TAMING THE PRESUMPTION OF INNOCENCE

RICHARD L. LIPPKE

Taming the Presumption of Innocence

RICHARD L. LIPPKE

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press is a department of the University of Oxford. It furthers the University's objective of excellence in research, scholarship, and education by publishing worldwide. Oxford is a registered trade mark of Oxford University Press in the UK and certain other countries.

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America.

First Edition published in 2016

Library of Congress Cataloging-in-Publication Data
Lippke, Richard L., 1954– author.
Taming the presumption of innocence / Richard L. Lippke.
pages cm. — (Studies in penal theory and philosophy)
Includes bibliographical references and index.
ISBN 978–0–19–046919–1 (hardcover : alk. paper) 1. Presumptions (Law)
2. Presumption of innocence. I. Title.
K5469.P7L57 2016
345'.06—dc23
2015032005

9 8 7 6 5 4 3 2 1
Printed by Sheridan, USA

Taming the Presumption of Innocence

Recent Titles in

Studies in Penal Theory and Philosophy
R. A. Duff and Michael Tonry, General Editors

Popular Punishment
On the Normative Significance of Public Opinion
Jesper Ryberg and Julian V. Roberts

Just Sentencing
Principles and Procedures for a Workable System
Richard S. Frase

Punishment, Participatory Democracy, and the Jury
Albert W. Dzur

Retributivism Has a Past
Has It a Future?
Edited by Michael Tonry

ACKNOWLEDGMENTS

My interest in the presumption of innocence began with an invitation from Antony Duff to present a paper at the University of Minnesota Law School's Robina Institute for Criminal Law and Criminal Justice in April 2012. I had just finished a book on plea bargaining and was spending some time researching and thinking about the role of prosecutors in the US criminal justice system. When I received Antony's invitation, I decided to write a paper about prosecutors and the presumption of innocence. I was intrigued by the question of whether, if at all, they were bound by it. I had, at the time, a fairly amorphous understanding of the presumption, one that, I am sorry to say, persisted as I worked on the paper. At the conference, someone (I think it was Zach Hoskins, in his commentary on my paper) asked about the difference between a presumption of innocence and a nonpresumption of guilt. Since I had not really thought about the question, I said so and indicated that I would have to think further about it. When I got back from the conference, I did just that. In many ways, this book is the result. As will become apparent to readers of the following chapters, I became convinced that much of the burgeoning scholarly literature on the presumption of innocence failed to take seriously the distinction between it and a nonpresumption of guilt. The latter often makes sense in contexts in which the former does not. Or so I argue.

In addition to Zach, Chad Flanders (my other commentator) and others at the Robina Institute conference had numerous important comments and suggestions about my paper. I thus learned just how complicated the scholarly debate about the presumption of innocence had become. My early attempts to grapple with the questions that debate raised produced several

articles that are incorporated, in revised forms, in this book. Chapter 4 previously appeared as "The Presumption of Innocence in the Trial Setting" in *Ratio Juris* 28 (2015): 159–79. Chapter 5 previously appeared as "Justifying the Proof Structure of Criminal Trials" in the *International Journal of Evidence and Proof* 17 (2013): 323–46. Chapter 7 previously appeared as "Preventive Pre-trial Detention without Punishment" in *Res Publica* 20 (2014): 111–27. I thank these journals for their kind permission to reuse some of this material in the present manuscript. I should add that anonymous reviewers for the journals offered many criticisms of the earlier papers that enabled me to substantially improve them. Two reviewers for Oxford University Press also offered numerous helpful comments on the manuscript.

I owe special thanks to Antony Duff, not only for his sagacious and consistently challenging work on the presumption of innocence, but also for encouraging me to submit my book to the OUP series that he coedits with Michael Tonry. Also, many thanks to James Cook, the Sociology and Criminology editor at OUP, for believing in the book and pushing it forward through the review process.

Finally, as always, I am enormously grateful to my wife, Andrea Wiley, and my children, Aidan and Emil, for their love and support.

Taming the Presumption of Innocence

CONTENTS

Introduction

IN RECENT YEARS, CONCERNS about expansion of the criminal law, the harshness of penal sanctions, and the lingering effects on persons of entanglement with the criminal justice system, have led some scholars to cast the presumption of innocence as a panacea, of sorts, for many of the perceived ills of our contemporary approach to crime and punishment. Instead of conceiving of the presumption of innocence as confined to the criminal trial, where its function is clearly defined, if not always well-understood, scholars have posited other roles for it. Some seek modest extensions of the presumption—to the pretrial phase, invoking it to ward off the erosion of due process protections, limit the damage done to the reputations of the accused, or discourage the use of pretrial detention.[1] Others have sought to extend its protections further back into the criminal justice process. Some see it as a normative constraint on the kinds of conduct that can be legitimately criminalized.[2] Others go further, extolling a substantive human right to be presumed innocent, one that persons are alleged to have independently of whether they have fallen under any official suspicion of criminal misconduct.[3] Such a right has implications for the social interactions of persons outside the ambit of the criminal law. Finally, some scholars envision roles for the presumption posttrial, especially when individuals have been acquitted of all or some charges against them, or have fully served whatever sanctions have been assigned to them by the courts pursuant to convictions.[4] Here, the idea is that there comes a point at which persons who have been caught up in or punished by the criminal justice system ought to have their status as citizens in good standing fully restored.

One of the principal themes of this book will be the difficult questions with which we must grapple if we extend the presumption of innocence

(hereafter, I will usually employ the abbreviation PI) outside of the trial context. In that context, there is some consensus about the rules governing the presumption. Persons accused of crimes are to receive the PI at the outset of their trials; it is jurors, or judges in bench trials, who are charged with presuming their innocence. The burden of bringing forward evidence that establishes the guilt of the accused is squarely on the government. The standard of proof that the government must meet in order to obtain convictions—beyond a reasonable doubt—is exacting. If the government satisfies that standard, then the court ought to convict the accused. The outcome of conviction is the assignment of some form of legal punishment, with its characteristic censure and hard treatment. In short, in the context of criminal trials, who is to presume the innocence of whom, for what purpose, what rebuts it, and what happens when it is rebutted, are all readily identifiable.[5] This is not to say that there are no uncertainties concerning how to understand the operation of the PI during the trial process. There most assuredly are, as we will see in chapter 4.

However, the perplexities surrounding the PI in that context pale in comparison with those that will have to be faced if we take up the invitation to cast the PI in roles outside of the trial. To gain some sense of these perplexities, consider the notion that we should extend the PI to the pretrial phase of the criminal justice process. The pretrial phase begins with official suspicion or accusation and ends with the advent of a trial, or, more likely, a guilty plea by the accused. Since the PI is a presumption, and thus seemingly a deliberately adopted perspective on suspects or formally accused persons, we must first ask who is to presume their innocence in the pretrial context. The police or prosecutors directly involved in arresting, investigating, and processing charges against the accused? These are officials who might have seen substantial evidence of the guilt of the accused, or worse, heard full and free confessions of guilt from them. As a result, it is unclear whether instructing such officials to presume the innocence of the accused makes much sense.[6] More importantly, we might worry that, if they really attempted to do so, it would interfere with their assigned tasks, which involve detecting crimes, investigating them thoroughly, and pursuing charges against those whom they conclude have committed them. When the crimes in question are grave, it would seem that we want police and prosecutors to be proactive about preventing or interfering with them and dogged about bringing suspected perpetrators to justice.

Next, consider the victims of crimes, if there are any. Should they be instructed to presume the innocence of those who victimized them? This

seems a dubious proposition as well, especially for those individuals who are certain that it is the accused who stole from, assaulted, or threatened them. Perhaps it is members of the public more generally who should presume the innocence of suspects and formally accused persons. Such an admonition seems more promising, except that most of the time the public will be unaware of which individuals have been charged with what crimes.[7] Only in cases of serious or notorious crimes does the public become cognizant of them and the persons alleged to have committed them. If the public is to actively presume the innocence of suspects and accused persons, then it seems that it will have to be considerably more engaged in the workings of the criminal justice system than it currently is.

Further, what evidence or other considerations should be understood as rebutting the PI in the pretrial context? Proof beyond a reasonable doubt? That seems an unlikely candidate, since evidence of that kind (including evidence that has withstood contestation by the defense) will usually be unavailable until a trial has progressed almost to its completion. Other evidence standards exist, but which of them to select—"probable cause," "the preponderance of the evidence," "clear and convincing evidence,"—seems a somewhat arbitrary decision, at least until we have some better idea of what follows if the standard is satisfied in any given case. What presumably does not follow is that persons suspected or accused can be subjected, without further ado, to legal punishment; for that, they have to be tried and convicted, or convinced to plead guilty. Is it that once the standard is met, whatever that standard is, it is all right for some or all of us to think less of the accused, to regard the accused as something other than law-abiding? And can we then withhold more than our good opinion of them, perhaps denying them some of the myriad benefits of social cooperation, ones that we extend to persons whose good citizenship is not in doubt? Now the problem is that it is hard to see how such responses on our part are not premature. They would seem to be, especially for those scholars who insist that, until they are convicted of one or more criminal offenses, we ought to treat persons *as if* they are innocent.[8] How do we treat accused persons as if they are innocent if we withhold things from them that we would ordinarily offer our fellow citizens?

As will be shown, puzzles and problems such as these are not unique to a pretrial PI. In fact, they exist in more baffling forms once we consider proposals to extend the PI outside of the criminal justice process altogether—to lawmaking or to our treatment of our fellow citizens quite independently of any official suspicion of them. This brings me to a second principal theme of the book. Much of the work that some legal scholars

would have the PI perform outside the trial context can be, I argue, performed as well, if not better, by utilizing other moral constructs or by reminding legal officials of the harms that their actions risk if they do not adhere strictly to due process. For instance, police or prosecutors should be circumspect in their public comments about accused persons, not because the accused are presumed innocent, but because such comments might irreparably harm the reputations of persons who are never actually convicted of crimes. This, in turn, will make it more difficult for the formerly accused to resume the full exercise and enjoyment of their basic rights as citizens. In particular, public statements by police or prosecutors that impugn acquittals seem to be illicit efforts to impose some of the social costs of criminal conviction on persons who have not been found guilty by the courts.

Instead of trying to make the PI do more work than it is capable of or suited for, I argue that we ought to tame it: We should confine it to the trial context, where what it means, how it functions, and what are the consequences of its rebuttal can be tolerably well-defined and defended. Before attempting to tame it, I first examine proposals by scholars to expand its role in the criminal justice system. In chapter 1, I provide an overview of the full range of claims that have been, or might be made, about the PI, sorting these claims into various categories and offering some initial clarifying remarks about them. The aim of the chapter is to provide readers with some sense of the lay of the land in recent scholarship on the PI.

In chapters 2 and 3, proposals to extend the PI outside of the context of official suspicion or accusation within the criminal justice system are examined in close detail. Chapter 2 focuses on the boldest of these proposals—the claim that there is substantive human right to be presumed innocent. Initially, I raise doubts about whether the right to be presumed innocent can be substantive, rather than procedural. I then scrutinize the rationales supplied by the leading proponents of a substantive right to be presumed innocent and find them unconvincing. In place of such a right, I develop an account of the ways in which the investigation and prosecution of alleged offenses should be restrained due to concerns about how they impact more familiar substantive rights—to liberty, privacy, and autonomy. I contend that it is respect for and concern about such rights that should lead criminal justice officials to proceed cautiously in investigating crimes and charging individuals with them. Those officials should also be required to have and provide justifications for infringing the rights of individuals as they proceed with criminal investigations and charges.

Chapter 3 takes up two distinct kinds of claims made by scholars who see the PI as more than narrowly procedural but who do not explicitly identify it as a substantive human right. First, there are claims that the PI should function as a constraint on the content of the criminal law. Various criminal law provisions have been seen as contravening the PI, and, indeed, many of the provisions scholars have expressed concerns about are troubling. However, I maintain that their problematic character is not helpfully explained by invoking the PI. Instead, the provisions tend to be overbroad or unduly harsh in their penal consequences, or they make individuals liable to punishment who have not engaged in serious, culpable wrongdoing. Second, some scholars would have the PI regulate our everyday interactions with our fellow citizens. These scholars claim that we should not regard or treat our fellow citizens as inclined to prey upon or assault us, or else we act contrary to the spirit of the PI. However, I contend that not treating or regarding our fellow citizens as active threats to us must be distinguished from presuming them innocent of legal wrongdoing. Also, we can be civil to people about whose law-abidingness we are far from certain. Finally, many people live in circumstances in which they rightly fear some of their fellow citizens, and some occupy those circumstances more or less continuously. A blanket prescription to the effect that they should "think the best" or "not think the worst" of their fellow citizens is neither wise nor defensible.

One strand of argument that emerges in chapter 3 is worth highlighting. It might be plausibly claimed that there is a societal presumption against legal punishment of the innocent. Such a presumption can be seen as the basis for objecting to overinclusive legal prohibitions or strict liability provisions that expose the innocent, qua undeserving, to legal punishment. I do not deny that there is something like a societal presumption against punishment of the innocent. But I do not believe that it is equivalent to a presumption *of* innocence. Instead, it is a principle, one that carries enormous weight. Indeed, it is hard to imagine what "evidence" would rebut it if it is a presumption *of* innocence. What we can imagine is something different, namely, that there might be competing principles to which we subscribe that outweigh it in special kinds of circumstances. Yet principles are not presumptions, at least not presumptions of the sort that the PI is usually thought to be, and little is gained by conflating the two.

Having cleared the ground of false starts in our thinking about the PI, chapters 4 and 5 constitute the theoretical heart of the book. In them, I develop and defend an account of the PI in the context in which I believe that it makes the most sense—namely, the criminal trial. I cast the PI

as a vital aspect of the "proof structure" of criminal trials, wherein the accused get the presumption of innocence, the burden of proving guilt is on the government, and the standard of proof, beyond a reasonable doubt, is exacting. In chapter 4, I characterize the PI as a deliberately adopted perspective on accused persons, one that is designed to motivate jurors (or judges in bench trials) to subject the government's evidence to close and exacting scrutiny. I also contrast it with competing perspectives that they might adopt and attempt to show its superiority in shielding accused persons from unjust conviction.

In chapter 5, I detail how the proof structure of criminal trials makes them the appropriate kinds of stern tests of the government's evidence against the individuals who have been charged with crimes. Trials are characterized as elaborate "moral assurance procedures." Accused persons should be able to demand them and we should accommodate this demand in order to assure ourselves that we act justifiably when we inflict legal punishment, with its potentially life-altering effects, on them. I also contrast my account with more familiar error-distribution accounts of the proof structure of criminal trials.

The narrow account of the PI developed and defended in chapters 4 and 5 is challenged in chapter 6. For many scholars, it will seem obvious that the PI has implications beyond the trial, most particularly in the pretrial context. Individuals suspected of or formally accused of crimes are to be presumed innocent, or so we are often told. By whom, for what purpose, and what rebuts that presumption, are questions that are less often answered. I suggest an alternative to the PI in the pretrial context, one that I believe is sometimes confused with it in the literature on the subject. This brings me to a third principal theme of the book: The PI must be distinguished from a nonpresumption of guilt. The nonpresumption of guilt is consistent with having substantial doubts about the law-abidingness of persons. Yet it counsels criminal justice officials, and others in society, to avoid presuming that the individuals suspected of or accused of crimes are guilty or will be found guilty—the former because the criminal justice process is fallible and we know this, or ought to by now; the latter because it is unpredictable. Caution in jumping to conclusions about suspects, a willingness to keep the door open to doubts or confounding evidence in cases, and a firm commitment to full and fair due process are all things that we can sensibly urge, particularly on the legal officials involved in the prosecution of crimes. More than this, we should continually remind police and prosecutors to avoid practices that are known to produce mistaken convictions.[9] These include pressuring suspects to admit their guilt,

relying on jailhouse snitches, prompting reluctant or uncertain witnesses to decisively identify suspects, coaching witnesses, and concealing or destroying exculpatory evidence. My contention is that providing periodic and clear reminders to the police and prosecutors concerning the dangers of tactics such as these will do much more to prevent errors than hectoring them about the presumed innocence of those whom they suspect of crimes and often have amassed considerable evidence against.

In chapter 7, I continue my examination of the PI in the pretrial context by focusing specifically on the controversial practice of pretrial detention. Such detention, especially when it is premised upon the belief that accused persons are apt to commit further crimes before the current charges against them have been resolved, has been portrayed by numerous legal scholars as contravening the PI. Not surprisingly, since I reject a pretrial PI, I am unpersuaded that the abundant grounds we have for limiting pretrial detention have much to do with it. In its place, I urge reforms in the conditions of pretrial detention, so that it is much less like legal punishment than is currently the norm. I also support drastically less use of such detention, on the grounds that relatively few accused persons can be shown to present dangers to the public. However, some do pose substantial risks and their pretrial detention can be justified.

In chapter 8, I take up the topic of "incomplete prosecutions." I employ this catchall phrase to refer to persons who become entangled in one way or another in the criminal justice system but who are not convicted of any crimes. They are arrested but never charged, charged but the charges are dropped, or charged but acquitted after trials. All subjects of incomplete prosecutions are apt to suffer adverse social consequences because of their involvement with the criminal justice system. Employers who find out about their arrests or charges will be leery of hiring them. Credit agencies might refuse to extend them loans and licensing boards might decline to offer them credentials. Various remedies aimed at limiting the damage done by incomplete prosecutions have been proposed: the expungement of official records not leading to convictions; required explanations from legal officials concerning why prosecutions were discontinued or never pursued; forms of acquittal disambiguation; prohibitions on publication of the names of suspects; and antidiscrimination provisions designed to protect individuals who have not been convicted of crimes. Some scholars will see the PI as providing support for these remedies. However, I contend that the PI might not support such remedies or might lead to the adoption of unwise versions of them. I propose an alternative framework for analyzing such remedies, one centered on the nonpresumption of guilt.

Such a framework permits us to weigh the value of the information that the various kinds of incomplete prosecutions provide us about our fellow citizens against the costs of letting their histories of entanglement with the criminal justice system continue to hinder them.

It might seem that once persons are convicted of crimes, then there is little remaining role for the PI to play in relation to them. Yet most of the individuals convicted of crimes and sentenced for them will eventually complete their sentences. Once they do so, are they to be presumed innocent again, and for what purposes? These questions are made more pressing by the common practice of imposing myriad "collateral consequences" on convicted offenders, including ones who have fully served their sentences.[10] Ex-offenders encounter all manner of restrictions on their liberty, privacy, civil, and welfare rights. Often, these collateral consequences are defended on the grounds that ex-offenders pose risks to the public. Chapter 9 focuses on our treatment of ex-offenders. The discussion is split into two parts. In the first, I examine whether such collateral consequences should be viewed as they often are by both the courts and legal scholars—as mere adjuncts to legal punishment, not inherent parts of it. I propose a novel account, according to which the restrictions and legal disabilities imposed on ex-offenders should be counted as integral aspects of their official sanctions. As such, they should be assigned prospectively by sentencing judges, not added on after offenders have served their sentences. They should also be subject to proportionality analysis; doing so would require sentencing judges to evaluate the entire package of censuring losses imposed on individuals convicted of crimes. In the second part of the chapter, I examine collateral consequences through the lens of the PI. Instead of casting the imposition of such consequences as contrary to the presumed innocence of individuals who have fully served their sentences, I argue that they are better understood as unjustified infringements of the rights of full and equal citizenship, to which those who have completed their sentences are, once again, entitled.

As will become apparent, I take literally the notion that the PI is a *presumption*. As such, it is a deliberatively adopted perspective on persons suspected of or formally charged with crimes. It is tempting to deny this, to cast the PI as consisting of no more than certain rules of conduct for criminal justice officials. On such a conduct-centered approach, it matters little what such officials, or others in society, believe about the accused, or what perspective they take on them. The PI is honored if criminal justice officials refrain from statements suggesting the guilt of suspects and see to it that they get full and fair due process. I regard such a conduct-centered