done is so weak compared to what a broad conception of the presumption of innocence demands. Labeling the former as "presuming innocence" would remove any force the phrase may still possess.

Prosecutors are also not presuming innocence, or there would not be prosecutions. Similarly, no arrests could be made if the right to be presumed innocent was applied against police.[161]

The only actors in the justice system left to consider are the jurors. If it follows from these examples that it applies to jurors only, then the conclusion the presumption is only a trial right necessarily follows.[162] Despite this, as others have pointed out, the inconsistency between the phrase's "actual operation and the rhetorical commitment of the presumption is nothing short of remarkable."[163]

Although this Comment primarily focuses on the presumption of innocence's use pre-trial and its rampant misapplication in that setting,[164] the errors in *Coffin* that are largely responsible for enshrining it as a fundamental right[165] and the lack of historical support[166] signal larger theoretical issues with the doctrine as a whole—something particularly relevant given the newfound focus on history at the Supreme Court.[167] Although this Comment does not

161. *See* Laudan, *supra* note 6, at 336–38.

162. *See id.* at 338.

163. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 348 (1995).

164. *See* discussion *supra* Part I.

165. *See* discussion *supra* Part II.

166. *See* discussion *supra* Part II.

167. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (to extend rights not guaranteed by the constitution "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'") (quoting Washington v. Glucksberg, 521 U. S. 702, 721

examine these other issues to the extent they deserve, hopefully what is provided reduces the unquestioning acceptance of the principle, as noted by Justice White.[168]

For example, while some claim the presumption of innocence can alone create reasonable doubt to such an extent that an acquittal is required,[169] other scholars have noted the idea of the presumption of innocence actually follows logically from the reasonable doubt standard.[170] Possibly resolving the debate on this point, a syllogism starting at the idea of legal innocence[171] and the burden of proof can be crafted that leads to the presumption of innocence.[172]

(1997)).

168. Coffin v. United States, 156 U.S. 432, 454 (1895).

169. Laudan, *supra* note 6, at 334–35 (quoting STAR-0-3 Modern Federal Jury Instructions—Criminal P 3.02).

170. *Id.* at 335, n.15; Taylor v. Kentucky, 436 U.S. 478, 491 (1978) (Stevens, J., dissenting).

171. Factual ("material") innocence is the status of not having committed the crime in-fact. This is the general idea of innocence as considered in common vernacular. Legal (probatory) innocence is when the evidence "fails to satisfy the criminal standard of proof, that is, the traditional sense of 'not guilty.'" Laudan, *supra* note 6, at 339.

172. (1) The presumption of innocence is a presumption of legal innocence. (2) If, and only if, evidence presented proves the guilt of the defendant beyond a reasonable doubt, is the defendant legally guilty. (3) Therefore, only evidence can establish legal guilt. (4) Legal innocence is the state of not having allegations proven beyond a reasonable doubt. (5) As legal guilt is the status of having the allegations proven beyond a reasonable doubt only by the production of evidence, it follows that the jury cannot consider any facts or circumstances that are not evidence in arriving at their decision to convict. (6) Therefore, the jury cannot consider their preconceived notions, biases, or the status of the defendant as the accused, in arriving at their decision to convict. (7) Prior to trial, the jury knows the defendant is likely to be guilty. (8) The jury cannot consider the preconceived notion that the defendant is likely to be guilty in arriving at their decision to convict. (9) Therefore, the jury must take the defendant's legal innocence for granted despite the likelihood the evidence to be presented against the defendant meets the burden of proof. (10) In the law, a presumption, stripping it down to its simplest terms, is the call to take certain circumstances for granted as true although they are of uncertain validity. (11) Therefore, as a necessary

The idea of "legal innocence" briefly mentioned above is particularly relevant to the debate.[173] A great deal of importance is placed upon factual guilt or innocence in the criminal justice system, but it is entirely superficial.[174] Since trial by ordeal was deemed an unsound fact-finding process,[175] factual innocence has had almost no bearing on the administration of our criminal law in actuality and absolutely no bearing where the vast majority of cases are resolved—outside of trial.[176] The superficial focus on factual innocence the public has come to believe in was given a rather massive shock in 2022 when the Supreme Court decided that factual innocence was not enough to overturn the conviction of a man sentenced to death[177]—leading to headlines that looked more like Onion articles than actual reports on a Supreme Court decision.[178] However, the Court's

consequence that a defendant is only to be found guilty on the evidence presented at trial, a defendant must be presumed innocent.

173. See generally Laudan, supra note 6.

174. William S. Laufer provides a remarkable discussion of the difference between legal and factual innocence/guilt in his article, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329 (1995), that goes far beyond what this article will do. Equally interesting, and similar to the argument presented in this section, is his conclusion that in actuality, the presumption of innocence is "indistinguishable from the reasonable doubt rule" in its effects. *Id.* at 329. The argument presented here differs in its conclusion by stating it does not differ from the reasonable doubt rule in actuality, not just in effects. Laufer also goes further than this article by arguing that the accused's factual innocence should be assumed. *See generally id.*

175. *Id.* at 331–32 ("As modern standards emerged and burdens of production and persuasion shifted from the accused to the accuser, evidence of factual innocence became increasingly irrelevant. An accused did not have to demonstrate innocence by hands unscarred from hot coals, irons, or stones.").

176. Almost all cases end in guilty pleas. *See* Gramlich, *supra* note 98 and accompanying text.

177. *See* Shinn v. Ramirez, 142 S.Ct. 1718 (2022).

178. *E.g.*, Radley Balko, *In Death Row Case, the Supreme Court Says Guilt is Now Beside the Point*, WASH. POST (June 1, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/06/01/arizona-death-row-supreme-court-shinn-innocence; Michael A. Cohen, *The Supreme Court Just Said*

focus on legal principles and precedent instead of factual innocence is unsurprising when viewed alongside the general thrust of the criminal law away from factual innocence.

Returning to Laudan, his article *The Presumption of Innocence: Material or Probatory?* forwards a great argument in showing the presumption's use as a jury instruction goes far beyond the bounds of logic.[179] Think of any decision in the criminal process. In which ones does the court weigh whether the defendant is factually innocent? From signing an arrest warrant to reading the verdict, the answer is decidedly none. In each circumstance, the dispositive fact is whether the alleging party has shown enough proof to rise above a certain level. Regardless of the result, no inference can be drawn by a ruling regarding what a defendant factually did or did not do—only legal sufficiency.[180]

Additionally, defendants do not plead innocent at arraignment.[181] Yet, the trial instruction on the presumption of innocence utilizes only the language of the common vernacular. It demands jurors believe the defendant is factually innocent *until the proof demands a contrary belief*.

If the belief in factual innocence must persist until evidence brings forth a confidence, beyond a reasonable doubt, of the defendant's guilt then the possibility of a defendant being considered factually guilty but legally innocent by a jury is entirely foreclosed upon.[182] Laudan contends that the average juror does not reason the way our jury instructions demand. Instead, jurors "gradually move[]

That Evidence of Innocence Is Not Enough, DAILY BEAST (May 24, 2022, 4:10 AM), https://www.thedailybeast.com/the-supreme-court-just-said-in-in-shinn-v-ramirez-that-evidence-of-innocence-is-not-enough.

179. *See* Laudan, *supra* note 6.

180. *Id.* at 339–43.

181. *Id.* at 343.

182. *See id.* at 345.

from believing [the defendant] did not commit the crime . . . to believing that he probably did commit the crime . . . to, finally, being morally certain that he committed the crime."[183] If the standard set by our jury instruction is to presume factual innocence until the evidence demands a contrary belief beyond a reasonable doubt, then a juror following the instruction mandated by law could not land at the intermediate stage. That is, they could not hold a belief in factual guilt (which the system does not care about) and find the defendant is legally innocent.[184]

Other problems abound. Is it even possible for a juror to acquiesce to a court's demand to adopt a belief as if it were their own? While one can assume a stern judge's instruction is taken seriously by jurors, the idea that jury instructions arise to the level of mind control is doubtful.

Would it not be much more realistic and productive if—instead of instructing jurors to do a confusing, contradictory, and likely impossible task that has nothing to do with legal guilt—jurors were reminded that the proof is the only thing one can consider and no proof has yet been presented? Coupled with the reasonable doubt instruction, what would this not accomplish that instructing on the presumption of innocence does?

The most shocking example brings us back to where we began: the bail hearing. It is astounding that courts say the presumption of innocence makes the weight of evidence the least important factor[185] while, in many circumstances, also finding remand appropriate based on the defendant's past acts and characteristics. In one moment, the court is proclaiming they have formed the belief the defendant is innocent, as is the defendant's supposed fundamental right,

183. *Id.* at 346.

184. *Id.* at 345–46.

185. *See* discussion *supra* Section I.A.

and are changing their analysis accordingly by discounting the most predictive factor. In the next, the court begins an analysis based on the defendant's characteristics, showing no attempt at feigning a belief in her factual innocence. How one squares this completely evades reason. Yet, in the opinions of our courts, they are written only paragraphs apart.

James Bradley Thayer wrote of the holding in *Coffin* that we have "wandered into the region of shadows and phantoms."[186] As the unquestioning acceptance of the presumption of innocence only grows, we walk amongst them still.

186. Thayer, *supra* note 1, at 212.