HOMAGE TO THE PRESUMPTION OF INNOCENCE

WRITTEN BY **JOHN B. STEVENS JR.**

The fourth century Roman governor Numerius, on trial before Emperor Julian, insisted on denying his guilt. Delphidius, his accuser, realizing acquittal was inevitable, exclaimed: "Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?"[1]

The law presumes innocence in all criminal prosecutions.[2] It is a conclusion drawn by the law in favor of the accused. When brought to trial upon a criminal charge, one must be acquitted, unless proven to be guilty.[3] The U.S. Supreme Court has long proclaimed the standard of presumption of innocence in American jurisprudence as undoubted law, axiomatic law.[4]

Texas courts, as well, have long embraced the presumption of innocence standard.[5] Both the Texas Penal Code and Code of Criminal Procedure unequivocally proclaim that: "All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial."[6]

The presumption of innocence is not only a core principle of American and Texas jurisprudence, but it also can be historically traced to the very beginning. God called upon Adam and Eve to answer whether they violated His Commandment by eating the forbidden fruit.[7] Although omniscient, God nonetheless summoned the "defendants" to hear their explanation before rendering judgment.[8] Humans should no less provide an accused the opportunity for vindication while presuming innocence.[9]

> The Roman Code of Law declared: "Let all accusers understand they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day."[10] The concept seems to have been implemented even much earlier with the ancient Babylonians, found in the Code of Hammurabi, stating: "The presumption is always in favor of the innocence of the accused."[11]

Nonetheless, before the 13th century, medieval inhumane ordeals were practiced in determining guilt or innocence in Europe.[12] England evidenced barbaric trial practices of battle and ordeal, products of its Norman and Saxon ancestors.[13] For example, ordeal by fire, also used by the ancient Greeks, required the accused to hold heavy pieces of hot iron or walk barefoot over heated plowshares.[14] Water ordeal involved plunging the accused's arm into boiling water or casting the person into icy water.[15] Escaping ordeal by fire or boiling water unhurt would prove innocence. As to ordeal by icy water, if the accused sank, he or she was acquitted (if he or she didn't drown). A third ordeal consisted of swallowing an execrated or cursed piece of barley bread. Guilty if the accused choked or convulsed.[16]

Unsurprisingly, trial by ordeal usually resulted in guilt. As Sir William Blackstone stated: "One cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate imposition of providence to save the innocent, whenever it was presumptuously required."[17] Thus, as a practical matter, guilt was presumed.

Over the course of a millennium, canon law and biblical morals evolved into a legal watershed event culminating with the Magna Carta in 1215.[18] Individuals should be secure from the arbitrary exercise of the powers of government.[19] This providential change resulted in cruel trial methods yielding to evidence actually relating to guilt or innocence. The virtue of man became inferred. The burden on proof of facts now rested on the asserting, rather than the denying, party. Individual liberties outweighed society's interest in obtaining conviction. It was Johannes Monachus, a French canonist in the 13th century, who is first credited with articulating the now famous epiphanal expression: item quilbet presumitur innocens nisi probetur nocens; translated in English as a person is presumed innocent *unless* proven guilty.[20]

Perhaps the earliest colonial American court decision on the innocence presumption was issued in 1657 by the General Court of Massachusetts declaring: "Whereas, in all civil cases depending in suit, the plaintiff affirmeth that the defendant hath done him wrong and accordingly presents his case for judgment and satisfaction, it behoveth both court and jury to see that the affirmation be proved by sufficient evidence, else the case must be found for the defendant; and so it is also in a criminal case, for in the eyes of the law every man is honest and innocent unless it be proved legally to the contrary."[21]

The presumption of innocence was subsequently proclaimed in the Declaration and Resolves of the First Continental Congress in the colonists' objections to the Sugar and Stamp Acts of 1764 and 1765.[22] Not only was taxation without representation protested by colonists, but also alleged violations of the acts, which were tried in the juryless

admiralty courts with alleged violators essentially required to prove their innocence, were denounced.[23] Admiralty court judges were appointed by the British Crown and received rewards for finding defendants guilty, much to the colonists' disdain.[24] The inherent denial of the presumption of innocence of the Stamp Act motivated the active movement toward American independence.[25]

In 1827, the U.S. Supreme Court declared: "The general rule of our jurisprudence is, that the party accused need not establish his innocence; but it is for the government itself to prove his guilt before it is entitled to a verdict or conviction."[26] Then in 1895, the Supreme Court profoundly trumpeted the presumption of innocence as a core principle of American jurisprudence, separate and distinct from the fundamental requirement of proof beyond a reasonable doubt for conviction.[27] It is unquestioned in textbooks and is referred to as a matter of course by the Supreme Court.[28] The presumption of innocence has become a basic component of a fair trial under our system of criminal justice, and a fair trial is what the Due Process Clause of the 14th Amendment above all else guarantees.[29]

In the bicentennial year of our independence, Chief Justice Warren E. Burger stated: "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[30] Two years later, the Supreme Court ruled in *Taylor v. Kentucky* that a jury instruction on the innocence presumption may be required in certain circumstances to ensure overall fairness in a trial since it "is an element of Fourteenth Amendment due process, an essential of a civilized system of criminal procedure."[31] Defendants are entitled to have guilt or innocence determined solely on evidence admitted at trial, and not because of suspicion, charges, custody or another circumstance not admitted.[32]

Notwithstanding its praise of the presumption of innocence, the Supreme Court has held that the Due Process Clause of the 14th Amendment does not absolutely require a jury instruction on presumption of innocence be given in every criminal case.[33] Failure to provide such a jury instruction must be evaluated in light of the totality of circumstances including its context with the overall jury charge, counsels' arguments, and the weight of the evidence.[34] The test is whether failing to give such a jury instruction deprives the defendant of due process in light of all the circumstances.[35] However, Texas law has long held that Texas courts must instruct on the presumption of innocence even without such a request by the parties.[36]

Innocence presumption pattern jury instructions for Texas, as well as the U.S. Court of Appeals for the 5th Circuit, are universally used in criminal cases and clearly provide that defendants are presumed by the law to be innocent, and that the charging instrument is not evidence of guilt.[37] Both jurisdictions similarly instruct that defendants are not required to prove their innocence or produce any evidence at all.[38] Additionally, the Texas Pattern Jury Instructions adds that "the jury shall not consider the fact the defendant has been arrested, confined, or formally charged."[39]

The presumption of innocence follows the accused throughout the trial of every criminal case.[40] Defendants are presumed innocent through counsels' arguments as much as they are during arraignments.[41] In fact, the presumption of innocence is overcome only upon jury deliberations and their unanimous belief that the trial evidence proves the defendant guilty beyond a reasonable doubt of the crime charged or any appropriate lesser-included crime.[42]

Contemporary presumption of innocence has evolved differently in America compared with Europe. American legal procedure generally limits evidence in the guilt/innocence phase to the four corners of the charging instrument and deferring character evidence to the punishment portion.[43] By contrast, in Europe, evidence of character and historical behavior may become part of the guilt/innocence determination.[44] Thus, European juries may be influenced to show mercy to defendants in determining guilt or innocence, whereas sympathy in American trials is left for punishment—guilty but forgiven.

Although American jurisprudence has generally taken a firm commitment to preserving the presumption of innocence, some pretrial practices convey a different message. For example, pretrial publicity by media in publishing a charged defendant's booking photo and details from a probable cause affidavit certainly can thwart the perception of presumed innocent.[45] So-called "perp walks," the public display of arrestees being marched to jail in handcuffs while being peppered with questions by a feeding frenzy press corps, often evoking inculpatory responses, have been described as inherently punitive and similar to traditional shaming sanctions.[46]

In October 2016, the Texas Judicial Council issued its Criminal Justice Committee Report & Recommendations to enhance public safety and social outcomes regarding pretrial confinement.[47] As stated in the report, Texas was founded on the presumption of innocence, and "in our society liberty is the norm, and detention prior to trial … is the carefully limited exception."[48] Several recommendations were made including amending the Texas Constitutional bail provision and related bail statutes to provide for a presumption of pretrial release by personal bond, and pretrial detention for defendants posing a high risk (1) of flight or (2) to community safety.[49] In the 2019 Texas Legislative session, a bail reform bill passed the House but not the Senate.

Finally, Scottish Judge Lord Adam Gillies, known as learned and impartial, proclaimed in 1817: "(T)his presumption is to be found in every code of law which has reason and religion and humanity for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman."[50] **TBJ**

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NOTES

1. *Coffin v. United States,* 156 U.S. 432, 455 (1895), *citing* Rerum Guestarum, L.XVIII, c.1.

2. *Holt v. United States,* 218 U.S. 245, 253 (1910).
3. *Coffin* at 458-59.
4. *Id.* at 453.
5. *Black v. State,* 1 Tex. Ct. App. 368, 386-92 (1876).
6. Tex. Penal Code § 2.01; Tex. Code Crim. Proc. art. 38.03.
7. Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim,* 63 Jurist: Stud. Church L. & Ministry 106, 113 (2003), *citing Genesis* 3:9-12.
8. *Id.*
9. *Id.*
10. Code, L. IV, T, XX, 1, 1.25.
11. John Sassoon, *Ancient Laws and Modern Problems: The Balance Between Justice and a Legal System,* at 42 (Third Millennium Pub. 2001).
12. William S. Laufer, *The Rhetoric of Innocence,* 70 Wash. L. Rev. 329, 330-33.
13. 4 Sir William Blackstone, *Commentaries on the Laws of England,* at 336-57 (1769).
14. *Id.* at 337-38; *(plowshares are cutting blades of a plow).*
15. *Id.*
16. *Id.* at 339-43.
17. *Id.* at 338.
18. Pennington, *supra* note 7, at 112-16.
19. *Bank of Columbia v. Okely,* 17 U.S. 235 (1819).
20. Walter Ullmann, *The Defence of the Accused in the Medieval Inquisition,* The Irish Ecclesiastical Record 73, 481-489 (1950) (emphasis added).
21. 16 Records of Massachusetts, III, 431 (1657).
22. *Sources of Our Liberties* 261-69 (Richard L. Perry ed., Am. Bar Found. 1978).
23. *Id.*
24. *Id.*
25. *Id.*
26. *United States v. Gooding,* 25 U.S. 460, 471 (1827).
27. *Coffin,* at 458-59; *see also* Shima Baradaran, *Restoring the Presumption of Innocence,* 72 Ohio State Law Journal 724, 735-36.
28. *Coffin* at 454.
29. *Id.*
30. *Estelle v. Williams,* 425 U.S. 501, 503 (1976).
31. *Taylor v. Ky.,* 436 U.S. 478, 486 n. 13 (1978).
32. *Id.* at 485.
33. *Ky. v. Whorton,* 441 U.S. 786, 789-90 (1979).
34. *Id.* at 789.
35. *Id.* at 790.
36. *Black v. State,* 1 Tex. Crim. App. 368 (1876).
37. Fifth Circuit Pattern Jury Instructions (Criminal Cases), 1.05 (2012 ed.); Texas Criminal Pattern Jury Charges – General, Evidentiary and Ancillary Instruction, CPJC 2.1 (2018). Some legal commentators have suggested using the phrase, "I instruct you…" rather than "the law states" which more firmly impresses on jurors the presumption of innocence standard. *U.S. v. Walker*, 861 F. 2d 810, (5th Cir. 1988).
38. *Id.*
39. *Id.*
40. *Massey v. State,* 226 S.W. 2d 856, 860 (Tex. Crim. App. 1950).
41. *McGrew v. State,* 143 S.W. 2d 946, 947 (Tex. Crim. App. 1940).
42. *Will v. State,* 794 S.W. 2d 948, 951 (Tex. App.—Houston [1st Dist.] 1990).
43. *See* James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice,* 94 Texas Law Review 933, 939 (2016).
44. *Id.* at 948.
45. *Compare with Deck v. Mo.,* 544 U.S. 622, 626 (2005) (Shackling defendants in view of jury undermines the presumption of innocence and related fairness).
46. Palma Paciocco, *Pilloried in the Press: Rethinking the Constitutional Status of the American Perp Walk,* 16 New Crim. L. Rev. 50, 101 (2013).
47. Criminal Justice Comm. Rept. & Recommendations, Tex. Judicial Council (2016).
48. *Id.*
49. *Id.* at 8.
50. *Coffin* at 456, quoting *McKinley's Case* (1817), 33 St. Tr. 275, 506. *See also* Adam Gillies, 21 *The Dictionary of National Biography, 1885-1900.*

JOHN B. STEVENS JR.
has served as judge of the Jefferson County Criminal District Court since 2006. He was an assistant U.S. attorney for the Eastern District of Texas, receiving the Justice Department's highest honor, the U.S. Attorney General's Award for Exceptional Service, as one of the prosecutors of the James Byrd dragging death cases.